

On the Abolition of the Death Penalty for Drug Offences in China

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Abstract

The Criminal Law Amendment (VIII) Act and the Criminal Law Amendment (IX) Act abolished the death penalty for many non-violent crimes, in line with the provisions of our Constitution on “respecting and safeguarding human rights” and in line with the international trend towards abolition of the death penalty. However, unlike many of the non-violent crimes that have been abolished, drug offences, which are also non-violent crimes, remain on the list of capital punishment. Over the past two decades, many academic and judicial leaders have worked towards the abolition of the death penalty for drug offences. However, due to the myth of the deterrent effect of the death penalty for drug offences and the heavy-handedness of the traditional drug management system, the goal of abolishing drug offences has never been achieved. The author argues that the death penalty for drug offences, as a non-violent crime, should not be treated as the most serious crime in criminal law and should be abolished. The aim of this article is to discuss the author’s ideas and rationale for the abolition of the death penalty for drug offences and to suggest some possible measures or ways to abolish the death penalty for drug offences.

Keywords: drug offences, death penalty, abolition of death, human rights

1. Introduction

The issue of restriction and abolition of the death penalty has existed for a long time in the legislation and judicial practice of international criminal law, which is an inevitable trend in the development of international criminal law and human rights. A major focus of debate in China’s criminal law and judicial practice has been the restriction and abolition of the death penalty, and China has gradually followed the direction of development and innovation of the death penalty on this issue. In 2007, in order to restrict

and avoid abuse of the death penalty, the Supreme Court withdrew its power to review the immediate execution of death sentences. Amendments (VIII) and (IX) to the Criminal Law abolished the death penalty for a total of 22 non-violent crimes, an effort to restrict and abolish the death penalty in China. However, the number of death penalty offences remaining in China is still forty-six, which is still high compared to other countries and regions around the world where the rule of law prevails. The order of abolition in China seems to follow non-violent crimes, minor violent crimes, and

violent crimes, while drug crimes are placed in the category of violent crimes in China's criminal law, where the harshest penalties in the criminal law apply. It is inconsistent with the legislative intent of the Constitution and penalties, as well as the humanitarian spirit, that drug offences should not be classified as violent crimes and subject to the death penalty, as they pose little danger to society. Therefore, the academic and judicial circles have been waiting for the abolition of the death penalty for drug offences, and have been making efforts for it. Therefore, the author believes that the abolition of drug offences should be used as a breakthrough to promote the comprehensive development of the abolition of the death penalty in China.¹ Since 2010, when the Supreme Court issued the Opinions on Implementing the Criminal Policy of Compassionate Treatment with Leniency, the application of the death penalty for drug offences in China has entered a very strict and restricted stage. The abolition of the death penalty for drug offences is a necessary step in the development of China's criminal legislation, but due to the severe situation of the proliferation of drug offences in China as well as the irrational understanding of drug offences by the nation and the tradition of heavy-handedness, the abolition of drug offences will encounter numerous obstacles. The author is in favour of the abolition of the death penalty for drug offences. This paper will put forward views on the basis for the abolition of the death penalty for drug offences, the obstacles to the abolition of the death penalty for drug offences and the specific ways or paths for the abolition of the death penalty for drug offences, in order to put forward opinions and suggestions for the development and innovation of the death penalty system in China.

2. Basis for the Abolition of the Death Penalty for Drug Offences

The current scholarship on the death penalty for drug offences is above the debate on the retention or abolition of the death penalty for drug offences, the mainstream view is in favour of abolition. Scholars have examined and argued in detail for the abolition of the death penalty for drug offences from a number of perspectives, including the absence of extreme seriousness, retribution, international human rights law, and the lack of deterrence.² Scholars who favour the abolition of the death penalty for drug offences

advocate that before the full abolition of the death penalty for drug offences, a breakthrough should first be made by judicially restricting the application of the death penalty for drug transportation offences, followed by the abolition of the death penalty for drug transportation offences in legislation, and ultimately the full abolition of the death penalty for drug offences.³

2.1 The Death Penalty for Drug Offences Violates the Principle of Proportionality Between Crime and Punishment

The reason for punishing perpetrators is that when a person is harmed by another person, it is in his or her nature to take revenge on the perpetrator of the harm. In order to avoid social unrest caused by the constant pursuit of revenge by both parties, official penalties were imposed on the perpetrators of violence, so that they would receive the appropriate retributive punishment and maintain social stability. Hegel argues that crimes are committed in total freedom and disrupt the normal and stable social order, and that punishment by law on behalf of justice is a way to protect the social order and maintain justice. The above is the doctrine of equivalence of retribution, whereas Kant argues that equivalence of retribution is too unreasonable, and that guiding the public to maintain order is the function of a reasonable and appropriate punishment, and that excessive retribution may lead to unnecessary punishment of the perpetrator of the crime. The equivalence of retribution is comparable to the modern principle of proportionality between punishment and guilt, and the intensity of retribution should be limited to a certain extent in order to pursue justice and goodwill. In other words, retribution means that the penalty should not exceed the degree of infringement of the legal interest or society caused by the offender. The supreme value of life and its irrevocable nature require that the death penalty be applied with caution and that the basis for retribution and punishment should be limited to violent crimes that kill others, rather than non-violent economic crimes such as drug offences.

As mentioned in the preceding paragraph, retribution and punishment should be cautious in their intensity, and retribution and punishment under the death penalty should demonstrate protection of life and prudence. The reason for retribution and punishment is to

stabilise the social unrest that may be caused by continued retribution by the victim. However, the fact is that in the case of drug offences there is no single identified victim, and therefore in terms of equal retribution there is no victim, i.e., there is no possibility of revenge between victim and perpetrator, and therefore no retribution up to the death penalty. In the author's view, drug offences in China are essentially violations of the state's drug control system, and it is difficult to have a definite victim. This is because most drug offenders are aware of the harmful consequences when they commit the crime and continue to do so without directly causing any harm to others. Based on the above discussion, it appears that drug offences are a clear category of victimless crime. Given the victimless nature of drug offences, there is no victim's revenge. It is inconsistent with the principles of equivalence of retribution and proportionality of punishment for violating the national drug control system, but it is inconsistent with the application of the death penalty for violating a system that does not endanger the lives of others. The public interest of the State and society is harmed when a drug offence violates the national drug control system, as there is no certain victim. When the state and society are the victims, they should show reason and generosity by strengthening the control of drugs rather than punishing drug offenders with retribution, and the death penalty, which is a capital punishment, is a bit too brutal.

2.2 Drug Offences Do Not Meet the Criteria for the Application of the Death Penalty

As noted above, punishment is retribution. It is only fair and just that retribution should be applied to the extent of the harm caused, and that the harm and retribution or punishment should be in equal measure, beyond which it is unreasonable and unjust. On this basis, the death penalty should be applied only to the extent that it is equal to or greater than the damage caused by the death penalty, and it would be unjust and inhumane to impose the death penalty on those who do not fall within its scope. It is debatable whether the gravity of the infringement of legal interests caused by drug offences can be included in such a range of application of the death penalty.

In the author's opinion, no non-violent crime should be classified within the scope of application of the death penalty because it does not have a definite social victim and its

perpetrators are unnecessarily sentenced to capital punishment. The so-called non-violent crime refers to crimes that cannot be committed by violent methods and do not target the person of another person and do not pose a direct damage or danger to personal safety. ⁴In the author's view, drug crimes should be classified as non-violent economic crimes, and it is inappropriate to classify them as violent crimes and to apply the death penalty for the most serious crimes in our criminal legislation and judicial practice. As Professor Zhao Bingzhi said, the social danger of drug crimes is much lower than that of violent crimes such as intentional homicide, and they do not meet the criteria for the use of the death penalty as stipulated in Article 48 of China's Criminal Law. The interpretation of Article 48 of the Criminal Law on the criteria for the use of the death penalty is biased. ⁵Drug offences do not have the obvious characteristics of any violent crime, but are essentially a chain of operations in which personal resources buy and consume drugs, which in turn leads to the manufacture and transport of drugs. In this way, it is clear that there is no single victim of a drug crime, and that the subsequent manufacture, transport and trade of drugs violate the state's drug control system. In this chain of drug offences, there is clearly no violence associated with the crime. Moreover, since drug offences violate the national drug control system, can the causes of drug offences be found in the loopholes of the national drug control system? Furthermore, drug offences are within the scope of the death penalty, and it is easy to make a miscarriage of justice irreparable. In the case of drug offences, it is not easy to determine whether the perpetrator had the subjective intent to commit the offence. It is difficult to determine whether the perpetrator was transporting or selling drugs, whether he was actively selling or being used without knowledge, and whether he was knowingly or unknowingly involved. For this reason, it would be quite inappropriate to sentence a drug offender to immediate execution. For example, it is difficult to capture precisely the subjective consciousness of a passenger in possession of drugs at an airport as to whether he is actively transporting drugs or being used to transport drugs. In judicial practice, many drug offenders have appealed on the basis that they did not have the subjective intention to manufacture, transport or sell drugs. There is no

way to prove whether these defences are true or whether they are false statements made by the defendant to clear his name. It is because of the indistinguishable nature of drug offences and the irreparable nature of the consequences of the death penalty that the existence of the death penalty for drug offences is unjustified.

In summary, drug offences should be classified as non-violent economic crimes and should not be within the scope of application of the death penalty.

2.3 Limited Deterrent Effect of the Death Penalty in Practice for Drug Offences

As in his book *On Crime and Punishment*, Beccaria devotes a great deal of space to a critique of the death penalty system, expressing his scepticism about its deterrent effect. For example, in his book, Beccaria states that “no recent torture in history has ever brought back people determined to violate society”, “it is not useful to use the death penalty to prove to people the severity of the law”, “the abuse of capital punishment”, the arguments and justifications for the death penalty have been a real eye-opener and an enlightening insight into the death penalty. ⁶Professor Zhao Bingzhi, in his practical study of the death penalty for drug offences, points out that the strict restriction and reduction of the application of the death penalty for drug offences has had little impact on the occurrence of drug offences. The deterrent effect of the death penalty has not deterred drug offenders from committing crimes, but instead, incentivised by high profits, they still commit drug offences knowing that committing the act may be punishable by capital punishment. Therefore, the deterrent effect of the death penalty is limited. ⁷The lucrative nature of drug crime is obvious to everyone, and there is always a large number of people who are tempted to take the risk without fearing the penalty of death.

Another purpose of the death penalty for drug offences is to prevent drug offences due to the lack of deterrent effect of the death penalty. The purpose of state regulation of drugs is to maintain the proper functioning of society, and the death penalty, with its great deterrent effect, is a crime prevention tool. However, based on the above discussion of the deterrent effect of the death penalty for drug offences, it is clear that the deterrent effect of the death penalty for drug offences is not sufficient to reduce the

number of cases and the frequency of drug offences. Therefore, its preventive function cannot be applied for the purpose of drug crime prevention.

In the light of the above, the deterrent effect of the death penalty for drug offences in such a situation is quite inadequate and it is difficult to prevent drug offences from occurring.

2.4 The Death Penalty for Drug Offences Is Inconsistent with the Requirements of the Modesty of Criminal Law and International Human Rights Conventions

When criminal law was not created, social order depended primarily on morality. When the law came into being, it became the minimum of morality. Moral tolerance gave rise to the modesty of criminal law, which required a move towards lighter penalties and a reduction in the rate of heavy sentences. The international human rights conventions, while not fully supporting the abolition of the death penalty, do place severe restrictions on it. As a signatory to the International Covenant on Civil and Political Rights, our country should follow its provision on the death penalty: “In countries that have not abolished the death penalty, it may be imposed only as a punishment for the most serious crimes.” And according to the Safeguards guaranteeing protection of the rights of those facing the death penalty’s interpretation of the death penalty: “The most serious crimes shall be intentional crimes resulting in death or other extremely serious consequences.” When a drug offender commits a drug offence by violent means, it is a violent crime and should be punished severely. When the drug offence does not involve a violent crime, it should be considered a non-violent economic crime, which is clearly incompatible with the application of the death penalty for the most serious crimes under the International Covenant on Civil and Political Rights.

3. Obstacles to the Abolition of the Death Penalty for Drug Offences in China

3.1 History and Public Opinion

Since ancient times, China has had a historical tradition of heavy-handedness. Throughout China’s thousands of years of history, the idea of heavy penalties, which was “the lightest punishment in the world and the heaviest in the world” and “the heavy code to rule a troubled world”, guided the emperors through the ages to implement heavy penalties to rule the

country.

The Opium War was the beginning of China's descent into a semi-colonial and semi-feudal society. The Western imperial powers opened China's doors with drugs and then used them to make China's young adults weak and mentally dependent without realising it, and then began to colonise and enslave China and the Chinese nation. As a result, drugs have become a needle in the heart of every patriot in the history of China's humiliation, and it is deeply intertwined with that history and cannot be separated from it. To this day, when people talk about the humiliating history of the Chinese nation, they always know that it began with the Opium War; and when it comes to Lin Zexu's elimination of smoke at Humen, they always clap their hands and praise him as a national hero! With a population of 1.4 billion, China's tolerance for drug crime is generally low. Only some criminal law scholars and students of criminal law and a small number of ordinary citizens, at most ten million people, can be tolerant of it. Ten million to 140,000,000 is a negligible number. With such a disparity in public opinion, the immediate abolition of drug offences would be fraught with social unrest. Furthermore, the relevant authorities have made great efforts to promote anti-drug awareness and have made great sacrifices in carrying out anti-drug work. The abolition of the death penalty for drug-related offences would leave the drug police officers who have sacrificed their lives to carry out anti-drug work and those who have worked in anonymity for years to do so. I am afraid that Lin Zexu's coffin board will not be able to hold it down and he will have to jump out and curse: unworthy sons and grandsons!

However, there are two sides to everything. Are the disadvantages of anti-drug work outweighing the advantages? As the analysis in the second part of this article suggests, drug offences do not have an identified victim and are essentially violations of the national drug regime. By this logic, is it reasonable to sacrifice so many drug enforcement workers to the intense anti-drug efforts that infringe on the national drug regime? From a humanitarian point of view, is it not reasonable to sacrifice drug workers for the sake of defending the national drug control system, instead of improving the administration of the system by introducing the death penalty for drug offences, resulting in more intense resistance. Is this not

putting the cart before the horse?

In addition to the profound influence of historical circumstances, it seems that the authorities' strong propaganda about the dangers of drug crime is also one of the reasons for the low tolerance of drug crime among the population, but these also seem to be rooted in historical circumstances. In judicial practice, the authorities, and even the general public, have looked to heavy sentences as the most effective means of maintaining social justice. Coupled with a long history of exaggerating drug crimes, the national perception of drug crimes is somewhat paranoid, and it is natural that drug crimes do not escape the scope of the death penalty. Secondly, some scholars have speculated that the Supreme Court is in favour of abolishing the death penalty for drug offences, while its opposition should come from the public security sector. Since the public security authorities are mainly responsible for the detection, breakthrough and interrogation of drug crimes, they believe that the existence of the death penalty relies on its powerful deterrent effect to obtain confessions and solve cases better and faster.⁸

3.2 The Reality of Drug Crime Is Serious

The reality of the situation is that drug crime is serious in two ways: the increase in the number of drug offences and the proliferation of drugs.

From the beginning of the founding of New China until the 1990s, there were no signs of drug-related crime in China. Since the reform and opening up of China in the 1990s, the international market has opened up again and drugs have been pouring in from abroad until they are rampant. China's crackdown on drug crime has gradually increased, and for more than 30 years, although many drug crimes have been solved, the number of arrests is surprisingly high, and drug crime is still on the rise. The latest year's anti-drug report shows that the importation of drugs from abroad into the country is increasing. The number of arrests of drug dens in the country is declining while seizures are falling sharply, reflecting changes in the form of drugs and in the way drug offenders are learning to evade search and arrest by the anti-drug authorities. Moreover, the actual number of busts, after a small year-on-year decline following the growth in responses, remains large. The international market has opened up the Chinese market and Chinese

drug offenders can see the huge profits in foreign markets. When the domestic drug market becomes saturated or the domestic anti-drug effort is too strong, domestic drug criminals master the system and the trafficking channels and start to send drugs abroad. As a result, the amount of drugs exported from China rises dramatically.

As the times have changed, the spread of drugs has taken on new forms. In terms of the means of drug production, drug criminals have improved the route of drug synthesis in order to evade legal supervision, seeking non-listed chemicals to carry out the system; the form of transportation has also begun to be complex and variable, difficult to track, and the delivery of drugs has changed from “large quantities going through logistics and small quantities going through the mail” to large quantities of drugs being transported by professional teams and small quantities being delivered by unregistered companies. The drug trade is also difficult to trace, with the drug market continuing to expand online, with more money and drugs being paid separately and people being separated from each other, and the use of the Internet + logistics and delivery as a non-contact method of drug trafficking increasing. The number of collusive transactions has increased from mass chat tools to niche social tools, second-hand trading platforms, gaming platforms and even the dark web; the flow of drug money has expanded from online bank transfers to virtual currency and game coins.⁹

In terms of the trends in drug crime and abuse, drug crime has not been effectively curbed and has even begun to develop on its own, making it difficult for the anti-drug authorities to carry out their work. Drug crime tends to be technological, sophisticated, complex and even scientific, and it is doubtful that the authorities will be able to effectively curb it, and it is predictable that the situation of drug crime and abuse in China is still serious, and the state seems to rely on the so-called deterrent effect of the death penalty to combat drug crime.

In conclusion, the death penalty for drug offences, as an important measure to combat drug crime, is unlikely to be abolished in the short term.

4. The Concept of Abolition of the Death Penalty for Drug Offences

The death penalty for drug offences should be

abolished in China, but its abolition is not only a legal issue, but also one that needs to be considered from a political, economic and historical perspective. Then, the abolition of the death penalty for drug offences should not only be considered as a legislative abolition, but should be promoted by both the judiciary and the legislation. The abolition of the death penalty for drug offences in legislation should be promoted by the progress of judicial application.

4.1 Severe Restrictions on Judicial Application to Phasing out

As discussed above, the immediate abolition of the death penalty for drugs is unrealistic. Professor Gao Mingxuan's work seems to give a basic idea of the abolition of the death penalty for drug offences. That is, the judicial authorities should first strictly restrict the application of the death penalty in judicial practice, and then gradually stop or even abolish the application of the death penalty for drug offences.¹⁰ It is feasible to start with strict restrictions on the application of the death penalty in judicial practice as a transition to abolition, followed by a gradual and genuine abolition. A truly strict restriction on the application of the death penalty might lead to a significant reduction in the application of the death penalty or even to the elimination of death sentences. This has been the case in Korea, where the death penalty still exists but is applied very strictly. In Korean judicial practice, the death penalty has not been imposed for over 20 years due to the strict application of the death penalty. The death penalty, although still present in Korea, has de facto disappeared. Based on the Korean experience, the idea of abolishing the death penalty by imposing strict judicial restrictions on its application before moving to a complete legislative abolition seems to be a feasible path.

In judicial practice, the question of how to strictly restrict the application of the death penalty for drug offences is one that we should explore. First of all, there should be restrictions on the immediate execution of the death penalty, and the Supreme Court's withdrawal of the power to review the death penalty is already a major step forward in strictly limiting the power to judge the immediate execution of the death penalty. However, the author believes that drug crimes should be treated differently because of the complexity of the process, the variety of procedures, and the different levels of

involvement and procedures of the people involved. Different persons involved in the manufacture, transport, smuggling, and trafficking of drugs should be treated differently, for example, there are good reasons and conditions to abolish the death penalty for drug transport offences. Furthermore, criminals who do not have aggravating circumstances in drug offences should also be treated differently. In short, the judiciary should give more consideration to the education and rehabilitation of those involved in drug offences than to the execution of the death penalty. However, although the above restrictions are imposed on the judiciary to strictly apply the death penalty in judicial practice, they also seem to be based on legislative reform.

4.2 Harmonisation and Upward Adjustment of Quantitative Criteria for the Application of the Death Penalty for Drug Offences

The criteria for conviction and sentencing for many drugs have already been set out, but the frequent emergence of new types of drugs has created difficulties for conviction and sentencing in judicial practice. In addition, the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law to the Trial of Drug Crimes regulates the quantitative standards for conviction and sentencing of drug crimes, which stipulates that the standards of "large quantity" and "large quantity" are indistinguishable and leave a lot of room for discretion. There is a lot of room for discretion. While there is a uniform quantitative standard for drug types, there is no uniform quantitative standard for the application of the death penalty for drug offences across the country. Leaving aside the question of whether the death penalty for drug offences is justified, the different quantitative standards for the application of the death penalty for drug offences in different regions violate the principle of equality before the law. Moreover, the quantitative standards for the application of the death penalty for drug offences in China are low, and the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law to the Trial of Drug Offences has lowered the quantitative standards in several categories. In view of the above, the quantitative standards for the application of the death penalty for drug offences should be unified for all categories of drugs and for all regions, and the quantitative standards for the

application of the death penalty for drug offences should be adjusted upwards.

4.3 Legislative Abolition of the Death Penalty for Drug Offences

As mentioned earlier, the abolition of the death penalty for drug offences cannot be achieved immediately, but the idea of reform offered by Gao Mingxuan is that justice comes first and then transitions to full legislative abolition. However, after combing through the logic of the realisation of strict restrictions on the application of the death penalty for drug offences in judicial practice, it becomes clear that these are still based on legislative changes. At this point in the analysis, a logical closure seems to have been reached. Immediate legislative change is not possible, and the idea of judicial precedence is based on legislative change, so this path is not feasible. In that case, we can at least start by abolishing the death penalty for drug transport offences, which already has reasons and conditions for abolition. The abolition of the death penalty for drug transport offences should be used as a breakthrough in the search for a comprehensive abolition of the death penalty for drug offences. The abolition of the death penalty for drug trafficking offences alone would be controversial as dangerous goods such as firearms and ammunition may be used by those involved in the commission of drug trafficking offences. However, as Professor Zhang Hongcheng stated in his thesis work, "From the relationship between the act of transportation and the core acts of trafficking and manufacturing, the core acts can generally cover the act of transportation, and if the act of transportation is separately provided for, there is a suspicion of repeated evaluation, and the social harm of the act of transportation is obviously low, and there is an imbalance by including a uniform sentencing range."¹¹ In conclusion, it is reasonable to abolish the death penalty for transportation drug offences alone, and perhaps the legislative abolition of the death penalty for transportation drug offences will allow us to find the right path for the abolition of the death penalty for drug offences.

5. Concluding Remarks

In a world where the rule of law and human rights are rapidly developing and being implemented, many theorists and practitioners are aware of the irrationality and brutality of the death penalty. As a non-violent economic crime,

the question of whether to abolish the death penalty for drug offences is a focal point and even a problem in Chinese criminal law today. Unlike violent crimes that violate the right to life or social stability and order, drug crimes, as non-violent economic crimes, do not meet the criteria for the application of the death penalty, as discussed in this article. There are many obstacles to the abolition of the death penalty for drug offences in China, but these obstacles tend to be more subjective in nature and do not have a significant impact on the legislative revision of the death penalty for drug offences, and are not sufficient to be a decisive factor on the road to abolition. The mainstream view of the death penalty for drug offences in professional discussions at home and abroad is that it should be abolished, and that there are good reasons for its abolition. What theorists and practitioners should really consider is the path to abolition of the death penalty for drug offences, and we need a reasonable and feasible concept. There is no concrete idea of how to abolish the death penalty for drug offences, only general ideas. Perhaps we can either strictly restrict the application of the death penalty for drug offences through positive judicial regulation, or we can see if there is a new idea for a full abolition of the death penalty for drug offences by first legislatively abolishing the death penalty for transport offences alone.

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