

# 人权与毒品政策

## 毒品，刑法和政策实践

“长期以来，毒品使用者备受歧视和排斥，并被强制接受戒毒治疗。过分强调犯罪化和刑罚化，忽视减少危害和人权的处遇方式使得这一人群的权利受到侵害。”

联合国人权事务高级专员，2009<sup>1</sup>

依照国际法相关规定，各国政府有义务减少毒品的供给和需求。在履行该义务的同时，各国还不能在毒品控制和医疗目的管制药品的使用两者之间顾此失彼。并且还要保证承担相应的人权保障义务。然而，各国针对毒品使用和吸毒成瘾的相关立法和司法均以惩罚为导向。针对毒品问题的刑法，罪责刑不相称的刑罚和刑事执法导致了各种健康问题并影响到了其他人权问题。

### 刑法、政策以及执法

#### 针对个人使用和持有毒品的相关刑法

几乎世界上所有的国家都将基于个人使用而持有毒品的行为规定为犯罪。许多国家则将使用毒品本身定义为犯罪。这对那些吸毒成瘾者（慢性的、反复发作的医学状态）的影响尤为严重。每个人都有权获得救助生命的健康服务而不用担心被惩罚或被歧视。但在一些国家，就算是合法，许多注射毒品者也不会携带注射器或其他毒品注射器具。因为持有这些器具会被认定为毒品使用者，并使他们在某些情况下受到处罚。<sup>2</sup> 许多毒品使用者不寻求治疗或参与减少危害服务，同样也是因为害怕被逮捕定罪。除了与监禁相关的显而易见的危害（参加简报3）之外，犯罪记录会在许多方面对犯罪人产生影响，如就业、入学、甚至是如住房之类的社保问题。罪犯的身份还使得毒品使用者遭受警察暴力，如鞭打、敲诈、甚至是酷刑。

#### 与吸毒用具有关的法律

许多国家，随身携带吸毒用具，如针头和针筒，烟斗以及抽海洛因的箔纸等是非法的。因为怕引起警察的注意而不携带这些器具阻止了相对安全的毒品使用方式。其还导致危害减少服务的减少，因为服务提供者担心自己因提供卫生吸毒器具而卷入法律纠纷。

#### “煽动”“鼓励”“辅助和同谋”使用毒品的相关法律

许多国家的法律规定对煽动，便利或促进吸毒的处以刑罚。此类法律规定通常不以毒品使用的实际情况出发，也不考虑毒品使用的起因通常是由于同事，兄弟姐妹和朋友也使用毒品而引起的。此外，此类法律还阻碍了减少危害服务的进行。因为减少危害服务的提供者往往被指控为毒品使用提供便利。<sup>3</sup>

#### 减少危害服务的年龄限制

未满18岁（在有的国家如瑞典，该年龄规定还更大）注射毒品者通常被拒绝给予减少危害服务。这是对即存事实的漠视，因为在许多国家注射毒品的人群中有的年龄只有10岁或12岁。<sup>4</sup>

#### 毒品使用者档案

在许多国家，一旦毒品使用者去健康机构寻求服务，就会被记录在案，并且其使用毒品的情况也会为他人所知。吸毒人员登记制度是国家控制吸毒成瘾者的手段，并由此对吸毒人员的权利加以限制。该做法

使得一些人在多年之内都背负着“吸毒者”的称谓。在有的情况下，无论这些人是否戒毒，坏名声也会永远跟着他。<sup>5</sup> 例如在中国，通过美沙酮疗法戒毒的情况会被记录在个人档案中，从而使警方容易取得该类信息。在泰国，一旦被登记，毒品使用者就处于警方和缉毒部门的监视之下。该国病人使用麻醉类药品的信息也是被公开的。因为担心被记录在案，就算戒毒治疗免费，毒品使用者也避而远之。<sup>6</sup> 在俄罗斯，加入到公共戒毒治疗项目中的人会被记录在案，而那些有能力负担私人戒毒治疗的人则不会被记录在案。被列入吸毒人员名单之后，可能导致失去工作、丧失房产、甚至是被剥夺孩子的监护权。面对如此严重的后果，大部分人都不会把公共戒毒治疗看作是可供选择的戒毒方案。<sup>7</sup>

## 政策的执行

对人权的尊重，既是有效毒品政策的必要组成部分，也会对毒品使用者的健康产生积极影响。不幸的是，无数国家的实际情况恰恰相反。这一方面在于不良的法律法规的执行，另一方面在于毒品相关政策的实施。在许多地方，毒品使用者和减少危害服务被警察看作是容易骚扰，敲诈和陷入圈套的目标。

警察出现在减少危害服务场所或其附近，使得毒品使用者远离这些服务场所，因为他们担心会被警察逮捕或受到其他惩罚。<sup>8</sup> 例如在乌克兰，毒品使用者称其多次在针头交换点被警察逮捕，还有人因为在针头交换点或其附近持有注射器而遭到警察严重的鞭打。<sup>9</sup>

2007年，在格鲁吉亚抗击毒品行动中，4%的男性人口接受了毒品检测，其中很多是被强制执行的。在被检测的人群中，有35%的人因与毒品有关的罪名被关进监狱。<sup>10</sup> 2003年，泰国的“反毒品战役”使得2800人遭受法庭职权之外的杀害。该“反毒品战役”还对该国的毒品使用者享有基本医疗保健服务的权利造成持续性的影响。调查显示，在“反毒品战役”期间寻求医疗服务的毒品使用者人数明显减少。此外，还有报告显示之前参与戒毒治疗的人群中的很多人在此期间也停止了治疗。<sup>11</sup> 多年之后，很多毒品使用者还是不去公共医疗机构寻求治疗，因为他们担心自己过去或现在的毒品使用情况会被警察知悉。然而，这种恐惧并非毫无根据。在该国，公共医疗机构和毒品治疗中心将毒品使用者的信息与司法机构共享，这既是政策的要求也是实际存在的情况。<sup>12</sup>

大赦国际在其报告中控诉墨西哥在其加大反毒品控制实践中的法庭职权之外的处决。<sup>13</sup>

## 不相称的毒品犯罪刑罚和差别对待的毒品控制措施

在许多国家，基于个人使用或提供他人使用而持有毒品的将被判重刑，如长期监禁刑或者死刑。在美国的一些州，“三振出局法，或称重罪加长刑期法(three strikes legislation)”能导致轻型的非暴力毒品犯罪被判处终身监禁。<sup>14</sup> 在一些国家，可能因为持有相对来说很少量的非法毒品而被判处死刑。<sup>15</sup> 在其中的一些国家，该类死刑判决会被立即执行。死刑立即执行的判决被人权委员会<sup>16</sup>人权事务委员会<sup>17</sup>，美洲人权法院<sup>18</sup>和法庭职权之外的，草率和随意的处决问题特别报告员，以及其他国家的法院认定为违背国际法的判决。此类判决不符合罪责刑相适应原则，并且对减少毒品消费和相关犯罪并无成效。<sup>19</sup>

毒品控制常常对那些弱势群体和边缘群体产生更大的影响，如农民、小范围内兜售毒品的贩子、轻型毒品违法者、少数民族或者土著人。在美国，非裔男性和女性因毒品犯罪而被起诉的人数是白种人的几倍。相比那些主要的毒贩，他们被施以相同的或者更严厉的刑罚。<sup>20</sup> 在巴西的反毒品战役中，绝大多数被警察杀害的是那些来自平民窟的黑人青年男子。而对他们来说，加入贩毒团伙是唯一可能的谋生机会。<sup>21</sup>

## 毒品犯罪和公平审理原则

在许多情况下，对毒品犯罪的审理都未能达到公平审判的标准。例如在伊朗，毒品走私案件由革命法庭(Revolutionary Courts)审理。联合国阿拉伯国家监禁问题工作小组敦促该国取消该类法庭，因为其不符合正当程序原则。<sup>22</sup> 有报告显示，该类法院处理的案件中，有99%与毒品犯罪有关。<sup>23</sup> 法庭职权之外的，草率的，随意的处决问题报告员，对在印度尼西亚和沙特阿拉伯因酷刑而导致认罪并被处以死刑的问题表示关注。<sup>24</sup> 酷刑问题特别报告员在其2008年任职期间揭露的发生在印度尼西亚的类似案件也大多与毒品犯罪有关。<sup>25</sup>

## 毒品和未经审理的拘留

许多国家不经过审理，也没有相应的正当程序保障就对毒品犯罪嫌疑人进行拘留。例如在马来群岛，根据《危险毒品法案》，当局有权在未上庭，未获法庭许可的情况下对走私毒品犯罪嫌疑人拘留长达60天。<sup>26</sup> 在经过拘留之后，内政大臣会发出拘留令，使得被拘留者有权到法庭申辩要求释放。<sup>27</sup> 然而，如果法庭拒绝释放该嫌疑犯，其可能会被连续拘留长达两年。<sup>28</sup> 某个顾问委员会可以对嫌疑犯的拘留进行评议。但是，这一步骤缺少法庭诉讼的程序保障。<sup>29</sup> 据称，根据该法案警察在未经法庭许可的情况下就可以拘留嫌疑犯。<sup>30</sup> 2007年，有798人

依该法案被拘留。2008年的前八个月里，据此被拘留的人数已达到805人。<sup>31</sup>

## 强制戒毒治疗（参见简报4）

在一些国家，违反毒品相关法规的人可能被强迫在戒毒中心呆上几年，无论他们是否真的需要戒毒治疗。而且这种强制戒毒也没有正当程序的保障。2004年的一份调查显示，3213名中国海洛因使用者中有9%的人通过极端行为，如吞咽玻璃等方式来逃避强制戒毒。<sup>32</sup>

## 刑法及其执行与艾滋病毒/艾滋病

联合国毒品和健康问题相关机构，如联合国艾滋病规划署、世界卫生组织、联合国毒品和犯罪办公室以及国际麻醉药品管制委员会，对毒品使用者间的艾滋病毒传播的预防、治疗和护理予以支持并促进一系列广泛干预措施的实施。这些措施包括阿片类替代治疗、以及保障获得针头和针筒交换方案的服务。就算是在一些国家这些方案是合法的，惩罚性质的法律、政策和实践也使得毒品使用者无法获得这些能够挽救他们生命的服务。

在许多国家进行的研究表明，刑法禁止持有注射器以及其他相关的针对毒品使用的政策实践，直接或者间接地提高了艾滋病毒传播的风险。<sup>33</sup>这一现实情况在国际艾滋病毒和人权指导方针中被提及，如下文：

“各国需要对其刑法和矫正系统进行重新审视和改革，以使其与国际人权义务要求相一致。并且保障其不会在处理有关艾滋病毒问题时被滥用，也不会针对弱势群体……”

“刑法不该成为各国采取降低艾滋病毒在毒品使用者间的传播危险以及对毒品使用者提供与艾滋病毒预防有关的服务和治疗等措施的障碍。”<sup>34</sup>

艾滋病毒的治疗也受到法律和政策的影响，因为这些法律和政策将那些有着高危险性艾滋病毒传染的人群视为犯罪和耻辱。在许多国家，艾滋病毒携带者中的绝大多数是毒品使用者，但相对于其他不使用毒品的艾滋病人来说，他们获得的治疗可能性却很低。在中国，自2006年以来的数据表明，艾滋病病例中有48%是注射毒品者，但他们中获得ART的人数只占有获治人数的1%。在马来西亚，有75%的艾滋病病例是毒品注射者，但这些注射者中仅有5%的人获得ART。<sup>35</sup>类似的差异在世界卫生组织对欧洲国家的调查中也有所显示，特别是东欧国家更明显。<sup>36</sup>

## 毒品相关法律和政策的改善，毒品使用者的人权

考虑到刑事司法途径对毒品使用者的健康和人权产生的不利影响，多国政府开始对基于个人使用而持有少量毒品的行为非犯罪化。例如在西班牙、葡萄牙和意大利，就不对基于个人使用而持有毒品的行为认作违法。在荷兰和德国，基于个人使用而持有毒品是非法的，但是为防止任意施加刑罚，该国建立了对警察和检察官办理此类案件的指导原则。<sup>37</sup>许多拉丁美洲国家，如巴西、墨西哥和阿根廷，不管是通过法院令或立法的形式，都对基于个人使用而持有毒品非犯罪化。这一非犯罪化的运动，得到包括前总统在内的高层政客的支持。<sup>38</sup>葡萄牙对所有基于个人使用而持有毒品的行为非犯罪化。<sup>39</sup>

在美国，有的州通过颁发法院令的方式禁止警察对那些因为参与针具交换方案而持有未使用完的毒品针具的人施加速捕。有的州则通过公安部门下发政令，要求警察不要在针具交换点附近区域巡逻等方式来保障毒品使用者获得减少危害服务。<sup>40</sup> 包括瑞士、德国、澳大利亚和加拿大等国家在内的许多城市建有受监管的毒品注射点，允许毒品使用者在一个安全的，卫生的环境下注射毒品，并且不用担心因为在该类站点持有非法毒品而被逮捕或者受到起诉。<sup>41</sup> 至少有十个欧洲和中亚国家的监狱中有针头交换方案，这些国家包括伊朗、摩尔多瓦和吉尔吉斯斯坦等。<sup>42</sup>

联合国毒品控制相关公约对持有毒品和使用管制成瘾药品行为的刑罚化做出了弹性化的规定。<sup>43</sup>根据国际麻醉药管制委员会，“国际毒品控制条约的确对与基于个人使用有关的违法行为的刑罚给予了相对自由的裁量空间。《1961年公约》的缔约国应该不允许个人因非医疗目的而持有毒品的行为。《1988年公约》的缔约国需对个人使用毒品的行为建立刑法防范体系，并将此作为其宪法原则和立法体系基本概念而予以确立。”<sup>44</sup> 国际麻醉药管制委员会认为：2001年葡萄牙对使用毒品以及基于个人使用而持有少量毒品行为的非犯罪化符合国际毒品控制条约的规定。<sup>45</sup>联合国毒品和犯罪办公室同样对因为毒品犯罪化而对毒品使用者的健康和人权造成的危害表示担忧，并鼓励采取积极的措施来控制毒品，这些措施包括停止监禁轻型毒品犯，并改革那些可能导致逮捕数量激增的行为，例如将矛头主要指向那些暴力型毒品犯罪或大量贩卖毒品者。<sup>46</sup>

大量的研究，包括联合国毒品控制规划署应国际麻醉药管制委员会要求而做的报告，都指出实施减少危害项目，（如阿片类替换治疗、针具交换方案、受监管的机构内毒品使用以及海洛因处方方案等）与联合国毒品控制相关公约是一致的，并不违背各国依此公约所应尽的义务。<sup>47</sup>

1. High Commissioner calls for focus on human rights and harm reduction in international drug policy, Press release, 10 March 2009, <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/3A5B668A4EE1BBC2C12575750055262E?opendocument>
2. A survey of drug users in five Russian cities, for example, found that 40 percent routinely did not carry injection equipment, in part out of fear of attracting police attention. Jean-Paul C. Grund, "Central and Eastern Europe", in *HIV AND AIDS: A GLOBAL VIEW*, Karen McElrath, (ed) (Westport, Connecticut: Greenwood Press, 2002), pp. 41-67.
3. Young people and injecting drug use in selected countries of central and eastern Europe, Eurasian Harm Reduction Network, 2009, pp. 62-65.
4. 参见 ibid pp. 28-31.
5. The Effects of Drug User Registration Laws on People's Rights and Health, Key Findings from Russia, Georgia, and Ukraine, Open Society Institute, October 2009 [http://www.soros.org/initiatives/health/focus/ihrd/articles\\_publications/publications/drugreg\\_20091001/drugreg\\_20091001.pdf](http://www.soros.org/initiatives/health/focus/ihrd/articles_publications/publications/drugreg_20091001/drugreg_20091001.pdf).
6. Human Rights Watch, "Deadly Denial, Barriers to HIV/AIDS Treatment for People Who Use Drugs in Thailand," 2007, p. 20
7. Human Rights Watch, "Rehabilitation Required: Russia's Human Rights Obligation to Provide Evidence-Based Drug Treatment," Vol. 19, No. 7(D), November 2007.
8. 参见 also studies cited in the Human Rights Watch reports: "Rhetoric and Risk: Human Rights Abuses Impeding Ukraine's Fight Against AIDS," Vol. 18, No. 2(D), pp. 34-40; "Lessons Not Learned: Human Rights Abuses and HIV/AIDS in the Russian Federation," Vol. 16, No. 5(D), April 2004 pp. 28-31; "Fanning the Flames: How Human Rights Abuses Are Fueling the AIDS Epidemic in Kazakhstan", vol. 15, No. 4(D), June 2003, pp. 32-34; "Not Enough Graves: The War on Drugs, HIV/AIDS, and Violations of Human Rights," vol. 16, No. 8(C) (June 2004), pp. 36-42.
9. Human Rights Watch, "Rhetoric and Risk: Human Rights Abuses Impeding Ukraine's Fight Against HIV/AIDS."
10. Otiaishvili, D., "Georgian Drug War - Ignoring Evidences, Neglecting Human Rights." Presented at the International Harm Reduction Association's 19th Annual conference in Barcelona, Spain, May 14th, 2008.
11. "Not Enough Graves," pp. 36-37. Researchers have also found that the government crackdown on drug users was likely to discourage drug users from obtaining HIV testing and other medical services. Tassanai Vongchak et al., "The influence of Thailand's 2003 'war on drugs' policy on self-reported drug use among injection drug users in Chiang Mai, Thailand," *International Journal of Drug Policy*, No. 16 (2005), pp. 115-121.
12. Human Rights Watch and Thai AIDS Treatment Action Group, "Deadly Denial: Barriers to HIV/AIDS Treatment for People Who Use Drugs in Thailand", November 2007, pp. 20-24.
13. Amnesty International, Mexico: New Reports of Human Rights Violations by the Military, 8 December 2009, AMR 41/058/2009
14. 参见 for example, Justice Policy Institute, "Still Striking Out: Ten years of California's three strikes policy", 2004, [http://www.justicepolicy.org/images/upload/04-03\\_REP\\_CASStillStrikingOut\\_AC.pdf](http://www.justicepolicy.org/images/upload/04-03_REP_CASStillStrikingOut_AC.pdf); and Justice Policy Institute, "Three Strikes and You're Out: An examination of the impact of 3-strike laws 10 years after their enactment", 2004, [http://www.soros.org/initiatives/justice/articles\\_publications/publications/threestrikes\\_20040923/three\\_strikes.pdf](http://www.soros.org/initiatives/justice/articles_publications/publications/threestrikes_20040923/three_strikes.pdf).
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41. In Vancouver, Canada, for example, drug users are covered by a provision of the federal Controlled Drugs and Substances Act that exempts any person or class of persons from the application of the Act if, in the opinion of the Minister of Health, "the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest." Controlled Drugs and Substances Act, Section 56. For further information on safe injection sites, 参见 Richard Elliott et al., Establishing Safe Injection Facilities in Canada: Legal and Ethical Issues (Canadian HIV/AIDS Legal Network, 2002), [online] <http://www.aidslaw.ca/Maincontent/issues/druglaws/safeinjectionfacilities/safeinjectionfacilities.pdf>; and City of Vancouver, "Supervised Injection Sites (SISs): Frequently Asked Questions," [online] [www.city.vancouver.bc.ca/fourpillars](http://www.city.vancouver.bc.ca/fourpillars) (retrieved January 4, 2006).
42. 参见 Harm Reduction Policy and Practice Global State of Harm Reduction 2008, International Harm Reduction Association, <http://www.ihra.net/GlobalStateofHarmReduction>.
43. The treaty-based drug control system is based on three international drug conventions: the Single Convention on Narcotic Drugs (1961) as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs; the Convention on Psychotropic Substances (1971), and the Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988). The 1961 and 1971 treaties require governments "to take all practicable measures" for the prevention of drug abuse, and "for the early identification, treatment, education, after-care, rehabilitation and social reintegration" of people who use drugs." While all three treaties require governments to criminalize possession other than for medical or scientific purposes, they state that governments may provide measures for "treatment, education, aftercare, rehabilitation and social reintegration", "either as an alternative to conviction or punishment or in addition to conviction or punishment."
44. INCB Annual Report for 2001, [http://www.incb.org/incb/en/annual\\_report\\_2001.html](http://www.incb.org/incb/en/annual_report_2001.html), para. 211. 参见 also Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), UN Doc. E/CN.7/590 (noting flexibility with respect to criminal penalties, and that "as with the 1961 and 1971 Conventions, paragraph 2 does not require drug consumption as such to be established as a punishable offence. Rather, it approaches the issue of non-medical consumption indirectly by referring to the intentional possession, purchase or cultivation of controlled substances for personal consumption. (...)").
45. INCB, Report of the International Narcotics Control Board for 2004, New York: 2005, para. 538. Portugal's 2001 drug law "decriminalized, but did not "legalize" drugs, meaning that while drug possession and drug use are still legally prohibited, violations are considered exclusively administrative and exempt from criminal sanction.
46. UNODC, World Drug Report 2009, pp. 163ff.
47. 参见., Decision 74/10, Flexibility of Treaty Provisions as Regards Harm Reduction Approaches, prepared by UNDCP's Legal Affairs Section, E/INCB/2002/W.13/SS.5, 30 September 2002.