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**DEBUNKING THE THREE MYTHS ABOUT
REFORMING ASIAN DRUG POLICIES**

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Debunking the Three Myths About Reforming Asian Drug Policies

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Abstract

In the context of evolving global drug policies, notable shifts have occurred, yet Asia persists as a region marked by stringent approaches to drug use and distribution. Analyzing recalcitrant jurisdictions offers insights into potential trajectories of global drug policy. Asia's entrenched political and legal systems, resistant to harm reduction and human rights paradigms, wield substantial influence in shaping drug policy dialogues and reforms. This chapter provides an Asian drug policy overview, examining prevailing myths. Firstly, the causal link between historical trajectories and current reliance on prohibition is debunked. Secondly, the compatibility of criminal justice and harm reduction as complementary regulatory strategies is asserted, though transitioning remains intricate. Lastly, the pivotal role of human rights approaches in molding future Asian drug policy reform is underscored, refuting assertions of limited normative impact.

Introduction

While global drug policies and practices have started to make tectonic shifts in the past decades,¹ Asia remains home to countries and territories which adopt the most punitive approaches to drug use and supply. Paradoxically, Asia's lag in the global process of drug liberalisation is also why it can significantly shape the future of international drug policy. This is because an approach to gauge the likely course of global drug policy is to analyse trends and obstacles to reform in jurisdictions that have are the most resistant to policy change and attitudinal shifts. To predict the dynamic patterns of future change thus requires close attention to nations in Asia, where about 60% of the world population resides. In terms of drug use and supply

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¹ Since mid-2010s, a chorus of international and regional agencies have called for a human rights-based approach to drug policy worldwide. See, e.g., 'A Public Letter to UN Secretary General Ban Ki-moon' (*Drug Policy Alliance*, 14 Apr 2016) <www.drugpolicy.org/ungass2016> accessed 17 November 2021; 'International Guidelines on Human Rights and Drug Policy' (*International Center on Human Rights and Drug Policy and others*, March 2019) <www.humanrights-drugpolicy.org/site/assets/files/1640/hrdp_guidelines_2020_english.pdf> accessed 17 November 2021; 'Implementation of the Joint Commitment to Effectively Addressing and Countering the World Drug Problem with Regard to Human Rights - Report of the Office of the United Nations High Commissioner for Human Rights' (*United Nations High Commissioner for Human Rights*, September 2018) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/276/26/PDF/G1827626.pdf?OpenElement>> accessed 17 November 2021; in addition, harm reduction has been at the heart of debates against a criminal justice approach to drug use and possession for the past two decades.

around the world, it is estimated that this region accounts for 58% of people who use opioids, over one-third of people who use amphetamines, 35% of the people who inject drugs living with hepatitis C, and 38% of the quantities of synthetic new psychoactive substances seized.²

Besides its practical influence in the global landscape of drug use and supply due to its sheer size, Asia may also play a prominent role in shaping drug policy debates and legal changes because it is home to hard-line political and legal regimes which are the most resistant to harm reduction and human rights approaches.³ Many Asian countries, especially those governed by authoritarian political regimes, embrace zero-tolerance approaches of criminalisation and punishment that have reformed only slightly over the years. Notably, despite the international trend toward abolition around the turn of the century, “the number of countries expanding the application of the death penalty to include drug offences” increased in the first decade of the 21st century, especially in Asia.⁴ This gap between entrenched punitiveness in many Asian countries’ practices and drug liberalisation reforms in other parts of the globe⁵ has enlarged recently, marked by ongoing extrajudicial killings by law enforcement in the Philippines’s war on drugs launched in 2016, as well as in Bangladesh and Indonesia, over-incarceration for drug offences in countries such as Thailand and Cambodia, ongoing use of compulsory drug rehabilitation programme in detention, and unwavering use of the death penalty to punish and deter drug production and supply in countries such as China, Singapore, and Viet Nam.⁶ In many of these countries, punitive drug practices are not only a symbol of hard-line politics but a significant part of the nation’s operative criminal justice regime.⁷

These harsh realities invite enquiries about the potential of current reform initiatives to inspire changes away from exceptionally punitive policies in Asia. Indeed, it would be helpful to debunk three myths common to current drug policies and discourses in Asia. Here, we do not intend to claim that these Asian countries, with considerable variations in their political, social, economic, and legal contexts, can be classified as an identical or unified ‘Asian approach’ concerning drug prohibition. There are, however, shared characteristics in their reliance on state-centred ideological

² ‘World Drug Report 2021’ (*United Nations Office on Drugs and Crime Publications*, June 2021) <www.unodc.org/unodc/en/data-and-analysis/wdr2021.html> accessed 17 November 2021.

³ Gideon Lasco, ‘Drugs and Drug Wars As Populist Tropes in Asia: Illustrative Examples and Implications for Drug Policy’ (2020) 77 *International Journal of Drug Policy* 1.

⁴ Rick Lines, ‘The Death Penalty for Drug Offences: A Violation of International Human Rights Law’ (*Harm Reduction International*, 10 December 2007) 6 <www.hri.global/files/2010/07/01/DeathPenaltyReport2007.pdf> accessed 17 November 2021.

⁵ Banyan, ‘Asia Is Still Saying No to Drugs’ *The Economist* (London, 14 Jan 2017).

⁶ ‘2021 World Day Against the Death Penalty: The Additional Burden of the Death Penalty on Women’ (*Amnesty International*, October 2021) <www.amnesty.org/en/documents/act50/4791/2021/en/> accessed 17 November 2021; ‘Death Sentences and Executions 2019’ (*Amnesty International*, April 2020) <www.amnesty.org/en/documents/act50/1847/2020/en/> accessed 17 November 2021; ‘Substance Abuses: The Human Cost of Cambodia’s Anti-drug Campaign’ (*Amnesty International*, May 2020) <www.amnesty.org/en/documents/asa23/2220/2020/en/> accessed 17 November 2021; Gloria Lai and Claudia Stoicescu, ‘Drug Policy in Asia: the Origins and Extremities of Prohibition’ in David R Bewley-Taylor and Khalid Tinasti (eds), *Research Handbook on International Drug Policy* (Edward Elgar 2020).

⁷ See, for instance, David T Johnson and Franklin E Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (OUP 2009) 308-09.

preferences and political interests for tailoring drug policies. These salient characteristics shape the *status quo* of drug policies in this region and set out conditions for future reforms.

This chapter seeks to challenge the following three myths associated with Asian drug law, policies, and practices. First, we claim that Asian countries' historical paths do not causally determine their current and future reliance on prohibition and criminalisation in particular as the primary approach to solve drug-related social and public health problems. Second, we refute the assumption that a criminal justice approach and harm reduction are mutually exclusive and disconnected regulatory strategies of drug control. From a practical perspective, a genuine and meaningful transition from prohibition to harm reduction remains a significant challenge for many drug reformers in Asia. Third, we disagree that human rights approaches have limited normative and practical significance in shaping future Asian drug policy reform.

A. Are Asia's Drug Policies Determinately Shaped by History?

The contemporary prohibitionist policies in many Asian countries are believed to be inextricably tied to their colonial legacy in the early twentieth century.⁸ In the late-Qing period in China, military defeat in the 1839-42 Opium War with Britain and the subsequent forced acceptance of British opium imports into China marked the start of what has been labelled a "Century of Humiliation".⁹ Despite the varying interpretations of the ethics of the opium trade and the associated military conflicts,¹⁰ the Opium War is widely believed to be a pivotal part of the Chinese collective memory of drugs.¹¹ The unsaid statement about the political salience of this

⁸ See, for instance, William O Walker, *Opium and Foreign Policy: The Anglo-American Search for Order in Asia, 1912-1954* (UNC Press 1991) (arguing that it is impossible to fully understand foreign and security policy in Asia without understanding the fight against opium in the region); "中国的禁毒" ['Anti-drug in China'] (2000) 27 中华人民共和国国务院公报 [Gazette of the State Council of the People's Republic of China] 29 (stating that waging wars on drugs was the 'historical responsibility' of the Chinese government); James Windle, 'A Slow March from Social Evil to Harm Reduction: Drugs and Drug Policy in Vietnam' (*Brookings*, 2016) 2 <www.brookings.edu/wp-content/uploads/2016/07/WindleVietnam-final.pdf> accessed 17 November 2021 (in Vietnam, the punitive approach started in early 1990s).

⁹ William B McAllister, 'Foundations of the International Drug Control Regime: Nineteenth Century to the Second World War' in David R Bewley-Taylor and Khalid Tinasti (eds), *Research Handbook on International Drug Policy* (Edward Elgar 2020) 3-4; Julia Lovell, *The Opium War: Drugs, Dreams and the Making of China* (Picador 2012) 32-3.

¹⁰ Harry G Gelber, 'China as "Victim"? The Opium War That Wasn't' (2006) Center for European Studies Working Paper Series #136 <https://ces.fas.harvard.edu/uploads/files/Working-Papers-Archives/CES_WP136.pdf> accessed 17 November 2021 (the Opium War was to maintain the principle of free trade and defend British civilians); Jasper Ridley, *Lord Palmerston* (Constable 1970) 254-256; Arthur Waley, *The Opium War Through Chinese Eyes* (Allen and Unwin 1958) (Britain imposed its superior military power to guarantee the profitable trade and disregard the horrible moral evils of opium).

¹¹ Sheldon X Zhang and Ko-lin Chin, 'A People's War: China's Struggle to Contain its Illicit Drug Problem' (*Brookings*, 2016) 9 <www.brookings.edu/wp-content/uploads/2016/07/A-Peoples-War-final.pdf> accessed 17 November 2021.

historical chapter, however, is that a nationalist interpretation of the Opium War is fundamental to cementing the legitimacy of the contemporary Chinese political regime.¹² As the failure of the late-Qing government to stop domestic opium use and ban opium importation is perceived to have significantly weakened the power of the imperial throne¹³, the harsh stance of the Chinese government today against drug production, importation and distribution similarly bolster its political legitimacy.

The rationale behind the punitive approach to illicit drugs in China today is multi-dimensional. Besides claimed benefits - such as safety, health, moral purity, and order - to the Chinese society and individuals, the prohibitionist approach is also a political statement, a rejection of a nation's historical failure and the proud success of a new approach of social control¹⁴, which is believed to be effective, powerful and independent of Western influences¹⁵. It is in this sense that contemporary drug policies in China are not solely determined by historical experiences but rather contingent on a politicised, reconstructed narrative of history. Furthermore, framing drug-related activities as morally corruptive and life-threatening and claiming success in its implementation of prohibition-based strategies, the Chinese state has been able to extend its political control to other spheres of social life through the imposition of administrative sanctions¹⁶ and criminal punishment¹⁷.

Indeed, a brief survey of China's modern history reveals that drug prohibition is far from being a dominating trend. After the Opium War, the Chinese government ended its ban on opium and levied taxes on the trade to raise revenue, opening the way for domestic cultivators to enter the market and increasing the overall availability of opium in the country.¹⁸ After the demise of the imperial regime, opium consumption and trade in the post-Qing era remained widespread through to the establishment of the People's Republic of China (PRC) such that drug policies and practices during this period of modern China could hardly be characterised as punitive. The brutally punitive prohibitionist campaign after the founding of the PRC in 1949, which combined forced detoxification programmes, incarceration, and summary executions, was so effective that China proclaimed it rehabilitated 10-20 million 'drug addicts' and became a 'drug-free nation' within three years.¹⁹ The country's new image served as a powerful symbol of national pride and a rejection of old China's

¹² Yongming Zhou, 'Anti-drug Campaigns and State Building: China's Experiences in the 1950s' (2001) 32 CEMOTI, Cahiers d'Études sur la Méditerranée Orientale et le monde Turco-Iranien 233.

¹³ William O Walker, 'Drug Trafficking in Asia' (1992) 34 Journal of Interamerican Studies and World Affairs 201, 204.

¹⁴ Michelle Miao, 'The Penal Construction of Drug-Related Offenses in the Context of "Asian Values": The Rise of Punitive Anti-Drug Campaigns in Asia' (2017) 1 International Comparative, Policy & Ethics Law Review 47, 76; Patrick Tibke, 'Drug Dependence Treatment in China: A Policy Analysis' (*International Drug Policy Consortium*, February 2017) <http://fileserver.idpc.net/library/IDPC-briefing-paper_China-drug-treatment.pdf> accessed 17 November 2021; McAllister (n 9) 3.

¹⁵ See Walker (n 8).

¹⁶ 中华人民共和国治安管理处罚法 [Public Security Administration Punishments Law of the People's Republic of China], amended in 2012, arts 71-74.

¹⁷ 中华人民共和国刑法 [Criminal Law of the People's Republic of China] (1997 刑法 [1997 Criminal Law]), most recently amended in 2020, pt II, ch VI, s 7.

¹⁸ McAllister (n 9) 3.

¹⁹ Chongde Zhang and Yuan Chen, *China's Battle Against Narcotics* (New Star Publishers 1998).

‘century of humiliation’ plagued by what was portrayed as ‘foreign-induced drug addiction’.²⁰

With China opening its national borders to facilitate economic marketisation and globalisation in the late 1970s, illicit drugs were increasingly smuggled into China, starting in Yunnan Province bordering the infamous Golden Triangle region where the borders of China, Thailand, Laos, and Myanmar meet. Interestingly at that time, lawmakers, despite adopting a prohibitionist approach, were relatively lenient towards drug supply activities. The first criminal statute in the history of the PRC, which was enacted in 1979, prescribed a maximum five-year fixed term of imprisonment or penal servitude for producing, selling, and trafficking illicit drugs without aggravating circumstances.²¹ Drug possession was not a criminal offense. This is to be compared with the 1997 Criminal Law, which prescribes capital punishment for smuggling, manufacturing, selling, and transporting illicit drugs²² and life imprisonment for drug possession²³. In other words, the highly punitive approach to control drug-related activities in China today is hardly a product of a consistent historical track record; the extensive use of China’s criminal justice system to control illicit drugs, from combatting drug trafficking activities to treating people dependent on drugs is merely about two-decades-old. Throughout the region, prohibitionist drug policies are a recent phenomenon, compared with century-old practices of drug cultivation and consumption.²⁴

Drug policies in other Asian jurisdictions have been shaped by their respective colonial experiences to varying degrees and in different ways.²⁵ However, the politicised use of moralised rhetoric and criminal punishment against illicit drugs as a means of political and social control follows a similar political logic to China.²⁶ Compared with the long history of drug use and cultivation in Asia, often by indigenous peoples and ethnic minorities,²⁷ criminalisation has been a new addition

²⁰ Alison Adcock Kaufman, ‘The “Century of Humiliation,” Then and Now: Chinese Perceptions of the International Order’ (2010) 25 *Pacific Focus* 1.

²¹ 中华人民共和国刑法 [Criminal Law of the People’s Republic of China], amended in 1979, art 171.

²² 1997 刑法 [1997 Criminal Law], art 347.

²³ *ibid*, 348.

²⁴ John Collins, ‘Imperial Drug Economies, Development, and the Search for Alternatives in Asia, from Colonialism to Decolonisation’ in Julia Buxton, Mary Chinery-Hesse and Khalid Tinasti (eds), *Drug Policies and Development: Conflict and Coexistence* (Brill and Nijhof 2020).

²⁵ Ander Permanyer-Ugartemendia, ‘Opium after the Manila Galleon: The Spanish Involvement in the Opium Economy in East Asia (1815-1830)’ (2014) 10 *Investigaciones de Historia Económica-Economic History Research* 155; Anne L Foster, ‘Models for Governing: Opium and Colonial Policies in Southeast Asia, 1898–1910’ in Anne L Foster (ed), *The American Colonial State in the Philippines* (Duke University Press 2003); Gary Reid and Nick Crofts, ‘Historical Perspectives of Drug Use in Southeast Asia’ in Fifi Rahman and Nick Crofts (eds), *Drug law reform in East and Southeast Asia* (Wiley-Blackwell 2013); Tripti Tandon, ‘Drug Policy in India’ (*International Drug Policy Consortium*, February 2015) 7 <http://fileserver.idpc.net/library/IDPC-briefing-paper_Drug-policy-in-India.pdf> accessed 17 November 2021.

²⁶ Lasco (n 3); Kieu Truong and Pip Nicholson, ‘Drugs Prosecutions in Vietnam: the Modern Propaganda Trial’ (2008) 34 *Monash University Law Review* 430; Tim Lindsey and Pip Nicholson, *Drugs Law and Legal Practice in Southeast Asia: Indonesia, Singapore and Vietnam* (Bloomsbury 2016).

²⁷ Nguyễn Thị Phương Hoa, ‘Drug-Related Crimes Under Vietnamese Criminal Law: Sentencing and Clemency in Law and Practice’ (*Asian Law Center Briefing Paper Series*, 2014) 7

to the domestic government's arsenal to control and regulate drug-related activities.²⁸ Moreover, the policy shift and attitudinal hardening towards prohibition in Asia during the last two decades of the 20th century was at least partially a product of changing international politics, illustrated by a prohibitionist international legal environment and the United States' leadership in waging a global "war on drugs".²⁹

This suggests that transforming the way in which the issue of drug use and supply is politically framed in public and policy discourses may induce paradigm shifts in attitudes and policies. Arguably, reclaiming one's own traditional practice of drug consumption (e.g., opium, cannabis, and kratom) is also a nationalist project,³⁰ and establishing legally regulated markets for currently prohibited drugs would actually afford governments greater control over drug use and supply.³¹ To some extent, such arguments partially underpin reform measures in Thailand, where legally regulated markets for the use and supply of cannabis (limited to research and medical purposes), hemp, and kratom have been established, driven by political interests but also with the support of civil society advocacy.³² However, the shrinking spaces for civil society and NGOs throughout the region in recent years³³ bodes ill for prospects for further reform.

<https://law.unimelb.edu.au/__data/assets/pdf_file/0011/1547093/ALC-CILISPolicyPaper_Hoa_finalwbleed3.pdf> accessed 17 November 2021; Martin Booth, *Opium: A History* (Simon and Schuster 1996); Peter Lee, *Opium Culture: The Art and Ritual of the Chinese Tradition* (Inner Traditions/Bear & Co 2006).

²⁸ Daniel JP Wertz, 'Idealism, Imperialism, and Internationalism: Opium Politics in the Colonial Philippines, 1898–1925' (2013) 47 *Modern Asian Studies* 467; Bobby Anderson, 'People, Land and Poppy: The Political Ecology of Opium and the Historical Impact of Alternative Development in Northwest Thailand' (2017) 1 *Forest and Society* 48; Lindsey and Nicholson (n 26) 213.

²⁹ Istvan Bayer and Hamid Ghodse, 'Evolution of International Drug Control, 1945–1995' (1999) 51 *Bulletin on Narcotics* 1.

³⁰ Ann Fordham, 'The Meaningful Participation of 'Stakeholders' in Global Drug Policy Debates - A Policy Comment' in Julia Buxton, Mary Chinery-Hesse and Khalid Tinasti (eds), *Drug Policies and Development: Conflict and Coexistence* (Brill and Nijhof 2020).

³¹ Minxin Pei, 'Drugs, Gunboats and China's Score to Settle' (*Project Syndicate*, 24 August 2018) <www.project-syndicate.org/onpoint/drugs-gunboats-and-china-s-score-to-settle-by-minxin-pei-2018-08?barrier=accesspaylog> accessed 17 November 2021.

³² Virginia Macdonald and Supatra Nacapew, 'Drug Control and Harm Reduction in Thailand' (*International Drug Policy Consortium*, November 2013) <[http://fileserv.idpc.net/library/IDPC-briefing-paper-Thailand-drug-policy-English%20\(1\).pdf](http://fileserv.idpc.net/library/IDPC-briefing-paper-Thailand-drug-policy-English%20(1).pdf)> accessed 17 November 2021; Chokwan Kitty Chopaka, 'Medical Cannabis Moving Ahead in Thailand, but Who Stands to Benefit?' (*IDPC Blog*, 14 May 2019) <<https://idpc.net/blog/2019/05/medical-cannabis-moving-ahead-in-thailand-but-who-stands-to-benefit>> accessed 17 November 2021; Pascal Tanguay, 'Can Medical Cannabis in Thailand Balance Profits and Patients?' (*East Asia Forum*, 13 May 2021) <www.eastasiaforum.org/2021/05/13/can-medical-cannabis-in-thailand-balance-profits-and-patients/> accessed 17 November 2021. Jake Pesaruk, "An Unprecedented Achievement Anywhere" – Thailand's Decriminalization of Kratom' (*Filtermag*, 21 July 2021) <<https://filtermag.org/kratom-thailand-decriminalization/>> accessed 17 November 2021.

³³ 'Shrinking Civic Space in ASEAN: Indonesia and Thailand' (*Lokataru Foundation*, 15 March 2021) <<https://lokataru.id/shrinking-civic-space-in-asean-indonesia-and-thailand/>> accessed 17 November 2021; James Gomez and Robin Ramcharan, 'COVID-19 Shrinks Civic Space in Southeast Asia' *The Jakarta Post* (Jakarta, 25 April 2020); 'A Matter of Regional Concern: Shrinking Civil Society Space in Central Asia' (OSCE Human Dimension Implementation Meeting, Warsaw, 23 September 2015); Edward Wong, 'Clampdown in China Restricts 7,000 Foreign Organizations' *The New York Times* (New York, 28 April 2016).

In sum, a review of drug-related practices and policy development in this region does not provide convincing evidence that the punitive orientations of contemporary drug policies and practices are decisively shaped by historical experiences or traditional approaches. Instead, they seem to be products of domestic and international political dynamics and social conditions, which are promising yet challenging battlegrounds for reform-minded legal scholars, policymakers, and civil society advocates striving to chart a different future.

B. From Criminalisation to Harm Reduction: Old Wine in New Bottles

In the last two decades of the 20th century, the HIV epidemic spreading throughout Asia helped drive drug policy reforms away from a criminal justice-centred approach towards harm reduction.³⁴ Region-wide restrictions and criminalisation of opium use and supply led to the increasing popularity of heroin in Hong Kong, Thailand, and Laos.³⁵ A major negative health consequence associated with the growing injection of heroin was surging HIV transmission through the sharing of used needles. For example, in Yangon, Myanmar, there was an 80% HIV prevalence amongst people who injected drugs; HIV prevalence amongst people who injected drugs in Thailand rose from 2% to 43% in 1988.³⁶

As a direct response to the increasing rate of HIV transmission in the region, HIV prevention measures were introduced for people who inject drugs,³⁷ some of which became a constituting part of what has been widely referred to as a ‘harm reduction’ approach.³⁸ Harm reduction seeks to provide novel remedies that the existing criminalisation approach did not offer. Recent regional changes in drug policies and practices generally reflect this paradigm shift, including countries that impose the harshest penalties against drug-related activities, e.g., China, Vietnam, and Malaysia, introduced harm reduction measures such as Opioid Substitution Therapy and Needle/Syringe Programmes. For example, in Vietnam, the political leadership “emerged as strong proponents of including harm reduction in the new HIV law” and became forces pushing for policy and legal changes for HIV prevention.³⁹

³⁴ Thu Vuong and others, ‘Drug Policy in Vietnam: A Decade of Change?’ (2012) 23 *International Journal of Drug Policy* 319, 319-20.

³⁵ Reid and Crofts (n 25) 5.

³⁶ *ibid* 6.

³⁷ ‘Rampant HIV Spread in Developing Countries’ (1991) 38 *International Nursing Review* 167.

³⁸ Health, Rights and Drugs: Harm Reduction, Decriminalization and Zero Discrimination for People Who Use Drugs (*Joint United Nations Programme on HIV/AIDS*, 2019) <www.unaids.org/sites/default/files/media_asset/JC2954_UNAIDS_drugs_report_2019_en.pdf> accessed 17 November 2021.

³⁹ Vuong and others (n 34) 322; Theodore M Hammett, ‘“Social Evils” and Harm Reduction: The Evolving Policy Environment for Human Immunodeficiency Virus Prevention among Injection Drug Users in China and Vietnam’ (2008) *Addiction* 137-45.

Subsequently, the National Assembly in 2008 amended its Drug Law to introduce a generic reference to harm reduction.⁴⁰

Drug rehabilitation programmes were introduced in China, Vietnam, Laos, Cambodia, Nepal, Myanmar, Thailand, Indonesia, and Malaysia,⁴¹ alongside with reduction in the use of the death penalty for drug offences in Thailand, Vietnam, Singapore, and Malaysia, and the permitted use of cannabis for medical purposes in Thailand and South Korea (with a proposal being considered in the Philippines).⁴² In China, people who use or are dependent on drugs are increasingly seen as requiring medical treatment. They are perceived as ‘sick’ and ‘victims of their dependency’, rather than being evil or dangerous.⁴³ In Vietnam, for instance, “it has become a commonly held belief among many Vietnamese leaders that drug dependence is a chronic relapsing medical condition, not a crime⁴⁴. This criminal-to-patient attitudinal shift led to a legislative amendment⁴⁵ that removed the previously-required criminal arrests and incarceration of people who use drugs.

Harm reduction and criminalisation are theoretically distinctive approaches that represent different paradigms of drug policies. These two approaches agree on the *need* to minimise harm, but they disagree *how* to define and control those harms. The former uses criminal sanctions – in the form of deprivation of life, liberty and property – to condemn offenders and prevent as well as to eliminate the perceived harms of drug use and dependence to other people, based on the misguided assumption that people who use drugs will inevitably, steal, rape and kill. The latter directs resources and strategies to minimise the adverse health, social and legal impacts of drug use and punitive drug policies.⁴⁶ Under the approach of harm reduction, the harm includes the negative consequences of drug prohibition⁴⁷ but do

⁴⁰ Vuong and others (n 34) 323.

⁴¹ Adeeba Kamarulzaman and John L McBrayer, ‘Compulsory Drug Detention Centers in East and Southeast Asia’ (2015) 26 *International Journal of Drug Policy* S33, S33; Lee Edson P Yarcia, ‘It’s Time to Decriminalize: Drug Policy Reform under a Public Health Framework’ in Gideon Lasco (ed), *Drugs and Philippine Society* (Bughaw 2021) 310-11; Rick Lines, Julie Hannah and Giada Girelli, ‘“Treatment in Liberty”: Human Rights and Compulsory Detention for Drug Use’ (2021) 0 *Human Rights Law Review* 1, 5.

⁴² Claudia Stoicescu and Gideon Lasco, ‘10 Years of Drug Policy in Asia: How Far Have We Come? A Civil Society Shadow Report’ (*International Drug Policy Consortium*, 19 February 2019), <<https://idpc.net/publications/2019/02/10-years-of-drug-policy-in-asia-how-far-have-we-come-a-civil-society-shadow-report>> accessed 17 November 2021.

⁴³ Tibke (n 14); Simon Baldwin, ‘Drug Policy Advocacy in Asia: Challenges, Opportunities and Prospects’ (*International Drug Policy Consortium*, 18 November 2013) 19 <<https://idpc.net/publications/2013/11/challenges-opportunities-and-prospects>> accessed 17 November 2021.

⁴⁴ Law No. 16/2008/QH12 on Amending and Supplementing A Number of Articles of the Law on Drug Prevention and Control (National Assembly of Vietnam, 12 June 2008).

⁴⁵ Law No. 13/2009/L-CTN on Amending and Supplementing A Number of Articles of the Penal Code (National Assembly of Vietnam, 29 June 2009).

⁴⁶ Ethan Nadelmann, ‘Learning to Live With Drugs’ *The Washington Post* (Washington, 2 November 1999).

⁴⁷ An alternative view is that the harm reduction approach includes harm of drug use but not harm of prohibition. See Jarrett Blaustein, Miki McLay and Jude McCulloch, ‘Secondary Harm Mitigation: A More Humanitarian Framework for International Drug Law Enforcement’ (2017) 46 *International Journal of Drug Policy* 66, 67.

not include the perceived moral corruption stemming from drug use that does not affect third parties.⁴⁸

In practice, however, these two approaches co-exist in many Asian countries. The drug rehabilitation programmes implemented by governments in the region are overwhelmingly coercive and punitive, and have become sites of widespread human rights violations.⁴⁹ These circumstances indicate the lack of progress towards genuinely health-based responses to drug use and dependence. The approach of harm reduction often inherits coercive and stigmatising genes from its criminal justice predecessor. Under Vietnam's Ordinance on Administrative Violations, for instance, illicit drug use is still considered an administrative violation and subject to two-year compulsory treatment with longer terms of detention and forced labour. In response to the changes, some drug users purposefully commit petty crimes to be arrested and sentenced to shorter prison terms.⁵⁰ In some rehabilitation centres in South Vietnam, an economic incentive in building and running treatment centres constituted a self-reinforcing system that disregarded the wellbeing of people who use drugs.⁵¹ Governments in such countries use a diluted concept of decriminalisation to justify their losing sight of (or willingly disregarding) the fundamental values and principles behind the health-led approach of harm reduction.

The blurry boundary between these two approaches is an inherent danger in juxtaposing a supposedly humane, health-centered approach and a highly punitive method of drug control. Indeed, sometimes clothed in harm reduction programmes are initiatives resembling the characteristics of a criminal justice approach to drug control. Given the fragile rule-of-law conditions and weak right awareness in many Asian countries, sobering alertness to the intertwinement and conflation of the two courses is an urgent need. In this way, Asian drug policy reformers can promote a genuine transition from an oppressive ideology of drug control to a dignity-protecting, humane approach to drug policy.⁵²

In many Asian countries, it is within immense political and institutional constraints that drug policy reform and advocacy will take shape in the short term. A fundamental rejection of criminal justice responses – which is often central to power control and authoritarian legitimacy – is conditioned on successful broader reforms and restructuring the existing power dynamics. This will demand considerable

⁴⁸ Nadelmann (n 53); Bernard E Harcourt, 'The Collapse of the Harm Principle' (1999) *Journal of Criminal Law and Criminology* 109.

⁴⁹ Vuong, T. et al. (2012), p.321; Human Rights Watch, *The Rehab Archipelago: Forced Labor and Other Abuses in Drug Detention Centers in Southern Vietnam*, 7 September 2011, <https://www.hrw.org/report/2011/09/07/rehab-archipelago/forced-labor-and-other-abuses-drug-detention-centers-southern>

⁵⁰ Vuong and others (n 34) 323.

⁵¹ 'The Rehab Archipelago: Forced Labor and Other Abuses in Drug Detention Centers in Southern Vietnam' (*Human Rights Watch*, 7 September 2011) <www.hrw.org/report/2011/09/07/rehab-archipelago/forced-labor-and-other-abuses-drug-detention-centers-southern> accessed 17 November 2021.

⁵² Toby Seddon, 'Markets, Regulation and Drug Law Reform: Towards a Constitutive Approach' (2020) 29 *Social and Legal Studies* 313, 321.

resources and time. Eliminating state control from the formulation and implementation of drug policies at the moment is virtually impossible. Therefore, it is likely that harm-reduction-oriented reforms which circumvent state dominance will compete alongside state institutions for opportunities to regulate⁵³ drug-related activities for a considerable time.

Despite the limited space for critical civil society engagement on drug policy in many Asian countries,⁵⁴ enhanced participation by NGOs that meet the diverse needs and concerns of the population is critically important to remedy state dominance in this field. For instance, civil society's active participation in drug dependence treatment and harm reduction⁵⁵ programmes help safeguard the interests of individuals involved, in particular those from socially marginalised and economically disadvantaged groups. This is because NGOs have the advantage of reaching out to people who use drugs, including those in more vulnerable situations due to gender, race, ethnicity and socio-economic status, without necessarily provoking fears of arrest or stigmatisation.⁵⁶

Policy transformation entails the reallocation of resources and transfer of power between criminal justice and administrative agencies. A criminal justice approach demands funding for police, courts, and prisons, whilst the harm reduction approach requires health and social services, personnel support and facilities such as drug consumption rooms, needle and syringe programmes, non-abstinence-based housing and employment initiatives, drug checking, overdose prevention and reversal, psychosocial support, and the provision of information on safer drug use.⁵⁷ Both regimes are resource-demanding and may derive from funding, capacity building, personnel training, and institutional support emanating from the same pockets of state agencies.⁵⁸

It is in this pragmatic prsense that a paradigm shift from criminalisation to harm reduction may not always exclude criminal law from the sphere of drug regulation, but merely serve to reallocate criminal justice resources so that they are directed “not at nonviolent drug users and sellers but at violent and other predatory criminals”.⁵⁹ In many Asian countries, police own the power to oversee the co-existence of harm

⁵³ ‘Clifford Shearing, ‘A Constitutive Conception of Regulation’ in Peter Grabosky and John Braithwaite (eds), *Business Regulation and Australia's Future* (Australian Institute of Criminology 1993) ch 5.

⁵⁴ Gloria Lai, ‘Asia: Advocating for Humane and Effective Drug Policies’ (2015) 21 *Sur - International Journal on Human Rights* 1; Lai and Stoicescu (n 6).

⁵⁵ Pham Nguyen Ha and others, ‘The Evolution of HIV Policy in Vietnam: From Punitive Control Measures to A More Rights-based Approach’ (2010) 3 *Global Health Action* 1.

⁵⁶ Han-Zhu Qian and others, ‘Injection Drug Use and HIV/AIDS in China: Review of Current Situation, Prevention and Policy Implications’ (2006) 3 *Harm Reduction Journal* 1; Vuong and others (n 34).

⁵⁷ ‘What Is Harm Reduction?’ (*Harm Reduction International*) <www.hri.global/what-is-harm-reduction> accessed 17 November 2021.

⁵⁸ This is not to deny that funding for HIV prevention, treatment and care, e.g., from the Global Fund to fight AIDS, Tuberculosis and Malaria, has contributed significantly to the introduction and scale-up of harm reduction measures in countries that retain punitive drug policies.

⁵⁹ Nadelmann (n 53).

reduction and drug prohibition approaches. There is, therefore, a similarity in how the police perceive and implement health versus punishment.⁶⁰ But this intertwinement of harm reduction and criminal justice may not be normatively desirable as it opens the gate for right-abusive practices. This might explain the failures to tame the harms associated with drug use throughout the region, in both government-run and private drug treatment and rehabilitation centres. Abuses have been documented in these places, from torture resulting in death to extortion and kidnappings to extract money from family members of ‘patients’ in Nepal, Bangladesh, and Thailand. In China and Southeast Asia, economic incentives are vital for the proliferation and continued operation of many compulsory centres.⁶¹

These unintended consequences of drug policy reforms suggest that drug law reform should not only focus on promoting a shift away from police and prisons alone. Instead, reform towards a harm reduction approach needs to engage on a much broader footing with a reorientation and reshaping of the totality of multiple stakeholders, including but not restricted to state agencies and grassroots civil society organisations alike to effectively prevent harms associated with drug use, including the provision of voluntary, evidence-based treatment services. The real consequences of a reallocation of power and resources among and between different state organs and social institutions warrant scrutiny by civil society and public oversight bodies in countries where changes are underway. In comparison, debates are in dire need where an emerging global commitment to ‘harm reduction’ still meet strong resistance from local governments.⁶²

C. Human Rights are Incompatible with the Asian Approach to Drugs

Distinct political, social, and cultural conditions in Asia may appear to render progress towards human rights approaches as of limited possibilities, and even more so when it comes to the topic of punitive drug policies.⁶³ The above section demonstrated the challenges posed to transforming the issue of drug use and dependence from an issue of criminal justice into a matter of health and harm reduction. Redefining drug use and dependence as a human rights issue faces still more scepticism in Asia, partly due to issues of political palatability⁶⁴ and cultural acceptance⁶⁵ of international human rights language. These controversies are

⁶⁰ Kamarulzaman and McBryer (n 41); Vuong and others (n 34).

⁶¹ Vuong and others (n 34) 321; ‘The Rehab Archipelago’ (n 59).

⁶² Ricky Gunawan and Gloria Lai, ‘Consensus and Contradictions in ASEAN: An Analysis of Southeast Asia at and after UNGASS 2016’ in Axel Klein and Blaine Stothard (eds), *Collapse of the Global Order on Drugs: From UNGASS 2016 to Review 2019* (Emerald 2018) 155; Jennifer Hasselgard-Rowe, Naomi Burke-Shyne and Ann Fordham, ‘Public Health and International Drug Control’ in David R. Bewley-Taylor and Khalid Tinasti (eds), *Research Handbook on International Drug Policy* (Edward Elgar 2020) 257.

⁶³ Miao (n 14).

⁶⁴ Bilahari Kausikan, ‘Asia’s Different Standard’ (1993) 92 *Foreign Policy* 24, 26.

⁶⁵ Yash Ghai, ‘Human Rights and Governance: The Asia Debate’ (1994) 15 *Aust YBIL* 1, 4; *ibid* 32; Amartya Sen, *Human Rights and Asian Values* (Carnegie Council on Ethics and International Affairs 1997).

explainable by the central concern of human rights, in particular, civil and political rights: the relationship between individual rights and state power. Many authoritarian governments in the region are deeply allergic to limits on state power and find the rhetoric of human rights unappealing. Hence the past years saw the increased normative salience of human rights yet with limited implementation in the region.

As in other policy areas,⁶⁶ human rights ideals is a hard sell in debates about drug policy in Asia.⁶⁷ Many Asian politicians and policymakers believe a human rights approach would bring little benefits to the efficacy of drug control in the region.⁶⁸ Nonetheless, human rights have transformative potential. They are indispensable in achieving the deeper goals of drug policy reform, which technical solutions cannot sufficiently provide.⁶⁹ Vietnam is a case in point. Despite being the first country in Southeast Asia to decriminalise drug use in 2009, the implementation of the reform measures was undermined by the cultural inertia of Vietnam's police.⁷⁰ The reforms made positive steps towards a health-led and harm-reduction-oriented approach, but these technical shifts failed to shed the punitive nature of police-led implementation. It seems that, compared with changes in technicalities and strategies, transformations of underlying values generate more enduring impact. There are at least three reasons why a human rights-based approach will be a critical tool to shatter the once-unshakable regional reliance on the 'courts-and-cops' approach and achieve fundamental attitudinal shifts in the area of drug policy.

First, one of the central claims used by various Asian governments to contest the legitimacy and universality of human rights-based approaches, for a long time, has been that the priority of developing countries to protect economic, social, and cultural rights, rather than civil and political rights.⁷¹ The catalogue of human rights relevant to drug law, policies, and practices, however, includes a wide range of economic, social, and cultural rights, to which these human rights-sceptics, for decades, claimed to have a firm commitment⁷². International and regional agencies

⁶⁶ Diane K Mauzy, 'The Human Rights and 'Asian Values' Debate in Southeast Asia: Trying to Clarify the Key Issues' (1997) 10 *The Pacific Review* 210; Kausikan (n 68); Ghai (n 69).

⁶⁷ Miao (n 14).

⁶⁸ See, e.g., Rodrigo Duterte, "I Don't Care about Human Rights": Philippines' Duterte Acknowledges Abuses in Drug War but Refuses to Back Down' *South China Morning Post* (Hong Kong, 6 August 2016); 'China Will Never Allow Drug Traffickers from Any Country to Kill and Poison Its People: Chinese Embassy in Canada' *Global Times* (Beijing, 11 August 2021); Tee Zhuo, 'Singapore Has Sovereign Right to Use Death Penalty against Drug Offenders: Ministries Respond to Malaysian Minister' *The Strait Times* (Singapore, 22 November 2019); 'Indonesia: Death Sentences Carried Out for Narcotics Crimes' (*Library of the U. S. Congress*, 2 February 2015)

<<https://www.loc.gov/item/global-legal-monitor/2015-02-02/indonesia-death-sentences-carried-out-for-narcotics-crimes/>> accessed 17 November 2021.

⁶⁹ Damon Barrett, Julie Hannah and Rick Lines, 'What Does it Mean to Adopt a Human Rights-based Approach to Drug Policy?' (2020) 22 *Health and Human Rights Journal* 355 (stating that "Some of the biggest debates needed in drug policy are not about evidence, as such, but underlying principles or ideals.").

⁷⁰ Vuong and others (n 34).

⁷¹ Ghai (n 69) 27; John D Ciorciari, 'Institutionalizing Human Rights in Southeast Asia' (2012) 34 *Human Rights Quarterly* 695, 702.

⁷² Prime Minister's Office, *White Paper on Shared Values* (Cmd 1, 1991); 'Human Rights in China' (Information Office of the State Council of the People's Republic of China, November 1991)

and institutions, therefore, should meet less ideological resistance when they monitor whether respective countries fulfil their obligations under binding legal instruments to enforce and protect economic, social, and cultural rights, such as the right to the highest attainable standard of health, right to an adequate standard of living and the right to social security⁷³. In addition, some other rights - such as the right to life⁷⁴ and the right to privacy⁷⁵ - are commonly classified as civil and political rights but nonetheless are pregnant with social and cultural connotations in the context of drug policy.

In sum, reframing drug policies as a human rights issue in Asia is promising. At least theoretically, such a transformation will encounter fewer thorny ideological, cultural, and political challenges in the jurisdiction of many self-proclaimed guardians of economic, social, and cultural rights. The alleged primacy of economic, social, and cultural rights over civil and political rights, a major ideological obstacle to human rights protections in many Asian countries, can no longer be used to shield these governments from obligations and accountabilities from practices such as compulsory or coerced treatment⁷⁶. Moreover, in case of human rights violations, due to the relatively non-sensitive nature and judicability of these rights, individual victims and impacted groups have a greater chance of securing judicial remedies in domestic courts in addition to administrative, financial, educational, and social measures.⁷⁷

Second, there are considerable variations in Asian countries' attitudes towards human rights due to varying perceptions of its nature, scope, and suitable enforcement mechanisms. Yet, despite these disagreements, most governments would concede on some least challenging and minimalist role of human rights⁷⁸ in regulating domestic drug policies. Cross-border transfusion of human rights norms is feasible given both the regional integration of the drug trade market and the cross-country social impact of drug abuse and prohibition.⁷⁹ Due to the trans-local connections and influences of drug supply and demand in this region, countries will inevitably monitor, learn, and imitate each other's behaviours and policies, opening

<www.china.org.cn/e-white/7/index.htm> accessed 17 November 2021; 'White Paper on Human Rights Progress in China' *China Daily* (Beijing, 23 September 2019).

⁷³ International Guidelines on Human Rights and Drug Policy (n1).

⁷⁴ International Covenant on Civil and Political Rights 1966, art 6(1).

⁷⁵ Universal Declaration of Human Rights 1948, art 12; International Covenant on Civil and Political Rights 1966, art 17.

⁷⁶ Simon Flacks, 'Drug Control, Human Rights, and the Right to the Highest Attainable Standard of Health: A Reply to Saul Takahashi' (2011) 33 *Human Rights Quarterly* 856, 863.

⁷⁷ Scott Leckie and Anne Gallagher, *Economic, Social, and Cultural Rights: A Legal Resource Guide* (Penn Press 2011) xvi-xvii.

⁷⁸ Many countries, despite their varying degrees and patterns of reservation, enshrined human rights in their Constitutions. See, e.g., 中华人民共和国宪法 [Constitution of the People's Republic of China], most recently amended in 2018, art 33; Hiến pháp nước Cộng hòa xã hội chủ nghĩa Việt Nam [Constitution of the Socialist Republic of Vietnam], most recently amended in 2013, art 3; Ang Konstitusyon ng Republika ng Pilipinas [Constitution of the Republic of the Philippines] 1987, art II, s 11; and Konstitusi Republik Indonesia [Constitution of the Republic of Indonesia] 1945, ch XA.

⁷⁹ Cláudia Costa Storti and Paul De Grauwe, 'Globalization and the Price Decline of Illicit Drugs' (2009) 20 *International Journal of Drug Policy* 48; Ben Bowling, 'Transnational Criminology and the Globalization of Harm Production' in Mary Bosworth and Carolyn Hoyle (eds), *What Is Criminology* (OUP 2011).

the possibility of acculturation⁸⁰ as a powerful mechanism to reshape regional practices with the aid of human rights frameworks. In terms of compliance, it seems that most Asian governments are susceptible to not only material inducements and consequences but also what has been called the “logic of appropriateness”⁸¹ of their activities. Traditional arguments of “non-interference in the internal affairs of sovereign states” lose their appeals as the drug policy issue is no longer the isolated concern of any individual state or government.

The third benefit of reframing drug policy in a human rights-based language is its potential to fundamentally shift attitudes and practices away from stigmatisation, coercion, and discrimination. Alongside punitive approaches, compulsory drug rehabilitation programmes in the region pose the most formidable challenges to reformers seeking to establish genuine paradigms of harm reduction and voluntary treatment. During the first decade of the 21st century, compulsory drug treatment became a regional fad; most Asian countries introduced some form of compulsory treatment or rehabilitation programmes in response to the rise in drug use and new types of drugs such as methamphetamine.⁸²

Despite their seemingly humane, health-centred approach, abusive practices in both government and private drug rehabilitation centres have been documented, from denial of medical care to torture resulting in death.⁸³ These practices and the lack of public outrage over their extensive abuses raise serious concerns about the efficacy of prior reforms. Drugs are still seen as a social evil; drug users are moral culprits and public enemies.⁸⁴ The need to ground drug control and regulatory practices upon principles of individual autonomy, privacy, dignity, safety, and welfare is precisely the reason why a human rights-based approach is an urgent need. With its penetrating force and clarity, such a promising approach may dismantle the outdated mindset and stigmatising practices, fundamentally changing the way illicit drugs are

⁸⁰ Ryan Goodman and Derek Jinks, ‘How to Influence States: Socialization and International Human Rights Law’ (2004) 54 *Duke Law Journal* 621.

⁸¹ Sangmin Bae, *When the State No Longer Kills: International Human Rights Norms and Abolition of Capital Punishment* (SUNY Press 2007) 126.

⁸² Kamarulzaman and McBrayer (n 41); Stoicescu and Lasco (n 42) 31; Lee Edson P Yarcia and Jan Michael Alexandre C Bernadas, ‘Articulating Key Obligations of States to Persons Deprived of Liberty under A Right to Health Framework: the Philippine Case Study’ (2021) 14 *International Journal of Human Rights in Healthcare* 310; Lines, Hannah and Girelli (n 41).

⁸³ See, e.g., ‘Torture in the Name of Treatment: Human Rights Abuses in Vietnam, China, Cambodia, and Lao PDR’ (*Human Rights Watch*, 24 July 2012) <www.hrw.org/report/2012/07/24/torture-name-treatment/human-rights-abuses-vietnam-china-cambodia-and-lao-pdr> accessed 17 November 2021; Zhang and Chin (n 11); George Havenhand, ‘Reorienting Drug Policy in Indonesia: Pathways to the Sustainable Development Goals’ (*LBH Masyarakat and Reprieve*, March 2020) 12 <<https://lbhmasyarakat.org/wp-content/uploads/2020/06/Pathways-to-the-Sustainable-Development-Goals-1.pdf>> accessed 17 November 2021; ‘Coalition of NGOs on Human Rights and Drug Policies for UPR - Nepal’ (*Universal Periodic Review*, July 2020) <[http://fileserv.idpc.net/library/UPR-Submission-People-Who-Use-Drugs-in-Nepal\(1\).pdf](http://fileserv.idpc.net/library/UPR-Submission-People-Who-Use-Drugs-in-Nepal(1).pdf)> accessed 17 November 2021; Alia Shoaib, ‘Photos Show Homeless Heroin Addicts in Afghanistan Rounded up and Forced into Grim Rehab by the Taliban’ *Business Insider* (New York, 11 October 2021); Ambika Satkunanathan, ‘A Broken System: Drug Control, Detention and Treatment of People Who Use Drugs in Sri Lanka’ (*Harm Reduction International*, 2021) 16-18; Lines, Hannah and Girelli (n70).

⁸⁴ Miao (n 14) 66-7.

perceived, regulated, and controlled in the region. Without such a thorough revamp, even if drugs are regulated by legalised markets in the future, it will be bureaucrats and politicians that benefit the most; stigma and coercion will be an enduring part of the practice.

Conclusion

What is known about the contemporary drug policies and practices in Asian hard-line regimes? In this chapter, we challenge the three myths surrounding Asian drug policy discourses, debates and mindset from historical, strategical and human rights angles. We claim that the current punitive orientation of Asian drug policies, rather than being historically determined, are shaped by contemporary domestic, regional and international political dynamics and interests. We also believe that the alleged policy and practice shift from a heavy reliance on criminalisation and punishment to an ostensibly humane, treatment-centered approach of harm reduction in many Asian countries recently warrants close scrutiny due to institutional inertia and inadequate legal safeguards surrounding the control, management and treatment of people who use drugs. Last but not least, a human rights approach, despite being subject to intense scepticism in this region, is promising and pivotal to cultivating a human dignity-based right awareness and remold the mindset of various stakeholders involved in drug-related policy formulation, enforcement and implementation.

These clarifications are made keeping in mind the perennial epistemic obstacles, policy dilemmas and practical constraints facing drug policy reformers in the region. In this sense, it is the hope that this chapter could provide useful insights and framework of analysis for Asian advocates and reformers to form and implement their strategies and initiatives, free from some of the common misconceptions and controversies. The arguments highlighted in this chapter are framed and posited to echo a broader paradigm shift to harm reduction and human rights-based approaches in the governance of drug-related issues across the globe, which has already inspired multi-faceted institutional, discursive and policy transformations from discipline and punishment to human dignity, health and welfare.