

# **Death Penalty Reform in China- International Law Context**

**by**

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## **ABSTRACT**

This thesis provides an account of the history and the status quo of the death penalty in China, along with an analysis of its possible reform in the future. It begins by looking at the history of the use of the death penalty in China from the pre-Qin-Han era to the present. It revolves around consideration of the international law context, the drawbacks of and challenges to the Chinese legal system concerning the use of the death penalty and the would-be approaches to death penalty reform in China against the background of the global abolition movement. It examines the debates between reformists/neo-liberal cosmopolitans and conservatives in Chinese legal history from the end of the Qing dynasty to present-day China. Concerning the international law context, this thesis analyses how China treats international treaties, especially capital punishment related human rights treaties (mainly the ICCPR), on the legislative and judicial level. It studies the factors that have influenced the abolition movement in European countries. The thesis examines the Chinese Criminal Law and the Criminal Procedure Law to find challenges and gaps concerning the use of the death penalty between the Chinese legal system and the requirements of international human rights treaties. It also analyses case studies and empirical studies of capital crimes. Subsequently, the work outlines a number of alternative punishments to the death penalty and possible approaches to reform. It also analyses the present impetus for reform of the death penalty in China from a socio-economic perspective. The thesis further examines Chinese public opinion concerning the reform/abolition of the death penalty, as reflected in various surveys conducted by the author herself, as well as other Chinese or foreign scholars, for which a detailed analysis is provided in Appendix 6. Finally some possible suggestions and solutions are provided for the future reform of the death penalty in China.

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Under University regulations, I declare that this dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration. Where relevant, the work of others is expressly acknowledged.

## LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
AI	Amnesty International
CAT	Covenant on Acts against Torture
CPPCC	Chinese People's Political Consultative Conference
CPPCG	Convention on the Prevention and Punishment of the Crime of Genocide
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECOSOC	Economic and Social Council of the United Nations
GBP	Great Britain Pound
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICESCR	International Covenant on Economic, Social, and Cultural Rights
MPS	Ministry of Public Security of the PRC
MoJ	Ministry of Justice of the PRC
NGO	Non-governmental organisation
NPC	National People's Congress
PRC	People's Republic of China
SPC	Supreme People's Court
SPP	Supreme People's Procuratorate
RMB	Ren Min BI (the currency in China)
UDHR	Universal Declaration of Human Rights
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	United Nations High Commissioner for Refugees
UNHRC	UN Human Rights Committee
UNSC	United Nations Security Council
U.S.A.	United States of America
WTO	World Trade Organisation

# **CHAPTER 1 GENERAL INTRODUCTION**

## **1.1 INTRODUCTION**

This chapter provides the general introduction to the thesis. It will comprise seven sections. Section one is the general introduction to this chapter. Section two will illustrate the research rationale for this project and the objective of the research. This section will also discuss conflicts and debates regarding the abolition/retention of the death penalty in China and in the international society. The meaning of ‘death penalty’ as the term is used in this thesis will also be defined. Section three will outline the research questions for this thesis, identifying the main questions concerning reform of the death penalty in China. Section four consists of a literature review, appraising the major international and Chinese literatures to identify gaps that demand further investigation in this thesis as well as confirming the research areas for this project. Section five will analyse the originality and contribution of this thesis, discussing why the topic ‘Reform of the Death Penalty in China – an International Perspective’ has been chosen. This contribution will be based on the analysis of the perspectives and arguments within the international law context (using the ICCPR as the main yardstick), the drawbacks of and challenges to the Chinese legal system concerning the use of the death penalty and suggestions for the reform of the death penalty in China against the background of a global abolition movement, and on primary resources from my own research activities. Section six will present the research methodology. In order to explore and effectively unfold the research, I propose analysing which research methods are viable, focusing primarily on the doctrinal research method, the application of interdisciplinary, socio-legal research method and methodologies of legal positivism, realism and neo-liberal cosmopolitanism. This analysis will help to identify the methodology for this thesis. The last section will discuss the structure of the whole thesis, to facilitate the construction of a general theoretical framework.

## **1.2 RESEARCH RATIONALE**

### **1.2.1. The Definition of Death Penalty**

Before exploring the reform of the death penalty in the PRC the concept of the death penalty should be defined first. The definition in the Cambridge Dictionary is: The legal punishment

of death for a crime<sup>1</sup>, whilst the Oxford Dictionary's conception is: The punishment of execution, administered to someone legally convicted of a capital crime.<sup>2</sup> The encyclopaedia of China defines the death penalty as 'Death Penalty is to deprive criminals of life as a penalty method.'<sup>3</sup>

There have been some more contentious definitions. For example, Amnesty International (AI), a NGO which opposes the use of the death penalty, defines the death penalty as 'the premeditated, judicially sanctioned killing of an individual by a state. It's an irreversible and violent punishment that has no place in any criminal justice system.'<sup>4</sup> Another contentious definition is that in the classic work of Beccaria, 'the death penalty is not a matter of right,...but is an act of war on the part of society against the citizen that comes about when it is deemed necessary or useful to destroy his existence.'<sup>5</sup> He compared the death penalty to an act of war, though not all commentators have accepted this.

My definition will be based on the more neutral dictionary definitions given above: 'the death penalty is execution of legal punishment of death by a government or state for what are considered the severest crimes, following lawful conviction by a competent court.' Because this thesis focuses on judicial executions, the incidence of extrajudicial killing in China or its trends over time will not be discussed here.

## 1.2.2 Research Objectives

The death penalty is a controversial issue worldwide. Some abolitionist countries are trying to reintroduce it, but more countries are on the way to abolishing it, and especially after the 1990s, there has been a great leap towards abolition internationally.<sup>6</sup> China, as the country with the largest number of executions of death penalty convicts in the world, has been seeking to change this situation in recent years.<sup>7</sup> This thesis will research the issue of the death penalty from an international perspective mainly on the issue as to whether, after China

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<sup>1</sup> For this definition see <[dictionary.cambridge.org/dictionary/british/the-death-penalty](http://dictionary.cambridge.org/dictionary/british/the-death-penalty)> accessed 20 December 2013.

<sup>2</sup> The definition of the death penalty can be seen on the Oxford Dictionaries website: <[www.oxforddictionaries.com/definition/american\\_english/death-penalty](http://www.oxforddictionaries.com/definition/american_english/death-penalty)> accessed 20 December 2013.

<sup>3</sup> *Encyclopaedia of China (Law)*, (Encyclopaedia of China Publishing House, 1984) 554.

<sup>4</sup> 'Why We're Working To End The Death Penalty', <[www.amnesty.org.uk/end-death-penalty](http://www.amnesty.org.uk/end-death-penalty)> accessed 20 December 2013.

<sup>5</sup> Cesare Beccaria, *On Crimes and Punishments and Other Writings*, (Cambridge University Press, 1995) 66.

<sup>6</sup> For more information see Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edn, Oxford University Press, Oxford 2015).

<sup>7</sup> Trevaske, S. (2013). China's Death Penalty. *The British Journal of Criminology*, 53(3), 482-499.

singed the ICCPR, domestic laws relevant to the death penalty in China will be brought into compliance with this international treaty as well as other international human rights treaties. It also will examine multiple factors that influenced or are presently influencing China's current penal policy. By means of the research, some possible suggestions concerning reform of the death penalty in China will be proposed.

The word 'reform' in this thesis means to find a workable resolution to restrict the use of the death penalty and to prepare the road to its future abolition. This reform from its first emergence in China to the present day has been entwined with endless conflicts between people who advocate the reform according to the requirements of modern western legal spirit, and those who oppose such reform out of consideration for China's traditions.<sup>8</sup> The later chapters will unfold how debates between them influenced the reform of the death penalty. Those debates date back to the end of the Qing dynasty, when the first legal reform including the use of the death penalty took place. Then over a time span of more than a hundred years the debates continued. This thesis will be mainly focusing on the era after the year 1979, when the economic reform process started and the criminal substantive law and criminal procedure law were promulgated for the first time in the People's Republic of China (Hereinafter the PRC).

This conflict between those who want to restrict or abolish the death penalty and those who do not can also be seen internationally. Some countries's leaders have even wanted to reintroduce the death penalty in countries in which it has been abolished.

For example, the president of the Philippines, Rodrigo Duterte pronounced that people should forget human rights and he would reintroduce the death penalty in the Philippines.<sup>9</sup> The president of Turkey, Recep Tayyip Erdogan, after the failed coup in 2016, wanted to reintroduce the death penalty, though only if Turkish people agreed. He strongly asserted, however, that this should be a matter for the sovereign Turkish people, and not dictated or pressurised by the EU or other countries.<sup>10</sup>

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<sup>8</sup> They are called 'conservatives' and 'neo-liberal cosmopolitans' in this thesis. For a reference, see the section of methodology in this chapter. The discussion is in the part 'Methods of legal positivism, realism and neo-cosmopolitanism'.

<sup>9</sup> 'Philippines: Duterte Vows to Bring Back Death Penalty' *The BBC News* (16 May 2016) <[www.bbc.co.uk/news/world-asia-36297583](http://www.bbc.co.uk/news/world-asia-36297583)> accessed 8th August 2016.

<sup>10</sup> He proclaims that: 'It is the Turkish parliament that will decide on the death penalty... I declare it in advance, I will approve the decision made by the parliament... They say there is no death penalty in the EU... Well, the US has it; Japan has it; China has it; most of the world has it. So they are allowed to have it. We used to have it until 1984. Sovereignty belongs to the people, so if the people make this decision I am sure the political parties will comply.' See 'Turkey Coup: Erdogan Backs Return of Death Penalty at Vast Istanbul Rally' *The BBC News* (8<sup>th</sup> August 2016) <[www.bbc.co.uk/news/world-europe-37003819](http://www.bbc.co.uk/news/world-europe-37003819)> accessed 8<sup>th</sup> August 2016.

In China, the majority of people presently want to retain the death penalty at least for some crimes, and many also argue that if China considers the death penalty as essential to be retained in its territory it does not have to abolish or reform the death penalty merely because other countries or international organisations exert pressure on it. Those outside pressures are considered as a kind of imperialistic cultural aggression.<sup>11</sup> This thesis will also explore and analyse these competing opinions.

Inevitably, there are different voices from the United Nation (herein after the UN) and other countries that have abolished capital punishment. The then UN Secretary-General Ban Ki-moon in July 2014 proclaimed: ‘twenty-five years ago, only about one quarter of United Nations Member States had abolished the death penalty. Today, more than four out of five countries — an estimated 160 Member States — have either abolished the death penalty or do not practice it’. He argued that the death penalty had no place in twenty-first century, and urged concrete action by states for its abolition.<sup>12</sup>

When studying the death penalty, it has been established that China is the country with the largest number of executions, along with the most dynamic economic development in addition to rapid rates of social change, and it has a most important status just as Johnson and Zimring illustrated: “when one nation is responsible for nine-tenths or more of the world’s executions, it will play an outsized role in determining future world trends. For this reason, China is a compulsory stop on any tour of capital punishment in the world, and it is the most important case study.”<sup>13</sup>

On the issue concerning reform of the death penalty, this thesis will be focusing, in part, on protecting viable “human rights” dimensions and related issues raised by this topic. It will rely upon a close but critical analysis of previous researchers’ contributions, doctrinal studies of comparative criminal law provisions, detailed empirical field work, and the development of illustrative and instructive case studies, together with historical, political and economic background analysis. The purpose of these explorations will be to find a practical and legitimate way of conceiving death penalty reform both in the legislative system and in the

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<sup>11</sup> See Bingzhi Zhao, ‘The Discussion on the Main Controversial Issues of the Reform of the Death Penalty in Current China’, (2014) 1 *Science of Law* 146; and his other article, ‘Re-discussing the Debates on the Reform of the Death Penalty in China’, (2014) 5 *Law Science* 125, See also Su Li, ‘The Awareness of the Questions: What Questions and Whose Questions’, (2017) 1 *Wuhan University Journal (Philosophy & Social Sciences)* 10

<sup>12</sup> The speech of the UN Secretary-General Ban Ki-moon on 2 July 2014 in his press release, ‘Death Penalty Has No Place in Twenty-First Century, Secretary-General Tells Panel, Urging Concrete Action by States for Its Abolition’, the UN, (2 July 2014), <[www.un.org/press/en/2014/sgsm16000.doc.htm](http://www.un.org/press/en/2014/sgsm16000.doc.htm)> accessed 10 August 2014.

<sup>13</sup> David T Johnson and Franklin E. Zimring, *Next Frontier: National Development, Political Change, and the Death Penalty in Asia*. (Cary, NC, USA: Oxford University Press 2009) 40.

judicial system. In this way, it is arguable that not only can the judicial reform in China be accelerated but the human rights situation there can also be improved more generally.

This research project will consider the legal principle of the limitation and the abolition of the death penalty in the context of the international legal framework, which will lead to abandonment of the death penalty and prevent retrogression in abolitionist States. Because the relationship between the domestic and international law is dramatically close, such provisions enacted in domestic laws are equally important to the analysis of reform of the death penalty in China.

This thesis will build a viable legal framework based upon the different socio-economic and socio-legal backdrop of different countries for reform of the death penalty in China. This will be achieved by assessing international and domestic legal instruments, and by focussing on the approaches used by various abolitionist states during the long historical journey from the limitation of the death penalty to the abolition *de facto* to the eventual abolitionist countries. Since context is central to understanding what the death penalty is and what it will become, so are case studies, and so economic, cultural, social, and political history as a context for understanding the current status of death penalty policy and for exploring the possibilities for the future should also be researched. In order to build this framework, this thesis will briefly review the history of how the factual abolition of the death penalty has been developed and achieved as a main value and core principle of international human rights law, and how the previous reform of the death penalty in China has led to changes in China's legal framework as it exists today.

### **1.3 RESEARCH QUESTIONS**

Considering the complicated background presented above and the current situation regarding the use of the death penalty in China, the main research question in my field is concerned with the future direction of this issue and its possible reform or abolition. This will challenge to what extent, if any, should the existing death penalty provisions in the Chinese criminal law and criminal procedure law be changed to better comply with the requirements of the ICCPR, which restricts the use of the death penalty and other international human rights treaties. The question is: would any change along these lines ensure fairer justice, the promotion of human rights and the ultimate elimination of the use of the death penalty in China in the future? The research question is divided into six main branch questions:



First, what has been the history so far of China's use of the death penalty? Around this main question there are several aspects that need to be researched- What was the history of the use of the death penalty in ancient China? What was the first modernising meaning of the reform of the death penalty and what lessons can it bring to the present reform? What are the problems and contradictions with the use of the death penalty in present day China concerning some case study of wrongly decided death penalty sentences? This will require an in-depth background analysis from legal, political, socio-economic perspectives.

Second, concerning the norms within the death penalty related international treaties (especially the ICCPR), to what extent, if any, does China apply some or all of these in its domestic criminal justice system? Analyses of the application of the international treaties in China's domestic law are necessary as well, because in China there is no constitutional law prescribing the relationship between international treaties and domestic laws, and there are no principled rules on whether international treaties should be applied in China by transformation or by direct application. Also, how China's courts in different levels apply the international human rights treaties- ratified or non-ratified will be researched under this main question.

Third, what experience of the abolition in European countries would be for China? This question further should be separated into several questions to be researched as the following- what were the influential factors which generated the abolition movement in European countries? Has there been a common process when European countries abolished the death penalty? How could this process be linked directly or indirectly to the norms of the ICCPR? In what circumstances can China draw selectively at least on some of those countries' experiences of abolition? What are the similarities and the differences on the way to seeking reform/abolition of the death penalty between China and those European countries?

Fourth, what are the challenges to the Chinese Criminal Law? Under this question, there are also some sub questions to research. Firstly, what changes in Chinese criminal substantive law would be necessary for this reform to result in fewer executions in ways that comply to the ICCPR and other international human rights treaties? Secondly, how has the Chinese Criminal Law evolved in the past four decades? Thirdly, what were and are the capital crimes in the criminal law and would there be a new trend towards the reform of the death penalty concerning those capital crimes? Fourthly, respecting the necessary changes, what would be the alternative punishments for the death penalty in the future?

Fifth, what changes in Chinese criminal procedural law could be important for this reform to execute less defendants, whether innocent or non-innocent, again in relation to relevant international norms, mainly the ICCPR? Reform of the death penalty cannot only be achieved through the amendment of criminal law; procedural justice should also be taken into account - this will review the procedural law to identify changes required to safeguard the human rights of criminals and criminal suspects, thus achieving just and fair trials. It will also research how the criminal procedure law evolved during the past four decades.

Sixth, what should be considered towards further death penalty reform in China? Several sub-questions will be researched- On what policy grounds and ethical basis could China move towards the reform and what other considerations would be helpful to address in seeing a practical way forward? What would be the possible measures for the future reform? This will require an analysis of the current socio-economic policy, which are relevant to identifying the most contextually appropriate way forward regarding the state's death penalty reform.

The above analyses constitute the current issues that this thesis will research. In order to find the research gap, the next section will conduct a literature review.

## **1.4 LITERATURE REVIEW**

### **1.4.1 Conflict between Abolitionists and Retentionists World Wide**

#### **1.4.1.1 Historical perspective on the death penalty**

Capital punishment has existed for thousands of years, and before abolition of the death penalty were first proposed, few people contested the legitimacy and rationality of it. In ancient Greece, however, Thucydides had recorded a debate between Cleon and Diodotus on the use of capital punishment. Diodotus argued that: 'we must not, therefore, commit ourselves to a false policy through a belief in the efficacy of the punishment of death, or exclude rebels from the hope of repentance and an early atonement of their error'<sup>14</sup>. This viewpoint was rarely to be seen in the world before the emergence of the Enlightenment movement in Europe. On the contrary, from the Middle Age until the Renaissance and the

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<sup>14</sup> Cited from William A. Schabas, *The Abolition of the Death Penalty in International Law*, (2<sup>nd</sup> edn, Cambridge University Press 1997) 4.

Reformation era, several great thinkers supported the legitimacy of the use of the death penalty.

Schabas points out that Grotius used the Bible and other examples of Christian mores as references to justify the acceptance of capital punishment and the legality of its use in times of war. He also argues that both Thomas Hobbes and John Locke admitted that the death penalty was acceptable.<sup>15</sup>

In Ancient China, one of the rulers of the Zhou dynasty (in about 1100 BCE), Zhou Gong, proposed a concept that ‘since kings in the Zhou dynasty govern the country by the mandate of heaven, their behaviours must be worthy of (the love of) heaven with virtue’.<sup>16</sup> Based on this idea, he constructed a legal system with ‘virtue’ at its core. Later, Confucius developed this idea and contended that: ‘putting men to death, without having taught them (the right); is savagery’.<sup>17</sup> He further pointed out that: ‘to rule is not to slay. If you desire what is good, the people will at once be good’.<sup>18</sup> Confucius’ thought was continued by Mencius, who also supported the idea of education over punishment. Mencius contended that the application of the death penalty must be cautious, performed following prudential investigation, and public opinion must be sought before the sentence to death is passed.<sup>19</sup> Although those Confucian masters accentuated the virtues of education and prudent execution, however, they were not against the application of the death penalty. With Confucianism established as the orthodox ideology in 134 BCE, their legal thoughts became dominant in China, and they continue today.

With human progress from savagery, through barbarism to civilisation, people began to reflect on the use of the death penalty. The first person to systematically theorise on the modern tendency towards the abolition of the death penalty and garner a significant response was Beccaria. In his book *On Crimes and Punishments*, he argued: ‘this futile excess of punishment, which has never made men better, has impelled me to consider whether the death

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<sup>15</sup> Ibid..

<sup>16</sup> The Book of Songs, (Shanghai Ancient Books Publishing House, 1987) 119-120. For the relevant discussions see Fuguan Xu, *On The history of Chinese Humanity*, (East China Normal University Press) 21; see also Ronggen Yu, *General Discussion on Confucian Legal Thoughts*, (Guangxi People’s Publishing house, 1998) 478; and Xingliang Chen, *The Humane Base on the Criminal Law*, (China Renmin University Press, 2006) 2.

<sup>17</sup> The Analects of Confucius, translated by Arthur Waley, (Hunan People’s Publishing House 1999) 233, for the discussion see Hongyong Xiao, ‘On the Human Nature Basis of Ancient Chinese Concepts of Death Penalty’, (2012) 6 *The Jurist*, 16. See also Schwartz, B I. *The World of Thought in Ancient China*, (Harvard University Press, 2009) 56-255.

<sup>18</sup> The Analects of Confucius, translated by Arthur Waley, (Hunan People’s Publishing House 1999), 133.

<sup>19</sup> Mencius: 2 King Hui of Liang, edited by Bojun Yang, *The Translation and Annotation of Mencius*, Volume 1, (Zhonghua Book Company 1988), 305.

penalty is really useful and just in a well-organized state.<sup>20</sup> He argued that the death penalty was neither useful to change human beings for the better nor just in a civilized society.

He raised the question, ‘by what right can men presume to slaughter their fellows?’<sup>21</sup> He queried the legitimacy of the source of the power to kill people legally. He argued that it should not derive from where states and laws derive from, so there was no legal source of the authority to perform the death penalty.

He also questioned the alleged general will. He argued that the small part of the will just represented a particular will instead of all people’s will, because no one would like to place their lives at anybody else’s disposal. He pointed out it was a contradiction that people could not give up their own lives but could give up the right to life to authorities.<sup>22</sup>

On the contrary, Beccaria’s points went against the contemporary philosopher Kant and the later philosopher Hegel. The following part will analyse some of the important European philosophers’ views on the use of the death penalty.

#### **1.4.1.2 European Philosophical Perspectives**

Kant analysed it from the perspective of social justice; he argued, ‘anyone who is a murderer or take part in one-must suffer death. This is what legal justice as the idea of the judicial authority wills in accordance with universal laws that are grounded a priori.’<sup>23</sup> He argued that there would be no substitute that would satisfy the requirements of legal justice except the death penalty.<sup>24</sup> Kant further contended that without the death penalty, a society could not achieve justice, and hence the whole country would face the danger of dissolution.<sup>25</sup>

Kant suggested that there could be the exception of the death penalty if it was necessary, but the pardon should be undertaken by a monarch according to leniency rather than by a judge in the light of public law, and it should be restricted to individual cases.<sup>26</sup>

Kant opposed Beccaria, saying that the Marquis of Milan, ‘moved by overly compassionate feelings of an affected humanity (*compassibilitas*), has put forward his

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<sup>20</sup> Cesare Beccaria, *On Crimes and Punishments and Other Writings*, (CUP, 1995) 66.

<sup>21</sup> Ibid 66.

<sup>22</sup> Ibid 66.

<sup>23</sup> Immanuel Kant, *The Metaphysical of Elements of Justice*, (Bobbs-Merrill Educational Publishing Indianapolis, 1965) 104.

<sup>24</sup> Ibid 102.

<sup>25</sup> Ibid 99.

<sup>26</sup> Ibid 99.

assertion that any capital punishment is wrongful because it could not be contained in the civil contract; for if it were, everyone in a people would have to have consented to lose his life in case he murdered someone else (in the people), whereas it is impossible for anyone to consent to this because no one can dispose of his own life. This is all sophistry and juristic trickery.’<sup>27</sup>

Although his opinions on the death penalty have some reasonable parts, such as it is impossible for people to consent to lose their lives in murder cases, the possible criticism of Kant’s views is that after more and more countries abolished the death penalty, there is no sign that the abolitionist countries are facing dissolution and legal justice could be achieved in many ways not necessarily only by the execution of the death penalty.

Hegel, although criticizing Kant about his philosophical opinions, at the level of retention of the death penalty has similar views as Kant. Hegel regarded Beccaria’s argument as revealing the ultimate absurdity of the contractarian conception of political obligation. He rejected abolishing the death penalty. His arguments also derive from social justice. He questioned Beccaria’s consent theory as well, arguing that ‘Beccaria is quite right to demand that human beings should give their consent to being punished, but the criminal gives this consent by his very act. Both the nature of crime and the criminal’s own will require that the infringement for which he is responsible should be cancelled.’<sup>28</sup>

However, Hegel admitted that “Beccaria’s efforts to have capital punishment abolished have had advantageous effects”, because “even if neither Joseph II nor the French have ever managed to secure its complete abolition, people have begun to appreciate which crimes deserve the death penalty and which do not. The death penalty has consequently become less frequent, as indeed this ultimate form of punishment deserves to be.”<sup>29</sup> His above argument of retaining the death penalty but restricting its use could be found similarity in Mao’s discourse on the CCP’s penal policy before and after the founding of the PRC. It was also echoed in the ICCPR, which prescribed that the death penalty should only be applied for those most serious crimes.<sup>30</sup>

According to Kant and Hegel’s justice theory of the death penalty, they raise a question about the death penalty--should the principle of justice give way to the principle of the

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<sup>27</sup> Ibid 99-105.

<sup>28</sup> Georg Wilhelm Friedrich Hegel, *Elements of the philosophy of the right*, (Cambridge University Press, 1991) 126.

<sup>29</sup> Ibid 127.

<sup>30</sup> Article 6, the ICCPR.

absolute supremacy of life? The utilitarian philosopher Jeremy Bentham answers the question from a utilitarian perspective.

After Beccaria, Jeremy Bentham is the other philosopher who supported abolition of the death penalty. In his book *An Introduction to the Principles of Morals and Legislation*, he focused on the perspective that the death penalty was the most egregious example of a punishment that cannot be corrected in the event of a wrongful conviction.<sup>31</sup>

Then fifty years later Bentham summarised his views against the death penalty in several aspects in another book, *To His Fellow Citizens of France, on Death Punishment*.<sup>32</sup>

Bentham argued that, firstly, the death penalty is not efficient compared to other approaches of punishment. The first cause of inefficiency being, ‘On the part of the several descriptions of persons whose co-operation is necessary to the conviction of the criminal, reluctance as to the performance of their respective parts in the melancholy drama.’<sup>33</sup> He claimed that some part of the participants within the criminal justice system were reluctant to co-operate with the prosecutors, because they were unwilling to be involved in state killing, but they would be willing to co-operate if there was no death penalty. As a result, the death penalty creates a degree of inefficiency in the practical operation of the criminal justice system. He also suggested that among all the punishments, the death penalty could not change a criminal to be a kind man.<sup>34</sup>

The second reason for inefficiency, he thought, was ‘[O]n the part of the delinquent himself - that is to say, on the part of persons at large, considered as standing exposed to the temptation of becoming delinquents in this shape, —comparative insensibility to the danger of punishment in this shape: - as to this matter, presently’.<sup>35</sup> He interpreted that, without the distinction of crimes, the general application of the death penalty from theft to murder would lessen the criminals’ sensibility on crimes. The death penalty tends to generate more crimes. For example, a thief who faces imprisonment and death penalty may be willing to kill the arresting police officers in order to keep his own life. In contrast, if the highest sentence possible excluded the death penalty, then there will be less incentive for a thief to become a murder. He called it ‘positive maleficence: tendency to produce crimes.’<sup>36</sup>

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<sup>31</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*. (Kitchener, Ontario, CAN: Batoche Books, 2000) 155.

<sup>32</sup> Jeremy *To His Fellow Citizens of France, on Death Punishment*, (Heward, 1831) 5.

<sup>33</sup> Jeremy Bentham, *The Works of Jeremy Bentham*. Vol. 1. (John Bowring ed, W. Tait, 1843) 526.

<sup>34</sup> *Ibid* 527.

<sup>35</sup> Jeremy Bentham *To His Fellow Citizens of France, on Death Punishment*, (Heward, 1831) 5.

<sup>36</sup> *Ibid* 4.

He claimed that the main reason that most or all governments keep the death penalty was that people appeared to support its use, they did not want to abolish the death penalty. However, he argued that actually only the opinions of the people in the higher echelons of society were being overgeneralized, as if these represented the wishes of all citizens – “the child and disciple of aristocracy” could influence the death penalty because they had an invested interest, – ‘a sinister interest.’<sup>37</sup>

He also held the opinion that if ill-applied pardon, it would produce evils.<sup>38</sup> A possible interpretation of this might be that one of these evils could be the corruption of the integrity of the entire legal system because convicted murderers, for example, can skip capital punishment through personal influence, family connections and even bribery, and when discovered such practices undermine any perceived legitimacy of the entire legal system.

Although some of his views can be justified, for example his view on the death penalty preventing society from benefiting from the results of rehabilitation, the possible criticisms of Bentham’s views are:

Firstly, in the light of the efficiency, some people might be enthusiastically in favour of the death penalty instead of all the people being against it. Hence, the efficiency would not be necessarily low.

Secondly, in his era, the death penalty applied to crimes generally, but with the improvement in human rights, in modern society even in the retentionist countries the death penalty only applies to severe crimes. So, the basis for his argument does not exist presently.

Thirdly, his view on judicial corruption is partial, because we must admit that corruption could exist with respect to not only the application of capital punishment. This possibility can also apply to other forms of punishment, for which pardons and amnesty and immunities might exist.

Marx, whose doctrine is the cornerstone of the CCP’s ideological framework, is another philosopher who was against the use of the death penalty. He objected to the deterrent function of capital punishment by declaring:

‘Now what right have you to punish me for the amelioration or intimidation of others? And besides, there is history – there is such a thing as statistics – which

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<sup>37</sup> Ibid 11.

<sup>38</sup> Ibid 4.

prove with the most complete evidence that since Cain the world has neither been intimidated nor ameliorated by punishment.<sup>39</sup>

Marx was against Kant's and Hegel's, approach, arguing that crimes in any given society are the product of that society. His suggestion on how to abolish the death penalty was to alter the system that bred capital crimes.<sup>40</sup> His declaration on changing the system to eliminate capital punishment might seem extreme, but it is important to keep in mind that he wrote at a time when the ruling classes executed people for minor theft. In his view, once the workers spontaneously rose to establish the classless society there would be no need for governmental laws. The people would own their means of production and thus alienation would cease. Thus, there would be no need for punishment if the cause of crimes was removed. This may seem utopian, but there is still a valuable core to it. The possible understanding is that everything has its origin. Crime has its own reasons as well. To abolish capital punishment, people should eliminate the cause of crime, instead of simply executing criminals.<sup>41</sup>

#### **1.4.2 Recent Western Views on the Death Penalty**

With the enlightenment movement and the dissemination of human rights theory, more and more scholars back the theory of abolition of the death penalty. However, the idea of abolition of the death penalty was generally accepted by international society mainly after World War II. Similarly, Schabas pointed out that the study on the abolition of the death penalty in international law could not have been written fifty years ago because its subject matter did not exist, while international norms addressing the limitation and the abolition of the death penalty were essentially a post-Second World War phenomenon.<sup>42</sup>

Even at the beginning of the post-World War Two era, Uruguay was criticised by international society that it had Nazi sympathies, because it objected to exerting the death

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<sup>39</sup> Karl Marx, 'Capital Punishment. — Mr. Cobden's Pamphlet. — Regulations of the Bank of England', New-York Tribune, 17 February 1853, <https://www.marxists.org/archive/marx/works/1853/02/18.htm> <accessed on 18 July 2017>.

<sup>40</sup> Ibid.

<sup>41</sup> For the relevant discussion on Marx's views on capital punishment, see Andrew Hammel, *Ending the death penalty: the European experience in global perspective*. (Springer, 2010) 158-159; see also Weis, Valeria Vegh. *Marxism and Criminology: A History of Criminal Selectivity*. (Brill, 2017); and Mooney, Jayne. 'Finding a political voice.' *Handbook of Critical Criminology* (2011): 13, 16.

<sup>42</sup> William Schabas, *The Abolition of the Death Penalty in International Law*, (2nd edn, Cambridge University Press 1997) 1.



penalty in the Charter of the Nuremberg Tribunal.<sup>43</sup> The experts who drafted the Universal Declaration of Human rights first declared the right to life in absolute fashion, any limitations being only implicit.<sup>44</sup>

The next part of this section will analyse post-World War Two western viewpoints on the abolition/retention of the death penalty, as well as the relationship between the abolition and human rights/international human rights law.

#### **1.4.2.1 Arguments concerning the reasons behind the movement for abolition**

Some western scholars argue that democracy played an important part in abolition of the death penalty.<sup>45</sup> They contend that certain types of democracies tend to abolish the death penalty more than others. Some even argue that democratic transitions provided incentives. For example, in Eastern European countries, after the former Soviet Union and socialist Eastern European countries collapsed, there emerged a rapid movement of abolition and all these countries have become abolitionist except Belarus.<sup>46</sup>

Some other western scholars attribute the abolition movement to the emergence of international human rights law. Schabas discusses this from the aspect of abolition of the death penalty within the United Nations human rights system, international humanitarian law, European human rights law, and Inter-American human rights law. He also addresses capital punishment in the African human rights law and international criminal law.<sup>47</sup> Others analysed the *European Convention on Human Rights* (hereinafter the ECHR) as well as the non-treaty instruments, such as Resolutions of the UN Economic and Social Council, General

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<sup>43</sup> UN Doc.A/C.3/SR.811, 28.

<sup>44</sup> The Universal Declaration of Human Rights, Art. 3.

<sup>45</sup> For the discussion see McGann A, Sandholtz W. 'Patterns of Death Penalty Abolition, 1960–2005: Domestic and International Factors', (2012) 56(2) *International Studies Quarterly* 275; see also Johnson, David T., and Zimring, Franklin E. *Next Frontier: National Development, Political Change, and the Death Penalty in Asia*, (Cary, NC, USA: Oxford University Press, USA, 2009) 68; see also David F. Greenberg and Valerie West, 'Siting the Death Penalty Internationally.' (2008) 33 *Law and Social Inquiry* 295.

<sup>46</sup> For more discussion see Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edn, Oxford University Press, Oxford 2015) 62; see also Anckar, Carsten, *Determinants of the death penalty: a comparative study of the world* (Routledge, 2004) 90; see also Neumayer, Eric, 'Death Penalty: The Political Foundations of the Global Trend toward Abolition.' (2008) 9 (2) *Human Rights Review* 241

<sup>47</sup> William A Schabas, *The Abolition of the Death Penalty in International Law*, (2nd edn, Cambridge University Press 1997) 4.

Comments of the UN Human Rights Council (hereinafter the UNHRC) and recent judgements of the International Court of Justice (hereinafter the ICJ).<sup>48</sup>

Some challenge the death penalty in the U.S.A. as violating international human rights standards, claiming that it undermines the worldwide standing and moral authority of the nation.<sup>49</sup> Michael L. Radelet argues that since the 1970s there has been a rapid retreat from death penalty throughout the world; however, the U.S and China are not following this trend. In 2006, there were 53 executions in the U.S, which is similar to what was happening in Beijing, where executions reportedly dropped 10 percent. He argues that since China hosted the Olympics in 2008, the number of executions has dropped 40 percent. In both America and China, the death penalty today is very different than it was only five years ago.<sup>50</sup>

In his opinion, in America, the diminishing support for the death penalty relates to the change of social concept, arbitrariness, and racial bias, etc. Overall, he thinks that Americans have become very frustrated with the death penalty. The experience in the U.S.A. suggests that a top priority for death penalty reforms in China should be to get more information about how the death penalty is being applied.<sup>51</sup> Although Michael does not give elaborate information and statistics, he provides a comparative aspect of reforms in death penalty policy and points out that there are some aspects that can be used for reference in China.

Some western scholars are concerned about the issue of wrongful convictions, and their viewpoints resemble one of Bentham's arguments for the abolition.<sup>52</sup> They have analysed cases of miscarriages of justice, in which innocent defendants convicted of murder and sentenced to death escaped execution on account of timely intervention, to be eventually acquitted. They argue that it is because of the fallibility of human judgements, that the death penalty should be abolished.<sup>53</sup>

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<sup>48</sup> Andrew Clapham. 'Symbiosis in International Human Rights Law: The Ocalan Case and the Evolving Law on the Death Sentence', (2003) 1 Int'l Crim. Just. 475; see also Diego Rodriguez-Pinzon. 'Inter-American System', (2010) 28.4 Netherlands Quarterly of Human Rights 599.

<sup>49</sup> Hugo Adam Bedau and Paul G Cassell. *Debating the Death Penalty*, (Hugo Adam Bedau and Paul G Cassel ed, Oxford University Press, 2004) 15-50.

<sup>50</sup> M L Radelet and M J Borg 'The changing nature of death penalty debates', (2000) 26(1) Annual Review of Sociology 43-61.

<sup>51</sup> Ibid 43-61.

<sup>52</sup> For Bentham's viewpoints see the part of European Philosophical perspectives in section 4 this chapter.

<sup>53</sup> James S Liebman, 'The overproduction of death' (2000) 8 Columbia Law Rev 2030; See also Hugo Adam Bedau and Paul G Cassell. *Debating the Death Penalty*, (Hugo Adam Bedau and Paul G Cassel ed, Oxford University Press, 2004) 32; see also A Anderson, 'Responding to the Challenge of Actual Innocence Claims After Herrera v. Collins' . (1998) 71 Temp. L. Rev. 489; and Dieter R C. *The Future of the Death Penalty in the United States: A Texas-Sized Crisis*. (The Center, 1994) 3.

The above literatures provide useful sources for discussion on why the death penalty should be abolished, and how the relationship of the death penalty with human rights and international human rights law developed after World War Two. Nonetheless, there are always discordant voices in international society that oppose the abolition of the death penalty. Their arguments mainly focus on justice/retribution, deterrence, repeated crimes by recidivists and public opinion.

#### **1.4.2.2 Arguments for retention of the death penalty**

Concerning justice, as mentioned above, Kant and Hegel both have addressed this question. Some later scholars hold similar viewpoints of justice as these thinkers, justifying the use of the death penalty. They argue that this punishment is endorsed by the mainstream of philosophers, from Plato to Thomas Aquinas, from Hobbes to Kant, Thomas Jefferson, John Stuart Mill, and C. S. Lewis, that the death penalty is an appropriate punishment for murder.<sup>54</sup> With respect to reducing the chances that the offender will return to society and commit another murder, they argue, execution is the best way.<sup>55</sup> Some of them also justify retribution through the exercise of the death penalty as rightful societal vengeance (an eye for an eye). Deterrence is regarded as the most effective function of the death penalty by retentionists, which is not a new argument.<sup>56</sup> As for public opinion, they argue that in the face of the public's rejection of their philosophical arguments the abolitionists have lost, because public opinion supports the use of the death penalty.<sup>57</sup>

#### **1.4.2.3 Literatures on the regional/international achievement of abolition**

The early research work on abolition was conducted by the European Council. In 1966, it published a report on the *status quo* of the application of the death penalty in 23 European

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<sup>54</sup> See Hugo Adam Bedau and Paul G. Cassell. *Debating the Death Penalty*, (Hugo Adam Bedau and Paul G. Cassell ed, Oxford University Press, 2004) 54; see also James P Gray. 'Facing Facts on the Death Penalty.' Special Issue (2011) 44 Loyola of Los Angeles Law Review 44. 255-264.

<sup>55</sup> Ibid Bedau 54.

<sup>56</sup> Ernest Van Den Hagg, 'On Deterrence and the Death Penalty .' *Journal of Criminal Law, Criminology and Police Science* 60.2 (1969): 141; see also I Ehrlich *The deterrent effect of capital punishment: Economics, Law and Individual Rights*. (Routledge, 2008) 370; see also James M.Reams and, Charles T Putnam, 'Making the Case for the Deterrence Effect of Capital Punishment', Vol. 52 Issue 2 (Summer 2011), *New Hampshire Bar Journal* 18-20.

<sup>57</sup> Hugo Adam Bedau and Paul G. Cassell. *Debating the Death Penalty*, (Hugo Adam Bedau and Paul G. Cassell ed, Oxford University Press, 2004) 54.

countries.<sup>58</sup> This report was mainly based on the questionnaire it circulated among 14 countries. It provided detailed information of the processes that many European countries underwent to abolish the death penalty. It also analysed how during that period those retentionist countries, such as the UK, successfully restricted the use of the death penalty.<sup>59</sup> Although this report conducted empirical research in the 1960s, at a time when even in Europe only a few countries had abolished the death penalty, it is still not outdated for the present research in China. China not only retains the death penalty but also has the largest number of capital punishment crimes, a situation similar to that of the western European countries at the beginning of the 20<sup>th</sup> century.

Then Roger Hood was commissioned by the Economic and Social Council of the United Nations (hereinafter the ECOSOC) to prepare a report based on the questionnaires completed by the member states of the UN for ‘a study of a question of the death penalty’.<sup>60</sup> By 2015 Hood and Hoyle had finished the fifth edition. In this book, they discussed the issue of abolition/retention worldwide. They pointed out that 158 countries in the world had abolished the death penalty in law (*de jure*) or in fact (*de facto*), and by 2015 there were still 39 countries recognised as active execution countries. They also analysed the reasons for these various changes, the processes of the abolitionist movements, different situations regarding execution in different parts of the world, and public opinion’s influence on this movement.<sup>61</sup>

In their book, Hood and Hoyle also point out that regional human rights conventions, such as the ECHR and the *American Convention on Human Rights* (hereinafter the ACHR) prescribe the right to life to protect the individual against the death penalty, unless provided as an implicit or express exception. The right to life in international law also ensures that the death penalty cannot be imposed without rigorous procedural safeguards, or against certain protected categories of persons, such as juveniles, pregnant women, and the elderly.<sup>62</sup> This book provides detailed information and many first-hand materials from the earlier abolition movements, and a theoretical basis to the present situation worldwide. Although it does not dwell specifically on the issue of the death penalty in China, the book shows a general trend and a panoramic view of the use of the death penalty across the world.

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<sup>58</sup> European Committee on Crime Problems, Council of Europe, *The death penalty in European countries* (Council of Europe, Strasbourg 1962) 16.

<sup>59</sup> *Ibid* 54.

<sup>60</sup> See Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edn, Oxford University Press, Oxford 2015) 1.

<sup>61</sup> *Ibid* 1.

<sup>62</sup> *Ibid* 50.

Rhona Smith contends that, traditionally, international human rights have recognised states' use of the death penalty for the most serious crimes; however, international opinion is aiming at the complete abolition of the death penalty.<sup>63</sup> She also discusses the way the Chinese government has applied the death penalty, combining this with a report on human rights protection from China to the UN.<sup>64</sup> She points out that China retains the death penalty and has not ratified any international human rights treaty to prohibit its use; therefore, there is no existing legal requirement to stop the practice.<sup>65</sup> This is why China did not accept the comments about this issue during the Universal Periodic Review.<sup>66</sup>

Daniel Moeckli and others argue that regional/international achievements include exerting pressures on retentionist countries by abolitionist countries or international/regional organisations. According to a shame theory—human rights groups investigate and report on situations in which governments fall short of their obligations. The resulting publicity, through the media and other outlets, can undermine a government's standing and credibility, embarrassing it before its people and peers and generating pressure for reform<sup>67</sup>. Some imagine a set of external or internal pressures and inducements that would provide sufficient motivation for abolition of the death penalty by the PRC's authoritarian regime, and the closest analogy in recent history is the moratorium on executions the Europeans negotiated with Russia in 1996.<sup>68</sup> Therefore, how Russia froze its executions in the light of its commitment with the European Union should be studied from a comparative perspective.

Western literatures have been reviewed above, which will be followed by an analysis of Chinese literatures and academic achievements of the death penalty research.

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<sup>63</sup> Rhona K.M. Smith, *International Human Rights* (6<sup>th</sup> edn, Oxford University Press, Oxford 2016) 220-221.

<sup>64</sup> Rhona K.M. Smith, 'More of the Same or Something Different? Preliminary Observations on the Contribution of Universal Periodic Review With Reference To the Chinese Experience'. 2011 10(3) *Chinese Journal of International Law*, 565-586; and Rhona K.M. Smith, 'Form over Substance? — China's Contribution to Human Rights through Universal Periodic Review'. (2011) 17 *Asian Yearbook of International Law* 85-116.

<sup>65</sup> Rhona K.M. Smith, 'Form over Substance? — China's Contribution to Human Rights through Universal Periodic Review'. (2011) 17 *Asian Yearbook of International Law* 91.

<sup>66</sup> *Ibid.*

<sup>67</sup> Daniel Moeckli and others, *International human rights law* (2<sup>nd</sup> edn, Oxford University Press 2014) 8-9. See also Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edn, Oxford University Press, Oxford 2015) 38.

<sup>68</sup> David T Johnson and Franklin E Zimring, *Next Frontier: National Development, Political Change, and the Death Penalty in Asia*. (Cary, NC, USA: Oxford University Press 2009) 255.

### 1.4.3 Academic research on the death penalty in China

#### 1.4.3.1 The death penalty based research

The College for Criminal Jurisprudence Studies of Beijing Normal University has conducted a series of researches on reform of the death penalty. They organised some conferences to invite domestic and international scholars, judges, and legal experts to discuss the issue of the death penalty. The research was edited and compiled as a book – *Overseas Experience of Death Penalty Reform*.<sup>69</sup> The following are some of the viewpoints in the book.

Zhao Wei reviews the hard path to the abolition of the death penalty from when the death penalty first emerged in 1398 in Russia to the present day, even as now the death penalty has been “frozen” by judicial practice. He analyses the issues from four standpoints: Firstly, the death penalty argued for abolition by the theoretical circle; Secondly, the death penalty supported by the public; Thirdly, the death penalty applied cautiously by legislation; and Fourthly, the death penalty ‘frozen’ by judicial practice. He argues that the present death policy in Russia is not to abolish but to restrict the death penalty in legislation. He also gives some data to illustrate the policy.<sup>70</sup>

South Korea as a *de facto* abolitionist country and an East Asian country has historically been deeply influenced by China’s culture and penal policy. From the cultural identity perspective, South Korea’s experience displayed in the reform and eventual abolition of the death penalty provides feasibility of reform of the death penalty system in China. Hoh II - Tae analyses the death penalty’s roots in history, the standpoints of reservation of the death penalty in South Korea, and the present state of the death penalty. He finds that the Korea peninsula, not only the ancient Korea, but Korea as a latter-day country, has been successively influenced by China and the system of death penalty in the times of Korea is mainly based upon the ‘Grand Code of Ming Dynasty’ of China. From the author’s perspective, law is also a kind of culture and the death penalty is a system which has always been relied on for the people living in Northeast Asia. However, after the debates between

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<sup>69</sup> B Z Zhao and M X Gao, *Overseas Experience of Death Penalty Reform*, (B Z Zhao and M X Gao ed, China Legal Publishing House, 2011).

<sup>70</sup>Zhao Wei, ‘Historical Path and Countermeasures against the Death Penalty in Russia’, in B Z Zhao and M X Gao (eds), *Overseas Experience of Death Penalty Reform*, (B Z Zhao and M X Gao ed, China Legal Publishing House, 2011) 103-112.

abolitionism and retentionism, by the end of 2007, South Korea was regarded as a country having abolished the death penalty.<sup>71</sup>

India as the second most populous country and one of the retentionist countries as well as an Asian country adjacent to China is worthy of being studied from comparative aspects. Bikram Jeet Batra believes that the death penalty appears to have wide-ranging support and the issue is not seen as a significant human rights concern in India, with public discourse on the subject largely centred on issues of deterrence and crime control. There are no abolitionists in India, but sporadic mobilization of persons around the death penalty. He discusses the problems of the increased scope for award of the death penalty and law relating to the reduction of death penalty legislation, as legislative reduction of scope of the death penalty and the judiciary's 'rarest of rare' formula in India.<sup>72</sup>

To some extent, China's culture is similar to India's culture. Buddhism, which is popular in many parts of China, derives from India. The biggest difference between the two peoples is that although Chinese people's attitude on this issue is also centred on deterrence and crime control, there still are some specialists, politicians and judges who support abolition of the death penalty or legislation to diminish the scope of application of the death penalty. Bikram's opinions provide some useful views for China's reform, from public opinion to restricting application of the death penalty.

The above is part of the accomplishments of the conferences conducted by the College for Criminal Jurisprudence Studies of Beijing Normal University. Chinese scholars in other universities and academic organisations have also researched this issue during the past two decades.

The mainstream viewpoints held by Chinese scholars in China are, firstly, based on the current situation there being inclined towards reform rather than abolition; secondly, there is also a need to take public opinion into account to avoid any adverse consequences of such reform; thirdly, restrictions on the use of the death penalty by the judiciary are as important as reduction in the number of capital crimes in Chinese criminal law; fourthly, international

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<sup>71</sup> Hoh II -Tae, 'The Past, Status Quo and future Destination of the Death Penalty in South Korea', , in B Z Zhao and M X Gao (eds), *Overseas Experience of Death Penalty Reform*, (BZ Zhao and MX Gao ed, China Legal Publishing House, 2011) 127-134.

<sup>72</sup> Bikram Jeet Batra, 'The Death Penalty in India--Issues and Aspects', , in BZ Zhao and MX Gao (eds), *Overseas Experience of Death Penalty Reform*, (BZ Zhao and MX Gao ed, China Legal Publishing House, 2011) 163-198.

human rights law and western modern legal spirit should both be considered as points of reference.<sup>73</sup>

At the level of non-legal academic people or the public security organs, vocal voices against reform or abolition in China can be found in some articles and books. Their viewpoints are almost the same as those mentioned above, held by western people who oppose abolition - deterrence, justice, retribution, and recidivism.<sup>74</sup>

### 1.4.3.2 The Chinese historical perspective

Some scholars have researched the issue of capital punishment in China from an ideological perspective in Mao's and Deng's works.

Johnson and Zimring point out that someone thinks that China's contemporary penal policy is influenced more by the PRC's founding fathers than by Confucius. They argue that the proximate causes of China's death penalty exceptionalism are 'more rooted in the nation's recent history—and in the legacy of the PRC's founding fathers: Joseph Stalin, Mao Zedong, and Deng Xiaoping— than in the Analects of Confucius, the punishment philosophies of emperors or mandarins, or the social practices associated with these ideas'<sup>75</sup>. Some scholars argue that studying current Chinese policy on capital punishment, Mao Zedong's penal policy and thoughts are the most important research subjects to consider. The recent history of modern China has been decisively shaped by the legacy of Maoism. It follows, therefore, that any adequate explanation of China's policy on the death penalty had to begin with a

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<sup>73</sup> See HZ Chu, 'Reform of the Death Penalty: Both in Legislative and Judicial Levels'. 27(3) (2015) *Peking University Law Journal* 612-614; see also B Z Zhao, K Zhang, 'Tradition and Modernisation: Reform of the Death Penalty and Shift Public Opinion on Humanitarian', 30(2) (2016) *Contemporary Law Review*; see also Lu, Jianping, 'The Human Rights Dimension on Reform of the Death Penalty in China', *Journal of Beijing Normal University (Social Sciences)* 2015(3) 124-132; see also Guoling Zhao. 'Crime in China, 1949-2008.' *Peking University Journal of Legal Studies* 2 (2010): 3-29; J Su 'Kill Fewer and Kill Cautiously? A Critical Review of Death Penalty Reforms in China'. *Peking University Law Journal*, 2014, 2(2): 277-316; and see Jue, Jiang, 'Legal and Political Rights Advocacy in Wrongful Conviction Death Penalty Cases in China: A Study of the Leping Case of Injustice'. *Columbia Journal of Asian Law* 29.2 (2016);; Lu, Hong and Lening Zhang, 'Death penalty in China: The law and the practice' (2005) 33(4) *Journal of Criminal Justice* 367.

<sup>74</sup> See X K Liang, 'It Is Not Feasible for China to Consider Light Punishment at Present'. *Hebei Law Science*. 1990 (4): 9; see also N Liu, 'Consideration on the Debate on Abolition or Retention of the Death Penalty'(2009)20 *Law and Social Policy* 58; Guang, MX, 'What Would be the Meaning of Abolition of the Death Penalty for Corrupt Officials?' *Honesty Outlook*. 2006(7):35; see also Chen, S. 'Should the Death Penalty be Abolished?' *Xinmin Weekly*. 2014(3):12; Yang, JY, 'On the Entire Abolition of the Death Penalty Should be Suspended.' *Essay monthly (Original Edition)*. 2008(7): 18; see also S Jiang, E G Lambert, V M Nathan, 'Reasons for death penalty attitudes among Chinese citizens: Retributive or instrumental?' *Journal of Criminal Justice*, 2009, 37(3): 225

<sup>75</sup> David T Johnson and Franklin E. Zimring, *Next Frontier: National Development, Political Change, and the Death Penalty in Asia*, (Cary, NC, USA: Oxford University Press 2009) 226.



consideration of how this political ideology and form of state practice conceived of this type of killing, and ascribed a qualified type of legitimacy to it.<sup>76</sup>

Some scholars argue that as an instrument for the Chinese government to govern the country in the name of people, the death penalty is treated as a tool for political struggles in Mao's era and later as a tool for fighting crimes in Deng's reform era. They attempted to reconstruct this ideological element by reference to Maoist doctrines.<sup>77</sup> Ning argues that 'the Marxist concept of class struggle and the punitive practices of Hunan peasants profoundly influenced Mao in forming his ideology of law and its manner of application. Reduced to an instrument of the revolution, the law no longer had inherent autonomy or value. It was a self-legitimized tool of the 'class struggle', an expression that simply designated the classification of successive enemies according to the circumstances. State violence was subject to no legally established limits, and was hence at the complete disposal of considerations of opportunity.'<sup>78</sup>

They believe that there is an evidence that during the Maoist years the practice of capital punishment was vigorously employed for expressly political purposes, in keeping with the Leninist principle that severe forms of criminal punishment are necessary in order to protect the revolution from bourgeois reactionaries.<sup>79</sup> Indeed, the state killing 'counterrevolutionaries' played a key role in the Communist rise to power<sup>80</sup> and continued throughout the early years of the PRC, when criminal procedures in general served as "a blunt instrument of terror"<sup>81</sup>.

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<sup>76</sup> For a discussion see Ralph Haughwout Folsom and John H. Minan, eds. *Law in the People's Republic of China: commentary, readings, and materials*. (Brill, 1989) 6.

<sup>77</sup> See M Miao, 'Capital punishment in China: A Populist Instrument of Social Governance', (2013) 17(2) , *Theoretical Criminology* 233-250; see also M S Tanner, 'State Coercion and the Balance of Awe: The 1983-1986 Stern Blows Anti-Crime Campaign'. *The China Journal*, 2000 (44): 93; See also Trevaskes S. *Policing serious crime in China: from 'strike hard' to 'kill fewer*, (Routledge, 2010) 4; see also H Luand T D Miethé, 'Confessions and criminal case disposition in China', (2003) 37(3) *Law & Society Review*, 549.

<sup>78</sup> Zhang Ning, 'The political origins of death penalty exceptionalism: Mao Zedong and the practice of capital punishment in contemporary China', (2008) 10 *Punishment & Society* 117.

<sup>79</sup> Edited by Yao Meizhen, Wuhan University Law Department (Ed.), *Handbook of Legal Studies*, (Zhongzhou Ancient Books Publishing House, 1983) 20.

<sup>80</sup> Oda, Hiroshi, 'Chinese Law and Procedure in the Chinese Soviet Republic' in W E Butler, (eds), *The Legal System of the Chinese Soviet Republic 1931-1934*, (W. E. Butler ed, New York: Transnational Books, 1983) 53-70.

<sup>81</sup> Cohen, Jerome A. *The Criminal Process in the People's Republic of China: An Introduction*. (Cambridge, MA: Harvard University Press, 1968) 9; see also Frank Dikotter, , *Crime, Punishment, and the Prison in Modern China: 1895-1949*. (New York: Columbia University Press, 2002) 81; see also Jeremy T Monthly, 'Internal Perspectives on Chinese Human Rights Reform: The Death Penalty in the PRC', 33.1 (1998) *Texas International Law Journal* 189-226.

If this is right, then it places the Chinese tradition in sharp contrast with that of Western liberalism, which claims that law should be treated as possessing an inherent value, and this is the basis for the rule of law doctrine articulated in some western scholars' works.<sup>82</sup> This difference casts the debate over capital punishment in a different light, because the revolutionary state is considered to be above the law, and all valid law is treated as the law of the state itself. It follows that the state cannot be held legally accountable for acts of state killing other than on the basis of this state's own positive law and perhaps customary practices, and indeed the state was considered to have a specific and overriding responsibility to defend the revolution.

Noakes has provided a useful summary of a type of liberal triumphalist argument that assumes that historical progress is predetermined towards the realization of liberal values as well as market economies at the expense of "dictatorships"<sup>83</sup> and this means that capital punishment is destined to be replaced over time. He argues changes in the administration of criminal justice in China since 1978 may be a cause or a consequence of post-Mao liberalization and a sign of further changes to come—the policy of the Hu-Wen government to "Kill Fewer, Kill Carefully" represents the latest in a gradual move toward China's eventual abolition of the death penalty, the developing rule of law, improvement of human rights, and eventual democratization.<sup>84</sup>

Objectively speaking, this argument is not acceptable and instead it is suggested that history is not pre-programmed either to abolish or strengthen the death penalty, certainly not in the case of China. In fact, the position that Noakes himself adopts appears to be far more realistic in that he recognizes the linkage between popular legitimacy and the retention of the death penalty in China. Indeed, he argues: "the policy amounts to the deeper institutionalization of capital punishment in Chinese jurisprudence, and that its retention,

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<sup>82</sup> See R H Fallon Jr. 'The Rule of Law' as a Concept in Constitutional Discourse'. *Columbia Law Review*, 1997: 1-56; see also B Z Tamanaha. *On the rule of law: History, politics, theory*. (Cambridge University Press, 2004), pp58-71.

<sup>83</sup> China is not immune to such liberal determinist thinking, where rule of law development is often taken as evidence of democracy's forward march and a signpost of eventual transition to liberal democracy. See for example Larry Diamond, 'The Rule of Law as Transition to Democracy in China', *Journal of Contemporary China*, Vol. 12, No. 35, (2003), 319. Stanley B Lubman, *Bird in a Cage: Legal Reform in China After Mao*. (Stanford, CA: Stanford University Press, 1999) Pittman B Potter,, 'Riding the Tiger: Legitimacy and Legal Culture in Post-Mao China', *The China Quarterly*, Vol. 138, (June 1994), 325 Randall Peerenboom, 'A Government of Laws: Democracy, Rule of Law, and Administrative Law Reform in the PRC', *The Journal of Contemporary China*, Vol. 12, No. 34, (2003) 45.

<sup>84</sup> S Noakes. *The Death Penalty and Institutional Reform: the Case of China*. 2012, full text see <ftp://209.183.10.27/cpsa-acsp/papers-2012/Noakes.pdf>, accessed on 2 February 2014.

connected to key aspects of state performance and legitimacy, is in fact a greater portent of the regime's longevity than its demise."<sup>85</sup>

On the contrary, it has been argued that if the Chinese state abolished the death penalty, one result would be to reduce its quota of popular legitimacy. As Miao argues: 'Nowadays, the demands of the masses for revenge, justice and equality have been translated into a fervent passion for capital punishment for certain offences and offenders. By reaching out to satisfy these public demands and sentiments, the party-state hopes to enhance its political legitimacy. There is some albeit weak survey evidence supporting the popularity of the death penalty'.<sup>86</sup> In China in this sense, the death penalty serves as 'a populist mechanism to strengthen the resilience of the authoritarian party-state by venting public anxiety and resentment towards social problems created in the processes of China's rapid modernization and social fragmentation.'<sup>87</sup>

Even if this view is only partly justified, its implications for my thesis are considerable. It would prevent my analysis from simply appropriating a liberal approach to this topic which prioritises the individual's "right to life" over any countervailing social imperative, such as deterrence of murder, even mass murder, terrorism, and genocide.

### **1.4.3.3 The ICCPR Related Research**

In respect of the problems with the death penalty in the legal domain, the issue of abuse of human rights will be mainly considered here, especially the right to life, which is considered as the most fundamental of all rights.<sup>88</sup> The ICCPR, as one of the International Bills of Human Rights, is used as a benchmark for the reform of the death penalty in China in this thesis, to ensure that the reform meets international human rights standards. Since China signed the ICCPR in 1998, its future ratification has become a problem of international concern. In the 2013 Report of the Working Group on the Universal Periodic Review – China (including Hong Kong, China and Macao, China), ratifying the ICCPR was the first concern

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<sup>85</sup> S Noakes. 'The Death Penalty and Institutional Reform: the Case of China'. (2012), full text see <[www.cpsa-acsp.ca/papers-2012/Noakes.pdf](http://www.cpsa-acsp.ca/papers-2012/Noakes.pdf)> accessed 2 February 2014.

<sup>86</sup> M Miao, 'Capital punishment in China: A populist instrument of social governance', *Theoretical Criminology*, 2013, 17(2): 233-250; see also J Ranta. 'Reform or Regress? The Chinese Communist Party's Quest for Political Legitimacy in the 21st Century,' (Dissertation, University of Helsinki, 2015).

<sup>87</sup> Ibid Miao233.

<sup>88</sup> Rhona K. M. Smith, *International Human Rights* (6<sup>th</sup> edn, Oxford University Press, Oxford 2016), 216

of the international recommendations.<sup>89</sup> A number of Chinese and overseas scholars have researched the relevant ICCPR issues in China.

Concerning the future ratification, Bai Guimei points out that since China signed the ICCPR, its ratification has simply been a problem of schedule. There may be a period of time between signature and ratification, and this might be a very long time. Human rights scholars in China have many problems to work through during this period, and they can make the most of such a turning point to promote the respect and implementation of human rights and fundamental freedoms of human beings.<sup>90</sup>

Sun Shiyan also contends that, considering the ratification, the interpretation and understanding of the ICCPR is a crucial process. Chinese scholars need to develop the correct way to comprehend the covenant. He argues, however, that the interpretations of the covenant by the Human Rights Committee have not been adequately taken into account in the research done by Chinese scholars on the ICCPR.<sup>91</sup>

Overseas scholars, such as J. Seymour, raise a similar question. They argue that after the PRC began representing China in the UN, new Chinese-language versions of each mysteriously came into existence. These are the versions one is likely to find on the UN website, and they are what the Chinese government treats as the ‘covenants’. The authors of this article show that these contain substantial revisions from the covenants that were passed by the UN in 1966 and subsequently ratified by at least 164 countries. The revised versions are so different, in fact, that one could well question whether the PRC actually embraced the covenant. The covenant granted rights that the revisions would later withdraw, and in at least one case the revisions recognise a right that is absent in the covenants. Based on their comparative analysis of the various versions, the question arises as to whether China is a responsible actor in the international legal order and a reliable partner when it comes to entering into agreements with other countries or acceding to international treaties. Given that China contains over one-fifth of the human population, this also brings into question whether

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<sup>89</sup> UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review : China (including Hong Kong, China and Macao, China)*, 11 December 2013, A/HRC/25/5, available at: <http://www.refworld.org/docid/52e3ba754.html>, <accessed 26 January 2018>.

<sup>90</sup> Guimei Bai. ‘The International Covenant on Civil and Political Rights and the Chinese Law on the Protection of the Rights of Minority Nationalities’. *Chinese J. Int'l L.*, 2004, 3: 441.

<sup>91</sup> Sun Shiyan. ‘The Understanding and Interpretation of the ICCPR in the Context of China's Possible Ratification’. *Chinese Journal of International Law*, 2007, 6(1): 17-42.

the principles in the covenants can claim absolute validity and anything like universal acceptance.<sup>92</sup> The criticism for the above view will be discussed in Chapter 3.

With respect to the application of the ICCPR in China's courts, Guo Sanzhan argues that although China has ratified most human rights treaties and is seriously considering ratifying the ICCPR, the direct application of human rights treaties in Chinese courts may not happen. The Chinese Constitution lacks provisions on the relationship between treaties and its domestic law.<sup>93</sup>

Other Chinese scholars, such as Xue Hanqin and Jin Qian, have researched how international treaties apply in the Chinese domestic legal system. They agree that China has made considerable progress concerning the implementation of international obligations in the domestic legal system. They argue that, to a large extent, China has incorporated substantial international treaties into its special national laws. China has prescribed almost all international crimes as criminal offences under Chinese Criminal Law.<sup>94</sup>

Generally speaking, the literature review shows whether Chinese scholars or overseas scholars believe that concerning two particular articles in the ICCPR, Article 14 and Article 6(2), where China insists on its current domestic legislation and practice in terms of conformity, there still needs to be significant legal reform in the area of fair trial issues and the use of the death penalty before ratification is possible.<sup>95</sup>

The above-mentioned Western and Chinese scholars, politicians, and philosophers – from the utilitarian or liberal perspective, from the social justice or human rights perspective, and from an empirical or comparative perspective – have discussed whether the death penalty should be abolished, and also the processes of abolitionist countries abolishing the death penalty. They are informative and detailed in many aspects. Concerning philosophical arguments on the pros and cons of abolition, and consideration of the relationship between capital punishment and international human rights law, western researchers have provided

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<sup>92</sup> Seymour, J., & Yuk-Tung Wong, P. (2015). China and the International Human Rights Covenants. *Critical Asian Studies*, 47(4), 514-536. Alec Sweet and Clare Ryan argue that international human rights are interpreted and applied according to the priorities of the ruling party in China, see Alec Stone Sweet and Clare Ryan. *A Cosmopolitan Legal Order: Kant, Constitutional Justice, and the European Convention on Human Rights*. (Oxford University Press, 2018) 255.

<sup>93</sup> Guo Sanzhan. 'Implementation of human rights treaties by Chinese courts: Problems and prospects'. *Chinese Journal of International Law*, 2009, 8(1): 161-179.

<sup>94</sup> Hanqin Xue, Qian Jin; 'International Treaties in the Chinese Domestic Legal System', *Chinese Journal of International Law*, 2009, 8(2): 299-322.

<sup>95</sup> See Lee, K. (2007). China and the International Covenant on Civil and Political Rights: Prospects and Challenges. *Chinese Journal of International Law*, 6(2), 445-474; see also Seymour, J., & Yuk-Tung Wong, P. (2015). China and the International Human Rights Covenants. *Critical Asian Studies*, 47(4), 514-536.

deeper and more logical analyses. In respect of the empirical study on debates of the use of the death penalty in China, Chinese scholars contributed more useful materials to analyse whether there is a possibility of reform or abolition of the death penalty in China under the *status quo*. This thesis will consider both the philosophical and the international human rights law perspectives to conduct an empirical study in the legal domain, on China's present situation regarding the use of the death penalty. This thesis also will address the issue of public opinion on abolition, to decide whether China would need a reform or eventual abolition, and in either scenario, what the possible judicial and legal changes could be.

## **1.5 ORIGINALITY AND CONTRIBUTIONS IN THE THESIS**

### **1.5.1 Why Is Reform of The Death Penalty Chosen as The Research Theme?**

The research direction of this thesis is not a quixotic purpose of reform of the death penalty. Concerning the long-lasting debates between conservatives and reformists/neo-liberal cosmopolitans, there are people advocating for abolition of the death penalty, whilst others argue that abolition is not possible or feasible in China. Some other Chinese people also suggest compromising between abolition and retention to adopt a middle way to reform the death penalty. Which would be the best choice for China? This will be the objective of this thesis's research.

Based on the above literature review, it can be found that several of the works focus on comparative analyses and contemporary China's political problems preventing abolition of the death penalty in China. Seldom do publications and articles get involved in the inconsistency that exists in the Chinese criminal law and criminal procedure law compared with the ICCPR. Some leading figures and mainstream organisations such as the UN, the Amnesty International (hereinafter the AI) and the Council of Europe (hereinafter the CoE) tend to be biased toward the analyses of the global or regional tendencies with regard to the death penalty and toward the research on providing concrete data about the statistics related to the death penalty.

On the one hand, they show trends on the death penalty worldwide in general and the data are reliable, informative and aggregated that can be used directly. On the other hand, if people study the reform of the death penalty in China, the disadvantage with the above research is the lack of a close relation with China's current reality.

Many Chinese scholars have over-magnified in their research the present difficult situation in China. They argue that considering the Chinese people's attitude and many social problems generated by the colossal social transformation in China, further reform, especially in the legislative domain, would be hard to effect. For many such scholars, abolition would be almost entirely impossible in the foreseeable future. This thesis will analyse their perspectives and arguments, and whether it is in fact necessary and possible for China to have a reform and eventual abolition. If there is such a possibility, then what would be the most effective path to it?

### **1.5.2 Originality and Contribution**

This thesis will analyse the death penalty question from a philosophical perspective. It will analyse the pro and con arguments based on legal positivism, realism, and neo-liberal cosmopolitanism. By this analysis, a conclusion will be drawn at the end of this thesis as to which viewpoint would be compliant with the current policy requirement in China. Such compliance will make it workable concerning the issue of the application of the death penalty. It will be one of the contributions of this thesis. The main contribution will be based on the analysis of the perspectives and arguments that within the international law context (using the ICCPR as the main yardstick) the drawbacks of and challenges to the Chinese legal system concerning the use of the death penalty and suggestions to the reform of the death penalty in China against the background of a global abolition movement, and also on primary resources from my own research activities.

The thesis will be based on the fact that China at present is not an advanced democratic country and is under the leadership of the Chinese Communist Party. There are institutional deficiencies, political problems, and the faultiness of related legislative and judicial systems. This kind of situation will not change immediately. The goal of many CCP leaders and most legal professionals in the PRC is criminal justice without executions. Therefore, this thesis will discuss whether, with economic progress, the long-term future of capital punishment in China will change, and whether this aspiration will be fulfilled is a research aim for this thesis. Will reform/abolition come attached to qualifications that posit a long-term future in which the country is economically developed and its legal system is significantly more advanced than it is today? Since China has the largest population in the world, the situation becomes more complicated than in less populated countries. These will all be considered in this study.

The thesis will also evaluate the changes in death penalty policy that have started to arrive in clusters at the national level of government in contemporary China. By means of such an evaluation, this thesis will analyse whether there need to be more changes in the future, and if so what would be the way to implement them as viable and workable reform. This will also be one of the contributions from the research.

The former research in China focused mainly on empirical studies without precise methodology and philosophical guidance, while overseas research mainly focused on general issues of the abolition. This thesis will systematically research specific issues of reform of the death penalty in China with more precise methodology and in relation to relevant philosophical ideas and ideologies.

This thesis will examine public opinion as reflected in a survey which will be conducted by myself. It will investigate the opinions on the application of the death penalty in China from Chinese university students and recent graduates. By the survey, this thesis will provide an up-to-date and detailed information of the young, well-educated generation's attitude to the death penalty in China, which will be another contribution of this thesis. The analysis of this survey will be allocated in the Appendix.

## **1.6 RESEARCH METHODOLOGY**

For the purposes of this thesis, the available methods including doctrinal research, methods of legal positivism, realism and neo-liberal cosmopolitanism, interdisciplinary and socio-legal research method and comparative method will be thought through, filtered, and identified carefully.

### **1.6.1 Doctrinal Research**

Doctrinal research is an important research methodology in this thesis. It will be conducted into specific legal provisions, principles, rules and axioms concerning the meaning, scope and rationale of China's death penalty.

According to doctrinal and non-doctrinal research, such as problem, policy and law reform, in order to identify and to evaluate the implications of the ratification of the ICCPR for China's current criminal justice system, a doctrinal research methodology should be



adopted first. The statutes of Chinese criminal law and criminal procedure law must be scrutinized one by one in order to check whether they are in accordance with the requirements of the Covenant.

At the same time, the interpretation of the ICCPR should be taken into account. The first aim of the research is to describe the criminal law in China and how it applies in modern Chinese society, then through the analysis of the criminal law itself to demonstrate how it should be developed in terms of judicial reasoning and legislative enactment. In this regard, the first period of the research is purely theoretical. A literature review, summarizing the meaning and implications of specific legislation, legal monographs, law journals, websites, and theses relevant to traditional “doctrinal analysis” of relevant national and transnational legal sources should be carried out and updated.

### **1.6.2 The Application of Interdisciplinary and Socio-Legal Research Method**

Answering the research questions of the reform of the death penalty in China will never be a purely legal problem. By determining the existing criminal law and criminal procedure law in a doctrinal area, the follow-on work will consider the problems currently affecting the law and the policy underpinning the existing law, while highlighting the flaws in such policy.

Without undertaking interdisciplinary or socio-legal research work, the reform cannot be achieved due to the complicated and sophisticated social situations. The disciplines of sociology, political science, economics, anthropology, statistics, psychology, and other social theory-based approaches, each of these within the social sciences have had an impact on legal research. Nowadays, discussing reform of the death penalty in China cannot only be confined to its legal scope and application of understanding law by reference primarily to legal statutes and provisions, but the law itself should be put in context.

From this perspective, the legal context in which factual issues arise should be identified. Just like someone pointed out ‘The starting point is not law but problems in society which are likely to be generalised or generalizable. Here law itself becomes problematic both in the sense that it may be a contributor to or the cause of the social problem, and in the sense that whilst law may provide a solution or part of solution, other non-law solutions, including political and social re-arrangement, are not precluded and may indeed be preferred.’<sup>96</sup>

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<sup>96</sup> Mike McConville and Wing Hong Chui, *Research Methods for Law*, (Edinburgh University Press, reprinted 2012) 1

No one can embark upon a study of the death penalty without making the observation from a philosophical and policy stand point.<sup>97</sup> The research on the reform of the death penalty in China encompasses not only those pure problems existing in the laws but also the complicated social situations such as policies, the perceptions in judges, the attitudes of the masses in China and so on.

The project will also conduct empirical law-in-action research into the context of the legal materials addressed in stage one above, including reviews of the differences in culture and socio-economic backgrounds between China, countries in Europe, Japan, Taiwan, and the USA.

### **1.6.3 Discussion of Methodologies of Legal Positivism, Realism, and Neo-Liberal Cosmopolitanism**

In China, at present amongst people who object to the reform/abolition of the death penalty, some are legal positivists who oppose the natural law of human rights, some are realists who oppose reforming/abolishing the death penalty by highlighting the Chinese reality or the Chinese's special characteristics. The others are purely conservative, who on the pretext of maintaining the *status quo* oppose changing the present social order by reform. Some are nationalists/populists; they oppose the reform by insisting that China should not adopt western legal theory, the enlightenment theory or liberal theory to change China's legal systems. Because in China there is no systematic theory directly pinpointing legal positivism, realism or nationalism/populism, so Chinese scholars often avoid using these western terms. Therefore, all the above people are considered as conservatives in this thesis, based on the commonality that they all have used the same argument of 'the Chinese reality' against the reform/abolition. Other Chinese scholars advocate reform and gradually abolishing the death penalty according to western legal theory, enlightened thought and international human rights law, so they are recognised as neo-liberal cosmopolitans in this thesis. Here, I choose to use neither the word 'globalism' nor solely 'cosmopolitanism', because often the former is recognised as an economic term and the latter has been deemed an advocacy of imperialism.<sup>98</sup>

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<sup>97</sup> Roger Hood, *The Death penalty, a world-wide perspective*, (Oxford Clarendon Press, 1990), 6

<sup>98</sup> For an account, see Peter Gowan, 'Neoliberal Cosmopolitanism', (2001) 11 *New Left Review* 79. Also see Michael A Peters, 'Problematizing Liberal Cosmopolitanisms: Foucault and Neoliberal Cosmopolitan Governmentality', 6.1 (2014) *Contemporary Readings in Law and Social Justice* 13; and K A. Appiah. *Cosmopolitanism: Ethics in a world of strangers (issues of our time)* (WW Norton & Company, 2010) 2-5.

## **1.7 STRUCTURE OF THE THESIS**

The research project will construct a general theoretical framework by continuing to analyse and evaluate the relevant literature material, as mentioned above. This will be followed by chapters for each of the other dimensions of the analysis, as outlined below:

### **Chapter One:** General Introduction

This section outlines the general introduction to the objectives, rationale, literature review and research methodology. This chapter will analyse why the topic has been selected, how to conduct the research and what the rationale is for the research. In order to find the gap, to identify what has been researched on this topic by the academia, to critically evaluate research in the field and to provide evidence that can be used to support my own findings, a literature review will be conducted in this chapter. Since my research will be on the theme of the death penalty, the Chinese legal system and international human rights treaties, the literature review will revolve around these three aspects. It will also discuss the research methodology and the framework of this thesis, as well as the work's originality and contribution.

### **Chapter Two:** Historical Review and Case Study of the Death Penalty in China

This chapter will research the history of the application of the death penalty in China and the status quo, as well as whether there are problems with the use of the death penalty in present day China. This chapter will also analyse reform of the death penalty from a legal historical point of view in China, as well as debates between reformists/neo-liberal cosmopolitans and conservatives during the first period of legal reform with a modern meaning. This will look back to the end of the Qing dynasty. It will also present case studies to find possible gaps between the Chinese law and international human rights law. In this chapter, the case study will mainly focus on wrongly decided death penalty cases from recent years in order to consider the most important problems in the current legal system. The normal death penalty cases will be analysed in Chapter 5 to find whether the application of the death penalty in China is in accordance with international human rights treaties.

### **Chapter Three:** China's Behaviour and Acts under International Law

How are international human rights treaties applied domestically in China, of those China has ratified or is yet to ratify? Some of the research will revolve around the possible future ratification of the ICCPR, based on the context that the ICCPR does not prohibit the death penalty, so even if China ratified the ICCPR, it could still retain the death penalty in its Penal Code. This chapter will first explore the relationship between international treaties and the Chinese domestic law and the Chinese government's attitude to these treaties. Then the research will go further to focus on the application of international human rights law in China. This chapter will also research empirical judicial exercises on such international treaties in China and around the world.

#### **Chapter Four:** Abolition in European Countries and Its Implications for China

This chapter will research the theory, legal basis and process of abolition in European countries. It will research the historical, legal and cultural conventions in European countries to find the underlying reasons for abolition of capital crimes in these countries. The judicial systems and legal processes in such countries during the period from retention to abolition will also be analysed. This research is undertaken in order to consider whether China can, to some extent, learn from their experience. Notably, the philosophical basis of my research on conservatism and neo-liberal cosmopolitanism has its origin in the Enlightenment movement. Since the ICCPR provides the thread throughout this thesis, this chapter also will research whether this process could be linked directly or indirectly to the norms of the ICCPR and whether ICCPR may have influenced the process of abolition in European countries.

#### **Chapter Five:** Challenges to Death Penalty Reform in Chinese Criminal Law

In the context of the above analysis, this chapter will identify the challenges to the Criminal Law and its possible changes in the future concerning conformity with the international standard set by the ICCPR. It will review the ways in which, in the last four decades, Criminal Law has been amended in relation to capital crimes and how the conservatives and neo-liberal cosmopolitans have debated these changes. In this chapter, a case study will be undertaken on some categories of capital crime. Since in Chapter 2 the case study focused on wrongly decided cases, in this chapter it will research normal cases in which the sentenced are the offenders who committed capital crimes by breaching Criminal Law. Through the case study, it will further be identified whether there will be a gap between the Chinese substantive law and the ICCPR concerning the use of the death penalty, and if there is a gap, how China could fill in it. In practice, which of these alternatives are most

likely to succeed in achieving conformity, given various preconditions and favourable circumstances?

### **Chapter Six: Challenges to Death Penalty Reform in Chinese Criminal Procedure Law**

This chapter will first research how the Criminal Procedure Law has evolved in the past four decades. It will also analyse the debates between the conservatives and reformists. The following questions will then be considered. Has this evolution been in the direction of conformity with the ICCPR and other international human rights treaties? What are the challenges to the relevance of securing an optimal form of procedural justice in capital cases? Prior to any complete abolition of the death penalty, how can contextually appropriate conceptions of ‘human rights’ in capital cases be protected? Concerning the standard set by the ICCPR in the use of the death penalty, how can the Chinese Criminal Procedure Law be strengthened to make sure the due process will be secured and fewer people are executed?

### **Chapter Seven: Towards Future Reform**

What would be the motivations and policy rationale in China for moving towards lesser or no use of a death penalty sentence? What are possible practical ways to achieve such reform and what are the foreseeable obstacles? This chapter will provide a discussion of whether it is necessary to reform the death penalty in China, which will entail arguments for and against from both the conservatives and the neo-liberal cosmopolitans. It will also analyse the up-to-date evidence from a political-legal perspective. The main analysis of the statistics from the survey will be included in the appendix. There will be suggestions proposed concerning conformity with the ICCPR, relating to the death penalty both as an end in itself and, equally important, as a part of a wider system of institutional reforms to enhance due process and wider rule of law and human rights protections concerning the future ratification of the ICCPR.

### **Conclusion:**

A general conclusion of the overall research will discuss what has been analysed in this thesis. It will review the overall history of the application of the death penalty in China. It will also provide the implications of the research. The general conclusion will extrapolate the future death penalty reform, both from the successful experience of the ongoing economic reform in China itself and the current trend of the abolition movement worldwide.

## **CHAPTER 2 HISTORICAL REVIEW AND CASES STUDY OF THE DEATH PENALTY IN CHINA**

### **2.1 INTRODUCTION**

The previous chapter introduced the current issues of the use of the death penalty, conflicts between competing views, the research objectives and methodology of this thesis, and conducted a literature review. This outlined the main research questions in this thesis.

This chapter will first present a brief summary of China's application of the death penalty from the pre-Han era to the end of the imperial era in 1911, and then examine the reform of the death penalty from the end of the Qing dynasty to present-day China. It will analyse the first modern legal reformist Shen Jiaben's achievements, and his legal thoughts on the death penalty. The first and the most famous debates on the reform of Chinese law between conservatives and reformists, which happened between 1907 and 1910, will also be analysed to see what light it may shed on current reforms. The third part will analyse how penal policy and criminal law concerning the death penalty changed with the replacement of the political regimes from the Nanjing national government to the PRC, and the last section will conduct a case study to examine the gap between the Chinese legal system and the international human rights treaties, mainly the ICCPR.

### **2.2 A HISTORICAL REVIEW OF THE DEATH PENALTY IN CHINA**

The purpose of reviewing the history of the death penalty is threefold. First, Chinese conservatives argue that the favourite of the use of the death penalty is the product of Chinese history, and that a western idea of human rights is at odds with China's own traditions. This cultural and traditional divide will lead to the failure to reform or abolish capital punishment in China. To make sense of these arguments requires some understanding of China's past history.

Second, some western scholars hold the opinion that, within a non-liberal context, it is difficult to transplant modern western legal ideas and approaches to the abolition of the death penalty to China. This historical review will thus provide background for further discussions embedded in a non-liberal context in the following chapters.

Finally, even a cursory review of the Imperial and post-Imperial era of capital punishment-related legal systems will suffice to demonstrate how substantially China's legal transformation has been achieved. After exploring the historical, political and philosophical

backgrounds, it will be easier to discuss in later chapters whether China could develop a path, whether similar to a western model or not, to the reform of the death penalty.

### 2.2.1 The Origination of the Death Penalty in China

According to archaeological evidence, Chinese legal history dates back 4000 years.<sup>99</sup> There is a consensus that Chinese legal history is mainly a criminal history, as even civil disputes were also resolved by punitive methods.<sup>100</sup> The use of criminal sanctions was the normal approach to governing the country from 4000 years ago to the end of Imperial era at the beginning of the 20<sup>th</sup> century. The first recorded use of the death penalty in China was in the mythic era when the head of the alliance of tribes executed a head of a tribe because he was late for a political conference of alliance of all the tribes in central China.<sup>101</sup> During this period the formal meaning of law was still yet to form, and it was a kind of primitive ancient custom law. Daiwei Zeng and some Chinese scholars argue that the death penalty was the first criminal penalty preceding any other criminal sanction in Chinese legal history.<sup>102</sup> They argue that the death penalty was generated by ancient wars. Due to the extremely low agricultural productivity and the limited sources of subsistence, the death penalty removed the need to feed prisoners of war precious food, after battles, so the captured enemies would be executed.<sup>103</sup>

Ancient Chinese law was formed by two things. Firstly, the ancient wars amongst tribes shaped the main forms of criminal punishment (especially the use of the death penalty), and secondly, the rituals of offering sacrifice to ancestors formed *Li*<sup>104</sup> as the basic cornerstone of Chinese ethical rules and the core of Confucian culture which dominated Chinese people's

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<sup>99</sup> *Chinese Legal History*, edited by Daiwei Zeng. (Law Press China, 2006), 16. On the discussion on the originality of the death penalty in China, see Xingdong Hu, *The Chinese Ancient History of Death Penalty Related Systems*, (Law Press China, 2008) 1-5; Min Cui, Mingxuan Gao et al., *Textual Research and Discussion on the Death Penalty- History, Present and Future* (China People's Public Security University Press, 2008) 2-4.

<sup>100</sup> *Chinese Legal History*, edited by Daiwei Zeng. (Law Press China, 2006),11; See also Xianyi Zeng, *The Legal History of China*, (Peking University Press, 2013), 2-6; Yifan Yang, *An Overview of China Legal History*, (China Social Sciences Publishing House, 2014) 1-3.

<sup>101</sup> *The History of Nations – The Lu's History*, Volume 2, A Collection of Chinese Classical Books, (Zhonghua Book Company, 1982).

<sup>102</sup> *Chinese Legal History*, edited by Daiwei Zeng. (Law Press China, 2006),19; See also Xianyi Zeng, *The Legal History of China*, (Peking University Press, 2013), 2; and Yifan Yang, *An Overview of China Legal History*, (China Social Sciences Publishing House, 2014) 2-3.

<sup>103</sup> *Ibid*, 19.

<sup>104</sup> *Li* is a set of ethical rules which were formed by the rites of offering sacrifice to ancestors. For the further explanation see Wei-Ming, Tu, and Weiming Du. *Confucian thought: Selfhood as creative transformation*. (SUNY Press, 1985), 86; see also Randall Peerenboom, *China's Long March toward Rule of Law*, (Cambridge University Press, 2002), 31.

thought and behaviour for more than 2000 years, and influenced the death penalty policy in China until the beginning of the 20<sup>th</sup> century.

### **2.2.2 The Main Capital Crimes in China's History**

One famous ancient Chinese historian- Sima Qian, writing more than two millennia ago, noted that there were approximately 200 capital crimes under the Zhou dynasty in the 11<sup>th</sup> century BCE.<sup>105</sup> Then with the replacement of dynasties and the development of the economy, the main forms of capital crimes fixed on some specific crimes in each dynasty after the Qin-Han era.

There were three broad categories of capital crime in Chinese legal history. Firstly, political crimes. Among those crimes, the most serious was plotting a rebellion, which was defined as conspiring to overturn the country. If a person committed this crime, their whole family (including parents, grandparents, siblings, cousins, nephews, wives, offspring and slaves of the family) would be sentenced to death.<sup>106</sup> Conspiracy against royal shrines was another capital crime in Ancient China. Since Chinese people regard their ancestors as holy and inviolable, and emperors, as the most-high, deemed their ancestors much more important than those of common people, infringing or accessing an emperor's ancestor's tomb, temple or palace would be punished by death. The sentence was the same with plotting a rebellion. Not respecting the emperor and treason were the other two crimes for which the offender would be sentenced to death and their family members would be enslaved. These four crimes were among the so-called Ten Abominations and could not be pardoned or amnestied in any circumstances.

Secondly, there were crimes against the ethical rules, the *Li*, which are often interpreted as universally applied patriarchal ethical principles in China.<sup>107</sup> The government had the responsibility to maintain social order revolving around *Li*, and there were five such crimes among the Ten Abominations. The first and most severe one was beating or murdering the older people in the family, including grandparents, parents, older brothers, older sisters,

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<sup>105</sup> Sima Qian, *Records of the Grand History*, (Zhonghua Book Company, 1982) 135-136.

<sup>106</sup> The punishment for this crime varied in different dynasties. During the Tang dynasty, the offender and accessory offenders were beheaded, the offender's father and sons over 16 years of age were hung, and other members of family were enslaved. During the Ming and Qing dynasties, all offenders were punished by slicing them into pieces and their all male relatives over 16 years of age were beheaded. Their properties were forfeit and female relatives were enslaved.

<sup>107</sup> See Randall Peerenboom, *China's Long March toward Rule of Law*, (Cambridge University Press, 2002) 31. Since *Li*, as a set of ethical rules, required obedience from people to the emperor, children to parents, wives to husbands, younger brothers to the eldest brother, they are typically patriarchal.



uncles, aunts, husband, husband's parents or grandparents. People who committed this crime were sentenced to death. The method of punishment in the Tang period was beheading, while in the Ming and Qing it was slicing into pieces.<sup>108</sup> The second was unfilial crime, which was another serious capital crime under the requirements of *Li*, which was committed by children or grandchildren cursing or bringing a lawsuit against their parents or grandparents. The offender would be hung. The third was non-harmonious behaviour, including murdering relatives descended from the same great-grandfather, wife-beating or bringing a lawsuit against a husband's elder relatives descending from the same grandfather. The range of the punishment was from hanging to two years' imprisonment.<sup>109</sup> The fourth was non-righteousness: an inferior killing the superior or a student killing his teacher or a wife not mourning when her husband died all fell into this category. The range of punishments spanned from beheading or hanging to exile of 2,000 miles.<sup>110</sup> The final crime was internal family disorder, including rape of or adultery with a father's or grandfather's concubines. The punishment for this was hanging.

Finally, there were crimes of infringing upon personal and property rights. The first was inhumanity, another of the Ten Abominations, which consisted of killing three people who were not criminals, dismembering a person, poisoning people using venomous insects and conjuring evil spirits to kill people. The range of punishment in the Tang dynasty was from beheading to imprisonment.<sup>111</sup> The other capital crimes of infringing upon personal rights and property rights included robbery, theft, rape and murder, but as they were not included in the Ten Abominations, they often could be pardoned or amnestied by the emperor; the punishment was hanging.<sup>112</sup>

### **2.2.3 Methods of Execution in China**

The process of execution was prescribed in detail in each dynasty's law. The date of execution must be in autumn or winter in accordance with the requirement of *Li* as in spring

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<sup>108</sup> *The Legal History of China*, edited by Zeng Xianyi, (Peking University Press, 2000).

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> Yongkang Xu, 'The Research on Ten Abominations in Tang Code', (1999) 6 *Journal of Henan Administrative Institute of Politics and Law*, 34.

<sup>112</sup> Xingdong Hu, 'A Study on the Application of the Substituting Punishment in China's Ancient Death Penalty', (2008) 5, *Journal of Kunming University of Science and Technology (Social Sciences)*, 6.

and summer lawsuits and inharmonious activities must cease, as they were seasons of growing.<sup>113</sup>

During the ancient Xia (21<sup>st</sup> BCE), Shang (11<sup>th</sup> BCE) and Qin dynasties (221 BCE), the methods of execution were extremely cruel. There were more than 30 techniques, including beheading, hanging, slicing into pieces, burning to death, taking out of the heart, drowning, beating to death by cane, cutting into two pieces at the waist, burying alive and splitting by horses.<sup>114</sup> Retaliation and deterrent were the two characteristics of punishment in this period. During the Han dynasty (from 206 BCE), to show humanity, the emperor reduced the main execution methods to five: beheading, cutting into two pieces at the waist, demonstrating the body (after hanging and beheading) at the market, dismembering and torturing to death.<sup>115</sup> During the Liang-Jin and the Northern-Southern dynasties (from 220 CE), the formal punishment methods further reduced to three in the law books: beheading, hanging and hanging the head after beheading, yet many informal and cruel methods also were used at the same time.<sup>116</sup>

In the heyday of the Chinese feudal era in the Sui and the Tang dynasties (from 581 CE), the approaches to execution became more humane and only two methods were permitted: hanging and beheading.<sup>117</sup> While there was still a gap between the law and practice, from then on hanging and beheading were the two main statutory approaches.

With the fall of the Tang dynasty, China separated into many small countries. Because of the turmoil of the situation, some cruel methods of execution were reinstated into law books, including slicing into pieces.<sup>118</sup>

After the Mongolian army conquered China in 1271 CE, it applied more cruel execution methods including mincing and flaying.<sup>119</sup> After the Ming dynasty's founders drove out

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<sup>113</sup> Tingting Liu, 'A Brief Study on the Application System of Capital Punishment in the Ancient China', (2006) 2 *Journal of Yunnan University (Law Edition)*, 123.

<sup>114</sup> Xingdong Hu, 'Research on the execution of the death penalty in ancient China', (2009) 1, *Journal of Yunnan University (Law Edition)*, 1.

<sup>115</sup> Jiaben Shen, *Textual Research on Past Dynasties' Criminal Law (the Third)*, (Zhonghua Book Company 1985): 1548.

<sup>116</sup> Xuanling Fang, *The History of the Jin dynasty, the Record of Criminal Law*, the 20<sup>th</sup> of thirty volumes. (Zhonghua Book Company 1974) 925.

<sup>117</sup> Zheng Wei, *The History of the Sui Dynasty, the Record of Criminal Law*, Volume 20. (Zhonghua Book Company 1973) 698; Linfu Li, *The Six Codes of the Tang Dynasty, Volume 6, The ministry of Punishments*. (Zhonghua Book Company, 2005) 183.

<sup>118</sup> Yi Dou, *The Codification of Criminal Law in Song Dynasty*, Volume 27, (Zhonghua Book Company, 1984) 437.

<sup>119</sup> *The Decrees and Regulations of the Yuan Dynasty, Volume 39, The Five Criminal Punishments*. (China Radio and Television Publishing House 1998) 1452.

Mongols from central China, the Ming's law inherited some cruel methods of execution from the former dynasties and retained slicing into pieces and flaying as two execution methods to beheading and hanging.<sup>120</sup> Then the last dynasty of China, the Qing dynasty, inherited some of the Ming dynasty's legal legacy, prescribing slicing into pieces, beheading and hanging as three statutory execution methods, until Shen Jiaben's reform at the beginning of the 20<sup>th</sup> century.

#### **2.2.4 The Legal Systems Relevant To the Death Penalty**

The death penalty-related legal systems in ancient China possessed some of the aspects of modern systems, including pardon and amnesty, the death penalty review system and the alternative punishment system. These were developed into complicated and sophisticated systems with detailed prescriptions in the criminal code in every dynasty.

##### **2.2.4.1 Pardon and Amnesty System**

China had formed a complicated pardon and amnesty system during its long legal history. It is said that the ideas of pardon and amnesty were formed in a mythic era where the leader pardoned people who committed a crime by negligence.<sup>121</sup> This developed to amnesty for people in doubtful cases in approximately 800 BCE<sup>122</sup> and later to amnesty for criminals in need of benevolent governance.<sup>123</sup> According to historical records, in the Han dynasty of about 200 years, amnesty was granted 101 times, while in the Tang dynasty, also of approximately 200 years, amnesty was granted 164 times.<sup>124</sup> Amnesty not only removed sentences but also discharged the accused without any punishment. Pardon commuted sentences from death to less terminal punishments such as exile or heavy labour for several years. As mentioned above, it should be noted here, only criminals who did not commit one of the crimes of the Ten Abominations could be amnestied or pardoned.

In addition to general pardon or amnesty, the law in all dynasties also prescribed certain situations for special amnesty or pardon. Firstly, if the only son of the family was sentenced to death, in order to retain his life to look after his parents when they were getting old, he

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<sup>120</sup> Dongyang Li, *The Record of Laws and Systems of the Ming Dynasty, The Ministry of Criminal Punishment*. (Zhonghua Book Company 1998) 2239.

<sup>121</sup> The ancient *Book of Documents* recorded that in prehistorical era, Shun, a legendary monarch in ancient China in about 2200 BCE, proclaimed amnesty to criminals who committed crimes by negligence.

<sup>122</sup> Xueqin Li, *The Interpretation of the Spring and Autumn Annals By Guliang*, Volume 6, (Peking University Press 1999) 85.

<sup>123</sup> Senior Dai, *The Book of Rites*, Volume 8, (Shengde, Zhonghua Book Company 1985) 882.

<sup>124</sup> See Shen, Jiaben, *The Textual Research on Each Dynasty's Criminal Law*, Volume 2. (Zhonghua Book Company, 1985). See also Xingdong Hu, Pardon for Capital Punishment in Ancient China, (2008) 5 Modern Law Science, 187.

could be granted amnesty or pardoned under the *Li*'s requirement. Secondly, a son seeking revenge for his parents or grandparents by killing other people could be granted amnesty. Thirdly, if a son applied to die for a parent or brother who had committed capital crimes, all parties could be pardoned.<sup>125</sup> Fourthly, privileged people such as aristocrats, decorated soldiers or generals and high ranking officials could be eligible for amnesty. Fifthly, the emperor gave exemption certificates to high ranking officials to promise that they would be pardoned if sentenced to death.<sup>126</sup>

#### **2.2.4.2 The Review of the Death Sentence System**

The final decision of a death sentence was made by the emperor. Cases of capital crimes judged by any level of the judiciary should be sent to the emperor to review. Even before the execution, the judicial officials had to report the case again to the emperor to review a last time whether there would be any extenuating circumstance to exempt the criminal from death. This review system was formed in the Northern-Southern dynasty in about 420 CE.

The law also allowed that, if the criminal himself shouted his innocence on the site of execution, the execution must cease and there must be a review, or if there was somebody else beating a drum in front of the site of execution to assert the innocence of the condemned, there must also be a case review.

During the Ming and Qing dynasties, a new review system was generated, the 'joint hearing system'. It further divided hearings into two: hearings in the court and autumn hearings, both for reviewing death sentences. A hearing in the court was special for reviewing death sentences passed in places other than the nation's capital, while the autumn hearing was the cases sentenced in the capital. The two review hearings were held every year and all high ranking central officials were required to attend. After review, the situations would be categorised into four types: the fact being true, extenuating circumstance existing, execution that could be delayed, and saving the life for looking after parents. Only the 'fact being true' would lead to actual execution.<sup>127</sup>

#### **2.2.4.3 The System of Alternative Punishment of the Death Penalty**

Several alternative punishments evolved. In the pre-Qin era, exile and redemption by ransom were the two main alternatives to the death penalty, and later in the Qin and Han era, exile

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<sup>125</sup> *The Real Record of Ming Taizong*, Volume 96. (Taipei, Institute of History and Philology, Printed Copy 1966).

<sup>126</sup> *Ibid.*

<sup>127</sup> Limin Wang, 'System of Reviewing Death Sentences and Its Ideological Basis in Ancient China', (2002) 6, *Political Science and Law*, 79.

was substituted by migration to the boundary of China as a soldier. The purpose for this was to increase the strength of the army along the boundary as well as to show the benevolence of the emperor to his people. Another new alternative – genital mutilation – was added to the law book for special capital crimes such as treason or rebellion. Paying a ransom was also used very often under these two dynasties.<sup>128</sup> During the Northern-Southern dynasty, a new alternative of life imprisonment was created for robbery. This applied to a criminal who was sentenced to beheading. Then exile and migration to the boundary as a soldier were also allowed, with the latter being used more than the former. Some argue that exile was a method of commutation of the death penalty while migration to the boundary was an alternative to the death penalty.<sup>129</sup> During the Sui and Tang dynasties, genital mutilation as a punishment was abolished as an alternative to the death penalty and a new substitute introduced: exile with hard labour for several years. Just as migration as a soldier provided many unpaid soldiers, this new alternative punishment provided the authorities with free labour.

Using these alternative methods ensured that, although there were a lot of death sentences passed, a large proportion of those sentences were commuted. This fulfilled the governments' requirements for labour, soldiers and money whilst executing fewer people and being more cautious in the use of the death penalty.

### **2.2.5 A Brief Period of Suspension during the Tang Dynasty**

In the Chinese legal history, there was even a period of suspension of the death penalty between 747 and 759 CE.<sup>130</sup>

#### **2.2.5.1 The Background of Suspension**

The Tang dynasty (618-907 CE) was the heyday of the Chinese feudal period. Its culture, political and legal system were exported to other East Asian and South-east Asian countries,

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<sup>128</sup> Xingdong Hu, 'A Study on the Application of the Substituting Punishment in China's Ancient Death Penalty', (2008) 5, *Journal of Kunming University of Science and Technology (Social Sciences)*, 6.

<sup>129</sup> Ibid.

<sup>130</sup> Some Chinese and overseas scholars argue that this period was a period of abolition instead of suspension. See Bai Ken, 'On the Chinese People's Attitude to the Death Penalty' (2012) 6 *Issues on Juvenile Crimes and Delinquency*, 28; and Charles Benn, *China's Golden Age: Everyday Life in the Tang Dynasty*, (Oxford University Press, USA 2004) 209-210; but others, such as Paul Ratchnevsky and Jerome Burgon, argue that the Tang Code did not abolish the use of the death penalty. Only the execution method of beheading and hanging were substituted by using heavy rod. Imposing heavy rod also could lead the death of criminals. The prohibition of the beheading and hanging was only by an emperor's detective. It was not the abolition in Law. Since the law still retained the prescription of capital crimes. It was only a suspension. See Paul Ratchnevsky, *Un code des Yuan*, (Paris: 1937, Institut des Hautes etudes chinoises, tome 1) 10; and Jerome Burgon, 'The Gain and Loss of the Abolition of the Death Penalty in Ancient China', (2014)6, *Global Law Review*, 80. Here, since the Tang Code, as the principal of the criminal law in the Tang Dynasty, retained the capital crimes throughout the whole dynasty, I adopted the view of suspension instead abolition

which later formed the Confucian culture circle. The capital of the Tang dynasty was substantially cosmopolitan, with people from different areas of the world including Japan, Arabic countries and Ancient Rome.<sup>131</sup> The economy improved substantially. A poet of the time wrote that, in the heyday of the Tang dynasty, all barns in China were full of good quality grain and the whole society was harmonious and stable.<sup>132</sup> Buddhism and Confucian culture were the two dominant schools of thought of the time, both of which advocated benevolence. The law represented an open, tolerant, optimistic and wealthy societal spirit. At this time, the Chinese political and legal system and culture were disseminated to Japan, Korea and Vietnam, which later formed Confucian cultural circle.<sup>133</sup> Against this background, a lighter punishment policy was adopted by its emperors. The second Tang emperor set a record that in one year, only 18 people had been executed across the whole country.<sup>134</sup> Amnesty and pardon were common, and the Tang emperors would proclaim amnesties and pardons every 55 months on average, but by the middle of the Tang dynasty this had increased to every 18 months on average.<sup>135</sup>

#### **2.2.4.2 The Alternative**

In 747 CE, the Tang emperor issued a directive to suspend the execution of the death penalty and prescribed that if a criminal was about to be sentenced to death, the alternative was to be beating with a heavy rod.<sup>136</sup> According to the Tang Code, there were five penal punishments. The first and most serious was the death penalty by beheading or hanging. The second was the exile, the third one was imprisonment, the fourth was beating with a rod and the last was

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<sup>131</sup> See Ishida, 'The Textual Research on the Transplantation of the Tang Law to Japan', (1999) 5, Law Science, 15. See also Lewis, Mark Edward. *China's Cosmopolitan Empire: The Tang Dynasty*. Vol. 3. (Harvard University Press, 2009) 25-29.

<sup>132</sup> Du Fu, 'Recall the Past', from *The Selected Poems of Du Fu*, edited by Zhang, Zhonggang (Zhonghua Book Company, 2005) 189.

<sup>133</sup> See Lee, Jeong-Kyu. 'Confucian Thought Affecting Leadership and Organizational Culture of Korean Higher Education.' Online Submission (2001); and Ishida, 'The Textual Research on the Transplantation of the Tang Law to Japan', (1999) 5, Law Science, 15; and Whitmore, John K. 'Social organization and Confucian thought in Vietnam.' 15.2 (1984) *Journal of Southeast Asian Studies* 296-306.

<sup>134</sup> The registered population at that time was approximately 20 million, but many historians believe that, to not pay the head tax, many people were not registered.

<sup>135</sup> Brian MacKnight, *The Quality of Mercy. Amnesties and Traditional Chinese Justice*, (The University Press of Hawaii, 1981) 70.

<sup>136</sup> For the detective of abolition see *The Old Historical Book of Tang, Volume Nine, Biographic Sketches of Emperors*, (Zhonghua Book Company 1975), 209. For some scholars' view on the detective, see Charles Benn, *China's Golden Age: Everyday Life in the Tang Dynasty*, (Oxford University Press, USA 2004) 209-210. Also, see Paul Ratchnevsky, *Un code des Yuan*, (Paris: 1937, Institut des Hautes etudes chinoises, tome 1) 10, cited from Jerome Burgon, 'The Gain and Loss of the Abolition of the Death Penalty in Ancient China', (2014)6, *Global Law Review*, 80.

whipping with bamboo strips. Beating with a rod was a much lighter punishment in the hierarchy of the punishment.

### **2.2.4.3 The Debate on the Suspension and the Failure**

When the directive was issued, it was criticised by officials, although the grounds for the criticism are not known from contemporaneous records.<sup>137</sup> A later scholar during the Yuan dynasty argued that the alternative method – beating with a heavy rod – was crueller than beheading and hanging, because this punishment often led to the death of the prisoner instead of saving their lives.<sup>138</sup> In 759 CE, with the outbreak of the An Lushan rebellion, the death penalty was reinstated and the short 12-year suspension ended.<sup>139</sup>

The above simply reviewed the death penalty in the ancient Chinese legal history- the evolution of the punishment methods, the prescription of the death penalty, the legal systems related to the use of the death penalty and a short period of suspension. Then next, another historical review of an influential legal reform in the late Qing Dynasty will be depicted and analysed in section 3.

## **2.3 THE SHEN JIABEN REFORM**

### **2.3.1 The Context of the Reform**

Reform of the death penalty is not new in China; it dates back to the end of the 19<sup>th</sup> century when China was under the reign of the Qing's Empire. Any kind of reform has its own context, and the incentive for the reform of the death penalty in the late Qing dynasty took place after the opium war, which some scholars consider the most influential incident in the modern history of East Asia.<sup>140</sup> This war resulted in the integrated jurisdiction of the Qing Empire being broken by western countries.

Johnson and Zimring point out that, by the time of China's first confrontation with the West in the 19<sup>th</sup> century, the nation had acquired a reputation for barbarism in criminal punishment compared with European countries. China's penal system was harsh. When the

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<sup>137</sup> *The Old Historical Book of Tang, Volume Nine, Biographic Sketches of Emperors*, (Zhonghua Book Company, 1975), 209.

<sup>138</sup> Ma Duanlin, *Comprehensive Textual Research of Historical Documents*, Volume 166, <https://ctext.org/wiki.pl?if=en&chapter=57294&remap=gb>, accessed on 31 October 2017.

<sup>139</sup> Jerome Burgon, 'The Gain and Loss of the Abolition of the Death Penalty in Ancient China', (2014) 6, *Global Law Review*, 80.

<sup>140</sup> D TJohnson and F E Zimring, *The Next Frontier: National Development, Political Change, And the Death Penalty in Asia*. (Oxford University Press, 2009) 225-288.

Qing dynasty (1644 – 1911) drew to a close, the main form of punishment was the ‘age-old death penalty’.<sup>141</sup> Indeed, the scope and scale of capital punishment had expanded significantly during this last imperial period. Chinese law also held a firm attitude on foreigners’ crime – there was no room within the system for the special treatment of foreigners.<sup>142</sup>

Therefore, the continuation of the death penalty generated conflict over extraterritoriality. Executions during the late 18<sup>th</sup> and early 19<sup>th</sup> centuries helped convince Western nations to coerce the Chinese to yield up jurisdiction over cases involving foreign nationals. The perceived harshness of Chinese punishment provided one of the pretexts for Western powers to impose the same humiliating system of extraterritorial sovereignty on China that they also imposed in other Asian places, such as Japan and Korea.<sup>143</sup> After the opium war, the UK was the first country which founded its own court in China.<sup>144</sup> Then subsequently there were a total of 19 nations from Asia, Europe and America exercising extraterritoriality in China.<sup>145</sup> In 1899, Japan regained its integrated jurisdiction after completely amending its penal code, which stimulated the will in the Qing Dynasty to reform its legal system to retrieve China’s integrated jurisdiction. The leading figure was Shen Jiaben, and his most important mission was the reform of the death penalty.

Then next part will introduce Shen’s legal thoughts of the reform.

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<sup>141</sup> For the information of this, see W Y Tsao, ‘The Chinese Family from Customary Law to Positive Law’ (1965) 17 *Hastings Law Journal*, 727; see also Xingliang Chen, ‘Opinions on Retention versus Abolition of the Death Penalty’ (2005) 36(3) *Contemporary Chinese Thought* 26; see also Alford W P, ‘Of arsenic and old laws: Looking anew at criminal justice in late imperial China’. (1984) 72(6) *California Law Review* 1180; See also Yeung A S C, ‘Fornication in the Late Qing Legal Reforms Moral Teachings and Legal Principles’. (2003) 29(3) *Modern China* 297.

<sup>142</sup> D. T. Johnson and F. E. Zimring, *The Next Frontier: National Development, Political Change, And the Death Penalty in Asia.* (Oxford University Press, 2009) 225-288; see also Chen L. ‘Universalism and Equal Sovereignty as Contested Myths of International Law in the Sino-Western Encounter’, (2011) 13(1) *Journal of the History of International Law/Revue d'histoire du droit international* 75; see also Chen L Law, ‘Empire, and Historiography of Modern Sino-Western Relations: A Case Study of the Lady Hughes Controversy in 1784’ (2009) 27(01) *Law and History Review* 1.

<sup>143</sup> See M M Yang, ‘Postcoloniality and Religiosity in Modern China- The Disenchantments of Sovereignty’ (2011) 28(2) *Theory, Culture & Society* 3; See also X Xu, *Trial of modernity: judicial reform in early twentieth-century China, 1901-1937* (Stanford University Press, 2008) 25-54.

<sup>144</sup> Jiade Pan, ‘On Modern Foreign Courts in China, *Journal of Sichuan Teachers College*’, (2001) 2 *Philosophy and Social Science* 14, <[www.doc88.com/p-7874757599293.html](http://www.doc88.com/p-7874757599293.html)> accessed 17 March 2015.

<sup>145</sup> Yuhuan Zhao, ‘The Research on The Legal Thoughts of Shen Jiaben’, (LLM Dissertation, Shandong University 2008) 14, <[www.docin.com/p-745548537.html](http://www.docin.com/p-745548537.html)> accessed 26 May 2016; see also Jinfan Zhang, ‘Research on Shen Jiaben Legal Thoughts’, (1991) 1 *Zhejiang Academic Journal* 18;



### 2.3.2 Shen's Legal Thoughts

On the one hand, Shen was influenced by traditional Chinese education of Confucianism; and worked for several decades at the highest judicial organ – Xingbu in the Qing's government. As a result, he had a good command of the Chinese feudal penal code. On the other hand, he held an open-minded attitude in his study of modern western legal thoughts and systems. He contended that the Japanese old legal system was totally copied from that of the Tang dynasty, however, after Meiji's reforms in the 1860s, the Japanese adopted a European legal system, leading, after no more than a few decades, to Japan becoming a stronger state.<sup>146</sup>

At the same time, Shen criticised the thought that brutal and barbaric punishment methods of execution should be retained to deter crimes. He cited history to counter such views:

‘it is said they (brutal punishments) can deter the mass, however what people have seen on the cruel executions just recalled their cruelty...Throughout the whole span of Tang dynasty's three hundred years, they had never used this kind of cruel punishment but people have never heard the increase of the crimes’.<sup>147</sup>

Some scholars argue that in researching modern ideology on western law, Shen generated thoughts of human rights and the rule of law and combined them into the reform of the penal code.<sup>148</sup> Shen Yuedi points out that Shen's thoughts on human rights were built up on the views of the modern western bourgeoisie, and at the same time he absorbed traditional Chinese humane thoughts. It mainly reflected on the point that Shen focused on the protection of the ‘right to life’ and a ‘right over one's own body’.<sup>149</sup>

The scholars who research Chinese history and law generate a view that deeply-rooted aspects of Chinese culture have led to a general lack of concern for individual rights. The long imperial tradition of Chinese society revolved around family, the clan, and the

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<sup>146</sup> Jiaben Shen, *The Survey on the Penal Code in All Previous Dynasties--the Preface on the newly Translated Entire Laws*, (Chung Hwa Book Co. 1985) 2242.

<sup>147</sup> Jiaben Shen, *The Manuscripts of Jiyi (Jiyi Wencun)* (Volume I, Chung Hwa Book Co. 1986) 203.

<sup>148</sup> Hua Zhong, ‘The Shen Jiaben's Legal Thoughts and Its Influence in the Change of Human Rights in the Late Qing Dynasty’, (2004) 4 *Journey of Bohai University (Social Science)* 26; See also Yuedi Shen, ‘On Shen Jiaben's Thoughts of Nullum Crimen Sine Lege’, (2003) 4 *The Academic Journal of Huzhou Normal Collage* 72-76.

<sup>149</sup> *Ibid* 72.

emperor.<sup>150</sup> Shen's thoughts on human rights can be seen as a revolution against the thousands of years of feudal thoughts promoting communitarian values over individual rights.

Some scholars argue that Shen's human rights' thoughts involved a kind of transition from China's traditional Confucian thoughts to modern western human rights' thoughts because Shen accentuates the Confucian principle of *Ren* when he advocated the legal reform.<sup>151</sup> The Confucian principle of *Ren* involves 'benevolence' or 'humanity'. *Ren* was believed to be crucial to achieving and sustaining an orderly and virtuous society. This teaching of *Ren* is 'to love all devotedly'.<sup>152</sup>

Admittedly, this could be interpreted as Shen's strategy for a successful reform. Since Shen faced enormous pressure from conservatives. They were opposed to adopt western legal thought to reform Chinese law and legal system by using Confucian thought to attack Shen's reform. Shen was a master of Confucian classical work as well. He also quoted words from Confucius to justify for the reform.

From this perspective, it cannot be denied that Shen built his own simple concept of human rights by combining the Confucian principle of *Ren* with the more individualistic thoughts of western human rights. By this combination, he formed his modern legal value, and applied it to the legal reform of the Qing's criminal law and thus he achieved profound influence on Chinese legal system afterwards.

Based on the above mentioned human rights thought, Shen's attitude to the death penalty was that it eventually would be abolished by enhancing moral education, which in turn encourages moral improvement throughout the whole of society.<sup>153</sup> His opinions on the

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<sup>150</sup> Hong Lu and Terance D Miethe, *China's Death Penalty History, Law, and Contemporary Practices*, (Taylor & Francis Group 2007) 22; also J. Zhang, *The Thoughts and Practices of Legal Reform in the Transitional Process- The Tradition and Modern Transition of Chinese Law*. (Springer Berlin Heidelberg, 2014) 555-670.

<sup>151</sup> See T Pei-yu 'On the Human Rights of Shen Jia-ben' (2009) 6 *Journal of Shangqiu Vocational and Technical College* 9; see also S Hua, 'Shen Jiaben and the Late Qing Legal Reform (1901-1911)' (2013) 30(2) *East Asia* 121-138; see also S Jian, 'On Historic Significance of Legal System Reform in the Late Qing Dynasty', (2004) 4 *Journal of Nanjing Forestry University (Humanities and Social Sciences Edition)* 9.

<sup>152</sup> See C Li, 'Li as Cultural Grammar: On the Relation between Li and Ren in Confucius' Analects'. (2007) 57(3) *Philosophy East and West* 311-329; see also J Chan, 'A Confucian perspective on human rights for contemporary China' [1999] *The East Asian Challenge for Human Rights* 212; see also Hong Lu and Terance . Miethe, *China's Death Penalty History, Law, and Contemporary Practices*, (Taylor & Francis Group 2007) 22.

<sup>153</sup> Yang Zhang, 'The Research on the Legal Thoughts of Shen Jiaben', (Dissertation of LLM, Shandong University 2009) 22, <[www.docin.com/p-525207973.html](http://www.docin.com/p-525207973.html)> accessed 26 May 2016; see also Fuhua Chen, 'Research on Legislature of the Doctrine of Humanitarian Criminal Punishment in New Criminal Code of Qing Danasty' (2010) 4 *Journal of Fuqing Branch of Fujian Normal University* 23.

abolition of the death penalty even now are still advanced in the context of China's current situation.

### 2.3.3 Shen's Reform

Shen prescribed a ban on retrospective punishment as well as the usage of analogy in criminal law. He adopted the modern legal principle of *nulla poena sine lege*- one could not be punished for doing something that was not prohibited by law. He also abolished brutal punishments, and downgraded what were traditionally severe crimes to minor offences. These reforms provided an important model to later governments, and they were preserved even after the new government was founded via the revolution led by Sun Yat-sen.<sup>154</sup> After Shen achieved the amendment of the penal code, the Qing dynasty's law in 1910 reduced from the 800-plus capital offenses to fewer than 30.<sup>155</sup>

Bingzhi Zhao and others point out that at the end of the Qing dynasty, China was shown to be embarking on the same kind of reform of its criminal law that had transformed punishment in Meiji Japan during the last decades of the 19<sup>th</sup> century, not only in the field of capital punishment but also in its efforts to build a more 'modern' prison system.<sup>156</sup> This was also conducted by Shen. Shen proposed the improvement of the brutal and dark prisons system of the Qing Dynasty by borrowing from the experience of the 'civilised' western prisons.

Shen reformed the judicial system in order to protect human rights. He suggested that judicial systems should be independent, and recommended the introduction of the western system of defence and legal representation in order to reform the 'underdeveloped' Chinese judicial system. He abolished cruel methods of execution and the long-standing tradition that required criminals being executed to be paraded and killed in front of a public crowd. Article 38 of the *New Criminal Code of Da Qing Reign* prescribed that hangings 'take place in prison'.<sup>157</sup> That was a major development in the history of the death penalty. The parade of

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<sup>154</sup> J Bourgon 'Abolishing' cruel punishments': a reappraisal of the Chinese roots and long-term efficiency of the Xinzheng legal reforms'. (2003) 37(4) *Modern Asian Studies* 851-862.

<sup>155</sup> Z Ding and Y Ang, 'Restoring Shen Jiaben: General Discussion on Shen Jiaben and Vicissitude of Judicial Field of Late Qing Dynasty (1901-1911)' (2004) 1 *The Political Science and Law Tribune* 2.

<sup>156</sup> See X Chen, 'Destiny of the death penalty in China in the contemporary era'. (2006) 1(1) *Frontiers of Law in China* 53; See also Z Ning, 'The debate over the death penalty in today's China' (2005) 62 *China Perspectives* 62; see also Z Wang 'The Roman Law Tradition and Its Future Development in China' (2006) 1(1) *Frontiers of Law in China* 72.

<sup>157</sup> Bingzhi Zhao, 'The Transformation of Chinese Criminal Code During a Span of One Hundred Years' (2012) 30(1) *Tribune of Political Science and Law* 117.

criminals facing execution was not officially prohibited in the PRC until 2007, when the SPC, the SPP, the Ministry of Public Security (MPS) and the Ministry of Justice (MoJ) jointly pronounced a judicial interpretation to denounce it.<sup>158</sup>

In addition to the above reform of execution methods, he objected to torture as well. He stated:

‘There is no torture in the western law, however in the Chinese law torture is quite common ... the Chinese law focuses on confession and evidence. Without confession, even if there are plenty of evidences cannot judge the case, by contrast, western law focuses on evidence rather than confession. Hence, if there are sufficient evidence to testify the crime even without the criminal’s confession, the case can still be given a verdict’.<sup>159</sup>

It is arguable that his viewpoints of the Chinese tradition of torture and confession still can be applied in relation to today’s situation in China. This will be analysed in the second section case study.

### **2.3.4 The Debates between Conservatives and Reformists**

In the processes of Shen’s legal reform, the dispute between conservatives and reformists (*Li Fa Zhi Zheng*) was one of the significant legal cultural events of the period.<sup>160</sup> The arguments used by the conservatives and the reformists are still found in the present debates on the use of the death penalty between neo-liberal cosmopolitans and conservatives in 21<sup>st</sup> century China.

The conservatives argued that, to some extent, the amendment of law was acceptable, however, this activity must be restricted by ‘*Li*’, the tradition Confucian rules of propriety based on the feudal paternal hierarchy. If law strayed away from those Chinese traditions, it would lose its social base and lead to failure.

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<sup>158</sup> ‘The Parade of Criminals Sentenced to Death Will Become History- the Comprehension of the SPC, the SPP, the MPS and the MoJ’s Judicial Interpretation’, *Pingdingshan Daily* (16 March 2007), <[www.pdsxww.com/news/2007-03/16/content\\_331802.htm](http://www.pdsxww.com/news/2007-03/16/content_331802.htm)> accessed on 17 June 2016.

<sup>159</sup> Jiaben Shen, *Verification of All Dynasty’s Criminal Law Attached to The Manuscripts of Ji yi—The Record of Visiting the Judgements and Verdicts*, (Jiyi Wencun-Cai Pan Fang Wen Lu, Chung Hwa Book Co. 1985) 2235

<sup>160</sup> For discussions, see A S C Yeung, ‘Fornication in the Late Qing Legal Reforms Moral Teachings and Legal Principles’ (2003) 29(3) *Modern China* 297-328; see also L Jun-nan, ‘Constructing Chinese Legal System: Doctrine, Nationalism and Discursive Practice (1900—1949)’ (2008) 2 *Peking University Law Review* 10; see also Xingzhong Yu, ‘Chinese Legal Philosophy in the Post-Globalisation Age: Opportunities and Challenges’ (2011) 10 *Pacific Journal* 5.

The reformists argued that China should adopt a western advanced legal spirit, such as the principle of *nulla poena sine lege* to amend the Chinese criminal law. They advocated the need to study and then transplant the western law and legal systems to substitute the outdated legal system under the feudal paternal order. They contended to use the Enlightenment thought of equality, freedom, and inherent human rights to re-write the Chinese law and to build a modern Chinese legal system. They argued that learning from western countries' advanced knowledge, including the legal system and law, would make China stronger and its people wealthier.<sup>161</sup>

It seemed that the reformists failed and Shen resigned from his legal position eventually, however, the Qing criminal law was amended according to German, French and reformed Japanese's law at the time, which had a significant influence on later criminal laws in different political regimes.<sup>162</sup>

Here, there are some good reasons for paying more focus on the debate and the legal reform concerning the reform of the death penalty in the Qing Dynasty, led by Shen Jiaben, and Shen's thoughts of how to combine western modern legal thoughts and penal codes into legal reform in the Qing Dynasty, where people were still governed by extremely conservative feudal thoughts and cruel feudal laws. The first reason is that his reform thoroughly broke the old feudal legal system, which had been in force in China for several thousand years, and proclaimed the end of it. The second is that his reform provided an ideal comparative model of how to achieve reform under the political and legal thoughts of collectivism and conservatism, even during a tough environment in an era when the majority of the Chinese people, including most of the elites, disagreed with reform.

Then next section will illustrate how the successive governments treated the death penalty.

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<sup>161</sup> For the discussion, see Xian Da, 'Discourse and Comments on Disputes on 'Li' and 'Fa' (2012) 29(5) Journal of Shenzhen University(Humanities & Social Sciences) 140-145; see also Guilian Li, 'Disputes on 'Li' and 'Fa' During the Period of the Amendment of Law in the End of the Qing Dynasty' (1982) (Z1) Law Review 31-49; see also Xiaoming Li, 'Disputes on 'Li' and 'Fa' in the End of the Qing Dynasty and Its Analysis Respecting the Legal Philosophy' (2001) 19(4) Hebei Law Science 128-130.

<sup>162</sup> Rong Chai, 'The Value of Thought behind the Disputes of 'Li' and 'Fa' in the End of the Qing Dynasty' (2007) 2 Social Science in Guangdong 152-157; see also Rui Wang and Dasong Guo, 'The Discussion and Analysis of Disputes on 'Li' and 'Fa' in the End of the Qing Dynasty' (2003) 2 Journal of Shandong Normal University (Social Science Edition) 96-100; also see Hancheng Gao, 'The Analysis of the Balance of Power in Disputes on 'Li' and 'Fa' in the End of the Qing Dynasty' (2003) 3 Oriental Forum 3-10.

## 2.4 THE ATTITUDES OF THE SUCCESSIVE GOVERNMENTS TO THE DEATH PENALTY

This section will focus on the governments from the end of Qing to the founding of the PRC. After the collapse of the Qing dynasty, the successors to some extent undertook a modernisation of the criminal law, which was mainly influenced by Shen's reform. A Chinese scholar points out that, from the end of the Qing dynasty to the end of Nanjing national government, the modern Chinese legislation had been in a substantially complicated situation, struggling hard between 'barbarism' and 'civilisation'.<sup>163</sup>

### 2.4.1 The Post-Qing Governments' Attitude

In 1912, the Beiyang government legislated a *Provisional New Penal Code*, with only 19 crimes applying the death penalty.<sup>164</sup> It seems that Chinese criminal law departed from the earlier tradition of heavy feudal criminal punishment. However, the true situation was that a series of special criminal laws, such as the *Law of Punishing Robbers and Bandits*, *The Criminal Regulations on the Army* and so on, were made at the same time. These measures revived old feudal values in contradiction to the value of modern criminal laws built by Shen's reform.

After successive Nanjing governments promulgated penal codes, the situation deteriorated. It was criticised by the people because all kinds of special criminal decrees aggravated the abuse of the death penalty.<sup>165</sup> One thing should be mentioned here is that a *new crime* of 'counterrevolution' was generated when the national revolutionary government was setting out on its northern expedition in 1928-9. The Wuhan national government enacted *The Rules of Counter-revolutionary Offences*, which they copied from the former Soviet Union. From then on, this term 'counter-revolutionary offence' remained in use in China until 1997.<sup>166</sup> It was a broadly defined crime which could be deployed against political enemies, as not only a political stigma but also a capital crime potentially leading to

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<sup>163</sup> Yang Hui, 'The Characteristic of Modern Chinese Criminal Legislation', *Modern Law Science*, 1998(1):118-121.

<sup>164</sup> Chang Dan, 'Analysis on the Death Penalty System in China,' <<http://ylzy.chinacourt.org/public/detail.php?id=4164>> accessed on 21 March 2014.

<sup>165</sup> Yang Hui, 'The Characteristic of Modern Chinese Criminal Legislation', *Modern Law Science*, 1998(1):118.

<sup>166</sup> In Taiwan, the similar crime was abolished in 1993 after its penal code was amended. See Shihong Luo, 'Is Taiwan Really So Good—The History of the Situation of Politics and the Public', <[www.21ccom.net/articles/zgyj/thyj/article\\_2012061561998\\_2.html#](http://www.21ccom.net/articles/zgyj/thyj/article_2012061561998_2.html#)> accessed 12 December 2014.

execution.<sup>167</sup> Both in the reign of Kuomintang's Nanjing Government, and during the time of Cultural Revolution after the PRC's foundation, a lot of people were sentenced to death for this 'crime', even without real evidence.

In 1928 and 1935, the Nanjing national government enacted two penal codes. After Kuomintang retreated to Taiwan, its 1935 penal code remained valid in this 'state' although some small parts were revised. The 1935 *Penal Code* cancelled the feudal class hierarchy, and prescribed the death penalty as one of the five main punishments, which made some progresses in China's legal history. The execution methods were hanging and shooting.<sup>168</sup> However, in order to suppress members of the Communist Party and other dissidents, the judicial practice continued to apply different method of execution, such as beheading, assassination, burying alive and killing in secret.<sup>169</sup>

The above reviewed the post-Qing dynasty legal history with respect to the use of the death penalty before 1949. It showed that the reform of the death penalty passed through a tough road from the brutal and feudal style. Next, the development of legal thoughts on the death penalty in Chinese Communist Party (CCP) controlled territory – the Shaan-Gan-Ning Border Regions and the later the PRC – will be researched.

#### **2.4.2 The Legal Thoughts in the CCP's Regime**

A leading Chinese scholar Zhao Bingzhi argues that, generally speaking, in the 1940s before the founding of the PRC, the criminal legislation of Shaan-Gan-Ning Border Regions, which were controlled by the CCP, was basic, sporadic and unsystematic. Indeed, a lot of them were provisional. However, he suggests those were the early building blocks for the later founding of the PRC's criminal legislation. Some of the rules after testing and revision by the state's practices became important content within the PRC's criminal laws.<sup>170</sup>

This could be seen in the core component of the legal thoughts of Mao Zedong, such as the retention of the death penalty but '*killing with cautious attitudes and discrimination*' and

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<sup>167</sup> Qisheng Wang, 'The Northern Expedition's Geopolitics, Law and Counter-revolution' (2010) 1 *Modern Chinese History Studies*, <[www.cnki.com.cn/Article/CJFDTotal-JDSY201001003.htm](http://www.cnki.com.cn/Article/CJFDTotal-JDSY201001003.htm)> accessed 12 December 2014.

<sup>168</sup> Zhengmao Ni, *The Analysis of Comparative Law*. (China Legal Publishing House, 2006) 943.

<sup>169</sup> Famin Xu, 'On the Historical Evolvement of the System of Capital Punishment' (Series Of 2004 Annual Conference of the Chinese Criminal Law, Volume I Studies on Death Penalty, the Press of the People's Public Security University of China, September 2004) 30.

<sup>170</sup> Bingzhi Zhao, 'The Transformation of Chinese Criminal Code During a Span of One Hundred Years' (2012) 30(1) *Tribune of Political Science and Law* 117-127.

so on, became the most instructive thoughts throughout the whole criminal legislation from the foundation of the PRC till today.

This part just will focus upon some important criminal thoughts of Mao, which have instructed China's key principle of criminal law for more than half a century.

In December 1940, in his article *On Policy*, Mao suggests:

'The hard core of the traitors and determined anti-communist members should be cracked down decisively without this approach the anti-Japanese revolutionary force cannot be guarded. However we cannot kill more people, we shall never involve any innocent people'.<sup>171</sup>

In January 1948, Mao in another article *On Some Important Problems of the Party's Present Policy* stressed:

'(we) must kill fewer, forbid killing without discrimination. The practice of killing more and indiscriminately were thoroughly wrong, and can only lead our party to lose the sympathy and separate itself from the masses, and then sink in the situation of isolation'.<sup>172</sup>

In February 1948, in his article *The Essential Points in Land Reform in The New Liberated Areas* he reiterated that: '[i]t is necessary to prohibit killing without distinguishing, the fewer killed the better'.<sup>173</sup>

From Mao's articles, it can be seen that his thoughts on capital punishment involved its retention in principle but restriction in practice, which is similar to Hegel's viewpoints as mentioned in Chapter 1. Liu Renwen claims that, given the situation that prevailed before and after the founding of the PRC, over a long period the CCP had been governing the areas it controlled and the country just by policy rather than by means of a legal system. Hence, he argues that Mao's cautious policies on capital punishment thoughts were meaningful in that time, and without that, far more people would have been executed.<sup>174</sup>

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<sup>171</sup> Zedong Mao, 'On Policy', *Selective Works of Mao Zedong*, Vol II, 25 December 1942, <[www.ddcpc.cn/2012/03/29/39232.html](http://www.ddcpc.cn/2012/03/29/39232.html)> accessed on 23 March 2014.

<sup>172</sup> Zedong Mao, 'On Some Important Problems of the Party's Present Policy', *Selective Works of Mao Zedong*, Vol V, January 1948, <[www.360doc.com/content/13/0422/22/9288681\\_280233054.shtml](http://www.360doc.com/content/13/0422/22/9288681_280233054.shtml)> accessed 23 March 2014.

<sup>173</sup> Zedong Mao, 'The Essential Points in Land Reform in The New Liberated Areas', 15 February 1948, *Selective Works of Mao Zedong*, Vol IV, <[www.qstheory.cn/zl/llzz/mzdxjd4j/200906/t20090630\\_4158.htm](http://www.qstheory.cn/zl/llzz/mzdxjd4j/200906/t20090630_4158.htm)> accessed 23 March 2014.

<sup>174</sup> Renwen Liu, 'The Policy of the Death Penalty: From the world wide vision and Chinese Perspective' (2004) 4 *Journal of Comparative Law* 77-89.



Although the 1979 Chinese criminal law's provisions embodied Mao's thought,<sup>175</sup> as the actual (but not formal) successive leader in China, Deng Xiaoping's thoughts on capital punishment were in fact quite different from those of Mao, especially with Mao's views of killing fewer and killing cautiously. On 19 July 1983, Deng claimed that the dramatic increase in crimes, including particularly malignant ones, were highly unpopular with the masses. This difficulty arose because the state was not severely cracking down on criminals, and – in three years – every big and medium city should launch several campaigns striking hard on criminality (*Yanda*).<sup>176</sup> In 1984, he stated:

‘Last year I only did one thing – striking hard down on criminals ... It is necessary that we strike at criminal offenses, from now on, we will continue to do this work. However depending only on such striking down cannot solve the main problems, quadrupling and improving the economy are the actual approach to eradicate it’.<sup>177</sup>

On 17 January 1986, Deng stated at the conference of Politburo Standing Committee that:

‘the death penalty cannot be abolished; some criminals must be sentenced to death ... The problems involving the expression of political thought area that do not break the criminal law, do not need to be punished by the criminal law. However, some of the serious economic criminals and penal offenders must be killed. Present overall performance is soft-hearted, sentencing to death is a kind of indispensable method of public education’.<sup>178</sup>

Deng shows his determined attitude on the death penalty almost throughout all of his later political career.

Some scholars hold opposite attitudes to Deng's views. Professor Zou Keyuan argues that Deng Xiaoping largely regarded law as an instrument to maintain social order and

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<sup>175</sup> See Criminal Law of the People's Republic of China (1979) Date issued: 07-06-1979 Expire date: 10-01-1997, Article 1 prescribe that: ‘The Criminal Law of the People's Republic of China, which takes Marxism-Leninism-Mao Zedong Thought as its guide ... is formulated in accordance with the policy of combining punishment with leniency and in the light of the actual circumstances’.

<sup>176</sup> Xiaoping Deng, ‘Striking hard on the criminal activities’, 19 July 1983, *The Selected Works of Deng Xiaoping*, Volume III (The People's Press, 1993) 33-34.

<sup>177</sup> Xiaoping Deng, ‘Talking on The Third Session of the Central Advisory Commission’, 22 December 1984, *The Selected Works of Deng Xiaoping*, Volume III, (The People's Press, 1993), <[cpc.people.com.cn/GB/64184/64185/66612/4488778.html](http://cpc.people.com.cn/GB/64184/64185/66612/4488778.html)> accessed 23 March 2014.

<sup>178</sup> Xiaoping Deng, ‘Talking on conference of Politburo Standing Committee’, 17 January 1986, *The Selected Works of Deng Xiaoping*, Volume III (The People's Press, 1993), <[cpc.people.com.cn/GB/64184/64185/66612/4488757.html](http://cpc.people.com.cn/GB/64184/64185/66612/4488757.html)> accessed 23 March 2014.

economic development. Such thinking by the leadership will hamper China's progress towards establishing the rule of law.<sup>179</sup>

Susan Trevaskes has also adopted a stance over the policy of *Yanda* that the 'strike hard' years from the early 1980s to the early 2000s actually served to weaken, rather than strengthen, the crime control argument. This is because serious crime rates continued to rise in parallel with the rise in execution rates. Striking hard resulted in many human rights abuses and miscarriages of justice, and also stalled necessary criminal justice reforms.<sup>180</sup>

Some other scholars, however, think that Deng's 'strike hard' policy remains useful for China's socialist construction. Yu Weiqing suggests that Deng's ideology of the death penalty actually meets the wishes of the Chinese people and reflects its political will. Application of capital punishment on the tiny minority of serious criminal offenders not only strongly deters criminals, but also educates the mass into appropriate norms of conduct. Socialist construction cannot be done under a chaotic social order, and it follows that a stable social situation needs legal protection. Without the stipulation of capital punishment, the law cannot function.<sup>181</sup> His opinions represent a lot of people's views of Deng's ideology of laws in contemporary China.<sup>182</sup>

Hong and Miethe argue that Deng and his successor Jiang Zemin developed legal reforms that helped shape the legal system in the 1980s and the 1990s, respectively.<sup>183</sup> Jiang's perspective on law concentrated in four Chinese words '*yi fa zhi guo*', meaning 'govern the country with law'. Several important events of law reform in his era were that: firstly, the principle of the rule of law was enshrined in the Chinese constitution in 1999; secondly, the criminal procedure law and the criminal law were both amended in 1996 and

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<sup>179</sup> See K Zou, *China's legal reform: towards the rule of law*, (Brill, 2006); see also, C Lo Wing-Hung . 'Socialist Legal Theory in Deng Xiaoping's China' (1997) 11 Columbia Journal of Asian Law 469; and see Y Xingzhong, 'Legal pragmatism in the People's Republic of China' (1989) 3 Journal of Chinese Law 29; see also C A G Jones,. 'Capitalism, globalisation and rule of law: an alternative trajectory of legal change in China' (1994) 3(2) Social & Legal Studies 195.

<sup>180</sup> Susan Trevaskes, 'China's Death Penalty--The Supreme People's Court, the Suspended Death Sentence and the Politics of Penal Reform' (2013) 53(3) The British Journal of Criminology 482-499.

<sup>181</sup> Yu Weiqing, 'Deng Xiaoping's legal thought', (2003) 5 Journal of Fuyang Teachers Collage (Social Collage) 80.

<sup>182</sup> See W Ping,. 'Grounds for Light and Heavy Punishments - and on' Strike-hard' Campaign'. (2002) 2 Tribune of Political Science and Law, 10; see also Liang B. Severe strike campaign in transitional (2005), 33(4) China Journal of Criminal Justice 387; see also Yu J.' From Strike-hard Campaign to Temper Justice with Mercy' (2008) 2 Journal of National Prosecutors College 024.

<sup>183</sup> Hong Lu and Terance D Miethe, *China's Death Penalty History, Law, and Contemporary Practices*, (Taylor & Francis Group, 2007) 18.

1997; and thirdly, the ICCPR and the ICESCR were signed by the Chinese government in 1997 and the ICESCR was ratified in 2001.

Jiang's successor, Hu Jintao, furthered the idea of governing and administering the country under the rule of law. At a collective study session of the Political Bureau of the Central Committee of the CCP, he said the more onerous the mission of the reform, development and stabilisation, the more consciousness and firmness they (Central Committee Political Bureau members) should pay on governing and administering the country under the doctrine of the rule of law, the more attention should pay on the maintenance of the unification and dignity of the legal institution. Dealing with and settling all kinds of contradictions and problems must take place only in accordance with prior laws.<sup>184</sup> During Hu's era, the safeguarding of human rights was written in the Chinese constitution law in 2004.

Some western scholars point out that Hu and Wen's leadership had seemed like sticklers for the rules, and had spoken frequently of the need to establish the rule of law more deeply in China. Judges had been trained, and interrogation techniques improved. Death sentences dropped from 2008. Evidence obtained by the use of torture in court cases became inadmissible.<sup>185</sup>

After Xi Jinping came to power in November 2012, his thoughts on the rule of law were manifested in the decision of the Fourth Plenary Session of the 18th CCP Central Committee – *The Decision of the CPC Central Committee on the Comprehensive Promotion of Several Major Issues of the Rule of Law*.<sup>186</sup> The decision analyses the problems existing in present construction of the rule of law. It noted that: firstly, some laws cannot reflect the willing of people and the objective laws; secondly, laws were not being observed, or strictly enforced; thirdly, violators were being not brought to justice; and fourthly, some government functionaries, especially some leaders, were taking bribes and bending the law, abusing their power when executing the law, abusing their authority to override the law, and substituting their words for the law.

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<sup>184</sup> Jintao Hu, 'Governing and Administering the Country Under the Rule of Law (Yi Fa Zhi Guo, Yi Fa Zhi Zheng)' *Xinhua Net* (28 April 2004) <[www.china.com.cn/chinese/PI-c/554098.htm](http://www.china.com.cn/chinese/PI-c/554098.htm)> accessed 18 December 2014,

<sup>185</sup> Kerry Brown, *Hu Jintao : China's Silent Ruler* (SGP: World Scientific Publishing Co., 2012). ProQuest ebrary. Web, accessed 18 December 2014; see also B Z Tamanaha, *On the rule of law: History, politics, theory* (Cambridge University Press, 2004) 2.

<sup>186</sup> For the English version of this Decision see <[news.onedow.com/eview/pzhx79.html](http://news.onedow.com/eview/pzhx79.html)> accessed 1 November 2014.

These problems, he claimed, were damaging to the socialist rule of law. The *Decision* sets the general purpose which is constructing a Chinese characteristic socialist legal system of the rule of law and building a socialist country governed according to law. The *Decision* reiterates that no organisation or individual is privileged to act beyond the constitution or the generally applicable law. This reiteration can be seen as a signal that the CCP shows its determination that even its own activities must be in accordance with the Constitution.<sup>187</sup> It also states that the system of ensuring the courts and the procuratorates are exercising their authorities independently and justly according to the law must be improved. It shows that this rule is not just a black law without the ability to be implemented. In the near future, it will launch a reform to build an accountability system so that the liabilities of the person who interferes judicial activities will be recorded and investigated.

Guaranteeing human rights by the law is another consideration in this *Decision*, which actually was aroused by infamous wrongful death convictions in China over recent years. In addition to the precise description of the enhancement of judicial safeguards to protect human rights, it also prescribes the following rights: firstly, the right of the litigants and other participants in the procedure of the litigation to be informed; secondly, their right to make a statement; thirdly, the right to make a defence; and fourthly, the right to make an application and to petition as a safeguard.

At the same time, in order to limit miscarriages of justice, especially wrongful death penalty convictions, the decision also involves the enhancement of the prevention from the source of the extraction of confessions by torture and illegal investigation, and improved the system of effective prevention and timely correction from wrong cases.

Although it is a document of the CCP's policy, it involves the main problems existing in the present Chinese legal and political system. It gives a useful signal that after a long period of neglecting the important function of law, the new leaders of the CCP has been totally aware of that the system and laws should be stable, consistent and authoritative – not

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<sup>187</sup> Actually, this Decision's prescription of the rule of law that no organisation or individual is privileged to act beyond the constitution and law is the same as the liberal meaning of the rule of law - see the explanation of it in Chapter 1 - and is contradictory to a Marxist ideology of law that law, whether as a specific social relation or as the sum of relations in general, is a system of relations corresponding to the interests of the ruling class and to the safeguarding of those interests by organised violence. The latter denies bourgeois philosophy of law that law is a relation par excellence, and is a relation of human wills in general, therefore Marxist ideology of law denies law as a general form which has assumed an eternal quality. For the detailed analyses, see E B Pashukanis, and C. J. Arthur, *Law and Marxism: a general theory* (Ink Links, London (271 Kentish Town Rd, NW5 2JS) 1978), 83. Nonetheless, both Chinese scholars based on the Marxist theory, and Western scholars based on liberal theory, argue that at present the rule of law in the Chinese constitution is not a liberal kind rule of law.

changing with changes of state leaders or state leaders' opinions or attention – and achieve the goal of having laws to go by, laws that must be observed and strictly enforced, and lawbreakers must be prosecuted.

From the above illustration, it can be seen that although it moves forward slowly, improvements towards the rule of law are going forward in China step by step. It should be admitted that there has been a substantial change in China's legal system after more than 30 years of legal reform and build up, and it should also be conscious that there is still a long way for China to march to achieve the goal of the rule of law, which is of significant importance for the death penalty reform. John Wong and Youngnian Zheng point out that currently both in China and outside China, two tendencies exert bad influence on the establishment of the rule of law in China. One is a hasty mood, hoping to reach the stage of the rule of law overnight; and the other is the despair that the rule of law in China is impossible because of the past bitter lawless experiences.<sup>188</sup>

The above analysed the legal history and legal thoughts of the use of the death penalty in China from the end of the Qing dynasty to the current PRC's president Xi's era. The next section will conduct an empirical research on the death penalty by case studies. Some infamous wrongly decided cases recently caused Chinese people to call for justice, which is an influential factor to push forward the reform of the death penalty.

## 2.5 CASE STUDIES

It could be argued that it is not a theoretical concept of justice which accelerated the progress of the reform and abolition of the death penalty. Rather, wrongly decided death penalty cases aroused people's awareness about reform. Ordinary people reacted more strongly to those miscarriages of justice than to common cases. This section will present six cases concerning innocent people that were sentenced to death, or to the death penalty with a two-year reprieve.<sup>189</sup> From these wrongful convictions, the gap between the Chinese law and international human rights treaties signed or ratified by China can be analysed more clearly.

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<sup>188</sup> John Wong and Youngnian Zheng, eds. *Nanxun Legacy and China's Development in the Post-Deng Era. River Edge* (NJ, USA: World Scientific, 2001) ProQuest ebrary. Web, accessed 18 December 2014.

<sup>189</sup> This is a special designed mechanism in the application of the death penalty, for the detailed analysis, see Chapter 7 section 5 part 2.

Nonetheless, death penalty cases consist of not only those wrongly judged, but also normal cases. The latter will be researched in Chapter 5.

This chapter involves cases including those of Du Peiwu and Li Jiuming, the cases of She Xianglin and Zhao Zuohai, and the two cases of Nie Shubin and Hujiltu, in which those two innocent people were executed but acquitted many years later. These cases have been all rehabilitated by the Higher People's Courts.

### **2.5.1 The Cases of Du Peiwu and Li Jiuming**

Du Peiwu was a police officer in Kunming, the capital of Yunnan Province. In March 1998, his police officer wife and another police officer were shot dead. There then was an enormous outcry in Yunnan Province for three reasons. Firstly, the two victims were both police; secondly the murder weapon was found to be the gun of the police officer; and thirdly, the bodies were discarded in a police car. As a result, the case was drawn to the attention of high ranking officials as well as to the wider public of Yunnan Province and the investigation team was put under substantial pressure.

After the crime, the police detained Du. He was accused of obtaining his wife's gun by deception and killing them. In actuality, up to and until Du was sentenced to death, the gun had not been found. He denied the accusation but was subjected to torture,<sup>190</sup> as a result of which he confessed to his guilt.

When the prosecutor assigned to Du's case investigated him, Du told the prosecutor that he had been tortured by the investigators, and asked the prosecutor to take some photos of his injuries and his ragged clothes that had been brought about as a result of the torture. Although the prosecutor did take some photographs, he did not accept Du's explanation that he had been tortured. Also, on the hearing of the case in the court, when Du asked to show the photographs that were taken to prove he was tortured, his requirement was refused by the prosecutor, who said he could not find them. Du was subsequently sentenced to death by the first trial court in February 1999. In the court, Du's lawyer initially claimed that, because Du had been tortured, the procedure that was used to gain the evidence had seriously breached proper legal procedure. In addition, a witness's testimony showed that at the time the two police were killed Du was in his place of work to prepare for an examination, and had not,

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<sup>190</sup> This ill treatment included: twenty-one days of sleep deprivation, beatings, manacled and uninterrupted interrogation, for the relevant information see Jiahong He and others, *The Overdue Justice: Ten Wrongly Decided Cases Influenced the Chinese Judiciary* (Peking University Press, 2014).

therefore, had the opportunity to commit the crime. Finally, the defence claimed that evidence presented regarding the analysis of trace mineral elements in the soil in order to show Du had been to the scene of the crime had been complemented by the investigators after several months and had not appeared in the first-hand scene investigation. It could not, therefore, be objective evidence. From the murder weapon, to the timing of the crime, to the trace and the residue from the shooting, no evidence could conclusively prove Du's guilt.

The first instance court did not accept any of the defence's arguments provided by the lawyer. Du then appealed to the higher court, which commuted the death penalty of immediate execution to a death penalty sentence with two-year reprieve.<sup>191</sup> This judgement of the second instance court is in itself somewhat strange as, on the one hand it confirms that the fundamental facts of the case are clear, and that the evidence presented was legal and valid, but, on the other hand, suggests the defence lawyer's submissions should be adopted in part when the court reaches its final decision.

After Du was sent to prison in June 2000, a gang of individuals were arrested for robbing vehicles at gunpoint, homicide, and other serious crimes. During the pre-trial process, they admitted to having murdered Du's wife and the other police officer.

In July 2000, the Committee of Political and Legal Affairs of Yunnan Province pronounced that Du was innocent.<sup>192</sup> The High People's Court of Yunnan Province subsequently acquitted Du and he was awarded compensation for his wrongful conviction in the sum of ¥91,141 (approximately £9,100).<sup>193</sup> The two police officers held responsible for the torture were charged and given suspended sentences of 18 and 12 months in prison, respectively.

Sad though Du's case is, it is far from unique in the Chinese legal system and it exhibits certain characteristics common to many torture cases in China. The case of Li Jiuming is another case of a police officer being tortured to confess his non-existent guilt. As the case closely parallels that of Du, it is only presented briefly.

Li was a high-ranking police officer, a Police Supervisor, working in a prison in Hebei province. Although seemingly having a relatively high official status, he still did not avoid

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<sup>191</sup> About the death penalty with two-year reprieve, see the illustrations and analyses in Chapter 7 Section 5.

<sup>192</sup> 'Tracing the Case of Du Peiwu', (*Xinhua Net*, 13 October 2001) <[news.sohu.com/28/65/news146896528.shtml](http://news.sohu.com/28/65/news146896528.shtml)> accessed 12 December 2014.

<sup>193</sup> It is said that after being released, Du suffered terrible headaches and doctors claimed he had been damaged psychologically, see *ibid*.

being tortured. In July 2002, a couple were killed in their home in Hebei province. Li was suspected because of his relationship with the couple, and eventually confessed after torture.

After Li was sentenced to death with a two-year reprieve by the first and second instance court, the true criminal was found. Li was finally acquitted by the court in 2004 and was awarded state compensation in the sum of ¥48,000 (£4,800). Eventually, the two investigators who had tortured Li were sentenced to two-years' imprisonment, and five of them were exempted from criminal punishment.

Astonishing parallels can be found between these two cases: finding someone murdered, the person having the closest or relative closer relationship with the victims being suspected, exerting pressure through torture on the suspects to coerce a confession, the true murderers then being found, and, the wronged innocent persons eventually being acquitted.

If police officers, even in a higher rank, could not be exempted from torture, then how about common people? Then next case study involves two peasants who were both wrongly sentenced to death by the first instance courts.

### **2.5.2 The Cases of She Xianglin and Zhao Zuohai**

She Xianlin is another case that highlights issues with China's current legal system, and is among more than thirty misjudged cases that emerged suddenly after the year 2000.<sup>194</sup>

She was a villager in Jingshan County, Hubei Province. It has been suggested that She's case has been boosted the rule of law in China and as such should be included in current legal text books as an example of the application of the rule of law.<sup>195</sup>

She's case derived from an incident whereby a female corpse was found in a pool in a village in Jingshan County in April 1994. After field investigations, the Public Security Bureau in Jingshan County identified the victim as She's wife, Zhang Zaiyu, without identification through DNA, and that the suspect who murdered Zhang was her husband. When She was detained, he was coerced through torture to confess that he had committed the crime.

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<sup>194</sup> For the information of some of these cases, see Jiahong He and others, *The Overdue Justice: Ten Wrongly Decided Cases Influenced the Chinese Judiciary* (Peking University Press, 2014).

<sup>195</sup> Zhiyong Pei, 'What We Can Expect of From She Xianlin's Case' *People's Daily* (Beijing, 19 April 2005); see also Lina Wang, 'They Have Boosted the Process of The Rule of Law in China' *Jinghua Times* (Beijing, 11 May 2011).



In October 1994, She was sentenced to death by the first instance court. He then appealed to the higher court. When She's case was heard by the second instance in the higher court, his wife Zhang's relatives organised 220 signatures from people asking for the execution of She immediately and they petitioned higher authorities to exert extra pressure on the higher court. At that time, it can be understood that the higher court faced huge pressure. The collegial panel of the second instance court found that the evidence in the case was questionable and sent it to the judicial committee of the Hubei Higher Court. All of the members of the judicial committee agreed that there were too many doubtful areas to confirm a conviction.

However, the higher court did not proclaim She innocent, instead it rescinded the original judgment and remitted the case to the court which originally tried it for retrial. In May 1995, the former prosecutors returned the case to the police for supplementary investigation. Then after the coordinating work done by the two levels of Politics and Law Committee in Jingshan county and Jingzhou city, Jingshan's People's Court sentenced She to fifteen years' imprisonment for the crime of homicide in 1998. She appealed again, but his appeal was rejected and the original judgment was affirmed.

During She's years of imprisonment, in March 2005, his alleged dead wife suddenly appeared in his village. Then in April the same year, She was acquitted by Jingshan Court.

What drew the mass media attention was not only She's wrongful case and his having been tortured to coerce a confession for a non-existent crime, but also the tough road his relatives had experienced in appealing to senior authorities hoping to gain a correct judgment. Without She's mother's persistent seeking and appealing, She might have been sentenced to death.

After She was acquitted, the People's Daily, the views of which represent the official view, published an article titled *What Can We Expect from the Case of She Xianglin Killing his wife*. The article quoted Francis Bacon's famous words 'One unjust judgment is more malicious than many times wrong doing'. The article claimed that people expected the operating mechanism of the judicial system to run in the way of justice. It argued that wrongful cases on one hand violated citizen's legal rights, and on the other impaired the authority of the justice system while trampling on the dignity of legal system.<sup>196</sup>

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<sup>196</sup> Zhiyong Pei, 'What We Can Expect of From She Xianlin's Case' *People's Daily* (Beijing, 19 April 2005).

Zhao Zuohai's case is similar to She's case. A fellow villager disappeared, and the night before he disappeared he fought with Zhao. Then Zhao was suspected and tortured, and after his confession was sentenced to the prison. The alleged dead person reappeared, and then the wrongful conviction was corrected and the innocent person gained state compensation. The investigators who inflicted torture were then sentenced to fixed term imprisonment.

Many parallels can be drawn between Zhao's case and She's case. According to Chinese law, the public security organs, the procuratorates and the courts are divided and coordinated, and at the same time they are mutually restricted as well. However, in both cases, the local Public Security Bureau used torture to coerce a confession, the local procuratorate was muddled in its prosecution of the case, and the different levels of courts returned wrong judgments in several trials. The judicial supervision's system and its checks and balances were ineffective. How the state can protect the common citizens' human rights from torture to confess a crime that might involve the death penalty has become a severe cause for concern and a popular topic in modern day China. It should be the case that the channel of remedy of for a citizen's rights should never be blocked again.

The above two groups of innocent people, though they suffered unjust treatment, lived to see their eventual rehabilitation. Compared with the cases of Nie Shubin and Hugjiltu, they are fortunate. Next part of this section will analyse cases of two executed innocent people.

### **2.5.3 The Cases of Nie Shubin and Hugjiltu**

#### **2.5.3.1 The Case of Nie Shubin**

Nie Shubin<sup>197</sup> was born in 1974, a worker in Hebei Province. In October 1994, he was detained and in 1995 he was sentenced to death for the crimes of homicide and rape. Nie was executed in the same year.<sup>198</sup> In 2005, another criminal Wang Shujin confessed that he was the real criminal of the case of Nie Shubin. After that the Political and Legal Department in Hebei Province commenced an 8-year investigation.

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<sup>197</sup> For the details, see 'Ten-year Investigation on the Nie Shubin's Case' *Sina News* (10 May 2016) <[news.sina.com.cn/c/nd/2016-12-10/doc-ifxyipt0838318.shtml](http://news.sina.com.cn/c/nd/2016-12-10/doc-ifxyipt0838318.shtml)> accessed 21 June 2016.

<sup>198</sup> There are debates on the accurate executed year. Some argue that because Nie's kidneys matched an important former official's, so that in order to transplant his organs to that official, he was executed in 1996. Otherwise, he would not have died. For the discussion see 'The Picture of the Execution Ground for Nie ShuBin: Sandy, Snowy or 'Kidney' Ground?' <[bbs.tianya.cn/post-free-5081368-1.shtml](http://bbs.tianya.cn/post-free-5081368-1.shtml)> accessed 21 June 2016.

Li Shuting, the defence lawyer in Nie's case, and in the process of appealing for a re-trial, said that during the span of 8 years' investigation he had applied 54 times to read the documents of the case but all his applications were rejected by Hebei Province Higher People's Court.<sup>199</sup> He stated that in the first instance hearing, there were no procedures of cross-examinations and debate. Nie's former first instance defence lawyer merely stated that Nie was very young, so he should be punished leniently. The whole process of the first instance court hearing took just one hour.<sup>200</sup>

Then in December 2012, the SPC declared that it ordered Shandong Province's Higher People's Court to re-investigate the case. Li Shuting acclaimed that the SPC, in appointing Shandong Higher People's Court to re-investigate the case, had clearly signalled that judicial reform had really stepped forward in the direction that every wrongful conviction should be corrected and these cases should not be delayed by stakeholders. He argued that the re-investigation by the court in a different province was significant to re-build people's confidence in the judicial system.<sup>201</sup>

Then after the re-investigation, Shandong Higher People's Court affirmed that Nie's case lacked important evidence to prove that Nie committed the crime and suggested the SPC re-try the case. In December 2016, after the re-trial, the SPC pronounced Nie's acquittal.<sup>202</sup> Then Nie's parents applied for ¥13.91 million (almost £1.4 million) national compensation in the same month. In 28 March 2017, Nie's parents were paid RMB 26813991 (almost £0.31 million). They accepted the compensation.<sup>203</sup>

The surprising similarity repeated in the case of Hugjiltu, which will be analysed in the next part.

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<sup>199</sup> 'Hebei Higher People's Court 54 Times Rejected the Defence Lawyer's Application for Looking at the File of Nie Shubin' *Legal Mirror* (24 November 2014) <[www.mnw.cn/news/china/824211.html](http://www.mnw.cn/news/china/824211.html)> accessed 21 June 2016; see also *Phoenix News*, <[hebei.ifeng.com/life/detail\\_2014\\_11/25/3195073\\_0.shtml](http://hebei.ifeng.com/life/detail_2014_11/25/3195073_0.shtml)> accessed 21 June 2016.

<sup>200</sup> For the information, see Xianfeng Li, 'The Review of the Nie's Case' *Jinghua Times* (26 December 2014) <[www.chinacourt.org/article/detail/2014/12/id/1524438.shtml](http://www.chinacourt.org/article/detail/2014/12/id/1524438.shtml)> accessed on 28 December 2014.

<sup>201</sup> *Ibid.*

<sup>202</sup> 'The SPC Corrected 11 Wrongly Decided Cases in 2016, the Cases of Nie Shubin and Chen Man Drawn Substantial Reflection' *The Guangming Daily* (28 February 2017) <[news.cnr.cn/native/gd/20170228/t20170228\\_523624912.shtml](http://news.cnr.cn/native/gd/20170228/t20170228_523624912.shtml)> accessed 28 February 2017.

<sup>203</sup> See 'How Much Compensation for Nies's Case?', reported by Everyday Financial Economy website <http://www.mrcjcn.com/n/216012.html>, <accessed on 7 July 2017>. For a discussion see 'The Opinions from the SPP on the Retrial of the Case of Nie Shubin Published in Full Text: Raising 6 Doubtful Points' *Caixin Net* (9 February 2017) <[china.caixin.com/2017-02-09/101053502.html](http://china.caixin.com/2017-02-09/101053502.html)> accessed 9 February 2017.

### 2.5.3.2 The Case of Hugjiltu

There is much debate at present in China concerning Hugjiltu's Case. Headlines in the newspapers or online often question who has the responsibility for the unjust execution of the 18-year-old teenager. These reports argued that the Hugjiltu case may be the most unjust case in China's history: a person who tried to help others and acted heroically was sentenced to death, and the people whose actions led to a wrongful conviction were promoted.<sup>204</sup> Under such headlines, it can be imagined why this case can trigger even stronger emotions than others.

According to the above newspapers' reports, one night in April 1996, a cry for help was heard from a woman in a nearby public toilet. Hugjiltu, who was working near there, called his workmate to run to the toilet, where they found a woman had been killed. Hugjiltu and his workmate went to the nearest security guard post to report the case to the police. However, they were treated as suspects and detained. After being tortured, Hugjiltu confessed his non-existent crime.

Under the instruction of the 'strike hard' (*Yanda*) policy, as mentioned in section one of this chapter, which implements a policy of quick and severe punishment, the time taken from the investigation stage to the execution stage was only 61 days. Despite a lack of evidence to support the case, the first instance court sentenced Hugjiltu to death, and although he appealed the case, the judgement was upheld by the higher court, following which, he was executed immediately.

Hugjiltu's parents believed their son had been wrongly killed. Then they began their long and tough road for justice. However, at the same time many of the police officers involved in the case were awarded 'second class merit' honours and were promoted because of this case.

In 2005, a serial rapist was captured and he confessed to that he had killed a woman and raped her in a public toilet. The details of his claim matched the time and scene of crime of the Hugjiltu case. The case was subsequently reported by the mass media which brought it to the attention of a central leader. A new investigation into Hugjiltu's case began in

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<sup>204</sup> For a reference see 'The innocent case in the Inner Mongolia, the Journalist of Xinhua Agency Wrote Five Times Internal References to Push the Retrial' *New Culture Newspaper* (3 November 2014) <[news.china.com/socialgd/10000169/20141103/18920183\\_all.html](http://news.china.com/socialgd/10000169/20141103/18920183_all.html)>accessed 18 December 2014.

November 2006 and lasted until November 2014.<sup>205</sup> Then in December 2014, the Inner Mongolia Higher People's Court pronounced Hujiltu innocent following a re-trial.<sup>206</sup>

The common characteristic of the two cases is that both the alleged criminals were executed, after which further evidence was uncovered proving that the crimes were committed by other perpetrators. However, for whatever reason, the review procedures of the two cases were slow to develop. The deep reason generating those significant miscarriages of justice will be analysed in the next section.

## 2.6 EXISTING CHALLENGES TO THE CHINESE LEGAL SYSTEM

The above mentioned three groups of wrongly decided cases expose challenges to the current Chinese legal system and highlight the fact that the use of the death penalty in China needs to be reformed. The victims in the first group were all police officers, Li was a relatively high ranking police officer, but even this could not save them from torture. Their cases were corrected mainly because of the emergence of evidence pointing to the real criminals. The victims in the second group were all common villagers, and they did not have enough money to hire a good lawyer. The approach they had chosen to follow by trying to petition senior officials had also been blocked. As a result of their petitions, their families and their other relatives had also paid a severe price in terms of their own incarceration and ill-treatment. Their cases were only corrected because the alleged dead victims were found alive.

The third group is the most tragic. They were executed and it was more than ten years, long after any petition on their behalf, before the truth of their cases was uncovered. Some of the investigators involved in their cases were promoted because of their convictions. Their cases were also only corrected because of the emergence of the real criminals.

While mainstream academia identifies gaps or ambiguities in the law as the major cause of police torture, others relate it to the organisational structure of the Chinese criminal justice system.<sup>207</sup> Some studies have concluded that traditional cultural Chinese values account for

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<sup>205</sup> For the information see 'The Case of the Innocent Executed Inner Mongolia Man Will Be Retried', *Legal Mirror* (30 October 2014) <[news.qq.com/a/20141030/036125.htm](http://news.qq.com/a/20141030/036125.htm)> accessed 18 December 2014.

<sup>206</sup> See 'After the 18<sup>th</sup> CPC National Congress, 23 Wrongly Decided Cases Were Corrected' *People's Daily* (17 December 2014) <[www.ha.xinhuanet.com/hnxw/2014-12/17/c\\_1113671638.htm](http://www.ha.xinhuanet.com/hnxw/2014-12/17/c_1113671638.htm)>, accessed 18 December 2014.

<sup>207</sup> See Guangzhong Chen and Zunzeng Yu, 'Reflections on Rigorously Preventing Miscarriages of Justice from Re-occurring' (2014) 1 *The Jurists* 56; see also Hongbo Zuo, 'Research on the Democracy in the Criminal

the tolerance and acceptance of police torture.<sup>208</sup> Objectively speaking, there are two main challenges in the existing socio-legal system and laws, which should be explored and debated. The reason to discuss these challenges is because the whole legal system cannot be overturned in a country as big as China overnight, and these are priorities to take into consideration first.

### 2.6.1 The First Challenge

On the basis of the requirements of international human rights law, such as the ICCPR, the first challenge is to restrict the use of the death penalty in China. The above case studies reveal that the risk of executing the innocent is real. The Marquis de Lafayette argues that: ‘till the infallibility of human judgments shall have been proved to me, I shall demand the abolition of the penalty of death’.<sup>209</sup> The mainstream viewpoint at present in China is that the complete abolition of the death penalty is not feasible in the light of the complicated socio-economic situation which has persisted during on-going reforms in almost all aspects of politics and the economy. This is further complicated by one of the largest populations in the world and the lack of concept of the rule of law, both among the masses and at the highest level of the government.<sup>210</sup> However, the ICCPR in itself does not prohibit the use of the death penalty in countries which have not abolished the death penalty.

Verses 1 and 2 of Article 6 of the ICCPR reads,

- ‘1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the

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Procedure’, (LLM Dissertation, Nanjing Normal University, 2014) 33-35; Xiaona Wei, ‘Reform of Criminal Procedure System Centered On Trial’ (2015) 4 Chinese Journal of Law 86.

<sup>208</sup> For a discussion see, J He *Back from the Dead: Wrongful Convictions and Criminal Justice in China* (University of Hawaii Press, 2016).

<sup>209</sup> C. Lucas, ‘Recueil des Débats Des Assemblées Législatives de la France sur la Question de la Peine de Mort’, pt. 2, at 42 (1831), cited in P. Mackey, ‘Voices Against Death: American Opposition to Capital Punishment 1787-1975’, at 98 (1976), Hugo Adam Bedau and Paul G. Cassell. *Debating the Death Penalty*, (Hugo Adam Bedau and Paul G. Cassell ed, Oxford University Press, 2004) 1.

<sup>210</sup> See Bing Liu, ‘The Study of Human Rights Protection During the Executions of Capital Punishment in Our Country’ (2009) 12 Hebei Law Science 121. See Zhigang Yu, ‘A Reflection upon the Statistics Conclusion of the Number of Countries that Abolish Death Penalty’ (2009) 1 Law Science 89-93; see also Zhao Liu, ‘Focusing on the Reality to Discuss the Necessity of the Retention of the Death Penalty in China’ (2012) 2 Journal of the Staff and Worker’s University 94; see also Zhiming Zhang and Xia Zhang ‘On the Necessity of the Retention of the Death Penalty in China’ (2013) 10 Chinese Times 8-12.

time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.’

It can be seen that Article 6 applies the wording ‘imposed only for the most serious crimes’. However, it does not clarify what ‘the most serious crimes’ are. Then later the Safeguards Guaranteeing Protection of the Rights of those Facing Execution of 1984 (ECOSOC Resolution 1984/50) prescribes that the scope of the death penalty ‘should not go beyond intentional crimes with lethal or other extremely grave consequences’.

In comparison, verse 1 of Article 48 of the Chinese Criminal Law also prescribes: ‘The death penalty shall only be applied to criminals who have committed extremely serious crimes. If the immediate execution of a criminal punishable by death is not deemed necessary, a two-year suspension of execution may be pronounced simultaneously with the imposition of the death sentence.’

It also does not define what the most serious crimes are. However, if we examine the Chinese Criminal Law, it can be found that there are 46 capital crimes, which range from rape, murder, robbery, arson and drug-related crimes to embezzlement and bribery. Clearly, this is not in compliance with international law (for details, see Chapter 5)

Therefore, the first challenge is that in all aspects of substantive law, the use of the death penalty should be strictly controlled and its scope and use should be reduced. This will be discussed further in Chapter 5, which explores how to possibly limit the use of the death penalty in the Chinese Criminal Law.

### **2.6.2 The Second Challenge**

The second challenge is to the Chinese Criminal Procedure Law. The above case studies reveal that torture was abused in the investigation period and was overlooked by the procurator and judges, who tolerated the use of evidence gained from torture, which should be prohibited in courts. This exposes the lack of modern legal spirit in the establishment and application of the Chinese Criminal Procedure Law.

The current Chinese Criminal Procedure Law illustrates precisely that one of its aims is to protect the innocent from being investigated.<sup>211</sup> Its Article 136 also prescribes that it shall be strictly forbidden to extort a confession by torture. However, this is just a black letter interpretation of the law, and Belkin not only questions whether those rules are likely to be effectively implemented but also argues that, unless other protections urged by many Chinese experts are adopted, ‘there will be no significant progress made in addressing the fundamental problem of how to change police behaviour and prevent coerced confessions’.<sup>212</sup>

The protections he and other scholars specifically mentioned include the adoption of fundamental legal principles, such as: the presumption of innocence; the right to silence and the privilege against self-incrimination; the requirement of new procedures that permit lawyers to be present at all investigative interrogations and the use of audiotape and videotape during all such interrogations; and the alteration of the ideology and values of law enforcement officials in order to give equal weight to fight crime and to protect human rights.<sup>213</sup> The value of those comments are illustrated by the cases that have been considered above. The failures in justice show that, without a feasible and reliable legal system, to protect people from torture is unrealistic, which also uncovers defects in the present legal system. This will be further analysed in Chapter 6.

## 2.7 THE GAPS

Just as French lawyer Floriot points out:

‘Do not think that you are a well behaved father, a good husband and a good citizen, you will never have dealings with the local court throughout your life. In fact, even the most honest and the most respected person could be the victim of the justice system’.<sup>214</sup>

He argues that as long as human justice remains fallible, the risk of executing the innocent can never be eliminated.<sup>215</sup> His views indicate the weakness of human beings in

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<sup>211</sup> Its Article 2 prescribes: ‘Article 2 The objectives of the Criminal Procedure Law of the People's Republic of China are to ensure the accurate and timely finding of criminal facts and correct application of law, punish criminals, ensure that innocent people are not incriminated’.

<sup>212</sup> Ira Belkin, ‘China's Tortuous Path toward Ending Torture in Criminal Investigations’ (2011) 24 (2) *Columbia Journal of Asian Law* 273.

<sup>213</sup> Jerome A. Cohen, ‘Reforming China's Criminal Procedure: An Introduction to this Symposium’ (2010) 24 *Colum. J. Asian L.* 213.

<sup>214</sup> René Floriot, *Une Erreur Judiciaire* (Shumei Zhao and Hongzhu Zhang tr, Law Press · China, 2013) 1.

<sup>215</sup> *Ibid* 1.



that one can misjudge under his own experience and knowledge. In order to avoid this kind of misjudgement, the design of the legal system is very important.

Miscarriages of justice can happen in every country whatever its socio-economic situation, political regime or legal system. Gross, Chen and Kennedy, via empirical research, point out that the rate of false convictions in the US increased year by year, from the average of 12 cases a year at the beginning of the 1990s to an average of 43 cases per year after the year 2000. They concluded that 97% of wrongful convictions in that country mainly occurred in the crimes of homicide and rape.<sup>216</sup> The instances of wrongful convictions that are corrected later in the US is similar to those in China, and homicide cases take up the largest proportion of these wrongly judged cases. According to the 23 wrongful cases that were corrected after the 18<sup>th</sup> CCP's National Congress, except 5 cases of rape-murder and 1 case of trading in guns, all others are cases of homicide, which in total is 17, making up 73.91%.<sup>217</sup> In the light of research by Bedau and Radelet, miscarriages of justice in the US are caused by a wide variety of factors. Some involve the decision by the police and prosecution to seek a conviction of the defendant despite the lack of firm belief that he is guilty. Some are the result of negligence on the part of the authorities. Others are the product of a well-intentioned error that anyone might make.<sup>218</sup> It shows that torture has not played a part in these wrongful convictions. On the contrary, the problems that exist in China (including in Taiwan<sup>219</sup>) are the most eye-catching examples not only because of the complicated social and legal system and circumstance, but also because almost every case has involved torture. Someone has argued that false convictions in China are certainly unexpected disasters for the innocent convicts and their families, but hopefully examining the errors that caused these disasters can push the criminal justice system towards civilised progress and productive development.<sup>220</sup>

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<sup>216</sup> Samuel Gross and others, 'Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death' (2014) 111(20) *Proceedings of the National Academy of Sciences* 7230-.

<sup>217</sup> Yunfang Li and others, 'Every single wrong must be corrected, 23 severely misjudged cases were righted after 18th National Congress of CPC' *The Paper* (Shanghai, 15 December 2014) <[www.thepaper.cn/newsDetail\\_forward\\_1282995](http://www.thepaper.cn/newsDetail_forward_1282995)> accessed 6 March 2017

<sup>218</sup> Hugo Adam Bedau and Michael L. Radelet, 'Miscarriages of Justice in Potentially Capital Cases' (1987) *Stanford Law Review* 21-179.

<sup>219</sup> Yu-Jie Chen, 'One Problem, Two Paths: A Taiwanese Perspective on the Exclusionary Rule in China' (2011) 43 (3) *New York University Journal of International Law and Politics* <<https://ssrn.com/abstract=2492618>> accessed 25 September 2014.

<sup>220</sup> See He Jiahong and He Ran, 'Empirical Studies of Wrongful Convictions in Mainland China' (2011) 80 *U. Cin L Rev.*1277; see also Lili Wang, 'The Matters Pushed the Progress of the Rule of Law in China' (*Xinhua News Agency*, 17 October 2014) <[http://news.xinhuanet.com/2014-10/17/c\\_1112863435.htm](http://news.xinhuanet.com/2014-10/17/c_1112863435.htm)> accessed 20 September 2015. When mentioning the cases analysed above even the state-run news agency uses the topics as 'The Events Pushing Progress of the

Compared with the international treaties that China has signed or ratified, the challenges are obvious. Article 7 of the ICCPR stipulates rules regarding the prohibition of cruel torture: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’.<sup>221</sup> Also, China has ratified the ‘Prohibition of Torture and Cruel, Inhuman, or Degrading Treatment or Punishment Treaty’ in 1988.<sup>222</sup>

Therefore, the gap between China’s existing social-legal system and international law is that facing a case involving the use of the death sentence, the right to not be tortured and the right to a fair trial has not been adequately protected. This leads directly to the right to life being jeopardised. Therefore, the effective prohibition of torture and the safeguarding of the right to fair trial are also two important measures to protect the right to life before the abolition of the death penalty.

Fortunately, because of these wrongful cases, the SPC has interpreted the Chinese criminal procedure law on the consideration of the exclusion of the use of torture.<sup>223</sup> However it just confines unlawfully obtained evidence to the evidence of words, which makes it insufficient to eliminate torture from the root completely.

Some scholars then queried this as the following. Ye Xiaoqin argues this new obligation cannot be successfully carried out without adding to the duties of the police, who handle most investigations and who will also have to undertake the extra work of gathering the evidence needed for meaningful sentencing recommendations.<sup>224</sup> She is very realistic about the obstacles to implementing national standardised sentencing reforms.<sup>225</sup> Margaret K. Lewis also calls for caution in predicting the future reforms in this area.<sup>226</sup>

The experience of avoiding torture in Taiwan can also be used as a reference by the mainland judicial system. Yu-Jie Chen points out that in addition to the Supreme Court’s

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Rule of Law in China’ or, ‘Single Case Accelerates the Rule of Law’, see Xin Xu, ‘Single Case Accelerates the Rule of Law’ (*Procuratorial Daily*, 22 February 2012)

<[http://newspaper.jcrb.com/html/2013-02/22/content\\_120348.htm](http://newspaper.jcrb.com/html/2013-02/22/content_120348.htm)> accessed 20 September 2015.

<sup>221</sup> See Appendix 8, the ICCPR in International Instruments

<sup>222</sup> See the ‘Third Report on the Situation of the PRC Implementing the CAT’ (*The Ministry of Foreign Affairs of the PRC*, 7 November 2000) <[www.fmprc.gov.cn/web/ziliao\\_674904/tytj\\_674911/tyfg\\_674913/t4832.shtml](http://www.fmprc.gov.cn/web/ziliao_674904/tytj_674911/tyfg_674913/t4832.shtml)> accessed on the 23 November 2014.

<sup>223</sup> ‘The Comprehension and Application of the Rules of Handling the Criminal Case How to Exclude Unlawfully-Obtained Evidence’ (SPC) <[www.court.gov.cn](http://www.court.gov.cn)> accessed 30 July 2014.

<sup>224</sup> Cohen, Jerome A. ‘Reforming China’s Criminal Procedure: An Introduction to this Symposium’ (2010) 24 *Colum. J. Asian L.* 213.

<sup>225</sup> *Ibid.*, p223

<sup>226</sup> Cohen, Jerome A. ‘Reforming China’s Criminal Procedure: An Introduction to this Symposium’ (2010) 24 *Colum. J. Asian L.* 213

(Taiwan) 1998 decision, which authorised a court to suppress illegally obtained physical evidence on the basis of justice and fairness, the Taiwanese legislature passed amendments in 2001 and 2002 that accorded the courts discretion to exclude physical evidence seized in a search that later proved to be unauthorised.<sup>227</sup> Taking a further step forward, the legislature adopted a catch-all clause in the Criminal Procedure Code in 2003 to allow the courts to exclude any illegally obtained evidence based on considerations of human rights protections and public interest.<sup>228</sup>

Throughout history, China has de-emphasised formal judicial procedures that are essential for ensuring compliance with the right to a fair trial. Some scholars argue that a full compliance with the right to a fair trial is a daunting task, and one that must consider the obstacles that China faces.<sup>229</sup> China culturally and historically emphasises the collective over the individual. This makes the right to a fair trial along with the right to life and other human rights, which are highly protective of the individual, unnatural and undesirable to Chinese leaders.<sup>230</sup>

But recently, many amendments have been made to the Chinese criminal procedure law, which apparently bring China closer to compliance with the right to a fair trial. Despite these changes, some scholars still argue that the enforcement of the amendments is questionable, because the right to a fair trial requires an independent and impartial judiciary, which China currently lacks.<sup>231</sup> They also argue that China's historical de-emphasis of the judiciary will make it very difficult to develop a legal infrastructure that corrects these deficiencies. Given the obstacles, China's compliance with the right to a fair trial seems an insurmountable task.<sup>232</sup> Nonetheless, here it could be argued that one should not declare it an impossibility.

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<sup>227</sup> The fourth plenary session of the 18th Communist Party Central Committee has given an optimal view of legal and political reforms through advocating the rule of law. For the content see <[http://www.china.org.cn/china/fourth\\_plenary\\_session/node\\_7214095.htm](http://www.china.org.cn/china/fourth_plenary_session/node_7214095.htm)> accessed 30 August 2014.

<sup>228</sup> Yu-Jie Chen, 'One Problem, Two Paths: A Taiwanese Perspective on the Exclusionary Rule in China' (2011) 43 (3) New York University Journal of International Law and Politics <<https://ssrn.com/abstract=2492618>> accessed 25 September 2014.

<sup>229</sup> See Huang, Daphne. "The Right to a Fair Trial in China." *Pac Rim. L. & Pol'y J.* 7 (1998): 171; see also Attila Badó, *Fair Trial and Judicial Independence* (Springer International Publishing, 2014) 27; see also S Young and P Cheng, 'Right to a Fair Trial and the Criminal Process' Law of the Hong Kong Constitution', In J Chan and C L Lim, (Eds.), *Law of the Hong Kong Constitution* (Hong Kong: Sweet & Maxwell Hong Kong, 2011) <<http://hdl.handle.net/10722/141443>> accessed 30 March 2017.

<sup>230</sup> Daphne Huang, 'The right to a fair trial in china' (1998) 7 *Pac. Rim. L. & Pol'y J.* 171; see also Jiang Ping, 'The construction of the rule of law needs the ruler's courage in reform and correct thought of the rule of law' (*Caixin*, 20 March 2012) <<http://china.caixin.com/2012-03-20/100370403.html>> accessed 15 April 2015.

<sup>231</sup> See Möller-Jönsson, Paulina. "The Right to a Fair Trial in China-Is the Bad Reputation Well-deserved?." (DPhil Thesis, University of Lund 2008); see also Whitfort, Amanda. "The Right to a Fair Trial in China: The Criminal Procedure Law of 1996." *Chinese Law & Policy Review* 2.2 (2007): 141-151.

<sup>232</sup> Daphne Huang, 'The Right to A Fair Trial in China' (1998) 7 *Pac. Rim. L. & Pol'y J.* 171.

It also does not mean the further reform of the judiciary and the legal system respecting the death penalty could not happen. Concerning the current situation in China, China's leaders claim that economic reform would be joined by political reform, and a judicial reform has been launched after 2014.<sup>233</sup> Therefore, further shifts towards compliance with international human rights law would neither be unfathomable nor unprecedented. Hence, although all the changes needed may not happen at once, there is a hope in the future. The following chapters will explore its feasibility in depth.

## 2.8 CONCLUSION

This chapter has reviewed the history of the imposition of the death penalty and its reform in China from ancient times to the late imperial period of the Qing dynasty and up to the most recent time of Xi's governance in the PRC.

This chapter revealed that governors in ancient China developed complicated legal systems to restrict the use of the death penalty, such as the pardon/amnesty system, the system of review of death sentences, the system of alternatives to the death penalty and so on. The ideology rooted in the Confucian thought was that *Ren* (benevolent) and *Li* (rites in daily life) were the core. It also discussed the issue of a short period of suspension of the execution during the Tang Dynasty, which could be seen as an example for present-day society.

It found that Shen Jiaben reformed the application of the death penalty in China fundamentally and laid down precedents for the later political regimes. It is also noted in this chapter that Shen's reform was accompanied by disputes between reformists/neo-liberal cosmopolitans who advocate the use of modern western legal spirit to amend the Chinese law, and conservatives who argue that China should consider its own situation and tradition against reform according to western law. This dispute can be seen throughout the whole process of modernisation in the Chinese legal history. Therefore, Shen's arguments of reform of the death penalty could be treated as references for today's reform. Should the Chinese people learn from western countries concerning the issue of the death penalty? If we should, then how can we learn? These two questions will be discussed in the later chapters.

This chapter later illustrated the history of the imposition of the death penalty in the post-Qing era. It found in the penal code, there was a trend that the use of the death penalty

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<sup>233</sup> 'The Central Committee of the CCP Launched the Decision on Some Important Issues of All-round Reform', *The Xinhua News Agency*, (12 November 2013) <[http://news.xinhuanet.com/politics/2013-11/15/c\\_118164235.htm](http://news.xinhuanet.com/politics/2013-11/15/c_118164235.htm)> accessed 28 February 2014.

seemed to be restricted in China. However, by the introduction of many special criminal regulations, the later governments indeed added more capital crimes and used more execution methods beyond the penal code.

This chapter also analysed legal thoughts in the PRC, from Mao and Deng to their successors Jiang, Hu and Xi. It found that Mao's thought of the use of the death penalty was that this penalty should be retained, but when used the principle of 'killing less and killing cautiously' should be adopted. However, Deng argued that the Chinese people should not be merciful to severe criminals. He launched the first 'strike hard' (*yanda*) campaign, which drew both praise and criticism. Then his successors all shifted to the principle of the rule of law, and set it as a basic rule in the Chinese constitution. It showed that there would be a hope that the imposition of the death penalty is on the way under the rule of law and towards greater respect for human rights.

This chapter also analysed six wrongly judged death penalty cases, because these are more important concerning the protection of human rights than normal cases. From these cases, two challenges regarding the current death penalty system in China were identified. They are related to the responsibility that the Chinese government has to protect human rights under international human right treaties it ratified.

# CHAPTER 3 CHINA'S BEHAVIOUR AND ACTS UNDER INTERNATIONAL LAW

## 3.1 INTRODUCTION

Chapter 2 provided a historical review of the application of the death penalty in China. With civilisation developing into a modern society, the movement for the abolition of the death penalty has developed substantially worldwide. The intrinsic nature of the abolition of the death penalty is in fitting with a focus on human rights. After the Second World War, in order to protect human rights, the Universal Declaration of Human Rights, the ICCPR and other global human rights treaties were formulated. China has also signed or ratified a number of international human rights treaties. However, since China is often considered by the international community to be an autocratic regime with a weak civil society,<sup>234</sup> the majority of scholars hold the opinion that ratification can be expected to have no effect on the improvement in the respect for human rights in those countries categorised as autocracy.<sup>235</sup> Is this in fact true? Will international human rights treaties improve the protection of human rights in relation to the use of the death penalty in China? How does China treat international treaties – on both the legislative and judicial level? These questions are directly relevant to the theme of this thesis. To answer the above questions, this chapter will examine in four stages to what extent international treaties are internalised in China.

The first section will discuss the main general issue of international norms within China's domestic law, i.e. how general international treaties are applied in China. In the second section, the analysis will narrow down to the application of international human rights treaties within China's domestic law. This section will analyse whether China has fulfilled its international human rights treaty obligations, especially concerning where the death penalty could be used. The third section will illustrate whether, under the situation of the absence of an international human rights treaty obligation, China would make efforts to try to combine international human rights norms into its domestic law. With respect to the death penalty-related treaties, here the ICCPR, which China signed but has not ratified, will be used as a case study. The fourth section will research the possibility of the implementation of human rights treaties by Chinese courts from an international perspective.

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<sup>234</sup> Peerenboom, Randall, *China's long march toward rule of law* (Cambridge University Press, 2002).

<sup>235</sup> Neumayer, Eric, 'Do international human rights treaties improve respect for human rights?' (2005) 49(6) *Journal of Conflict Resolution* 925.

This sequence has been chosen because there is a need to respect a logical progression from the most general principles such as monism and dualism, towards far more specific issues concerning international law provisions on the death penalty and right to life. In other words, this chapter will begin its analysis by clarifying general monism and dualism that are relevant to the relationship between China's domestic law and international law, before narrowing down its discussion to the specific topic addressed by this thesis, namely the legal status of china's existing death penalty provisions. While previous chapters have focused on historical and purely domestic law aspects, this chapter broadens out the focus to include the question of the actual and possible relevance of various international law and international human rights measures relating to the right to life.

### **3.2 GENERAL INTERNATIONAL LAW WITHIN CHINA'S DOMESTIC LEGAL SYSTEM**

From the founding of the PRC to the end of 2012, China has acceded to about 300 multilateral international treaties and 26,000 bilateral treaties.<sup>236</sup> For this reason, an important issue drawing the attention of practical legal circles and academia has been how international treaties should be applied in China's domestic law.

#### **3.2.1 Historical Review and Concepts of Monism and Dualism**

A simple historical review of the application of international law into China's legal domain shows that from the 1950s to early 1970s, international laws and the study of international laws in China had been broadly in line with the Soviet Union instead of with Western and universal legal principles. However, this particularistic position has now changed fundamentally after China adopted the economic reform and open door policy in late 1970s.<sup>237</sup> People have more recently witnessed the incorporation of human rights provisions into the Chinese Constitution in 2004, accession to the WTO, and the ratification of increasing numbers of international human rights treaties including ratifying the ICESCR in

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<sup>236</sup> Yong Wang, 'On the Perfection of the System of the Judicial Application of Treaties in China' (2014) 5 Nanjing Social Sciences 91.

<sup>237</sup> More generally, see Tieya Wang, *International Law* (Law Press · China 1995) 43. See also Keyuan Zou, 'International Law in the Chinese Domestic Context' (2009) 44 Val. UL Rev. 935.

2001. This represents a significant change of direction. Furthermore, China is now a member of the United Nations Security Council (UNSC), and this carries with it a commitment to the values of this organisations which is founded on “faith in fundamental human rights and in the dignity and worth of human persons”.<sup>238</sup>

When talking about the relationship between international law and domestic law, three concepts – monism, dualism and modified dualism – must be defined first. Monism treats international law as a part of domestic law, and there is no separation between the two. Dualism holds that international law and municipal law are two separate systems, and international law needs to be transformed into domestic law for the purposes of its implementation at the domestic level. Namely, in a dualist-oriented legal regime, a treaty has non-self-executing status—that is, it becomes judicially enforceable only after the legislature has enacted specific legislation implementing the treaty’s provisions into domestic law. At the same time, there is a third approach that tries to modify the dualism by denying that any common field of operation exists as between international law and municipal law by which one system is superior or inferior to the other.<sup>239</sup> It means that the application of international law is actual a mixture of dualism and monism, according to different types of international treaties. Professor Zou Keyuan argues that many Chinese scholars are likely to adopt this approach, concluding that although the two systems are different they are closely linked and supplement and penetrate each other, because both laws are made by the States, collectively or individually.<sup>240</sup>

Usually the application of international law is stipulated in the Constitution, but in China, the Constitution does not do so. The Constitution of the PRC just prescribes the State Council’s treaty-making power and the Standing Committee of the NPC’s right to decide on the ratification or abrogation of treaties and important agreements concluded with foreign states. The law of the *PRC on the Procedure of the Conclusion of Treaties* only sets out the procedure of how to conclude the international treaties instead of prescribing how the international laws are implemented in China. Since no laws prescribe the relationship between international law and domestic law in China, it is undefined whether international treaties are part of the Chinese legal system.

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<sup>238</sup> Charter of the United Nations, 1945 <[www.un.org/en/charter-united-nations/](http://www.un.org/en/charter-united-nations/)>.accessed 30 March 2016

<sup>239</sup> See Keyuan Zou, ‘International Law in the Chinese Domestic Context’ (2009) 44 Val. UL Rev. 935; see also O’Connell, Daniel P. ‘Relationship between International Law and Municipal Law’ (1959) 48 Geo. LJ, 431

<sup>240</sup> Ibid K Zou: 938.



Many Chinese scholars argue that, because of this lack of stipulation of the acceptance of the international law, the application of international law in China is chaotic.<sup>241</sup> Nonetheless, generally speaking, the majority of Chinese scholars recognise China as a dualist country.<sup>242</sup>

### 3.2.2 Current Situation of Application

Considering the actual practice, there are three different situations at present in China.

First, at the civil law level and some administrative regulations level relevant to international affairs, there are precise prescriptions of monist application of the international treaties that China ratified. Article 142 of the *Chinese General Principles of Civil Law*<sup>243</sup> and Article 189 of the 1982 *Chinese Law on Civil Procedure*<sup>244</sup> support the view that international law can be conditionally directly applied in the Chinese civil law aspect. Concerning the administrative legal domain, Wang Tiewa especially goes further to draw the conclusion that international treaties can be directly adopted into Chinese domestic law, in the light of the *Provisions on the Use of Red Cross Signs* issued jointly by the State Council and the Central Military Commission in 1996, Article 23 “[i]f there is anything concerning the protective use of Red Cross signs not covered in these Provisions, the relevant provisions of the Geneva Conventions and their Additional Protocols shall apply.”<sup>245</sup>

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<sup>241</sup> See Ying Long, ‘On the Issues of Internal Application of the International Treaties’ (LLM Dissertation of China University of Political Science and Law, 2011); see also Exiang Wan, *Research on the Relationship Between International Law And Domestic Law* (Peking University Press, 2011); and see Guolu Dong, ‘The Application of International Law in China’ 55(3) (2002), *Wuhan University Journal (Philosophy & Social Sciences)* 349; see also Shaoxue Jia, ‘Epoch Crisis in the Controversy between International Law and Municipal Law A Reflection on Approaches of Monism and Dualism’ 2 (2009) *Law and Social Development* 60.

<sup>242</sup> See Xian Zhang, ‘To Improve the Mechanism of Safeguard Of International Law Applying In China’ (2000) 15(4) *Legal Forum* 99; see also Lu Bai, ‘The Issue of the Application of International Law in China’ (2008) 28 *Law and Society* 363; and see Naigen Zhang, ‘Discussion On Some Issues On The Interpretation On International Treaties’, (2016) 5 *Chinese Review of International Law* 47.

<sup>243</sup> *Chinese General Principles of Civil Law*, Article 142:

‘If any international treaty concluded or acceded to by the PRC contains provisions differing from those in the civil laws of the PRC, the provisions of the international treaty shall apply, unless the provisions are ones on which the PRC has announced reservations. International practice may be applied to matters for which neither the law of the PRC China nor any international treaty concluded or acceded to by the PRC has any provisions’.

Here it should be noted that after 1 October 2017, the new ‘General Provisions of Civil Law’ has taken effect, it deleted the chapter of ‘Application of Law in Civil Relations with Foreigners’, therefore, this new law does not prescribe how to apply international law in civil law area. Nonetheless the old ‘Chinese General Principles of Civil Law’ will be still effective until a civil code of the PRC to be accomplished in the future.

<sup>244</sup> 1982 *Chinese Law on Civil Procedure*, Article 189: If an international treaty concluded or acceded to by the People's Republic of China contains provisions that differ from provisions of this Law, the provisions of the international treaty shall apply, except those on which China has made reservations.

<sup>245</sup> Tiewa Wang, *Introduction to International Law* (The Peking University Publishing House 1998) 208

Second, at the criminal law level, which has a close link with human rights law, there is no evidence showing that international treaties can be directly applicable in the Chinese criminal law and the criminal procedure law. The present legal practice showed that on this issue, China took a dualist method. For instance, China signed the CAT in 1986 and ratified it in 1988, but it is not applied in China directly. It is transformed into the Chinese criminal procedure law. Its Article 43 prescribed that to extort confessions by torture and to collect evidence by threat, enticement, deceit or other unlawful means shall be strictly forbidden.<sup>246</sup>

Third, in other legal domains involved in China's territory or those concerning the involvement of international public law, most Chinese scholars agree that China adopts a dualist method to implement some of international treaties by means of enacting new domestic laws or amending relevant domestic laws to comply with the treaties that China has joined or is expected to join. In the case of any inconsistency, relevant domestic laws will be amended or even annulled.<sup>247</sup> For example, after China has ratified the *United Nations Convention on the Law of the Sea* (UNCLOS), China promulgated two laws—the *Law on the Economic Zone and the Contiguous Zone* and the *Law on the Exclusive Economic Zone and the Continental Shelf* in 1992 and 1998 respectively. By this approach, China achieved its transformation from international law to domestic law. The same applies to the WTO treaties. In order to join the World Trade Organisation, many administrative regulations and measures, either by the Chinese State Council or various ministries, were annulled before the end of 2000.<sup>248</sup>

From the above, with reference to general application of the international treaties in China, some conclusions can be drawn. First, China's legal system is not strict dualism, some treaties enjoy self-executing status while others are treated as non-self-executing. In the civil law level, the international treaties on private law and trade law are obviously superior to Chinese laws except China's Constitution and they could be applied directly according to regulations of civil laws and its interpretation by the SPC. Second, at the criminal law level, international treaties cannot be applied directly, they must be transformed first, only after that

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<sup>246</sup> Article 43; 'Judges, procurators and investigators must, in accordance with the legally prescribed process, collect various kinds of evidence that can prove the criminal suspect's or defendant's guilt or innocence and the gravity of his crime. It shall be strictly forbidden to extort confessions by torture and to collect evidence by threat, enticement, deceit or other unlawful means'.

<sup>247</sup> Zou, (n 4), and Long(n 6)

<sup>248</sup> See State Council, 'Decision on Annuling Partial Administrative Regulations and Measures Promulgated before the End of 2000'(State Council) <<http://www.npcnews.com.cn/gb/paper228/1/index.htm>> accessed 23 November 2016.

they could be combined into Chinese domestic law. Third, at other international public law levels (e.g. WTO treaties and the UNCLOS) in its domestic application, China adopts the approach of conversion, it has promulgated domestic laws and regulations etc. to implement them.

The above discussed the general issue of the application of international law in China. Next, I will narrow down the discussion to how international human rights treaties are applied in China.

### **3.3 THE MAIN GENERAL ISSUES OF HUMAN RIGHTS LAW**

#### **3.3.1 Arguments and Counterarguments of the Application of Human Rights Law in China**

This section will illustrate the main general issues regarding the status of international human rights law within China's domestic law, including its ratification of the *Convention on the Prevention and Punishment of the Crime of Genocide* (CPPCG) 1948, which could be relevant to the status of china's death penalty. It will explore, in respect of two particular international treaties – the ICESCR and the CPPCG – according to China's standpoints with its current domestic legislation and practice in terms of conformity, China's engagement with the international human rights machinery. How far they may have had an impact on the Chinese domestic law will also be analysed.

It could be argued that, concerning human rights law, there is no stipulation whether international treaties are superior to domestic law or they could be applied directly. Generally said, on the one hand, if China adopts monism on international human rights treaties, there is no prescription on its direct application; on the other hand, if China adopts transformation of human rights law, there is also no general law, such as a *Human Rights Act*, to protect human rights. Nonetheless, it has recently been argued that China has taken on a responsibility to abide by the letter and spirit of contemporary human rights norms.<sup>249</sup> The Chinese government in its 2012 report of the progress of human rights in China also proclaimed that by the end of 2012, China has paid great attention to proceeding from the requirement of protecting human rights to amend relevant laws and regulations.<sup>250</sup>

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<sup>249</sup> Wang Jianguy, 'China and The Universal Human Rights Standards' (2001) 29 *Syracuse J. Int'l L. & Com.* 135.

<sup>250</sup> 'Progress in China's Human Rights in 2012', *Xinhua Net*, (9 November 2013)

Katie Lee claims that a short review of China's record of signature and ratification of international human rights treaties shows that China, though it holds a strong stance on the principle of non-interference in the internal affairs of a sovereign state, has permitted this principle to be altered to change its international profile. This is so that it can be seen as a 'cooperative member of the international community'.<sup>251</sup>

If this is correct, then a question arises: whether international law norms relating to the right to life and the death penalty need to be considered as potentially relevant to China's legal system. In principle, whether a provision of an international treaty is incorporated into the domestic law of China depends on whether China has made express reservations and its consistency with the Chinese Constitution. However, some argue that the general practice of how China incorporates an international treaty into its domestic law suggests that the status of international treaties in China's domestic legal system is unclear.<sup>252</sup>

This has created scholarly debate in China and overseas. Some scholars claim that a treaty is in fact a superior measure to domestic law in application whilst still remaining inferior to the constitution.<sup>253</sup> However, other scholars disagree with this view by arguing that the alternative is the recognition of international law as equal to domestic law.<sup>254</sup>

Chen Lulu argues that China takes two main approaches to international human rights treaties. One is to recognise the priority of the human rights treaties, to give them a direct application. She takes the 1986 General Principles of Civil Law and the 1982 Chinese Law on Civil Procedure as examples to illustrate that, according to these stipulations, some international treaties that China has signed and ratified, such as the ICESCR, the CAT, the CEDAW, the ICERD and the CRC, have the legal status superior to domestic law and can be

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<[http://en.theorychina.org/chinatoday\\_2483/whitebooks/201309/t20130911\\_292640.shtml](http://en.theorychina.org/chinatoday_2483/whitebooks/201309/t20130911_292640.shtml)> accessed on 30 September 2014.

<sup>251</sup> Katie Lee, 'China and the International Covenant on Civil and Political Rights: Prospects and Challenges' (2007) 6(2) *Chinese J. Int'l L.* 445.

<sup>252</sup> Tang Yingxia and others, 'Relationship Between International Law and Domestic Law and Applicability of International Treaty in China's Domestic Law' (2003) *Social Science Front* 176.

<sup>253</sup> See Ye Li, 'Study on Applicability of International Treaty in China' (2012) *Journal of Taishan University* 021.

see also Zou, states that: 'In Chinese practice, a treaty is superior to municipal law in application, though the Chinese Constitution has no express provision on the relative status of treaties and laws', 2009, p936.

<sup>254</sup> See A Mestral and E Fox-Decent, 'Rethinking the Relationship Between International and Domestic Law' (2008) 53 *McGill Law Journal* 573; see also Jihong Mo, 'The International Human Rights Conventions and China' (World Knowledge Press, 2005); Jun Tian, 'The Two Human Rights Conventions And China's Improvement Of The Constitutional Protection Of Human Rights' 2 (2001) *Journal of China National School of Administration* 46; see also Congyan Cai, 'The Role Of Chinese International Law Scholars Played In The International Law Practice' 2 (2016) *China Law Review* 12.

applied directly. The other approach is that international human rights treaties are transformed into China's domestic law.<sup>255</sup>

However, there are two main problems in her analysis.

First, the 1982 Chinese Law on Civil Procedure and the 1986 General Principles of Civil Law are just involved in the civil law domain, so all of its provisions are valid only in the relationship between civil subjects. For this reason, it may not lead to the direct application of international human rights treaties and assumption of their superior power over domestic law.<sup>256</sup>

Second, as mentioned above, when checking the Chinese Constitutional law and the legislation Law and other laws having legislation property, there is no stipulation on the application of the international human rights norms, so this may also not lead to the conclusion that international human rights law can be transformed to apply in China's domestic law.

### **3.3.2 All Human Rights Treaties Signed By China and the Relation with the Death Penalty**

To answer this question, table 3.1 was made to examine whether all 27 international human rights treaties China signed, amongst which only the ICCPR is not ratified, have domestic effectiveness in China.

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<sup>255</sup> Lulu Chen, 'On China's Obligations of the Protection of Human Rights' (LLM Dissertation, Hubei University, 2011).

<sup>256</sup> Such as Zou points out that this may not lead to the conclusion that China recognises the prevailing force of international law over its domestic law because treaties are only part of the body of international law. According to one observation, 'treaties acquire prevailing force over domestic law only when the relevant domestic law includes an explicit stipulation to that effect. In other words, conflict rules operate only to the extent of the specific laws concerned. (n.19, 36.)

International treaties	China's participation	Relevant domestic law	Relationship with death penalty
1 The UN Charter	Signature: 26/06/1945 Ratification: 28/09/1945		
2 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)	Accession: 29/12/1981 Effective: 28/01/1982	(a) Article 4 of the Constitution of the PRC (1982, 2004 amended) stipulates that all nationalities in China are equal. (b) The Regional Autonomy Act of the People's Republic of China (1984, 2001 amended)	
3 International Convention on Civil and Political Rights (ICCPR)	Signature: 05/10/ 1998	the Constitution of the PRC (1982, 2004 amended)	This convention prescribes the principle of the imposition of the death penalty
4 International Convention on Economic, Social and Cultural Rights (ICESCR)	Signature: 27/10/1997 Ratification: 21/03/2001	(a) the Constitution of the PRC (1984, 2004 amended) (b)The Labour Law of the PRC (1994, 2009 amended) (c) The Educational Law of the PRC (1995) (d) The Compulsory Educational Law of the PRC (1986, 2015 amended) (e) Law of the PRC on Maternal and Infant Health Care (1994)	

			(f) Law of the PRC on the Prevention and Treatment of Infectious Diseases (1989, 2013 amended)	
5	Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	Signature: 17/07/1980  Ratification: 04/11/1980	(a) The Constitution of the PRC (1982, 2004 amended)  (b) Law on the Protection of the Rights and Interests of Women (1992, 2005 amended)  (c) The Labour Law of the PRC (1994, 2009 amended)  (d) Employment Promotion Law (2008)	
6	Convention Against Torture and Other Cruel, Inhuman and Degrading Inhuman Treatment of Punishment (CAT)	Signature: 12/12/1986  Ratification: 04/10/1988  Effective: 03/11/1988	(a) The Constitution of the PRC (1984, 2004 amended)  (b) The Chinese criminal law (1997, 2015 amended)  (c) The Chinese criminal procedure law (1996, 2012 amended)  (d) People's Police Law of the PRC (1995, 2012 amended)  (e) Public Procurators Law of the PRC (1995, 2001 amended)  (f) Judges Law of the PRC (1995, 2001 amended)	(a) The method of the execution of the death penalty was amended after 1997 from by shooting to use both shooting and lethal injection  (b) The prohibition of torture in stipulated in the listed laws  (c) Article 48 of the Chinese criminal law: The death penalty shall only be applied to criminals who have committed extremely serious crimes. If the immediate execution of a criminal punishable by death is not deemed necessary, a two-year suspension of execution may be pronounced simultaneously with the imposition of the death sentence.

7	Convention on the Rights of the Child (CRC)	Signature: 29/08/1990  Ratification: 31/01/1992  Effective: 02/04/1992	(a) The Constitution of the PRC (1982, 2004 amended)  (b) The Chinese criminal law (1997, 2015 amended) (c) The Chinese civil laws (1987&2017) (d) Law of the PRC on the Protection of Minors (1991, 2012 amended) (e) Law of the PRC on the Prevention of Juvenile Delinquency (1999, 2012 amended) (f) The Marriage law (1980, 2001 amended) (g) The Compulsory Educational Law of the PRC (1986, 2015 amended) (h) Law of the PRC on Maternal and Infant Health Care (1994)	Article 49 of the Chinese criminal law: ‘The death penalty shall not be imposed on persons who have not reached the age of 18 at the time the crime is committed or on women who are pregnant at the time of trial’.
8	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OP-CRC-AC)	Signature: 15/03/2001  Ratification: 29/12/2007		
9	Optional Protocol to the Convention on the Sale of Children, Child Prostitution and Child Pornography (OP-CRC-SC)	Signature: 06/09/2000  Ratification: 03/12/2002  Effective: 03/01/2003	(a) The Chinese criminal law (1997, 2015 amended) (b) Law of the PRC on the Protection of Minors (1991, 2012 amended)	The highest punishment for the crime of trafficking women and children could be the death penalty



10	Convention Relating to the Status of Refugees	Accession: 24/09/1982  Effective: 23/12/1982	
11	Protocol Relating to the Status of Refugees	Accession: 24/09/1982  Effective: 24/12/1982	
12	Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG)	Ratification: 18/04/1983  Effective: 17/07/1983	
13	Convention on Equal Remuneration for Men and Women Workers of Equal Value	Ratification: 07/09/1990  Effective: 02/11/1990	(a) The Constitution of the PRC (1982, 2004 amended)  (b) Law of the PRC on the Protection of Rights and Interests of Women (1992, 2005 amended)  (c) Labour law of the PRC (1994, 2009 amended)  (d) Employment Promotion Law (2008)
14	Employment Policy Convention (No. 122)	Ratification: 17/12/1997  Effective: 17/12/1998	(a) The Constitution of the PRC (2004)  (b) Labour law of the PRC (1994, 2009 amended)  (c) Labour Contract Law of the PRC (2007)  (d) Employment Promotion Law (2008)
15	Minimum Age Convention (No.138)	Ratification: 28/04/1999	(a) Labour law of the PRC (1994, 2009 amended)  (b) Law of the PRC on the Protection of Minors (1991, 2012 amended)

16	Prohibition and Immediate Action for the Elimination of Worst Forms of Child Labour Protection Convention (No. 182)	Ratification: 08/08/2002 Effective: 08/08/2003	(a) Labour law of the PRC (1994, 2009 amended) (b) Law of the PRC on the Protection of Minors (1991, 2012 amended)	
17	Geneva Convention Relative to the Treatment of Prisoners of War	Recognition: 13/07/1952 Effective: 28/12/1956		
18	Geneva Convention Relative to the Protection of Civilian Persons in Times of War	Recognition: 13/07/1952 Effective: 28/12/1956	The Chinese criminal law (1997, 2015 amended)	Article 446 stipulates the crime of cruelly injuring innocent residents or plundering their money or property during wartime is a capital crime.
19	Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1)	Accession: 14/09/1983 Effective: 14/03/1984		
20	Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol 2)	Accession: 14/09/1983 Effective: 14/03/1984		

21	International Convention for Safety of Life at Sea (SOLAS)	Signature: 20/06/1975 Effective: 25/05/1980	The Maritime Law of the PRC (1992)	
22	Protocol of 1988 Relating to the International Convention for The Safety of Life at Sea, 1974	Accession: 17/12/1982 Effective: 17/03/1983	The Maritime Law of the PRC (1992)	
23	Protection against Accidents (Dockers) Convention (Revised), 1932	Signature: 30/11/1935 Recognition: 11/06/1984		
24	Convention (No.159) concerning Vocational Rehabilitation and Employment (Disabled Persons)	Ratification: 05/09/1987	(a) Law on the Protection of The Rights and Interests of Persons with Disabilities of the PRC (1991, 2015 amended) (b) Law of the PRC on the Prevention and Control of Occupational Diseases (2001, 2011 Amendment) (c) Employment Promotion Law (2008)	
25	The Tripartite Consultation (International Labour Standards) Convention, 1976	Ratification: 07/09/1990	The Trade Union Law of the RRC (1992, 2001 amended)	
26	UN Convention on the Rights of Persons with Disabilities (CRPD)	Signature: 30/03/2007 Effective: 31/08/2008	(a) Law on the Protection of The Rights and Interests of Persons with Disabilities of the PRC (1991, 2015 amended) (b) Employment Promotion Law (2008)	Article 19 of the Chinese criminal law: Any deaf-mute or blind person who commits a crime may be given a lighter

<p>27 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime</p>	<p>Ratification: 26/12/2009</p>	<p>or mitigated punishment or be exempted from punishment. The highest punishment for the crime of trafficking women and children could be the death penalty</p>
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Figure 1 Table 3.1 Chins signed human rights treaties

Source: from China Society for Human Rights Studies <[www.humanrights.cn/html/2014/5\\_1125/3109.html](http://www.humanrights.cn/html/2014/5_1125/3109.html)> accessed 23 March 2016; and <[www.humanrights.cn/html/2014/5\\_0612/470.html](http://www.humanrights.cn/html/2014/5_0612/470.html)> accessed 23 March 2016

From this table, it is clear that, concerning those international treaties which focus more on the protection of human rights of the nation's own citizens, the Chinese government has made many domestic laws to fulfil its obligation from legal aspects. For example, for the protection of human rights of disadvantaged groups of people: women, children, persons with disability, China promulgated a series of domestic laws, some of them even enacted before the signature of relevant international treaties. Then after the ratification, the Chinese government amended some of them partly out of the requirement of these international treaties and partly because of its domestic needs.

Some other treaties (for example, the CAT) have been adopted into the criminal law and criminal procedure law through the conversion approach. For other treaties, such as the ICESCR's, application in China is not precisely prescribed but the protection of the involved rights could be seen from the Chinese Constitution and other laws, though the prescriptions are sporadically in different laws. Guolu Dong and some other Chinese scholars, therefore, argue that their implementation is still unclear.<sup>257</sup> Nonetheless, from the above legal activities, it can be seen that the ICESCR does have an impact on the Chinese domestic law and China engages in the international human rights machinery by transformation, namely it incorporates ICESCR into its domestic law. Jian He argues that to implement the ICESCR, China amended its Constitution which prescribed that 'the State respects and preserves human rights'.<sup>258</sup>

For the treaties of the protection of the life of the sea, Muzhu Shen argues that the Maritime Law of the PRC adopted some principles of the above mentioned treaties, however, it is not entirely compliant with those treaties.<sup>259</sup>

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<sup>257</sup> See Guolu Dong, 'The Application of the International Law in China' 55.3 (2002) Wuhan University Journal(Philosophy & Social Sciences 349; see also Hanfeng Chen , Weiguo Zhou and Hao Jiang, 'Relationship between International Treaties and National Law : Its Practice in China' 2 (2000) Tribune of Political Science and Law 117.

<sup>258</sup> Jiang He, 'Research on the Mechanism of the Implementation of ICESCR' (2007) 3 Journal of Henan Administrative Institute of Politics and Law 22.

<sup>259</sup> Shen Muzhu, 'The Development and Influence of the International Convention for the Safety of Life at Sea' (2004) 26 (5) Modern Law Science 182.

With respect to those conventions/protocols on the protection of refugees or children or people influenced by armed conflicts or war, there are no corresponding domestic laws reflecting them. Although China did accept refugees from other countries and treated them according to the requirement of those treaties, the UNHCR Beijing Office actually conducted refugee registration and refugee status determination in China.<sup>260</sup> There was no sign showing that China adopted monism or dualism to the refugee-related international conventions.<sup>261</sup>

Concerning the application of the CPPCG, China ratified it in 1983, but reserved Article 9.<sup>262</sup> On this treaty, Bingzhi Zhao and Fang Huang argue that China should incorporate the crime of genocide into the Chinese criminal law as a serious crime.<sup>263</sup> The others suggest that China could adopt universal jurisdiction to realise this norm.<sup>264</sup> Later Bingzhi Zhao combined the two analyses, advocating that China should put the crime of genocide into the Chinese criminal law as well as adopting the legal principle of universal jurisdiction.<sup>265</sup>

However, the CPPCG is different from other international human rights treaties, according to Vienna Convention on the Law of Treaties, it is a *jus cogens* norm, a peremptory rule of international law that prevails over any conflicting rule or

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<sup>260</sup>See 'Refugee Law and Policy: China'(Library of Congress) <<https://www.loc.gov/law/help/refugee-law/china.php>> accessed 30 July 2016; see also Haina Lu, 'From the International law perspective to See the China's Authority of the Protection of Refugees' (2015) 4 Journal of Jiangsu Administration Institute 020.

<sup>261</sup> Feifei Zhang, Research on Legal Issues on the Entry of Refugees (DPhil Thesis, Liaoning University, 2016).

<sup>262</sup> Article 9 prescribes: 'Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.'

<sup>263</sup> Zhao Bingzhi, Huang Fang, 'On International Norms in Chinese Penal Code' (2003) 9 The Science of Law 48.

<sup>264</sup> Xia Zhaohui, Tian Tian, 'Discussion on the Universal Jurisdiction in Chines Criminal Law' (1998) 4 Journal of National Prosecutors College 9.

<sup>265</sup> Zhao Bingzhi, Huang Fang, 'On International Norms in Chinese Penal Code' (2003) 9 The Science of Law 48.

agreement.<sup>266</sup> These kinds of norms permit no derogation. Since China has signed and ratified the Vienna Convention on the Law of Treaties, in light of China's responsibility for the CPPCG, abiding by and implementation of it may at least include two aspects of obligations, one is that there should be legal security to ensure that genocide will not happen in China. This may be achieved by either adopting the monism method (i.e. the CPPCG can be used directly and can have superior power to domestic law) or adopting the dualism method, namely, the CPPCG can be transformed into Chinese domestic law. Both of the methods need explicit prescription of Chinese domestic laws which are missing in the current legal system. The other is that as a member of the international community, China should establish universal jurisdiction of the crime of genocide to fulfil its obligation to international society. Since the lack of statutes of the universal jurisdiction of this crime, China has been criticised by other members of the international community.<sup>267</sup>

Article 9 of the Chinese Criminal Law stipulates that:

'This Law shall be applicable to crimes which are stipulated in international treaties concluded or acceded to by the People's Republic of China and over which the People's Republic of China exercises criminal jurisdiction within the scope of obligations, prescribed in these treaties, it agrees to perform.'

However, this is not a statute to prescribe the application of international law in China. It is a prescription of the universal criminal jurisdiction. Chinese scholars generally view the universal criminal jurisdiction as fulfilling the following three premises: firstly, the international treaty that China has concluded or acceded must prescribe this crime; secondly, according to the treaty, China has the responsibility to fulfil the universal jurisdiction; thirdly, the Chinese domestic law must stipulate the action as a domestic crime.<sup>268</sup>

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<sup>266</sup> E P Deutsh, 'Vienna Convention on the Law of Treaties' (1971) 47 *Notre Dame Law* 297.

<sup>267</sup> See Goldstone, Richard J. 'Introduction' (2008) 31(4) *Fordham International Law Journal* 811.

<sup>268</sup> Chi Manjiao, 'A Note on China's Legal and Operational Responses to International Piracy', (2013) 44(1) *Ocean Development & International Law* 118; Zhu Lijiang, 'The Chinese Universal Jurisdiction Clause: How Far Can It Go?', (2005) 51 (1) *Netherlands International Law Review*, 106; Xie, Wangyuan,

If we check Article VI of the CPPCG, it stipulates that:

‘Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.’

When it ratified this treaty, China held that ‘the People's Republic of China does not consider itself bound by article IX of the said Convention’.<sup>269</sup> Accordingly, China will not be subjected to the International Court of Justice at the request of any of the parties to the dispute. Therefore, the issue is that on the one hand, Chinese law does not stipulate that genocide is a crime so the universal jurisdiction does not apply, thus China has no international treaty-based responsibility; on the other hand, since China has preserved the provision of being bound by the ICJ’s judgement, it is also not restrained by the CPPCG. There appears to be a legal vacuum concerning the fulfilment of this treaty.

To sum up: generally speaking, the application of human rights treaties in China is not prescribed in any Chinese law. In one respect, for some international norms this nation regularly implements it through domestic legislation and thereby alters its legal system accordingly. In the other respect, the Chinese approach in practice is not as a purely monist system but rather as a modified form of dualism: one which acknowledges the

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‘The criminal jurisdiction outside the country and its realization’, (2000) 1 Legal Forum, 65; Gao, Mingxuan and Wang, Xiumei ‘The Characteristics and Localization of General Jurisdiction’, (2001) 6 Law and Social Development, 17; Wang Yong and Li Jia, ‘On the international criminal jurisdiction’, (2003)5 Chinese Criminology Review, 43; Cheng Liangwen, ‘Demarcation of the Criminal Jurisdiction of the Interregional Judicial Assistance in Criminal Cases in China’, (2002)4 Modern Law Science, 44; Xu Weian, ‘Jurisdiction of International Protection-the New Interpretation in Article 9 in the Criminal Law of PRC’, (2016)6, Present Day Law Science, 50; Lin Zhen, ‘International Anti-piracy Action and the Analysis of the Relavant Chinese Law’, (2016)1 China Ocean’s Law Review, 90.

<sup>269</sup> Article IX of CPPCG prescribes: ‘Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.’ [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-1&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en), <accessed on 10/07/2017>.



separate existence of the two types of law without recognising a hierarchical relationship between them.

### **3.4 THE ICCPR AND CHINA'S DOMESTIC LAW**

The above sections discussed how the ratified international treaties in general and ratified international human rights treaties in special applied in China. This section will ask whether, if China has signed a human rights treaty containing an international legal measure, it would be possible for such treaty to be applied domestically prior to China's ratification by introducing new domestic legislation to put this measure into China's legal order? Here, the ICCPR is adopted as a yardstick to examine this proposition.

#### **3.4.1 Two Chinese Versions of the ICCPR**

In order to discuss the domestic application of the ICCPR, one issue has to be clarified first: which Chinese transcript of the ICCPR is to be used in this thesis? Chinese scholars and overseas scholars are aware that there are two Chinese language versions of the ICCPR.<sup>270</sup>

As researched in Chapter 1, Sun Shiyuan points out that the ICCPR was drafted in the five official languages of the UN. Since Chinese is one of the official languages, the Chinese version is deemed an authentic text. All the texts of the ICCPR are published and held in the United Nations Treaty Series. However, it was later discovered that the present widely used version is not the same as the one published by the UN as the certified true copy. Sun names the authentic version 'the former Chinese text' and the new one 'the

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<sup>270</sup> See Sun, Shiyuan, 'The International Covenant on Civil and Political Rights: One Covenant, Two Chinese Texts?', (2006) 75, *Nordic Journal of International Law*, 187-209; see also James D. Seymour and Patrick Yuk-tung Wong, 'China and the International Human Rights Covenants', (2015) 47(4) *Critical Asian Studies*, 514-536; see also Sun, Shiyuan 'The Re-discussion with James D. Seymour and Patrick Yuk-tung Wong Concerning the Chinese Versions of the ICCPR', 3.4(2016) *Taiwan Human Rights Journal*, 9-30, see also Sun, Shiyuan, 'The Two Chinese Texts of International Covenant on Civil and Political Rights: Problems, Comparisons and Solutions', 4(2008) *Global Law Review*, 75-89.

latter Chinese text'.<sup>271</sup> The 'the latter Chinese text' uses more modern Chinese language than 'the former Chinese text', and, more importantly, there are also some different expressions and words leading to discrepancies in the meaning. Sun believes that the authentic version is more precise on the issues of different rights.<sup>272</sup> He further argues that because there needs to be a legal process if the text of the covenant is to be amended, and the new version has not undergone such a process, this is not a legal version.

James D. Seymour and Patrick Yuk-tung Wong argue that by manipulating the new Chinese version into the UN, the Chinese government has shown that it does not respect human rights and it does not behave as a responsible country.<sup>273</sup> Sun refutes this claim by arguing that the period in which the new version appeared in the UN's official documents was during China's Cultural Revolution Period. At this time, all Chinese experts in international law were exiled to do labour work in villages. The then Chinese government thus lacked intellectuals to work on it. There is also no evidence to show that the new version was generated and submitted to the UN by the Chinese government as a substitute for the authentic one. Therefore, it is unlikely that the Chinese government intentionally amended the words in the new version. One hypothesis is that negligent UN staff provided this new version for the Chinese government to use since it adopted modern Chinese language.<sup>274</sup>

By comparing the two different versions, the discrepancies between them become clear. This thesis will not repeat the research of the above articles, however. According to international law, the authentic version has been deemed the certified true copy by the UN and the new modern Chinese language version has not passed the process that would render it legal. Therefore, in this thesis, the authentic Chinese version will be adopted.

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<sup>271</sup> Sun, Shiyan, 'The International Covenant on Civil and Political Rights: One Covenant, Two Chinese Texts?', (2006) 75. *Nordic Journal of International Law*, 189.

<sup>272</sup> *Ibid*,

<sup>273</sup> James D. Seymour and Patrick Yuk-tung Wong, 'China and the International Human Rights Covenants', (2015)47(4) *Critical Asian Studies*, 514-536.

<sup>274</sup> Sun, Shiyan 'The Re-discussion with James D. Seymour and Patrick Yuk-tung Wong Concerning the Chinese Versions of the ICCPR', 3.4(2016) *Taiwan Human Rights Journal*, 9-30.

### 3.4.2 How Would China Be Bound by the ICCPR

According to table 3.1, it is clear that amongst all 27 signed human rights treaties, only the ICCPR is still not ratified. Also, the ICCPR is a foundational human rights text for the international community. In this perception, the nation's ratification of the treaty is an acknowledgment of membership in the broader international human rights community.

Rhona Smith points out that there were several calls for China to ratify the ICCPR. She suggests that China could accede to the ICCPR without signing the optional protocol on abolishing the death penalty.<sup>275</sup> Professor Zou also notes: 'even at present, China, though not obliged by the ICCPR, should comply with it *bona fide* since China has already signed it'.<sup>276</sup>

Chinese academics note that the existing Chinese law is inconsistent with certain elements of ICCPR in areas such as the legal principle of presumption of innocence until proven guilty, the scope of capital punishment, the re-education through the labour system<sup>277</sup>, the right to be silent and the right not to be tortured, and the institutional safeguard of judicial independence. Also, the relevant civil and political rights in the Chinese Constitution law need to be reflected in special laws.<sup>278</sup>

There are two questions relevant to the ICCPR. First, would China take obligations after it has signed a treaty but before it has been ratified? Second, if it did so, then would a ratified treaty's authority be stronger than that of an unratified treaty? The ICCPR and the Chinese Constitution law, the criminal law and the criminal procedure law will be used to see whether China is willing to apply the ICCPR in advance before its ratification. As mentioned in section 2, before China acceded the WTO rules, it amended all the

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<sup>275</sup> Rhona K M. Smith. 'More of the same or something different? Preliminary observations on the contribution of universal periodic review with reference to the Chinese experience' (2011) 10 (3) Chinese Journal of International Law 565.

<sup>276</sup> Keyuan Zou, 'International Law in the Chinese Domestic Context' (2010)44 (3) Valparaiso University Law Review 935.

<sup>277</sup> This system has been eventually abolished in 2013.

<sup>278</sup> Ming Wan, 'Human Rights Lawmaking in China: Domestic Politics, International Law, and International Politics' (2007) 29 (3) Human Rights Quarterly 727.

relevant laws and administrative regulations to fulfil the requirement of those international rules. Then, has China amended its law to pave the road for the ratification of the ICCPR?

First, at the constitutional law level, before China signed this treaty in May 1998, there was no prescription of the protection of human rights and governance the country under the principle of the rule of law in the Chinese Constitutional law. In 1999, the rule of law was enshrined into the Constitution.<sup>279</sup> Then in 2004, the protection of human rights for the first time in the Chinese history was written into the Constitution.<sup>280</sup> Although the right to life in the ICCPR is deemed as ‘inherent’, the Chinese Constitution law does not define whether this right is included as a part of human rights. Some might argue that these activities were not or not only for the compliance with the ICCPR, it could also be the need of the governance by the changed situation triggered by remarkable economic improvement and globalisation. Even if this is true, to respect and preserve human rights under the principle of the rule of law objectively facilitates the ICCPR to be reflected in the Constitution.

Second, under the ICCPR, in relation to the death penalty, China would be bound to extend to all its citizens the right to life (Article 6);<sup>281</sup> the right to freedom from torture

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<sup>279</sup> Article 5 of the Chinese Constitution: ‘The People’s Republic of China governs the country according to law and makes it a socialist country under rule of law.’

<sup>280</sup> Article 33 of the Chinese Constitution: ‘The State respects and preserves human rights’.

<sup>281</sup> Its Article 6 provides that:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

and from cruel, inhuman or degrading treatment (Article 7); the right to liberty and security of the person including freedom from arbitrary arrest (Article 9); rights of due process, including the right to equality before the courts, the right to be presumed innocent until proven guilty, the right to defence; and the right to be tried without delay (Article 14).

### **3.4.3 The ICCPR and the Chinese Domestic Laws**

At the criminal law level, since the ICCPR does not prohibit the use of the death penalty absolutely, the Chinese criminal law's stipulation on the use of the death penalty is similar to the ICCPR's prescription.<sup>282</sup> Before the signature of the ICCPR, there were 68 capital crimes in the 1997 criminal law. Then in 2012 the Amendment VIII abolished the death penalty for 13 crimes, and in 2015 the Amendment IX further abolished 9 capital crimes. This evolution of the criminal law will be analysed in Chapter 5.

At the criminal procedural law level, after the signature of the ICCPR, it also underwent several amendments. In the 2012 criminal procedure law, the legal principle of presumption of innocence and the right not to be tortured (which overlaps with that in the CAT) with other stipulations on criminal procedural systems such as the defence system and the arrest system were also precisely stipulated. This will be further analysed in Chapter 6.

From the above, some simple conclusions could be drawn. First, there is no evidence to support the view that the authority of the ratified treaties is more powerful than that of the unratified treaties with respect of human rights, since generally there is non-direct application of all of them. Second, from the legal activities that China amended its

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5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

<sup>282</sup> Article 48: The death penalty shall only be applied to criminals who have committed the most heinous crimes. If the immediate execution of a criminal punishable by death is not deemed necessary, a two-year suspension of execution may be pronounced simultaneously with the imposition of the death sentence.

constitutional law, its criminal law and its criminal procedure law to the direction of the protection of human rights, this gives the evidence that if China has signed a treaty containing an international legal measure, parts of such law might apply domestically prior to China's ratification, and it could at the same time introduce new legislation into China's legal order in a minor step. Third, China adopts dualism in its attitude in the application of the ICCPR, namely, there is no evidence to demonstrate it will apply the ICCPR directly in its domestic legal domain. The above signs show that it is transforming according to the ICCPR through amending its domestic law.

### **3.4.4 Towards Future Ratification**

As mentioned above, in international society there is a call for China to ratify the ICCPR in order to restrict the use of the death penalty and protect human rights in China.<sup>283</sup> Concerning the ratification, there are different views. According to it, the scholars can be divided into two groups.

Concerning ratification, there are different views, based on which the scholars can be divided into two groups. The first group believe that since China has signed the ICCPR, its ratification is just a matter of time. The Chinese government will fulfil its commitment to the ratification and thus improve human rights protection in China, though it is likely to take a long time. China has also initiated changes in the law in order to lead to the ratification of the ICCPR. The representative scholars of this school are Katie Lee, Bai Guimei, Sun Shiyan, David Kinley and Chen Guangzhong.<sup>284</sup>

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<sup>283</sup> Rhona K M. Smith. 'More of the same or something different? Preliminary observations on the contribution of universal periodic review with reference to the Chinese experience' (2011) 10 (3); Chinese Journal of International Law 565; see also Jerome Cohen. 'The Slow March to Legal Reform.' 170.8 (2007) Far Eastern Economic Review 20.

<sup>284</sup> Lee, Katie. 'China and the International Covenant on Civil and Political Rights: Prospects and Challenges.' 6.2 (2007) Chinese Journal of International Law 445-474; Guimei Bai. 'The International Covenant on Civil and Political Rights and the Chinese Law on the Protection of the Rights of Minority Nationalities.' (2004) 3 Chinese Journal of International Law 441; Sun, Shiyan, 'The Understanding and Interpretation of the ICCPR in the Context of China's Possible Ratification', 75 (2) Chinese Journal of International Law, 17-42; Whitfort, Amanda. 'The Right to a Fair Trial in China: The Criminal Procedure Law of 1996.' 2 (2006) Chinese Law and Policy Review, 141; Kinley D, 'Finding Freedom in China:

The second group question the motivation for the ratification and deny that there will be any improvement in the protection of human rights; even if the Chinese government ratifies the ICCPR, this will make no difference.<sup>285</sup> It could be suggested that the United States has also continued to resist ratification of the ICCPR. This is partly because Americans have been concerned that the covenant's anti-death penalty provisions could be used by domestic anti-death-penalty activists to litigate against capital punishment in the country. It was only in 1992 that the US finally ratified the Covenant on Civil and Political Rights, with many reservations, and its implementation has had little domestic effect.<sup>286</sup>

The possible criticisms of this second group's view are as follows. Firstly, the legal practice in China has testified that after China ratified the CAT, there was improvement in respect for human rights in China.<sup>287</sup> Therefore, ratification of past human rights treaties has had a clear positive influence on China. As Bai Guimei points out, within the global context, China has done very well in protecting minorities' rights; however, in order to make the domestic law more compliant with the ICCPR, the Chinese government should do more work on it, including in relation to the effective implementation of the

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Human Rights in the Political Economy.' (2013) 19(1) SUR - Int'l J on Hum Rts 143; Chen Guangzhong, *Research on Issues Regarding Ratification and Implementation of The International Covenant on the ICCPR*, (China Legality Press 2002); Simmons, Beth A. *Mobilizing for human rights: international law in domestic politics*, (Cambridge University Press, 2009) 20, 108.

<sup>285</sup> Hathaway, Oona A. 'Do human rights treaties make a difference?' (2017) 3 International Law and Society 110; Neumayer, Eric, 'Do international human rights treaties improve respect for human rights?', (2005) 49.6 Journal of Conflict Resolution 925-953; Hafner-Burton, Emilie M., and Kiyoteru Tsutsui. 'Human Rights in A Globalizing World: The Paradox of Empty Promises.' (2005) 110.5 American Journal of Sociology 1373-1411; Wan, Ming. 'Human rights law-making in China: domestic politics, international law, and international politics.' (2007) Human Rights Quarterly, 727-753.

<sup>286</sup> Black, Allinda; Hopkins, June, 'Covenant on Civil and Political Rights'. (2003) The Eleanor Roosevelt Papers, [https://en.wikipedia.org/wiki/International\\_Covenant\\_on\\_Civil\\_and\\_Political\\_Rights#United\\_States](https://en.wikipedia.org/wiki/International_Covenant_on_Civil_and_Political_Rights#United_States), <accessed 12/07/2017>

<sup>287</sup> Katie Lee, 'China and the International Covenant on Civil and Political Rights: Prospects and Challenges.' 6.2 (2007) Chinese Journal of International Law 445-474.

law.<sup>288</sup> This will objectively accelerate the protection of human rights. Although at present the main barrier to the ratification is the use of the death penalty, there are signs that the use of the death penalty in China is being restricted, which will be analysed in detail in Chapter 5.

Secondly, different Chinese leaders have noted that since China has signed this covenant they should create a suitable situation to ratify it. In order to shape China's image as a responsible member of the international society, it therefore seems likely that the Chinese government will keep its promise to ratify. A necessary reform of the death penalty will partly pave the way for the ratification, which the majority of the Chinese criminal and international law scholars agree with.<sup>289</sup> The Information Office of the State Council of the PRC has issued the National Human Rights Action Plan of China (2009-2010) proclaiming that: 'China has signed the ICCPR, and will continue legislative, judicial and administrative reforms to make domestic laws better linked with this covenant, and prepare the ground for approval of the ICCPR'.<sup>290</sup>

Therefore, with regard to future ratification of the ICCPR, as Bai Guimei points out, the Chinese government and scholars still need to do significant work to 'promote the respect and implementation of human rights and fundamental freedoms of human beings'.<sup>291</sup> This will probably take a long time, however, the ratification will be achieved eventually and will improve human rights protection in China.

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<sup>288</sup> Bai, Guimei, Guimei, Bai. 'The International Covenant on Civil and Political Rights and the Chinese Law on the Protection of the Rights of Minority Nationalities.' (2004) 3 Chinese Journal of International Law 441.

<sup>289</sup> Qiu Xinglong, 'International Human Rights and the Death Penalty', *On the New Questions of Criminal Law in The 21st Century*, edited by Gao Mingxuan & Zhao Bingzhi, (Law Press 2001) 357; Caixia, Su. 'The Present and Future: The Death Penalty in China's Penal Code.', (2011) 36 Okla. City UL Rev. 427.

<sup>290</sup> Information Office of the State Council of the PRC, National Human Rights Action Plan of China (2009-2010), (2009)8(3) Chinese Journal of International Law 741-777.

<sup>291</sup> Bai, Guimei, 'The International Covenant on Civil and Political Rights and the Chinese Law on the Protection of the Rights of Minority Nationalities.' (2004) 3 Chinese Journal of International Law 441.



### **3.5 JUDICIAL PRACTICE ON THE APPLICATION OF HUMAN RIGHTS TREATIES**

The above sections are all from legal perspective to discuss the application of international treaties in China. This section will research without domestic transformation whether courts in China would choose to use human rights treaties.

#### **3.5.1 How China's Courts Treat Human Rights Treaties**

Concerning this issue, there are different views. Zou argues that Chinese courts have generally tended to interpret domestic statutes wherever possible so as to reconcile domestic and international laws.<sup>292</sup> He has also recognised areas of ambiguity and confusion by noting that international law issues arise domestically only rarely, and where this occurs judicial practice to date has tended to be inconsistent. Although some courts have applied international law in commercial and maritime contexts, he points out that there is some authority for the position that international human rights treaties do not need to be given direct effect under Chinese law.<sup>293</sup> One reason, he argues, is that the fundamental human rights which have been written into the Chinese Constitution still cannot be applied directly by China's courts. This is because there is a judicial interpretation by the SPC prescribing that it is inappropriate to render criminal punishment by invoking the Chinese Constitution as an applicable law.<sup>294</sup>

It has been argued that under the 2004 constitution, judges are empowered to incorporate even those treaties that have not been ratified into Chinese domestic law.<sup>295</sup>

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<sup>292</sup> See Keyuan Zou, 'International Law in the Chinese Domestic Context' (2010) 44 (3) Valparaiso University Law Review 935.

<sup>293</sup> Keyuan Zou, 'International Law in the Chinese Domestic Context' (2010) 44 (3) Valparaiso University Law Review 935.

<sup>294</sup> Zou, *ibid.*

<sup>295</sup> Xia Zexiang, 'Implementation of Human Rights Provision in Chinese Constitution' (2010) 12 Legal Science, 59; see also Zhang Weiwei, 'Human Rights Provision: Source of Unenumerated Constitutional

Zhao and Miao note that in respect to the reform of the death penalty, the judiciary is the pioneer, because compared with the legislative level, at the judicial level, the judiciary faces less resistance. However, the application of international treaties in both judicial and legislative organs in China is selective, namely, they just chose the most important point of international human rights law instead of all aspects.<sup>296</sup>

Although some scholars point out that, in theory, international treaties can be applied to Chinese domestic law directly, there is no precedent to demonstrate that judges in China have quoted international human rights treaties directly in their judgments regarding the capital crimes. The common legal practice on this is that the SPC transforms international human rights treaties into its judicial interpretations. This is a kind of dualism at the judicial level. Since the SPC's judicial interpretations are the guidance for the lower courts, by this way, some of the international human rights treaties are converted into courts' practice.

For example, in 2010, the SPC with the SPP, the Ministry of Public Security, the Ministry of State Security, the Ministry of Justice jointly enacted *Regulations on Certain Issues Related to Examination and Judgement of Evidence for Handling the Death Penalty Cases* and *Regulations on Certain Issues Related to Excluding Illegal Evidence for Handling Criminal Cases*.<sup>297</sup> The two regulations provide a precise guidance on the prohibition of the use of torture. Then later, on the succeeded judicial interpretation on how to understand and implement the above judicial interpretations, the SPC clearly

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Rights' (2011) 1 Law Review 10. Sun Xianzhong & Chang Pengao, 'Study on Institutional Guarantee of Housing Rights' (2001) 2 Nanjing University Law Review 69.

<sup>296</sup> Zhao Bingzhi, Miaomiao, 'On the International Law's Accelerated Effect of the Reform of the Death Penalty in Contemporary China' (2013) 53 (4) Jinlin University Journal Social Science Edition 5.

<sup>297</sup> For these two judicial interpretations, see 'Regulations on Certain Issues Related to Examination and Judgement of Evidence for Handling the Death Penalty Cases', (*People's Court Daily*, 25 June 2010) <[www.chinacourt.org/law/detail/2010/06/id/143348.shtml](http://www.chinacourt.org/law/detail/2010/06/id/143348.shtml)> accessed 8 October 2014. And 'Regulations on Certain Issues Related to Excluding Illegal Evidence for Handling Criminal Cases', (*People's Court Daily*, 25 June 2010) <[www.chinacourt.org/law/detail/2010/06/id/143349.shtml](http://www.chinacourt.org/law/detail/2010/06/id/143349.shtml)> accessed 24 November 2014.

expressed that when it drafted these documents, the CAT was taken as a reference.<sup>298</sup> Nonetheless, the judicial interpretation did not quote any of the provisions of the CAT in its main text.

Therefore, to apply international human rights treaties by judicial interpretation from the supreme court is a normal practice in China's courts. However, it is hard to find instances where China's courts directly apply the international human rights law in the application of the death penalty. A feasible method to research the question of how a court could apply an international human rights treaty is to analyse from a comparative perspective. Studying other countries' judicial trends towards the incorporation of human rights treaties might be a good way to approach possibilities in China's application of international human rights norms.

### **3.5.2 Other Countries Experience**

Not only in China but in other countries such as the US, there is still a debate over whether international human rights treaties can be directly applied into domestic law. Waters notes that lately the US Supreme Court's judgements (including the case *Roper v. Simmons*) could be deemed as part of a transnational tendency among common law courts – he calls this tendency 'creeping monism'. The term means that common law judges have gradually forsaken their traditional dualist positioning to treaties and converted to use human rights treaties, even though there is lack of domestic legislation which gives domestic legal effect to the treaties. Judges quote international treaty obligations and so make them a part of domestic law, which process is named interpretive incorporation technique.<sup>299</sup> He argues that under globalisation of the legal regime, the historical and philosophical underpinnings of common law dualism have lost their force gradually, this

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<sup>298</sup> 'Understanding and Application of the Regulations on Certain Issues Related to Excluding Illegal Evidence for Handling Criminal Cases' (*The Supreme People's Court of People's Republic of China*, 31 July 2014), <[www.court.gov.cn/shenpan-xiangqing-6618.html](http://www.court.gov.cn/shenpan-xiangqing-6618.html)> accessed 24 November 2014.

<sup>299</sup> Melissa A. Waters, 'Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties' (2007) *Columbia Law Review* 628.

leads to a shift away from a strict dualist methodology to judicial combination of international law.<sup>300</sup>

So here we review the US Supreme Court's commentary of the case of *Roper v. Simmons*, one of the cases representing the judicial trend toward 'creeping monism'. In this case, the Supreme Court of the US considered 'the overwhelming weight of international opinion against the juvenile death penalty' and realised that the Court's conclusion conveys confirmation that the juvenile death penalty breaks up society's evolving standards of decency.<sup>301</sup>

DeNunzio notes that when interpreting the Eighth Amendment of the US Constitution, the majority of justices on the Supreme Court used international human rights law as the instruction because they have realised the relevance and the importance of it, so the Court cited international human rights law directly in its decision to reversal the juvenile death penalty.<sup>302</sup>

Arvin concludes that the significance of *Roper's* case is beyond the fact that it abolished the juvenile death penalty; this case marks 'a growing appreciation within the Court for the validity of international law'.<sup>303</sup>

By the analysis of the judicial treatment of human rights treaties in the jurisprudence of the high courts of Australia, Canada, New Zealand, and the United States, as well as the human rights jurisprudence of the British Privy Council in the Commonwealth Caribbean, Water finds that from 2000 to 2007 there were 92 judicial opinions citing the ICCPR in interpreting a domestic legal provision. She draws a conclusion that, as one of the foundational laws of the international human rights legal instruments, the ICCPR is one of the most frequently cited human rights treaties in domestic courts, since its wide-ranging provisions span over a broad zone of civil and political rights.<sup>304</sup> From her

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<sup>300</sup> Ibid 628.

<sup>301</sup> Dionne DeNunzio, '*Roper v. Simmons*' [2006] Ohio N.U. L. Rev 32 (note)

<sup>302</sup> Ibid.

<sup>303</sup> Stephen Arvin, '*Roper v. Simmons and International Law* [comments]' (2005) 83 (1) Denver University Law Review 209.

<sup>304</sup> Water (n 46)

analysis it can be seen that even in the traditional monism common law countries, courts increasingly cite the international treaties.

An influential series of judicial colloquia - the Bangalore Conferences - have developed some principles through case law, and the dialogue has enabled common law judges to develop and advocate a more monistic approach to treaty incorporation. Justice Sian Elias of the New Zealand Supreme Court argues:

It would be inconsistent and wasteful for the domestic courts not to draw on the body of thinking being developed by the Human Rights Committee. Just as it is idle to suggest that the domestic courts should not gain what help they can from the decisions of other jurisdictions based on the same foundation.<sup>305</sup>

The Bangalore Conferences formed the Bangalore Principles in 1988, which concluded:

It is within the proper nature of [...] national courts to have regard to international obligations which a country undertakes - whether they have been incorporated into domestic law or not - for the purposes of removing ambiguity or uncertainty from national constitutions, legislation or common law [...] However, where national law is clear and inconsistent with the international obligations of the State concerned, in common law countries the national court is obliged to give effect to national law.<sup>306</sup>

The view expressed that unincorporated treaties could play a gap-filling role in interpreting domestic law, which Water believes it represented a departure from strict common law dualism.<sup>307</sup> Then after ten years, the concluding declaration of the 1998 Interights colloquium (also held in Bangalore) released a very different judicial conception of the proper relationship between international and domestic human rights law, and the judge's role in mediating that relationship. The statement went even further in the proposition, announcing:

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<sup>305</sup> Sian Elias, 'Judicial Legitimacy and Human Rights' (International Bar Association Conference, Durban, October 2002)

<sup>306</sup> See 'Bangalore Principles' (Judicial Colloquium on "The Domestic Application of International Human Rights Norms", Bangalore, February 1998)

<sup>307</sup> Water (n 46)

It is the vital duty of ... [the] judiciary [...] to interpret and apply national constitutions and [...] legislation in harmony with international human rights codes and customary international law, and to develop the common law in the light of the values and principles enshrined in international human rights law.<sup>308</sup>

Thereby, the viewpoint of judicial perception of the relationship between international human rights law and domestic law in common law system has been changed step by step from dualism to monism.

Because China has a civil law tradition, as mentioned in Chapter 2, when it first contacted the modern law system at the end of the Qing dynasty in the 1900s legal reform, its law and legal system was copied mainly from Japan, Germany and France.<sup>309</sup> This law custom has been preserved and adopted from then on to the present. In original civil law traditional countries, the general view is that courts are not recognised as law makers as in common law countries.<sup>310</sup>

China's courts also cannot be makers of rules; even if a judge cited an international law in a case, that still would not be a legal precedent in China. Although in China by now there is no court or judge citing the ICCPR or any other international human rights treaties directly, China's courts, as Wang Yong points out, have applied the *United Nations Convention on Contracts for the International Sale of Goods* directly, when they deal with civil cases involving foreign factors.<sup>311</sup>

As mentioned in section one, the Chinese legal system and the Chinese law between the 1950s and 1970s was remarkably influenced by those of the Soviet Union. Some

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<sup>308</sup> See Lord Lester of Herne Hill, 'The Challenge of Bangalore: Making Human Rights A Practical Reality' (1999) 25 (1) Commonwealth Law Bulletin 47.

<sup>309</sup> See Yuantian Wang, 'Review Shen Jiaben Judicial Reform', 3 (2016) Legal Forum, 146; see also Min Jin, 'Whom We Inherited from the Late Qing Dynasty' 5 (2015) Tsinghua Law Review, 161.

<sup>310</sup> Mark W Janis. 'An Introduction to International Law' (1984) 16 (4) Connecticut Law Review 897.

<sup>311</sup> Yong Wang, 'On the Perfection of the System of the Judicial Application of Treaties in China' (2014) 5 Nanjing Social Sciences 91.

effects, such as Marxism-Leninism legal theory and the theory of the death penalty<sup>312</sup> can still be seen in today's legal thought in China. Therefore, the legal practice in Russia, as former Soviet Union's successor, is worthy to research as a reference.

In 1996 Russia signed the *Additional Protocol number 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms*, and enacted a moratorium on the death penalty executions without the death penalty being legally abolished.<sup>313</sup> Hence, because there is no new law passed by Russian parliament, the death penalty is still legal to date. In 1999, the Constitutional Court's decision prescribed that Russian courts have no right to pass the death penalty until the jury trial has been introduced across Russia. In 2009, the moratorium was reviewed again. In its argument, the Constitutional Court held that the use of the death penalty should be suspended in a relative long term. This would be only until the constitutional regime has been built and thereby the right to life will not be breached by the death penalty. The moratorium has exerted its influence on the use of the death penalty effectively.<sup>314</sup> Russia's experience may suggest that a constitutional court can prohibit the use of the death penalty in Russian courts according to the international human treaties it signed. China, however, does not have a constitutional court.

From the above, we might draw some brief conclusions. Empirical practice in the US and the Commonwealth legal regimes, such as Australia, Canada, New Zealand and the Commonwealth Caribbean shows a tendency that 'monism' is gradually adopted by some judges, though it may not lead to the observation that it has become the mainstream. It supports the view that judges directly quoting international treaties in the human rights domain is an effective method to protect human rights. Concerning the reform of the death penalty in China, we might hold a cautious attitude to such use of human rights treaties.

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<sup>312</sup> Johnson and Zimring argue that China's death penalty policy has been influenced by Starlin. See D T Johnson and F E Zimring, *The next frontier: national development, political change, and the death penalty in Asia*. (Oxford University Press, 2009) 225.

<sup>313</sup> Peter Leuprecht. 'Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement' (1998) 8 *Transnat'l L. & Contemp. Probs.* 313.

<sup>314</sup> Alexander I. Korobeev 'Death Penalty As A Criminal Punishment In The System Of Crime Counteraction In Russia' (2013) 10 (1) *Megatrend revija* 351

Because of the sensitivity of human rights treaties in China, judges tend to remain cautious to the direct quotation of those norms. In 5 or 10 years, it is unlikely that China will follow what happened in the above-mentioned countries.

### **3.6 CONCLUSION**

By the year 2017, China had signed 27 international human rights treaties and numerous other international treaties. How China reacts in regard to those treaties is a concern in international society. This chapter has analysed the questions set at the beginning of it as the follows.

In China, with respect to the relationship between international law and the Chinese domestic law, the Chinese Constitution and other laws have not prescribed how to deal with this relationship. In terms of the actual practice of the application of international law, the Chinese legal system is a mixture of dualism and monism, according to different types of international treaties.

First, concerning self-executing international norms, the international law in relation to civil level can be implemented directly and its power is superior to common domestic law. With respect to this point, China adopts monism. In contrast, for non-self-executing international norms, at the criminal law level, it is impossible to see the direct application of international treaties. However, in the international public law domain, such as trade-related WTO rules and maritime treaties, all of them have been transformed into China's domestic legal system. To these treaties, China adopts dualism.

Second, with respect to human rights law there are still different methods in treating this in practice. When China treats international treaties such as ICESCR, it adopts dualism, namely it transforms it into domestic law. According to peremptory treaties where there is no stipulation such as the CPPCG, many Chinese scholars suggest China adopts dualism, domesticating it. Those conventions involving the disadvantaged people could be seen transformed into different domestic laws. While the others, such as refugees related conventions, China has neither converted them into its own law nor stipulated the direct application of them. The actual power of the determination of status of refugees in



China is exercised by the UNHCR. This suggests that China focuses more on the construction of the legal framework of the protection of its own citizen's human rights. Therefore, because of the lack of a systemic legal framework, it is hard to conclude that, to those international human rights treaties, China has used an exclusively dualist or monist method.

Towards basic human rights treaties which China has signed but not ratified, for example the ICCPR, through the gradual amendment of its domestic law China shows a tendency to dualism.

With respect to the judicial practice, the trend of the application of human rights law in the US and commonwealth countries is to adopt monism by directly quoting human rights law in its judicial judgements. Whether the courts in China could follow the trend started by their counterparts in the above-mentioned countries we cannot yet tell. With the deepening political and judicial reform in China and with the improvement of the personal quality of judges, a cautious attitude should be held.

According to the above research, findings in this chapter suggest that human rights treaties do have effects on improving respect for human rights for its own citizens in China, especially in non-political areas.<sup>315</sup> China has combined some treaties provisions into its domestic law. When the SPC made legal binding judicial interpretations, it publicly proclaimed that the CAT has been taken into account as a yardstick. It cannot say that China has fulfilled its international human rights treaty obligations a hundred percent in practice. It, however, could be seen that to a large extent, China in the past two decades did make efforts to internalise those international treaties into its legal system. Even though the ICCPR is still yet to ratify, China also is preparing the legal road for its ratification to some extent concerning the restriction of the use of the death penalty.

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<sup>315</sup> This thesis will not involve political related cases, as it was mentioned in Chapter 1. The research objective is the common criminal death penalty cases.

## **CHAPTER 4 ABOLITION IN EUROPEAN COUNTRIES AND ITS IMPLICATIONS FOR CHINA**

### **4.1. INTRODUCTION**

In Chapter 3, the present situation of international treaties being incorporated into China's domestic law was analysed empirically. Special attention was given to those aspects that are relevant to the status of China's death penalty and, in the absence of a treaty obligation, to determining whether any other elements of international law apply to China's domestic legal system.

By contrast, this chapter will examine the theoretic foundation of the abolition of the death penalty in Europe, and the reason why the movement of abolition first took place in Western European and South American countries. Then the process by which these states abolished their death penalty as well as the connection between this movement and the ICCPR will be further studied. After researching the above questions, I will then compare Chinese culture and this nation's traditional legal legacy with the European equivalents. Analysis of potential positive lessons for the Chinese government will be conducted mainly focusing on how the western legal legacies could be or have been introduced into China as supposed 'universal values,' and what meanings they may have for China's death penalty reform against the background of current processes of rapid modernisation.

### **4.2 MAIN FACTORS FOR ABOLITION**

What are the main general factors which have spawned the movement in favour of abolition of capital punishment? Here I argue that if people try to comprehend the reasons underlying the abolition of capital punishment in Europe without understanding its cultural aspects and contexts, then the topic would become unintelligible. Culture, in this thesis is defined as the mixture of different historic values, ideas, thoughts, religious beliefs, and customary traditions. Whether the following cultural elements have played a

significant role during these processes of abolition will be examined first- religion (here pointing to Christianity) and Enlightenment thoughts: mainly utilitarianism and social contract theory.

Then Political elements, which point to the different styles of institutional organisation in different political regimes, will also be examined in the second part of this section.

#### 4.2.1 Religion

Religion here is referred from a broad perspective of this concept and identified as a ‘cultural factor’.<sup>316</sup> When the history of abolition in those countries who first denounced capital punishment is researched, an interesting phenomenon is observed: they were all states dominated by Christianity. In Europe, by the end of 19<sup>th</sup> century, Portugal, San Marino, the Netherlands, Italy, Romania, Austria, and Switzerland were among the first countries to have abolished capital punishment, followed by Norway, Sweden, Finland, Denmark, and Iceland.<sup>317</sup> According to a survey by Eurobarometer: ‘The largest religion in the EU is Christianity, which accounts for 72% of EU population’.<sup>318</sup> The figure was even higher in the 19<sup>th</sup> and the first half of the 20<sup>th</sup> century.<sup>319</sup> Therefore, it is clear that

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<sup>316</sup> Some argue that religion is different from culture, the other contend that religion is a branch of culture. See Rhys H. Williams, ‘Religion as Political Resource: Culture or Ideology?’ (1996,12) *Journal for the Scientific Study of Religion*, Vol. 35, No. 4, 368-378; Michel Foucault, *Religion and culture*, (Routledge Edition, Manchester University Press 2013); Olivier Roy, *Holy Ignorance: When Religion and Culture Part Ways*. (Oxford University Press (UK), 2014).

<sup>317</sup> Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edition, revised and updated edn Oxford University Press, Oxford 2015) 13.

<sup>318</sup> ‘Special Eurobarometer Discrimination in the EU in 2012’ 393 (European Union: European Commission 2012), 233 <[ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_393\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_393_en.pdf)> accessed 14 August 2013 , The question asked was ‘Do you consider yourself to be...?’ With a card showing: Catholic, Orthodox, Protestant, Other Christian, Jewish, Muslim, Sikh, Buddhist, Hindu, Atheist, and Non-believer/Agnostic. Space was given for other (spontaneous) and D K. Jewish, Sikh, Buddhist, Hindu did not reach the 1% threshold.

<sup>319</sup> For more information, see Hugh. McLeod *Religion and the People of Western Europe, 1789-1989* (Oxford University Press 1997)

in these European countries, Christianity hitherto has been the dominant religion from medieval to modern time.

Meanwhile, South and Central America have been deemed long-term supporters of abolition.<sup>320</sup> Venezuela, Costa Rica, and Brazil, which had already banned the use of capital punishment by the end of the nineteenth century, and Ecuador, Uruguay, Colombia, Argentina, Panama, along with most of the Mexican states, followed the trend by also becoming abolitionist countries.<sup>321</sup> As Paul Freston claims: ‘Latin America is broadly speaking, ‘Western’ and ‘Christian.’<sup>322</sup> David Lehmann also claims that Christianity was deeply rooted in the Latin America nations’ popular culture.<sup>323</sup> Christopher Dawson claims the same either<sup>324</sup>, and further asserts that it is exactly the dominance of Christian culture that has created ‘western people’ and their distinctly ‘western’ lifestyle.<sup>325</sup> In other words, Christianity has operated – and perhaps still functions – as a defining characteristic of what it means to be Western. Proof of this generalisation requires detailed empirical evidence, however, this is only possible through detailed comparative investigation which exceeds the scope of the present study.

Researchers would need to find that non-Christian states have a different attitude towards abolition because and only because of their different religious traditions, while all Christian states have favoured abolition. Such proof is difficult to secure, and researchers also have to consider the fact that for most of their history as Christian states, such states were not abolitionist in fact. In short, if we rely solely on the above evidence

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<sup>320</sup> Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edition, revised and updated edn Oxford University Press, Oxford 2015) 70.

<sup>321</sup> *ibid.*

<sup>322</sup> Paul Freston *Evangelicals and Politics in Asia, Africa and Latin America*. (Cambridge University Press, 2001) <ProQuest ebrary. Web> <accessed 5 May 2016>.

<sup>323</sup> David Lehmann *Democracy and Development in Latin America: Economics, Politics and Religion in the Post-war Period* (Temple University Press 1990) 93.

<sup>324</sup> Christopher Dawson, *Christianity and European Culture: Selections from the Work of Christopher Dawson*. (Catholic University of America Press 1998). <ProQuest ebrary>.< accessed 13 February 2016>.

<sup>325</sup> *Ibid.*; for similar opinions also see Thomas Stearns Eliot, who claims that it was exactly Christianity that has made Europe what it is. He further argues that it is out of Christianity that the laws of Europe have been rooted.

and draw the resulting ‘conclusion’ that Christianity could have played a decisive role in the process of abolition, this could be open to objection. For instance, in 1962, M. Marc Ancel contended that before the 18<sup>th</sup> century, capital punishment was implemented all over the world. This was accepted without serious or widespread objections as self-evidently the correct response to serious crimes. Hence even Christianity, although its influence had shrunk, did not question it.<sup>326</sup>

When the trajectory of possible abolition is further examined in another major Christian country, the U.S.A., one might arrive at an entirely opposite conclusion concerning the influence of this religion. Reviewing the criminal punishment history of the U.S.A. suggests that the more religiously conservative are the individual states, the greater inclination there is to retain the death penalty.<sup>327</sup> At present, there are 18 states in the US which have abolished the death penalty; while the majority of the states – 32 – still retain it.<sup>328</sup> According to a survey by Barry Kosmi, more than 86% of Americans consider themselves to be Christians.<sup>329</sup> In 1996, Kinkade illustrated that results from a Gallup poll showed high levels of death penalty support at the time (80%)<sup>330</sup>. Despite the fact that there could not be an entire overlap between Christians and the supporters of capital punishment, these statistics could still explain that in largely Christian America, there a majority of people supports the use of the death penalty.<sup>331</sup>

The above arguments can also be supported by examining the viewpoint of an American Supreme Court’s Justice, Antonin Scalia, who proclaimed in 2002 at a forum

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<sup>326</sup> M. Marc Ancel. *The Death Penalty in European Countries* (Council of Europe- Strasbourg 1962) 8.

<sup>327</sup> Stuart Banner *The Death Penalty: An American History* ( First Harvard University Press, 2009) 134 <ProQuest ebrary>. Accessed 8 May 2016.

<sup>328</sup> Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edition, revised and updated edn Oxford University Press, Oxford 2015) 45.

<sup>329</sup> Barry Kosmin *One Nation Under God: Religion in Contemporary American Society* (Crown Publishers 1993) 3.

<sup>330</sup> Meredith G . Worthen and others ‘Expanding the Spectrum of Attitudes Toward the Death Penalty: How Nondichotomous Response Options Affect Our Understandings of Death Penalty Attitudes’. (2014), 39(2) Criminal Justice Review 160; < sagepub.com/journalsPermissions.nav DOI: 10.1177/0734016814529967 cjr.sagepub.com> Downloaded from <cjr.sagepub.com> at University of Central Lancashire on May 9, 2016.

<sup>331</sup> <<http://www.gallup.com/poll/1606/death-penalty.aspx>> accessed 10 November 2016

on religion and the death penalty that ‘the more Christian a country is, the less likely it is to regard the death penalty as immoral.’ He further asserts that abolition only happened in post-Christian Europe; conversely, it has least support among the largely church-going United States. He ascribes this to the fact that, for the believing Christian, ‘death is no big deal.’ Scalia suggested it was only the ‘non-believer,’ whom he also referred to as ‘the post-Freudian secularist,’ who saw the death penalty as ‘a horrible act.’<sup>332</sup>

Accordingly, the above analyses suggest that Christianity might not be a direct cultural factor influencing the movement of abolition of the death penalty. So what can be identified as influential cultural factors upon this movement? M. Marc Ancel argues that the abolitionist project, which started in the 18<sup>th</sup> century, was largely under the influence of ‘humanitarian philosophy.’<sup>333</sup> Roger Hood agrees with this viewpoint and maintains that liberal utilitarian and humanistic ideas, which had been generated by the so-called ‘Enlightenment movement,’ had given rise to abolition.<sup>334</sup> This is what will be discussed in the next section.

#### **4.2.2 The Enlightenment**

To answer questions about the function of the Enlightenment, which started in the 18<sup>th</sup> century, in the movement of abolition, the definition of the Enlightenment should be first made clear. What is the Enlightenment? Immanuel Kant publicly answered this question raised by a Berlin newspaper in 1784. He stated that the Enlightenment was ‘man’s release from his self-incurred immaturity.’<sup>335</sup> This assertion generated new thinking in the world. Rousseau’s words – ‘Man is born free’ – represented burgeoning humanitarian

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<sup>332</sup> Kenneth W Miller and David Niven *Death Justice: Rehnquist, Scalia, Thomas, and the Contradictions of the Death Penalty* (El Paso, TX, USA: LFB Scholarly Publishing LLC 2009) <ProQuest ebrary> accessed 16 April 2016.

<sup>333</sup> M. Marc Ancel. *The Death Penalty in European Countries* (Council of Europe- Strasbourg 1962).9.

<sup>334</sup> Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edition, revised and updated edn Oxford University Press, Oxford 2015) 11.

<sup>335</sup> Cited from *The European World 1500-1800, An Introduction to Early Modern History* (Ed Beat Kumin, Routledge 2009) 224.

thought.<sup>336</sup> Paul Hyland argues that the central feature of the Enlightenment was the emphasis that all contemporaneous scholars had placed on the study of human nature.<sup>337</sup> The leading figures of the Enlightenment, such as Locke, Montesquieu, and Rousseau, argued that the ultimate objective of government was to promote the happiness and dignity of people.<sup>338</sup>

The literature review in Chapter 1 examined the origins of the theories of abolition and drew the conclusion that the first person to give a systematic theory of the abolition of the death penalty, which brought a significant response, was Cesare Beccaria. He argued that capital punishment neither improved mankind nor was useful or just in a well-organised state.<sup>339</sup> He admitted that his thought was influenced by Montesquieu, who was one of the great masters of the Enlightenment tradition. At the beginning of *On Crimes and Punishments and Other Writings*, Beccaria pays homage to Montesquieu, with references to his passage on arbitrariness made by the late eighteenth-century reformers of penal law.<sup>340</sup> Montesquieu asserts that ‘it is the triumph of liberty when criminal laws draw each penalty from the particular nature of the crime. All arbitrariness ceases... man does not do violence to man.’<sup>341</sup> Similarly, Voltaire stated that ‘man had lost his rights; Montesquieu gave them back to him.’<sup>342</sup>

Another leading figure of the Enlightenment who opposed the use of capital punishment was the utilitarian philosopher Jeremy Bentham. He argued that the death penalty is not efficient compared with other approaches to punishment, which were

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<sup>336</sup> <<https://www.theguardian.com/commentisfree/2012/jul/15/rousseau-shows-us-way-break-chains>> accessed 6 January 2016.

<sup>337</sup> Paul Hyland and others, *The Enlightenment*, (Routledge 2003) 1.

<sup>338</sup> David S Mason *A Concise History of Modern Europe, Liberty, Equality, Solidarity* (Third Edition, Rowman & Littlefield 2015) 20.

<sup>339</sup> Cesare Beccaria, *On Crimes and Punishments and Other Writings* (Cambridge University Press 1995) 66.

<sup>340</sup> *Montesquieu and His Legacy*. Ithaca, US: SUNY Press, 2008. <ProQuest ebrary> accessed. 17 May 2016.

<sup>341</sup> Ibid 280.

<sup>342</sup> Ibid 280

analysed in Chapter 1. From his utilitarian perspective, the death penalty could not be supported because mistakes cannot be remedied if a person is executed.<sup>343</sup>

From the above, it can be argued that, by focusing on so-called ‘human nature’ and by implication ‘human/natural rights,’ the Enlightenment generated humanitarian thought by which capital punishment was explicitly declared inhuman. The individual, conceived of as both rational and as endowed with God-given ‘rights,’ sits at the centre of the value system of modernity.

#### 4.2.3 The Relationship between Enlightenment and Christianity

Traditionally, the Enlightenment is thought of as contradicting religion, especially Christianity.<sup>344</sup> Some scholars hold different opinions, however. After having analysed the Enlightenment virtues of equality, authenticity, tolerance, and compassion, Ward concludes that these four virtues all arose from Christianity.<sup>345</sup> If we trace back over two or three centuries since the beginning of the Enlightenment, some leading figures, such as John Locke, Thomas Hobbes, and Newton, were all Christians, and their theories were deeply influenced by Christianity. Ian Shapiro contends that both John Locke and Hobbes believed in Divine Revelation, and that some of their main ideas about the presumed ‘equality’ of human beings originated from theology.<sup>346</sup> Here, the implication is that all

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<sup>343</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*. (Kitchener, Ontario, CAN: Batoche Books, 2000). 155 <ProQuest ebrary> <accessed 22 October 2014>.

<sup>344</sup> See James Schmidt *What Is Enlightenment?* He points out that Enlightenment had been blamed for many things, such as the failure of construction of the moral philosophy, totalitarianism, imperialism, the French Revolution, and so on. Cited from *Redeeming the Enlightenment: Christianity and the Liberal Virtues*. By Bruce K. Ward, published by Wn. B. Eerdmans Publishing Co. 2010, p.1.

<sup>345</sup> Bruce K. Ward, *Redeeming the Enlightenment: Christianity and the Liberal Virtues*, published by Wn. B. Eerdmans Publishing Co. 2010.

<sup>346</sup> Such as Thomas Hobbes and John Lock, their similar theories of workmanship were influenced by what they believed in Christianity’s theory, the world was created by God. The analysis of this, see Ian Shapiro, ‘This “creationist” or “workmanship” theory conferred a vastly superior epistemological status on moral matters in pre-Humean Enlightenment thought to any they have enjoyed since.’ Shapiro, Ian. *Moral Foundations of Politics*. New Haven, US: Yale University Press, 2012. ProQuest ebrary. Web. 19 May 2016.



humans are God's creations and that God values each one equally. Hence, the 'inequality' identified is interpretable as a form of insult to God.

Eliot even claims that it is solely in Christianity that the laws of Europe have been rooted, and that it is only against the background of Christianity that European thought has significance: 'an individual European may not believe that the Christian Faith is true, and yet what he says, and makes, and does, will all spring out of his heritage of Christian culture and depend upon that culture for its meaning.'<sup>347</sup> He further contends that only Christian culture could have produced a Voltaire or a Nietzsche, and that the distinctive culture of Europe would not survive if Christianity entirely disappeared, because it constitutes a founding value system distinguishing European traditions from those of China or the Arab world.<sup>348</sup>

According to the above analysis, it is possible to draw some basic conclusions. First, culture did have played an important role in the process of the movement of abolition. It was the ideas and concepts of 'natural/human rights,' themselves generated largely by the Enlightenment movement, which provoked the later movement of abolition. Bell argues along similar lines: 'the ideas and social imaginary encapsulated in the French Revolutionary slogan – liberty, equality, fraternity – seemed to become more deeply and widely realised and embedded, most evidently post World War Two.'<sup>349</sup> In this respect, the supposedly 'transcendent' Enlightenment movement of cultural values distinguished Europe from other ancient continents, such as Asia and Africa, and ultimately led to the entrenched idea of a justified form of capital punishment being changed fundamentally. In this way, the Enlightenment movement provided a theoretical foundation for the abolition of the death penalty.

Secondly, Christianity shaped European culture more generally at the level of both institutions, with a division of power between church and state, and associated societal

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<sup>347</sup> 'Selected T.S. Eliot on Tradition, Poetry, Faith, and Culture' <<http://www3.dbu.edu/mitchell/eliotpas.htm>> <accessed 12 January 2017>.

<sup>348</sup> 'Selected T.S. Eliot on Tradition, Poetry, Faith, and Culture' <<http://www3.dbu.edu/mitchell/eliotpas.htm>> <accessed 12 January 2017>

<sup>349</sup> Emma Bell, *Criminal Justice and Neoliberalism*, (Palgrave Macmillan, 2011) vi.

values. In this way, it indirectly influenced the movement of abolition. In short, there are grounds for paying attention to the role of cultural values transmitted by religious bodies to the general population, including law-makers and government officials.

The above analysed cultural factors and concluded that different cultural elements- Christianity and the Enlightenment movement indirectly or directly generated deep influence on the movement of the abolition in European and south American countries. Some scholars, however, argue that abolition is mainly a political issue. Greenberg and West, who examined different sources and the use of capital punishment in 193 nations, backed this viewpoint and concluded that the death penalty was rooted in a nation's legal and political systems.<sup>350</sup> Then next section will examine this argument of the influence of the political factor on the movement of abolition.

#### **4.2.4 Political Factor**

The above-mentioned viewpoint is not uncommon among Chinese and abroad scholars. Eric Neumayer also argues that the major determinants of the global trend towards abolition are essentially political, with cultural, social and, economic determinants receiving only limited support.<sup>351</sup> Rousseau in his work *The Confessions* claims: 'I had seen that everything is rooted in politics and that, whatever might be attempted, no people would ever be other than the nature of their government made them.'<sup>352</sup>

A Chinese scholar, Bai Ken, has a similar view, arguing that even if we searched throughout the totality of Chinese history, we still would not be able to find that this nation's dynasties were more prone to atrocities than their European counterparts concerning the history of punishment. On the contrary, historical sources suggests that

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<sup>350</sup> David F. Greenberg and Valerie West 'Siting the Death Penalty Internationally' (Spring 2008) 33 (2) Law & Social Inquiry 295.

<sup>351</sup> Eric Neumayer 'Death penalty: The political foundations of the global trend toward abolition (2008) 9 (2), Human Rights Review 241.

<sup>352</sup> Jean-Jacques Rousseau and J M Cohen, *The confessions of Jean-Jacques Rousseau* (Penguin Books 1953) 247.

the Chinese history of punishment was much more lenient than that of Europe.<sup>353</sup> Therefore, he concluded that, at present, China's Maoist political attitude to the death penalty, which aims to placate citizens' outrage at serious acts of criminality, has become the foundational principle of legislation in China. Hence, he argues that from 1949, capital punishment has been legitimated on this political basis.<sup>354</sup> His words might imply that capital punishment would be a problem solely in relation to Chinese politics, because this country previously had a relatively lenient criminal punishment system in early modern and feudal times. Yet, this tradition was reversed, not because of cultural changes in the way of life, but specifically because of a changed political context arising from the success of the Chinese Communist Party in securing state power. It is this political context that explains why China's current position is exactly opposite to the worldwide trend towards abolition.

Meanwhile, some scholars contend that the emergence of abolition has been accompanied by wider tendencies towards democratisation.<sup>355</sup> This also suggests that the retention of the death penalty in China – and perhaps more widely – is essentially a specifically and distinctly *political issue*. Of course, the issue is to identify the characteristics of the distinctly political realm, as opposed to those of culture. This is because there is surely some degree of overlap between any state's cultural traditions and overall way of life, the way life is actually being lived, and that state's political order. It is possible therefore that we might need to be careful in merely assuming that the realms of 'culture' and 'politics' are mutually exclusive opposites, such that students of abolition face an either/or choice between adopting a cultural or a political explanation of Chinese 'exceptionalism' relative to modern European states. For example, we cannot exclude the possibility that there is a distinctly 'political aspect' of Chinese culture, concerning the

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<sup>353</sup> Bai Ken, 'On Chinese People's Death Penalty's View', (2012) 6 (28) *Issues on Juvenile Crimes and Delinquency* 28.

<sup>354</sup> *Ibid.*

<sup>355</sup> See Roger Hood, 'Capital Punishment A Global Perspective' (July 2001) vol. 3 no. 3 *Punishment & Society* 331. Also see Rick Fawn, 'Death Penalty as Democratization: Is the Council of Europe Hanging Itself?' 8(2) *Democratization*, 69

power to define values and set policy, and a specifically ‘cultural aspect’ of how Chinese politics actually operate in practice.

Nonetheless, the problem with this view is that if it really is a political matter, or especially relevant to democratization, why does the so-called ‘great democratic champion of human rights’<sup>356</sup> – the USA – still retain the use of capital punishment in many of its states? Why does Japan retain it either? Taiwan, having the same cultural origin with mainland China, also retains it, although it has a different polity from that of mainland China. Since there has been no movement similar to the Cultural Revolution, Taiwan preserves more of Confucian tradition than the mainland does. Taiwan sentenced between 42 and 73 criminals to death each year from 2006 to 2016.<sup>357</sup> In 2013, the then Taiwan leader claimed that the majority of Taiwanese intensely opposed the abolition of the death penalty, and so the government's attitude was to retain it but to reduce its use.<sup>358</sup> The words of the then PRC’s Premier Wen Jiabao in 2006 closely resembled this.<sup>359</sup>

The other antithetic example is Venezuela: from 1863 onwards, this state prohibited capital punishment for all crimes, with the last execution taking place in 1830.<sup>360</sup> From then on, whatever the nature of the political regime, capital punishment, over more than 150 years, has never been reintroduced. It follows that the argument for abolition being essentially a political issue, as opposed to a cultural question, cannot be grounded in the

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<sup>356</sup> Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edition, revised and updated edn Oxford University Press, Oxford 2015) 45.

<sup>357</sup> See The Number of Executions and on the Death Row. Taiwan ‘Ministry of Justice’ <[http://www.rjtd.moj.gov.tw/rjtdweb/common/WebList3\\_Report.aspx?list\\_id=1245](http://www.rjtd.moj.gov.tw/rjtdweb/common/WebList3_Report.aspx?list_id=1245)> accessed 21 October 2016.

<sup>358</sup> ‘The Letters from Taiwan: The Division in the Society, the Way to the Abolition is still very Long’ *BBC News* (22 May 2014) <[http://www.bbc.com/zhongwen/trad/taiwan\\_letters/2014/05/140522\\_twletter\\_death\\_penalty](http://www.bbc.com/zhongwen/trad/taiwan_letters/2014/05/140522_twletter_death_penalty)> accessed 28 July 2015.

<sup>359</sup> See During the NPC and CPPCC Sessions in 2008, Premier Wen Jiabao Answered Questions from Chinese and Foreign Journalists, <[http://news.ifeng.com/mainland/special/wenjiabao10nian/detail\\_2012\\_03/13/13166139\\_2.shtml](http://news.ifeng.com/mainland/special/wenjiabao10nian/detail_2012_03/13/13166139_2.shtml)>.

<sup>360</sup> Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edition, revised and updated edn Oxford University Press, Oxford 2015), Appendix 1, Table A 1.2, Countries that have abolished the death penalty for all crimes in all circumstances, in peacetime and wartime 505.

comparative evidence. Therefore, we cannot conclude, from the above arguments at least, that abolition is mainly a political issue. This implies that it is unlikely that the CCP will definitely be one of the obstacles to reform/abolish the death penalty like what some people have always argued. Hence, it renders the discussion meaningful that China could learn experience and knowledge from those abolitionist countries at present situation. Then in next section, the processes of how abolitionist countries in Europe have phased out the death penalty will be researched to see whether they would bring a model role for China.

### **4.3 THE PROCESS OF ABOLITION IN EUROPE AND ITS EXPERIENCE FOR CHINA**

How were the processes of abolition in these European countries carried out, and what is the current worldwide trend of it at present? Would these processes provide China a positive example of reform/abolition of capital punishment? This section will research the above questions.

#### **4.3.1 The Processes of Abolition in Europe**

The *Report of the Death Penalty in European Countries* illustrated that the movement of abolition in Europe was a rather steady process when it first occurred. The first step was to reduce the number of death sentences. This report pointed out that capital punishment existed in every country in the world until the last half of the 18th century. The approaches to the abandonment of capital punishment varied in different European countries.<sup>361</sup> The following examines the processes of abolition in different European countries.

Portugal was the first main country in Europe to permanently denounce capital punishment for murder in 1867, and after 1849 no one was executed in that country for

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<sup>361</sup> *The Death Penalty in European Countries*, (Council of Europe- Strasbourg, 1962) 9.

this offence, although during the first World War, execution occurred for military crimes.<sup>362</sup>

In France, forgery and compound larceny were among the first to be removed from the list of crimes punishable by death, after pressure by the liberal movement. This movement led to the reform of the Penal Code in 1832, in which an important change was that the jury could exercise discretion in considering extenuating circumstances without providing reasons for doing so.<sup>363</sup> In this way, it reduced the number of death sentences. In Chapter 5, I will examine whether this method could provide positive lessons to China as a way of restricting the death sentence by considering special circumstances. Another noteworthy point in the procedure in France is that property related crimes and non-violent crimes were the first to be made non-capital offences. We can find commonality between this and the 8<sup>th</sup> Amendment to Chinese criminal law, which cut thirteen non-violent crimes from the list of 69 offences punishable by death.

When the abolitionist movement spread to Germany, in 1849 it drew up a German constitution to try to protect people from the death penalty, although this constitutional law had no effect on abolition in Germany.<sup>364</sup> Some German states abolished it at that time, while others reintroduced it after a period of abolition. Then, in World War Two, the death penalty was fully reinstated by the Nazi government. After the war finished, it was abolished again for all crimes by the West German government in 1949 (in East Germany this happened later in 1987). The processes in Italy were similar, first as abolition in fact (*de facto*) in 1876, then in law (*de jure*) in 1889. Italy's penal policy was also dramatically influenced by Fascism as in contemporary Germany. The death penalty was reintroduced by the Mussolini government in 1926, and was abolished again in 1944 when the war ended.<sup>365</sup>

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<sup>362</sup> Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edition, revised and updated edn Oxford University Press, Oxford 2015) 49.

<sup>363</sup> *The Death Penalty in European Countries*, (Council of Europe- Strasbourg, 1962) 9.

<sup>364</sup> *Ibid* 11.

<sup>365</sup> *ibid*.

Spain had introduced a bill to abolish the death penalty in 1822; this punishment was reintroduced soon after, however.<sup>366</sup> When we study the Spanish penal history of capital punishment, one noteworthy phenomenon is the frequent use of the royal pardon. There were two kinds of royal pardons, general and individual, which could be either full pardons, or involve a commutation of the penalty. General pardons were restricted to unpremeditated homicides and limited to 20 offenders a year. Individual pardons were even more common than general pardons. They were issued by the king at the request of individuals in return for some service rendered, or money, while the general pardons were granted *gratis*. This method dramatically reduced the number of executions.<sup>367</sup> It was adopted before the abolition movement, however, and it was abandoned during the later period of reform of capital punishment out of concern for judicial justice.<sup>368</sup> Here, I raise two questions from a comparative perspective. Since China's Constitution also stipulates special amnesty, could this method provide an exemplar for China's reform? If it could, how might China balance judicial justice and the restriction of capital punishment? In Chapter 7, these two questions will be further analysed.

In 1823, Sweden banned the application of capital punishment for embezzlement of public funds, and then in later several decades for mail-coach robbery, compound larceny, counterfeiting, infanticide, abortion, and unpremeditated murder with intent to kill. In its 1864 Code, capital punishment became an alternative penalty. The trajectory of abolition resembled that in other European countries, shrinking the number of offences punishable by death and providing for a period of no execution prior to the entire abolition.<sup>369</sup>

In Norway, the approach towards ending the use of the death penalty was almost the same: first the country restricted its use in certain crimes, then chose an alternative penalty before eventual abolition.

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<sup>366</sup> *The Death Penalty in European Countries*, (Council of Europe- Strasbourg, 1962) 9.

<sup>367</sup> Ruth Pik, 'Capital Punishment in Eighteenth-Century Spain' (1986). Vol 18, No 36 *Histoire sociale / Social History*.

<sup>368</sup> *ibid*.

<sup>369</sup> *The Death Penalty in European Countries*, (Council of Europe- Strasbourg, 1962) 11.

Belgium adopted a different method to stop execution by using the monarch's clemency, which was similar to Spain's previous course, but this happened after the movement of abolition. By that time, Spain had discarded this method after their reformation of the death penalty. In this way, Belgium became an abolitionist *de facto* country from 1863.<sup>370</sup>

The Netherlands introduced legislation to abolish capital punishment entirely in 1870, but the second world war changed the situation, and so it reintroduced this punishment for treason, war crimes, and collaboration with the enemy.<sup>371</sup> Then in 1982 the death penalty was re-abolished.

Among these countries, the most significant is the UK; in 1810, there were at least 223 crimes punishable by death in England.<sup>372</sup> After only five decades, however, the number had dramatically reduced to three in 1861, and only one third of death sentences were carried out.<sup>373</sup> Although the number of capital crimes substantially declined, the eventual and entire abolition in the UK was a long-run course, lasting for a fifty-year period from 1948, the first time Labour introduced a Private Member's Bill, calling for the suspension of the death penalty for a period of five years, to its final abolition in 1998.<sup>374</sup> In 1948 Labour MP Sidney Silverman's Bill aiming to abolish the death penalty was immediately passed by the Commons, but was rejected by the Lords.<sup>375</sup> Therefore, the death penalty continued to operate until the last execution in August 1964<sup>376</sup>.

During this period of sixteen years, the Royal Commission published a report in 1953 arguing that the abolition of the death penalty should only take place if the great majority of the public favoured it, which was something that had never been the case in that

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<sup>370</sup> Ibid 11.

<sup>371</sup> Ibid 12.

<sup>372</sup> Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edition, revised and updated edn Oxford University Press, Oxford 2015) 10.

<sup>373</sup> *The Death Penalty in European Countries*, (Council of Europe- Strasbourg, 1962) 9.

<sup>374</sup> Simon Webb, *Execution A History of Capital Punishment in Britain* (The History Press 2011) 131.

<sup>375</sup> Ibid.

<sup>376</sup> Ibid 130.



country.<sup>377</sup> It should be noted that such a use of public opinion as one of the reasons to retain such an extreme punishment is not uncommon, and can also be found in arguments made in U.S.A., China, and many other countries.<sup>378</sup>

According to reports at the time, however, even if capital punishment was not abolished at that time:

‘Hanging was coming to an end, even without further legislation. The numbers of executions carried out in this country had been declining since the beginning of the twentieth century, from twenty-nine in England and Wales in 1902, to fifteen in 1951... There was an even more dramatic decline in executions with the passage of the Homicide Act in 1957.’<sup>379</sup>

When at last capital punishment was formally renounced in the UK in 1998, people were almost unaware of it.<sup>380</sup>

#### **4. 3. 2 The General Experience and the relationship with the ICCPR**

##### **4.3.2.1 The General Experience**

By reviewing the history of abolition of capital punishment in fourteen European countries which have been in the vanguard of the movement, Appendix Table 1 gives some information about the processes (See Appendix Table 1). From the above illustration of the history of abolition and Appendix Table 1, it is clear that the processes of abolition did not differ significantly among these European countries. Some conclusions can be drawn, as follows.

First, all of these countries experienced a period of abolition *de facto* before the later *de jure* legal termination of the death penalty. In some countries, this period lasted longer; in Sweden, for example, the last execution in 1910 predated abolition for all crimes in

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<sup>377</sup> Ibid 131.

<sup>378</sup> Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edition, revised and updated edn Oxford University Press, Oxford 2015) 427.

<sup>379</sup> Simon Webb, *Execution A History of Capital Punishment in Britain* (The History Press 2011) 131.

<sup>380</sup> Ibid.

legislation in 1972 by more than 60 years. Hood also notes that in many countries, the processes of abolition for ordinary crimes passed through a lengthy period during which no executions were carried out. He takes Cyprus as an example: when the country removed the death penalty for the crime of premeditated murder in 1983, there had already been 23 years with no execution.<sup>381</sup> This gives us a perspective on China's reform, in a situation where there are presently a large number of executions. It could be also argued that if China abruptly abolished the death penalty for all crimes, it could produce a strong reaction, which would undermine the objective.

Second, except for the UK, the rest of the countries have undergone repetitive processes from abolition to restoration, then abolition to reinstatement, before the ultimate abandonment of capital punishment. One possible interpretation of this phenomenon might be that capital punishment had been extremely entrenched in human history, and so to eradicate it from the public mindset was an enormous challenge. The concept of human rights was rather a new idea which emerged from the spread of the Enlightenment thinking. Amongst human rights, the right to life was even more novel to many people. Some countries, such as 18<sup>th</sup> century Germany, tried to enshrine the right to life first in their constitutions. It provided an extraordinary model of how to protect human rights from its foundation, since in written law dominant countries, the amendment of constitutional law is much harder than that of other laws. Compared with Germany, an interesting phenomenon is that as a written law country, China also set the protection of human rights into its 2004 constitution, which suggests that the right to life, as a basic human right, is to be protected by the Chinese legal system.

Third, wars as the main political factor have dramatically influenced the move towards abolition in Europe. This effect is evident both in World War One and especially in World War Two. It led to many countries, even those which had banned the use of capital punishment for all crimes or had suspended executions, reintroducing it and retaining its use for military crimes for a relatively long time. Even in 1962, a universally acceptable view held that it was necessary to restore the death penalty when the country

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<sup>381</sup> Roger Hood, *The death Penalty, A Worldwide Perspective*, (Oxford University Press, 1989) 31.

was in a state of war or emergency.<sup>382</sup> With the era changing, however, wars can no longer influence the prominence of the death penalty in present European Union countries. The Protocol 13 to ECHR has prohibited its reintroduction in any circumstances, including when countries are in a state of emergency.<sup>383</sup>

Fourth, before total abolition, the minimisation of the number and span of crimes punishable by death was an unavoidable procedure in all of those countries; in the midst of these, property crimes were the first on the list to be removed from capital punishment on penal codes. Then crimes of embezzlement and other job-related offences followed. The last abolished ordinary crime in any European country was murder; concerning military law, it was treason. The General Assembly resolutions in 1971 and 1977 also pointed out the feasibility of this method of ‘progressively restricting the number of offences for which the death penalty may be imposed, with a view to the desirability of abolishing this punishment’.<sup>384</sup> From an international perspective, China's current reforms concerning criminal law and criminal procedure law correspond exactly to what those countries have done before. This will be researched in Chapter 5 and 6.

The section above analysed the major processes of abolition in main European countries. Next, the new trends occurring from 2000 will be examined to see whether these will bring new perspectives to China’s reform.

Hood and Hoyle argue that the above analysed methods represent the old pattern of abolition; after 1989, the movement shows a new trend globally, which is entirely different from that in the 1960s. He called this phenomenon the ‘new dynamic’.<sup>385</sup> The earlier approach was that countries first abolished capital punishment for ordinary crimes,

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<sup>382</sup> *The Death Penalty in European Countries*, (Council of Europe- Strasbourg, 1962) 9.

<sup>383</sup> See Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of The Death Penalty in All Circumstances. Article 1 Abolition of the death penalty ‘The death penalty shall be abolished. No one shall be condemned to such penalty or executed.’ Article 2 Prohibition of derogations ‘No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.’

<sup>384</sup> Anthony McGann and Wayne Sandholtz, ‘Patterns of Death Penalty Abolition, 1960–2005: Domestic and International Factors’ (2012) 56 *International Studies Quarterly* 275

<sup>385</sup> Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edition, revised and updated edn Oxford University Press, Oxford 2015) 17.

but this is less common in the more recent abolitionist countries. During the period of 1989-1999, there were among 41 new abolitionist countries, only seven of which adopted this old method, while the rest have moved directly to complete abolition. This trend has continued its momentum to the present.<sup>386</sup> Secondly, the period lasting from abolition *de facto* to abolition *de jure* in the new abolitionist countries has been dramatically shortened. Some did not even have such a process, instead moving straight to abolition *de jure* without having undergone the *de facto* process. Many of them achieved this just several years after the last execution. The long, drawn-out process has disappeared in these new abolitionist countries.<sup>387</sup> Thirdly, since 1989, the new abolitionist countries have consolidated this achievement into their constitutions or their constitutional courts by declaring that the death penalty is unconstitutional.

The Chinese government often uses the fact that there have been long delays in the process of abolition to justify their penal policy of avoiding abolitionism over a short period. Since the new tendency has shown the difference, however, the nation should research whether these processes generated by the ‘*new dynamic*’ would be feasible for China.

#### **4.3.2.2 The Connection with the ICCPR**

A century and a half after Enlightenment ideas in Europe directly provided the theoretical humanitarian foundation for abolition movement, the right to life as an endowed human right was first enshrined in the UDHR.<sup>388</sup> Some scholars point out that this movement became dynamic due to the emergence of international treaties, mainly the ICCPR and its protocols, concerning human rights after the Second World War, which proclaim the ‘right to life’ as a centrepiece of the legal regime.<sup>389</sup> Since the above has researched the

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<sup>386</sup> Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edition, revised and updated edn Oxford University Press, Oxford 2015) 17.

<sup>387</sup> Ibid.

<sup>388</sup> G A Res. 217 A (III), UN Doc. A/810, Article 3.

<sup>389</sup> See Peter Hodgkinson and William A Schabas, eds. *Capital Punishment: Strategies for Abolition*. (Cambridge University Press 2004). 36 <ProQuest ebrary> accessed 2 June 2016. See also Roger Hood and

process of abolition in Europe, this section will consider whether there is any connection between the abolition in European countries and the ICCPR.

Table 4.1 illustrates the abolition year and the ratification year by the European Union countries.

Member State	Year of last execution	Year of signature/ratification of the ICCPR	Year of ratification of the Second Optional Protocol to the ICCPR
Austria	1950	1973/1978	1993
Belgium	1950	1968/1983	1998
Bulgaria	1989	1968/1970	1999
Cyprus	1962	1966/1969	1999
Czech Republic	1989	1993 ratified	2004
Denmark	1950	1968/1972	1994
Estonia	1991	1991 ratified	2004
Finland	1944	1967/1975	1991
France	1977	1980 ratified	2007
Germany	1981 (Former Federal German 1948)	1968/1973	1992
Greece	1972	1997 ratified	1997
Hungary	1986	1969/1974	1994
Ireland	1954	1973/1989	1993
Italy	1947	1967/1978	1995
Latvia	1996	1992 ratified	2013
Lithuania	1995	1991 ratified	2002
Luxembourg	1949	1974/1983	1992
Malta	1943	1990 ratified	1994
Netherlands	1952	1969/1978	1991
Poland	1988	1967/1977	Signed but not ratified
Portugal	1849	1976/1978	1990
Romania	1989	1968/1974	1991
Slovakia	1989	1993 ratified	1999
Slovenia	1957	1992 ratified	1994
Spain	1975	1976/1977	1991
Sweden	1910	1967/1971	1990
United Kingdom	1964	1968/1976	1999

Figure 2 Table 4.1 Time of Abolition, signature and ratification

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Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edition, revised and updated edn Oxford University Press, Oxford 2015) 23-29.

Source from: the information of the signature and ratification of the ICCPR is from United Nations Human Rights Office of the High Commissioner website: [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx), accessed on 09/01/2018. The information of the Second Optional Protocol to the ICCPR is from Behrmann, Christian. 'The European Union and the Abolition of the Death Penalty.' (2013) *Pace International Law Review Online Companion*, 4(1), 1-79; the information of the last execution was combined both from Roger Hood & Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edn, Oxford University Press, Oxford 2015) and from Behrmann, Christian. 'The European Union and the Abolition of the Death Penalty.'

From the above table, there are 14 countries where the last execution was earlier than the generation of the ICCPR and much earlier than the ratification. These were also significantly earlier than the ratification of the ICCPR's protocol, which completely banned the use of the death penalty. However, as Pavel points out, the main idea of the right to life as the most important value throughout the abolition process and the ICCPR is the same. He contends that:

'the right to life as a supreme value is approached from the perspective of legal values in the field of law in general and the right to life in particular, and is motivated for this study by identifying principles in the field, set from documents with symbolic value to current European and universal standards.'<sup>390</sup>

This same value meant that the ICCPR and the abolitionist European countries shared the common idea of limiting and eventually eliminating the use of the capital punishment.

The European Convention on Human Rights (ECHR), which was formed before the ICCPR, has a similar prescription as the ICCPR.<sup>391</sup> The ECHR is 'a part of a network of international human rights treaties of universal or regional application. It is the regional

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<sup>390</sup> Pavel, N. (2012). *The Right to Life as a Supreme Value and Guaranteeing the Right to Life. Contemporary Readings in Law and Social Justice*, 4(2), 970-991.

<sup>391</sup> Its Article 2 Right to life verse 1: 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.'

counterpart to the ICCPR, to which all Convention parties are parties.<sup>392</sup> Similarly, the Declaration by Presidency on Behalf of the European Union noted:

‘The European Union recalled the adoption, on 15 December 1989, of the Second Optional Protocol to the International Covenant on Civil and Political Rights, the principal universal instrument aiming at the abolition of the death penalty. The Protocol marks an important milestone on the path towards the worldwide abolition of the death penalty, a cause the European Union has embraced as a strongly held policy view and an integral objective of its human rights policy.’<sup>393</sup>

The death penalty-related provision in the ECHR Article 2(1) prescribes the following:

‘Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.’

This is often compared with the ICCPR’s Article 6 (1) (2), which prescribes that:

‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. Then penalty can only be carried out pursuant to a final judgement rendered by a competent court.’

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<sup>392</sup> D.J. Harris, M. O’Boyle, E.P. Bates & C.M. Buckley, *Law of the European Convention on Human Rights*, (Oxford University Press, 2014) 3.

<sup>393</sup> Declaration by Presidency on Behalf of European Union on Occasion of 20 Anniversary of Adoption of Second Optional Protocol. (2010, January 05). US Fed News Service, Including US State News, p. US Fed News Service, Including US State News, Jan 5, 2010.

It is clear therefore that the two treaties retain the death penalty. According to the situation at the time they were drafted, the use of the death penalty had to be allowed because it was generally provided for and applied in all country parties. Accordingly, the Sixth and Thirteenth Protocols to the ECHR and the Second Protocol to the ICCPR require the abolition of the death penalty. The core value of human rights, especially the right to life in these important treaties, provides ethical, theoretical and legal bases for abolition. Therefore, the ICCPR and the European movement of the abolition combined promoted the abolition movement globally.

#### **4.4 THE MEANING TO CHINA FROM AN INTERNATIONAL PERSPECTIVE**

##### **4.4.1 Examining Chinese Cultural Factors**

###### **4.4.1.1 Confucian Idea**

Following the analysis of the influence of European religious and Enlightenment cultural values which shaped its current penal policy, it is appropriate to research the meaning to China with particular reference to its culture and religions. This raises some other relevant questions as the following. How can we analyse (from the perspective of Chinese cultural traditions) the reason that this state still retains capital punishment and deems it necessary at present? Has China possessed humanitarian thought in its culture and religions historically and, if so, how did these ideas operate in the past? What is the current cultural and religious situation in present day China that could be relevant to ideas concerning retention and abolition of the death penalty?

Arguably, many Chinese support the view that their compatriots lack the concept of ‘humanity,’ and have never attached major importance to human life.<sup>394</sup> Hence, they

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<sup>394</sup> As is evident from some blogs online, many Chinese people are complaining on the lack of humanitarian thought in China’s history, ‘What We Lack most is Humanistic Care’ Ma Yunlong’s Speech in Fudan University <<http://blog.ifeng.com/article/1605983.html>>, accessed 17 October, 2016; also see ‘Analysis on the Lack of Humanitarian Care in Journalists’ Reports <<http://www.docin.com/p-1319259529.html>> accessed 17 October 2016; also see *The Lack of Basic Humanitarian Care*, <[http://www.dzwww.com/2010/wjl/kn/201004/t20100406\\_5467806.htm](http://www.dzwww.com/2010/wjl/kn/201004/t20100406_5467806.htm)> accessed 17 Octobe2016.



argue that there is still no cultural soil available to grow the liberal ideology of ‘human rights,’ even a supposedly absolute ‘right to life.’

However, as mentioned in Chapter 2 about the history of the use of the death penalty, if people go back two thousand years, they would encounter a contrary Confucian idea. This idea has influenced and constructed the main ideology system throughout China’s extended history, and has even defined the core of China’s cultural-political tradition. Just as Christopher argues, it has been shown how Confucian ethics constituted the moral foundations of Chinese culture for more than two thousand years. Therefore, he argues that it is impossible to understand Chinese history without reference to such values. Confucian thought was linked not only with Chinese religion and ritual, but also with Chinese political and social order.<sup>395</sup> Confucianism expresses a genuinely humanitarian thought when it claims that ‘The benevolent loves others (*Ren zhe ai ren*)’<sup>396</sup> and that ‘people should love the populace extensively and be close to those who are humane (*fan ai zhe, er qin Ren*)’.<sup>397</sup> From *The Analects of Confucius*, we find that ‘*Ren*’ – meaning benevolence and humanity – was exactly the core idea of Confucian ideology. The idea of benevolent love, to a certain extent, confirmed values of ‘human dignity’ and ‘human values.’ It is an important theory in Confucian ethics that benevolence means loving others. Confucianism has traditionally permeated every aspect of Chinese life. In this way, these values provided an ideological basis for justifying penal policy, as well as other elements of Chinese governance. As previously mentioned in Chapter 2, constructing amnesty system for the death penalty was out of the idea of benevolent governance. The justification for it was that ‘the heaven/emperor has the virtue of cherishing life’.<sup>398</sup>

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<sup>395</sup> Dawson, Christopher. *Christianity and European Culture : Selections from the Work of Christopher Dawson*. (:Catholic University of America Press 1998) <ProQuest ebrary>. accessed 13 February 2016.

<sup>396</sup> *The Analects of Confucius, Ren Zhe Ai Ren (The Benevolent Loves Others)* <[www.liuxue86.com/a/2679460.html](http://www.liuxue86.com/a/2679460.html)>accessed 26 November 2016..

<sup>397</sup> ‘Love others, Love Benevolent’ *The Analects of Confucius: Xue ER*. <[www.liuxue86.com/a/2679460.html](http://www.liuxue86.com/a/2679460.html)>accessed 26 November 2016.

<sup>398</sup> Book of the Document, one of the Five Classical Confucian Books. <<https://baike.baidu.com/item/%E5%A4%A7%E7%A6%B9%E8%B0%9F/9504256?fr=aladdin>> accessed 21 November 2017.

Meanwhile, this ideology not only influenced political-culture in China, but also has generated a profound effect within Japan, Korea and Vietnam, which are referred to as ‘the Confucian culture circle.’<sup>399</sup> In this ‘circle,’ South Korea is the best-preserved country of Confucian ideas, customs, and rituals, and has come to be regarded as abolitionist *de facto*. Here, it is worth noting that this state’s last execution happened in 1997.<sup>400</sup> Although largely subject to similar influences of Confucian culture, the countries of Eastern Asia remain divided in their attitude towards capital punishment. As mentioned in Chapter 2, when we trace Chinese history, there was even a period in which China had abolished capital punishment between AD 747-759 in the Tang Dynasty.<sup>401</sup> It was also exactly in the Tang Dynasty that Confucianism spread to Japan, together with other elements of the Chinese culture and ancient political systems.<sup>402</sup> At this time, the Chinese emperors started to select officers according to their knowledge of Confucian classical works. From this, we cannot conclude that Confucianism led ancient – or even present – Chinese people to endorse the legitimacy of their nation’s death penalty.

Although, after the founding of the PRC, the officially dominant ideology has shifted from Confucianism to Marxism. Common Chinese people, especially those living in the vast rural land still stick to the basic Confucian values mostly. Just as M. Ulric Killion points out that after the Chinese Revolution of 1911, the law was westernized, but morality remained traditional. This meant that Confucian morality still ordered society and produced good government by paying attention to education, cultivation, and fulfilment of an individual instead of exclusively focusing on government and social

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<sup>399</sup> On Confucius' influence, see Yang Huanyin, ‘Confucius (K’ung Tzu) (551-479 Bc’) (1993) vol. XXIII, no. 1/2, .Prospects: The Quarterly Review of Comparative Education (Paris, UNESCO: International Bureau of Education) 5

<sup>400</sup> Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edition, revised and updated edn Oxford University Press, Oxford 2015) 103.

<sup>401</sup> See also Ken Bai, ‘On the Chinese People’s Attitude to the Death Penalty’ (2012) 6 Issues on Juvenile Crimes and Delinquency 28.

<sup>402</sup> Cai Hong, ‘Confucian Ethics and the Economic Development in Japan’ (1998) 2. Forum on Chinese Culture.

control. Modern Chinese communists find it problematic that traditional Confucian morality continues to exert its influence.<sup>403</sup>

Admittedly, Some Chinese scholars argue that although Chinese traditional culture did not lack humane and tolerant ideas, these are fundamentally different from the modern legal meaning of humanitarian thought, which is the foundation of abolition movement. This is because the traditional approach was to maintain hierarchical differences and safeguard feudal imperial power at the expense of the pursuit of liberty, whereas the modern approach concerns equality and human rights. Hence, if the modern sense of humanitarianism is what reforms are needed in China, the traditional one is only likely to hinder it. These scholars therefore argue that if we want to promote this reform, the transformation of ideology from feudal to modern and the construction of a spirit of ‘the rule of law’ is necessary.<sup>404</sup> The Chinese culture also has encouraged to revenge the feud instead of to forgive, especially according to the blood hierarchy.

Compared with the European countries, however, it can be found that from its feudal time to modern time, European People also had favoured the use of the death penalty. As researched in the section two, the Royal Commission in the UK also used public opinion as an excuse to oppose the abolition, but the public opinion only changed after long time abolition. Therefore, the favourite of the use of the death penalty is not a phenomenon only specific in China.

Combining the above research, here, we have to ask whether religions have been a significant factor in generating direct or indirect influence upon Chinese people’s

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<sup>403</sup> M. Ulric Killion, ‘‘Building Up’ China’s Constitution: Culture, Marxism, And The WTO Rules’; Content downloaded/printed from HeinOnline, Fri Sep 16 12:48:28 2016.

<sup>404</sup> Zhao Bingzhi and Zhang Weike, ‘The Tradition and the Modern: Reform of the Death Penalty and the Shift of Concept of Humanitarianism in Common People’ (2016), 30(2) Contemporary Law Review 28; see also Liu Yanjun, ‘Reform of the Death Penalty from Humanitarian Perspective’ (2011); Journal of SWUPL 1; and Wu Yong, ‘*On the Development of China’s Capital Punishment System from the Basis of Humanitarianism*’, (Masters Dissertation, Beijing Normal University 2011) <[http://d.g.wanfangdata.com.cn/Thesis\\_Y1983810.aspx](http://d.g.wanfangdata.com.cn/Thesis_Y1983810.aspx)> accessed 10 September 2016.

attitudes towards the death penalty. Next part will research religion's influence in China both in the past and at present.

#### 4.5.1.2 Religious Factor

If one researches China's history, it can be found that any religion in China, whether Buddhism, Taoism, Islam, Christianity, or any other religions emerging since Chinese ancient history, has never had power exceeding that of the emperors. Religions in China have always been subordinate to political power.<sup>405</sup>

Indeed, Yu-lan Fung argues that, when compared with other nations, Chinese people have always cared least about religions. The spiritual foundation of Chinese culture is Confucian ethics rather than religious doctrines. This phenomenon makes Chinese people different from other nations, such as Ireland, Britain or Spain, whose cultures were dominated by churches and church officials.<sup>406</sup> Even today, only a minority of Chinese people believe in religions, in contrast with 80% of people who are self-identifying Christians in the U.S.A.<sup>407</sup>

As the dominant religion in the Chinese history, Buddhism was disseminated in China in the late Han Dynasty in around the first century. Then with its development, monks and Buddhism temples owed vast lands and servants without paying tax to the government. The conflict between the government authority and Buddhism temples became irreconcilable. Then the first movement to eliminate Buddhism started in 438 A.D. Temples were demolished and monks were coerced to resume secular life. It gave Buddhism a heavy strike. Then later there were another three times large scale movements

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<sup>405</sup> See Lv Daji, and Mou Zhongjian, *Chinese Religions and Chinese Culture (Volume 1) – General Introduction of Chinese Religions and Traditional Culture* (China Social Sciences Press 2005).

<sup>406</sup> F Yu-Lan, and D Bodde. *A short history of Chinese philosophy* (Simon and Schuster, 1997), Volume 1 .1-5.

<sup>407</sup> According to a report from Center on Religion and Chinese Society of Purdue University, Buddhism, which has had more than 2000 years' history in China and at present is the major religion in China, only accounts for 18% of the total population. Li Xiangping, Wang Ying, How Many Religious Believers in China on Earth, (24 February 2012) <[http://big5.xjass.com/mzwh/content/2012-02/24/content\\_222148.htm](http://big5.xjass.com/mzwh/content/2012-02/24/content_222148.htm)> accessed 31 August 2014.

of elimination of Buddhism nationwide and many times small scale movements throughout the Chinese history. Meanwhile, the emperors after Han continued to erect Confucianism as the dominant thought in China. Buddhism was marginalised from the dominant thoughts.<sup>408</sup> The other religions such as the native Taoism, the imported Islam and Christianity have never been developed as dominant ones in the Chinese history.

Therefore, religions would not generate critical influence on Chinese people's world view in general, and the use of the death penalty in particular.

From the above, three simple conclusions are drawn. Firstly, religions have little impact on the majority of Chinese people's worldviews and attitudes to the use of the death penalty, both in the past and today. Secondly, Confucianism shaped Chinese history and Chinese people's codes of behaviour in all aspects in the past. Third, abolition thought in European countries also evolved in a long period, then the majority of people shifted their view from supporting the use of the death penalty to opposing it. The abolition in any country happened before public opinion changed.

#### **4.4.2 Arguments and Counterarguments of Enlightenment Thought in China**

Some intellectuals argue that value-laden liberal ideals of constitutionalism, democracy, and liberty espoused by Enlightenment thinkers such as John Locke and Jean-Jacques Rousseau – that government was held in trust instead of by ordained right and that the monarch was a mere agent of society with 'no will, no power but that of law' – are alien conceptions to the traditional Chinese social structure of hierarchical relationships and patriarchal values, which has its authority not in the people, but rather in the state.<sup>409</sup>

Objectively speaking, the problem with the above argument is that the concepts of the rule of law and human rights, which have been enshrined in the Chinese constitution, are also born out of this kind of liberalism. Since Chinese people can absorb liberal ideas

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<sup>408</sup> For the history of Buddhism in China, see Jiyu Ren, *The History of Buddhism in China*, (China Social Sciences Publishing House 1988), for online access <http://ds.eywedu.com/zhongguofojiaoshi/default.htm>, <accessed on 17 August 2017>.

<sup>409</sup> M. Ulric Killion 'China's Amended Constitution: Quest for Liberty and Independent Judicial Review' 4 (1) Washington University Global Studies Law Review.

generated from the western Enlightenment movement, and since the movement of abolition of the death penalty also originated in western countries, why would Chinese people oppose it? If we compare the Chinese constitution with the definition of liberal society – ‘a society that provides constitutional government (rule by law, not by men) and freedom of religion, thought, expression and economic interaction... freedom from coercion, freedom from illegitimate authority (ie, from unconstitutional government), freedom to buy and sell property (including one's own labour), and so on’<sup>410</sup> – it could be found that the prescription in the Chinese Constitution is more liberal than originally communist- which generated in the 19<sup>th</sup> century.<sup>411</sup> However, according the new Marxism theory in China, namely the localised Marxism, the Constitution is more in line with this theory. Locke argued that there was a natural right to the liberty of conscience. The Chinese constitution articles determining that ‘anybody can believe in any religion or not believe in any religion, which is the right to the liberty of conscience’, along with scholarly writings on human rights, freedom of belief, and the rule of law stipulated in the Chinese constitution, show that it is in accordance with the main idea of liberalism as opposed to Marxism. All of Montesquieu’s thought pertaining to the importance of a robust due process in law, including the right to a fair trial, the presumption of innocence, and proportionality in the severity of punishment, can be found in Chinese criminal law and criminal procedure law principles. This is clearly not Marxism either.<sup>412</sup> In the light of such liberal thought reflected in the laws mentioned above, it is clear that the main idea through the Chinese legal system is liberal.

As discussed in Chapter 1, the Chinese legal system and legal spirit were copied from western countries after the first reform in the end of Qing dynasty, and have existed for more than 100 years with numerous amendments towards modernization. Since

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<sup>410</sup> 'The Perils of Complacency.' (1996) 341. <https://waynehonors.files.wordpress.com/2015/01/hon-ps1010-liberalism-reading.pdf>, <accessed 17 June 2016>.

<sup>411</sup> Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edition, revised and updated edn Oxford University Press, Oxford 2015) 13.

<sup>412</sup> Randall Peerenboom, ‘Liberalism still faces challenges, especially with the phenomenal growth of China as a model combination of authoritarian government and economic liberalism.’ *China’s Long March toward Rule of Law* (Cambridge University Press 2002) 7.

transplanted western legal thought and legal systems can be localised in China, it is not realistic to deny the idea that the movement in favour of abolition originating from western countries would be possible in China on a theoretical level.

#### **4.5 CONCLUSION**

This chapter first analysed the theoretical background of the movement of abolition in Western Europe and examined the cultural factors which could have initiated this movement. Through examining the most conservative Christian judges' attitudes to the abolition of the death penalty, we cannot conclude that Christianity is the principal reason for abolition. From leading Enlightenment figures' attitudes to the death penalty, however, it can be seen that as Enlightenment thought emerged, conceptions of human rights spread fast, and therefore the right to life, which constitutes the fundamental theory of the abolition, became acceptable. Hence, the Enlightenment provides the theoretical ground for this movement. Following this, I examined the Chinese culture of traditional Confucianism with modern localised Marxist, which has been entrenched as the dominant theory since the founding of the PRC. I drew the conclusion that both Confucianism and localised Marxist are not preventing China from reforming or abolishing the death penalty. The Chinese constitution is more liberal than originally Marxist, and probably more in accordance with the localised Marxism, which makes China tend to accept liberal views of human rights.

The processes of abolition in European Countries were also researched. When abolition was first proposed, the common view of the movement was still that 'the subject was to be considered in relation to ordinary law crimes and criminals only, excluding political crimes, espionage, collaboration with the enemy and crimes punishable by military law.' Then, after decades, it become acceptable not only in the case of ordinary crimes, but for all crimes. By comparison, I reached the conclusion that there is a remarkable resemblance between China's reforms restricting the use of the death penalty and the processes that some European countries saw in the 1960s. Additionally, I noted

that a new dynamic emerged in the movement after 1989, which gave rise to a rapid process from retention to abolition.



## **CHAPTER 5 CHALLENGES TO DEATH PENALTY REFORM IN CHINESE CRIMINAL LAW**

### **5.1 INTRODUCTION**

In Chapter 4, the cultural and religious factors contributing to the abolition of the death penalty in European countries were explored. The reason why the movement towards abolition first happened and prospered in those countries was analysed. The course of how the European countries abolished capital punishment progressively was addressed, and questions were also asked as to how China could draw lessons from this experience.

Nonetheless, an objective study of the present situation with regard to capital punishment in China must also be concerned with research into China's current criminal law, its evolution and further possible development towards reform and eventual abolition in the future.

As was mentioned in Chapter 1, since the legal reforms of Shen Jiaben took place at the end of the Qing Dynasty, conflicts between conservatives and neo-liberal cosmopolitans have continued throughout legal history from 1905 to the present day in China. The evolution of the currently effective Chinese criminal law has also had a similar process.

In this chapter, the first part illustrates the history of how criminal law in the PRC evolved from the one first promulgated in 1979 to the current one and its amendments. The difference between the former and the latter as regards the use of the death penalty as well as the conflicts between different views will also be analysed. Then, in the second part, the main trends towards death penalty reform in the substantive criminal law in China in 2016 will be discussed. In the last section, possible workable solutions for legal reforms concerning the overuse of the death penalty in China at a criminal law level will be proposed in accordance with the ICCPR, and other international treaties that China has signed or ratified.

## 5.2 THE EVOLUTION OF THE CRIMINAL LAW RESPECTING CAPITAL PUNISHMENT

This section will mainly discuss how capital punishment evolved between 1979 and 1997. It will analyse what is officially designated as Criminal Law of the PRC (hereinafter the criminal law) and also other forms of Chinese laws and regulations which concern criminal attributes. It will also consider how many crimes were punishable in the first criminal law, and how they increased to a greater extent before and after the campaigns of Strike Hard (*Yanda*). When did China come to restrict the use of this punishment and when is the first time the number of the crimes decreased? What is the general trend of the former reform of the Criminal Law towards the death penalty?

### 5.2.1 Background and Evolution

The 1979 criminal law was enacted on 6<sup>th</sup> July 1979 and went into effect on 1<sup>st</sup> January 1980. The reason the 1979 criminal law is chosen here as the starting point is that it was the first penal code to come into force after the founding of the PRC. Before this law, there were only a few special regulations with criminal attributes in the PRC<sup>413</sup>. It was generated by the reconstruction of the Chinese judicial and legal systems after the end of the Cultural Revolution, during which period these two systems had been wiped out for a long time, with the slogan ‘smashing the public security organs, procuratorates and courts’, and so all the three ‘judicial organisations’<sup>414</sup> could not function. After the power of courts was transferred to the Revolutionary Committee, there were no laws or legal system existing in China.<sup>415</sup> When the Cultural Revolution came to an end in 1976,

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<sup>413</sup> These were not named as criminal law, and were just separated regulations, but they could be cited to sentence criminal punishments, so they functioned as criminal law before the 1979 criminal law came to power.

<sup>414</sup> In China, the public security organisation and the procuratorate are also recognised as judicial organisations. This is different from the English legal system, where only the judiciary is considered as being within the judicial system.

<sup>415</sup> Deshui Yu, Feng Gao. ‘On People's Court from the Perspective of National Governance’ (2015) 2 Journal of Political Science and Law.

the judicial organisations and the legal system in China were rebuilt, and against this background the 1979 criminal law was drawn up. It introduced some modern penal principles, which significantly influenced later criminal law.

Concerning the use of the death penalty, there were 28 capital crimes prescribed in it. Before and after the commencement of the *Yanda* (Striking Hard) campaign, however, 11 of 23 specific criminal laws that were issued successively over the timespan from 1981 to 1995 supplemented 44 charges applicable for the death penalty by the Standing Committee of the National People's Congress (NPC). Consequently, the number of death penalty charges increased to 72. The route of how the number of crimes punishable by death increased is listed in detail in Appendix II.

After the '*reform (of the economy) and open (to the world)*' policy had been carried out for nearly 20 years, society in China underwent a series of colossal changes, in both the economic and socio-political domains. The 1979 criminal law and its many supplements were no longer suitable for the new situation. On 1<sup>st</sup> October 1997, the new criminal law, which combined all the capital crimes in the 1979 equivalent and the later separated regulations, took effect. It abolished capital punishment for several crimes and changed some names of capital crimes, hence reducing the total number to 69 before its 8<sup>th</sup> Amendment.

### **5.2.2 Similarities and Differences Concerning Capital Crimes between the Two Criminal Laws**

A comparison of the death penalty offences in the 1979 criminal law and the 1997 equivalent is shown in the table in Appendix III. From this table, pie chart 5.1 and 5.2 are formed.

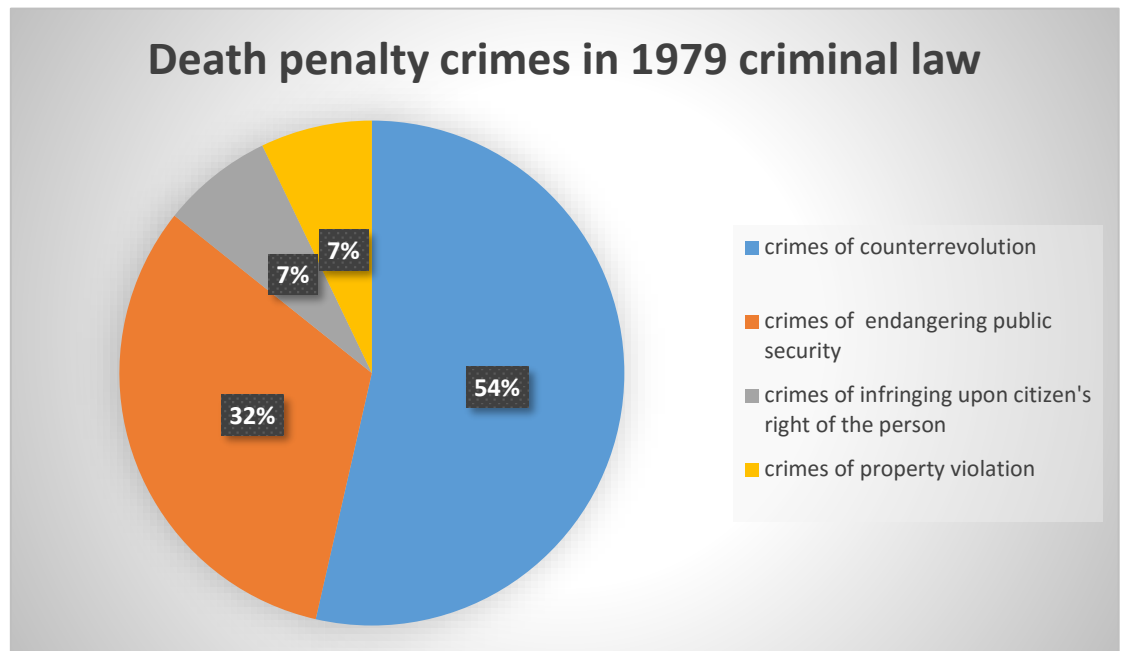


Figure 3 Pie chart 5.1: the proportion of capital crimes in 1979

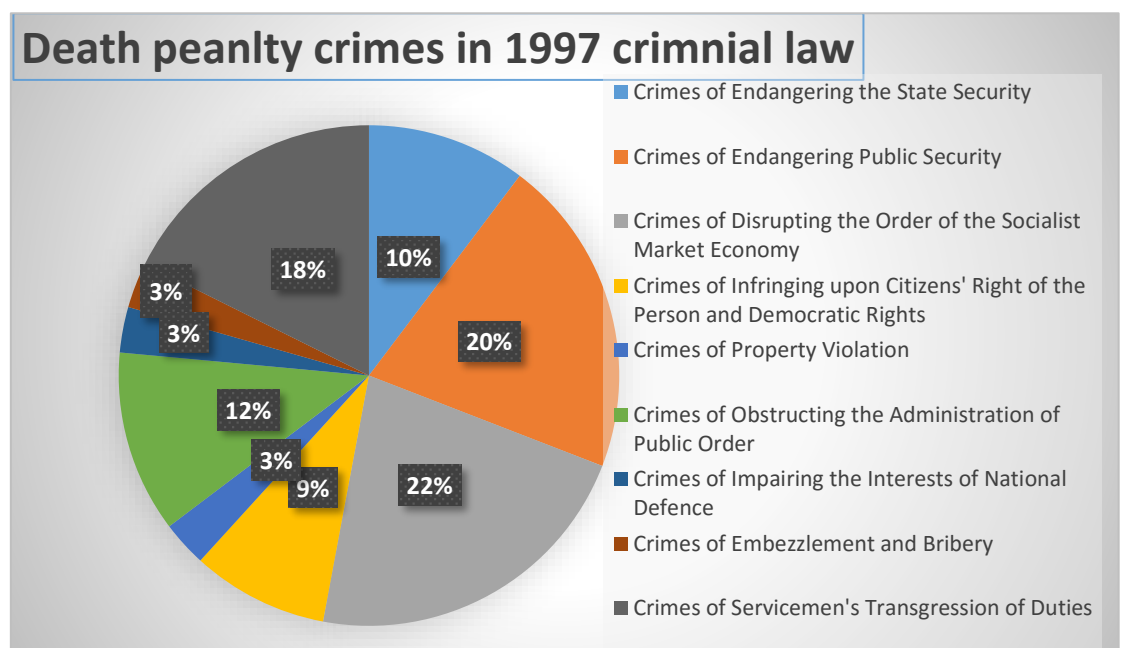


Figure 4 Pie chart 5.2 the proportion of capital crimes in 1997

From the pie chart 5.1, it can be seen that the crimes of counterrevolution punishable by the death penalty take up more than half of all death penalty crimes (54%) in the 1979 criminal law, followed by crimes of endangering public security, which account for 32%. On the contrary, crimes of Infringing upon Citizens 'Right of the Person' and crimes of

property violation make up a small proportion of the total. This reflects the situation at the time in 1979: even if the Cultural Revolution had ended, people's minds were still constrained by theories of 'class struggle' and could not distinguish actions which endangered state security from counterrevolutionary ones. Meanwhile, human rights – in the sense of protecting personal and democratic rights from illegal infringement – were paid little attention during that period, compared to the protection of the state's interests by stipulating substantial numbers of capital crimes. This, in one aspect, implies that the traditional Chinese values that focus on the good of the nation and overlook the need of individuals continued to have influence in criminal law.

Despite these defects, some Chinese scholars still argue that the 1979 criminal law is moderate in its application of the death penalty.<sup>416</sup> It can be seen that it did not consider crimes of undermining the socialist economic order or obstructing the administration of public order to be punishable by the death penalty; concerning crimes of property violation, theft was not a crime subject to death. Later, in the 1997 criminal law, however, those crimes were all prescribed as capital crimes.

It could be argued that a country's criminal policy reflects its socio-economic situation. From the evolution of criminal law, we can see clearly that the country's focus shifted from 'class struggle' to the development of the economy after the year 1978. Therefore, after 1997, the term 'counterrevolutionary' was no longer used, and was substituted by the term 'endangering the state security'; in any case, these were no longer the most significant part in the criminal law.

The category of crimes of disrupting the order of the socialist market economy began to form the most significant proportion of all crimes in the 1997 criminal law. The total number of crimes increased from 15 to 96, among which 16 capital crimes were newly added. Nonetheless, all of them had accumulated year by year since 1981, the time the first special criminal law was enacted.

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<sup>416</sup> 'The Current Fate of the Death Penalty in China: the 1997 Criminal Law weakens the use of it' (*Oriental Outlook*, 10 February 2014)

< <http://news.163.com/14/0210/12/9KNM6GCU00014AED.html> > accessed 10 January 2015

At the same time, the fast economic development and the out of date bureaucratic system brought another new problem, severe corruption, which has grown to become a serious social problem in China since the late 1980s. This also was reflected in the 1997 criminal law, in which a separate new chapter, *Crimes of Embezzlement and Bribery*, was inserted. Compared with the 1979 criminal law, these crimes were classified as *Crimes of Property Violation* and *Crimes of Dereliction of Duty*, and except Embezzlement, the rest of them were all not capital crimes.

Meanwhile, crimes relating to servicemen's transgression of duties, which were transformed from a special criminal regulation in 1981, formed a new chapter in the 1997 criminal law as well. This type of crime makes up 18% of all crimes and is the third biggest crime category punishable by death.

The above study reveals several findings. Firstly, compared with the 1979 criminal law, it is clear that the 1997 equivalent moved towards increasing the use of the death penalty, instead of minimising it. Secondly, the evolution of the criminal law displayed the Chinese government's reaction and reflection to new emerging problems generated by the transformation of Chinese society. This demonstrates that in the earlier post-Cultural Revolution period, the use of the death penalty was still treated as a governing instrument. It also shows that penal policy on the death penalty was influenced substantially by different political campaigns.

### **5.2.3 The New Trend towards the Death Penalty Reform**

The momentum towards increasing the number of capital crimes continued through the Amendments III and IV to the criminal law, which were enacted in 2001 and 2002 respectively, although the first and the second amendments did not add new capital crimes.

Nonetheless, neither the third nor the fourth amendment increased the number of capital crimes; both of the amendments broadened the death penalty's range of application by including more activities into one capital offence. For instance, the third amendment stipulated two new activities – spreading radioactive substances and spreading infectious disease pathogens or other substances – as a capital crime under the name of 'spreading

poisonous substances'. It is still one capital crime, but two new activities have been included in it. The fourth amendment continued to use this method to enlarge the scope of capital crimes without increasing the number of them. In this way, it actually extended the use of the death penalty.<sup>417</sup> However, by this time, the international trend was towards abolition.<sup>418</sup>

The increasing influence of international human rights law did cause a number of improvements in the 1997 criminal law, on which could be seen to some extent a degree of achievement by the neo-liberal cosmopolitans. Article 4 of the 1979 equivalent prescribes that any person over 16 years of age but below 18 years of age could not be sentenced to immediate death, but to a two-year reprieve.<sup>419</sup> It is evident that this prescription contravened article 6(5) of the ICCPR, which mandates that capital punishment can only be imposed against an individual who is over 18 years of age. The 1997 criminal law amended this to prohibit courts from sentencing young people between 16-18 to death or death with a two-year reprieve.

Furthermore, the 1997 criminal law abandoned the application of analogy, a system where crimes that were not expressly defined in the specific provisions of criminal law could be determined and punished by articles that cover the most closely analogous crimes. Judgment of this kind needed to be submitted to the SPC for approval. This application of analogy increased the likelihood of the application of capital punishment because it meant that with the SPC approval, any action which might be a potential danger to social stability and social order, could be classed a capital crime by matching it with a similar one. The repeal of this statute and the establishment of the principle of legally prescribed punishment for a specified crime (*nullum crimen sine lege*) made the 1997 criminal law more accordant with the ICCPR on this point.

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<sup>417</sup> Amendment (III) of the Criminal Law of the People's Republic of China.

<sup>418</sup> Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edition, rev edn Oxford University Press, Oxford 2015) 16.

<sup>419</sup> This is a special punishment attached to the death penalty. If the criminal does not commit a new intentional crime during this two-year period in prison, the death penalty will be commuted to life imprisonment or fixed-term imprisonment.

Despite its above merits, one problem with the 1997 criminal law was the high amount of capital crimes in it. Meanwhile, over a period of 30 years from 1981 to 2011, with China moving away from the abolitionist trend worldwide before it eventually shifted its penal policy towards reducing the use of the death penalty, it was under considerable pressure from international society, especially from the European Union.<sup>420</sup> China moved more in line with the international trend fourteen years later when the 1997 criminal law was enacted. In 2011, Amendment VIII of the criminal law (hereinafter Amendment VIII) abolished thirteen non-violent crimes from capital punishment and then, in 2015, Amendment IX further abolished the death penalty for nine crimes<sup>421</sup>. Consequently, as of the year 2016, there are 47 death penalty crimes in Chinese criminal law.<sup>422</sup>

The following bar chart 5.3 shows the trend of the use of the death penalty in China:

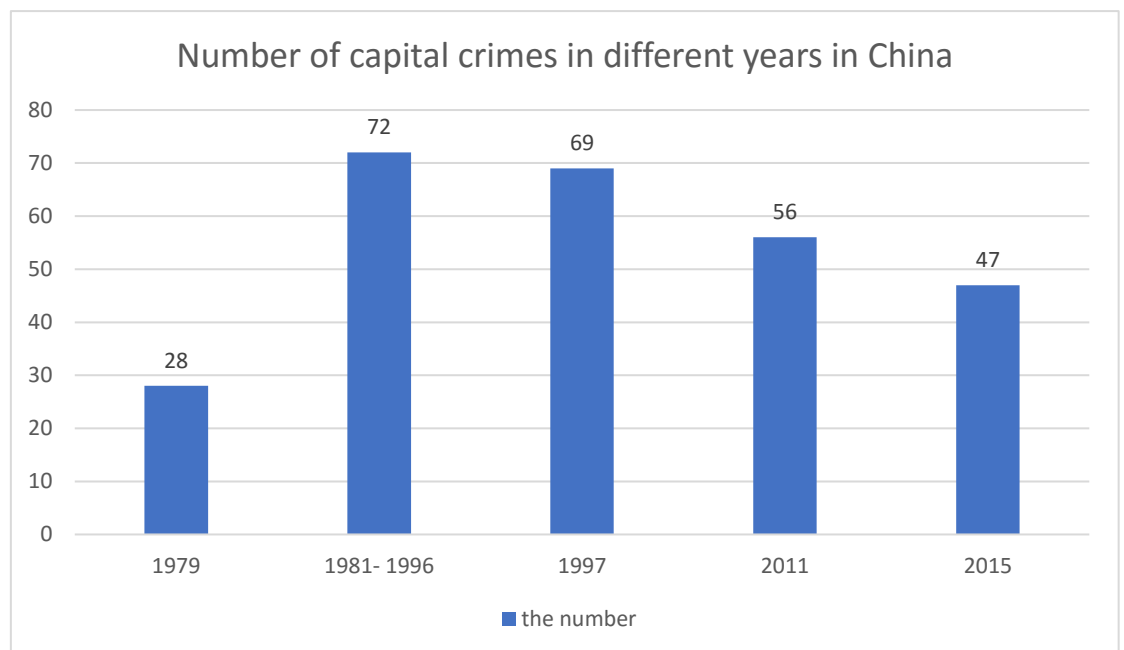


Figure 5 Pie chart 5.3 source from the criminal law

<sup>420</sup> Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edition, rev edn Oxford University Press, Oxford 2015) 63.

<sup>421</sup> See Appendix 8.

<sup>422</sup> See Appendix 5.



From this bar chart, it can be seen that after 1997, there was a clear decline in the number of capital crimes, while still at a high level, and higher than that in 1979. This indicates that China is moving towards reform of the death penalty by reducing the number of capital crimes.

This process of reform at the level of criminal law was accompanied by conflict between neo-liberal cosmopolitanism and conservatism.

Conservatives argued that the current situation in China necessitated the retention of the death penalty and of other criminal systems such as the system of criminal analogy. The reasons for preserving analogy system and the death penalty presented by the conservatives are the following. Firstly, they contended that through respecting the complexity of tremendous regional disparity, the social transformation towards modernisation, and the immature legal system in China, the criminal law could not list all crimes, and therefore using criminal analogy and the death penalty could safeguard the interest of the nation and the Chinese people. Secondly, they argued that given that the criminal analogy system was formed in ancient China, the prescription of it in criminal law was not only a good inheritance from the Chinese legal tradition, but also a necessary complement for criminal law. The principle of *nullum crimen sine lege* was not suitable to China's situation, and therefore China should not blindly copy western countries. Thirdly, concerning the retention of capital crime, they argued that the death penalty had constitutional legitimacy, and so China should retain it. Still others contended that given the sharply rising serious crime rate, the death penalty could not be restricted, but, on the contrary, needed to be expanded. The number of capital crimes in the criminal law was not too large but too small.<sup>423</sup>

The possible criticism to the above arguments is that the rising crimes rate is generated by complicated social reasons. The heavy punishment view adds too much

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<sup>423</sup> See Jinxue Fan, Yujie Zhang, 'On the Constitutional legitimacy of the Use of the Death Penalty in China' (2014) 5 Journal of Soochow University Philosophy and Social Science Edition 68; See also Bingzhi Zhao, Suixian Bao, 'Discussion of Some Hot Issues about China's Criminal Law Reform' (1993) 4 Heibei Law Science 22; See also Lian Xu 'Thought from the Perspective of Law about Whether the Death Penalty Should be Canceled or not and the Reform of China's Death Penalty System.' (2012) Shandong University.

weight on the personal causes of crime and individual responsibility while overlooking social reasons and the responsibility of society. Von Liszt has proclaimed that social policy would be the best criminal policy.<sup>424</sup> To decrease the crime rate by increasing the executions is not only unrealistic but has been testified failure by practice.<sup>425</sup>

Neo-cosmopolitans argued that retaining the criminal analogy system was a breach of the rule of law and international human rights law, and therefore was against the people's and nation's interest. The prohibition of the use of this system and the adoption of the principle of *nullum crimen sine lege* in China showed that the country was following the progress of legal civilisation. The increasing crime rate was caused by the progress of social development, and harsh punishment could not effectively control and reduce it. Crime control should not be a factor against restricting the use of the death penalty. They contended that the modern legal spirit which formed in the Enlightenment period was one made up of precious modern values. China was on the way to modernisation, and so it was necessary to learn from European countries' mature legal experience concerning legal reform, especially reform of the death penalty<sup>426</sup>.

In order to test whether it is necessary for China to retain numerous capital crimes as effective deterrents, the next section will examine China's penal policy during several periods of 'Hard Strike'.

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<sup>424</sup> Cited from Body-Gendrot, Sophie, et al. 'The Routledge handbook of European Criminology' (2013) Routledge 38.

<sup>425</sup> For discussion see Lappi-Seppala T, 'Penal Policy in Scandinavia.' (2007) 36 *Crime & Just* 217; Garland, David. 'Punishment and Welfare: Social Problems and Social Structures'. *The Oxford Handbook of Criminology* (Oxford University Press 2017) 77; Beckett, Katherine, and Bruce Western. 'Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy. *Mass Imprisonment: Social Causes and Consequences*, edited by David Garland. (New York University 2001) 35; Downes, David, and Kristine Hansen. 2005. 'Welfare and Punishment in Comparative Perspective.' *Perspectives on Punishment: The Contours of Control*, edited by Sarah Armstrong and Lesley McAra. (Oxford University Press 2006) 153; Killias, Martin.. 'Power Concentration, Legitimation Crisis and Penal Severity: A Comparative Perspective.' 24 (1986) *International Annals of Criminology* 181-211.

<sup>426</sup> Bingzhi Zhao, Suixian Bao, 'Discussion of Some Hot Issues about China's Criminal Law Reform' (1993) 4 *Hebei Law Science* 22.

### 5.3 CHANGES IN CHINA'S PENAL POLICIES IN 'HARD STRIKE' CAMPAIGNS

As mentioned above, in China before 1997, the death penalty was treated as an instrument to adjust the social order to the direction that the Chinese government wanted the Chinese people to be guided towards. For example, when smuggling common goods became rampant in China at the beginning of the 1980s, a special law enacted in 1982 stipulated crime of smuggling goods as punishable by death from then on. The manifest evidence for this argument is the three 'Hard Strike' campaigns.

The objective reason for launching the campaigns was the deterioration of the public security situation.<sup>427</sup> The background of the first campaign was that the abrupt modernisation of Chinese society generated high crime rates. At the beginning of this transformation, numerous 'intellectual youth', who had been exiled from cities to villages to work as farmers, returned back with the end of the 'Cultural Revolution' and became unemployed, which increased public risk in cities. Some severe murder, rape, and robbery cases were committed in daylight by gangs in different cities, which directly triggered the first 'Hard Strike' campaign in 1983. The policy for 'Hard Strike' was to punish the perpetrators harshly and swiftly. According to a report on the 1983 'Hard Strike', there were 24,000 people executed.<sup>428</sup> Although statistics on death numbers are generally kept secret, data obtained from other resources support this. Some reports put the national figure of people sentenced to death over the three years from 1983 to 1986 at over 30,000 (including those sentenced to death with a two-year reprieve).<sup>429</sup>

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<sup>427</sup> See Yunhua Zhong, 'Further Rational Knowledge on "Strike—Hard "Campaign' (2003) 4 *Journal of Gansu Institute of Political Science and Law* 63; also see Chen Xingliang, 'Discussion on Advantages and Disadvantages of Severe Cracking down on Criminal Activities' (2004) 5 *Journal of Henan Administrative Institute of Politics and Law* 120; and Ma Rongchun, 'Re-examination of Policies Used in Campaign to Crack Down on Criminal Activities from the Perspective of Rule of Law' (2014) 1 *Journal of Shandong Police College* 28.

<sup>428</sup> Inside Stories of 1983 'Hard Strike': 24,000 Executed (*China.com*)

<<http://news.china.com/history/all/11025807/20140106/18265953.html>> accessed 15 May 2015

<sup>429</sup> Susan Trevaskes, 'Severe and Swift Justice in China' (2007) 47 (1) *BRIT. J. CRIMINOL.* 23.

The backgrounds of the second and third ‘Hard Strike’ campaigns were similar to the first: further economic reform generated new social problems, such as higher levels of unemployment after substantial former state-owned factories went bankrupt, leading to high crime rates and influential gang crimes which caused widespread dissatisfaction and social insecurity. The fuse for the second ‘Hard Strike’ campaign was the murder of the then vice chairman of the Standing Committee of the NPC at his own home in February 1996. The fuse for the third was an explosion that killed 108 people and injured 38 in Shijiazhuang, the capital of Hebei province, in 2001.

After the first and second campaigns, capital crimes in the criminal law increased from 29 in 1979 to 72 in 1996, as observed in the first section in this chapter. Meanwhile, because of the swiftness and harshness of the campaigns, some cases – from the commitment to the completion of the second trial and execution – could be shortened to several days. An extreme example of this was when the grandson of Marshal Zhu De was sentenced to death in 1983, during the first campaign; there were only three days from the sentence of the first instance to the delivery of the second by the second instance court.<sup>430</sup> In the second campaign, the most famous example was the Hugjiltu case, which was analysed in Chapter 2, where capital punishment was executed just 62 days after the case was committed. Then later many death penalty cases have been revealed to have been wrongly decided.<sup>431</sup>

The cultural factors underlying the launch of the ‘Hard Strike’ campaigns, some Chinese scholars argue, was that every government in Chinese legal history had used criminal law as a tool to achieve its governance. Today’s penal policy is exactly inherited from the past.<sup>432</sup> Consequently, the neutrality and justice of the judicial system cannot exist, which makes subsequent miscarriages of justice inevitable.<sup>433</sup>

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<sup>430</sup> Inside Stories of 1983 ‘Hard Strike’: 24,000 Executed (*China.com*)

<<http://news.china.com/history/all/11025807/20140106/18265953.html>> accessed 15 May 2015

<sup>431</sup> See Chapter 2 case study section, in which I have analysed some wrong cases.

<sup>432</sup> Minyuan Wang and others, ‘Conversation by Writing: Wrong Cases, the Death Penalty and the Rule of Law’ (2015) 3 Peking University Law Journal 565.

<sup>433</sup> *Ibid.* 565

Jiangping Lu and Yili Chen argue that during the campaigns, the legal system was distorted, and the authority to punish criminals quickly and harshly came at the expense of sacrificing the due rights of suspects. This directly caused the abuse of capital punishment. Even minor hooligan activities such as having sexual relationships with different people were subject to the death penalty.<sup>434</sup> This, however, did not reduce crime rates. A statistical analysis shows that after each of the three campaigns, the volume of crimes dramatically surged in the following several years.<sup>435</sup> This is also supported by annual reports from the SPC to the NPC from 1980 to 2016<sup>436</sup>, which illustrates the fact that during the processes of tremendous socioeconomic change in China, the crime rates rose year by year. It is unrealistic to expect to eliminate crimes through several campaigns which, empirically, could only result in the breach of the rule of law and human rights.

Nonetheless, conservatives invoked the same fact of legal history in China to justify this penal policy. They argued that in China's history it was tradition that in governing a society in turmoil, the government should adopt severe methods punishment, and while governing a stable society, the government should administer less harsh punishment.<sup>437</sup> This is part of the historical legal legacy passed down generation by generation from slavery-based society to feudal society and even to contemporary society. Hence, they argue it is reasonable for the current government to inherit it. In 2004, the then president of the SPC, Xiao Yang (from 1998 to 2008), told the presidents of the high people's courts

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<sup>434</sup> See Jianping Lu, 'The Historical backlash on the Hujiltu Case' (2015) 1 *China Law Review* 25; also see Yili Chen, 'A Political Economic Analysis of Strike-hard Policy' (2012) 2 *Law and Social Development* 87; and Yunhua Zhong, 'Further Rational Knowledge on "Strike—Hard" Campaign' (2003) 4 *Journal of Gansu Institute of Political Science and Law* 56.

<sup>435</sup> See Jianping Lu, 'The Historical backlash on the Hujiltu Case' (2015) 1 *China Law Review* 25.

<sup>436</sup> These annual reports showed that the accepted criminal cases in all levels of courts in China almost increased year by year from 209,600 in 1980 to 1,099,000 in 2015; over a period of 35 years, criminal cases increased by five times. The reports can be find on

<[http://www.gov.cn/test/2008-03/21/content\\_925627.htm](http://www.gov.cn/test/2008-03/21/content_925627.htm)> accessed 25 July 2016

<sup>437</sup> See Tiechuan Hao, "'Hard Strike" and Harsh and Light Criminal Punishment According to the Situation' (*China-judge*, 18 August 2001)

<[http://www.china-](http://www.china-judge.com/ReadNews.asp?NewsID=95&BigClassID=16&SmallClassID=15&SpecialID=31)

[judge.com/ReadNews.asp?NewsID=95&BigClassID=16&SmallClassID=15&SpecialID=31](http://www.china-judge.com/ReadNews.asp?NewsID=95&BigClassID=16&SmallClassID=15&SpecialID=31) > accessed 23 June 2015

that experience accumulated over many years showed that according to the law, striking severely and promptly against crime was an effective approach in restraining their rapid increase in frequency. The contemporary situation of social transformation necessitated that courts would stick to the ‘Hard Strike’ policy over the long term.<sup>438</sup>

Objectively speaking, however, the problem with this conservative argument is that the arbitrary feudal legal legacy is entirely incompatible with the modern spirit of the rule of law. The heart of the idea of the rule of law lies in the conception of ‘law’, which principally consists of general rules that are binding to all, including parties, officials, and all members of the legislature. A fundamental equality is secured by the generality of the law: all are treated equally in accordance with whatever scheme of justice is enacted by the legislature or enforced by the courts.<sup>439</sup> Although governments can establish some exceptional situations, they are restricted to situations where the country is in a state of emergency: only then can human rights or citizens’ rights be derogated. Hence, modern governments, which are under the spirit of the rule of law, cannot breach the law or human rights in a non-emergency situation.<sup>440</sup> Since China has set ‘the rule of law’ in its constitution, this old feudal legal tradition should be discarded decisively.

Admittedly, this penal policy was confined by its special historical socio-economic conditions. When it was first made in 1983, the whole country was still recovering from the disaster of the ‘Cultural Revolution’. Low social productivity, a broken national economy, an undeveloped legal system, a lack of human rights, new problems accompanied by the processes of modernisation, and so on, restricted contemporaneous penal policies. These can be seen to justify the first campaign of ‘Hard Strike’. With the

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<sup>438</sup> ‘The President of the SPC Xiao Yang: ‘Hard Strike’ Policy will Be Held in A Long Period’ (*The Youth Daily*, 17 December 2004

<<http://news.sina.com.cn/c/2004-12-17/09024548942s.shtml>> accessed on 24 May 2016.

<sup>439</sup> T.R.S. Allan, ‘Constitutional Justice: A Liberal Theory of the Rule of Law’ (2003), Oxford University Press on Demand 32.

<sup>440</sup> This principle has been prescribed in many international treaties, such as Article 15 of the European Convention on Human Rights, which stipulates that ‘In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.’

further development of modern legal concepts in China after the 1990s, however, even common people's views have shifted from harsh punishment to justice and the protection of human rights.<sup>441</sup> The backlash against the 'Hard Strike' thus ensued.<sup>442</sup>

Hence, 'Hard Strike' as a penal policy has come to an end. When the third campaign launched in 2001, Chinese people even did not realise it. Therefore, Chen Xingliang points out that the influence of the three campaigns declined one by one. The first dramatically swept through the whole Chinese society like a storm, but the second and third did not have the same impact, especially the third, which, whether from public attitudes or the practice of judicial organs, could not match its two predecessors.<sup>443</sup>

This penal policy's legacy, however, is still apparent in present legal system. It left a significant number of capital crimes in the current criminal law, some of which are still difficult to abolish. In the next section, I will try to determine which among these capital offences could be abolished, and what alternatives could be for them.

#### **5.4. CRIMES SUBJECT TO THE DEATH PENALTY**

To answer these two questions, an empirical method will be adopted. Firstly, annual reports issued by the SPC from 2013 to 2016 will be examined to determine the most frequently committed capital crimes in recent years. Secondly, these cases will be studied according to actual judicial practice results. In this way, I will show which kinds of capital

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<sup>441</sup> This can be seen from the case of Yuqiang Niu, who was the last Chinese citizen convicted of being a hooligan. He was sentenced to death with two-year reprieve for the crime of hooliganism in 1984 in the first 'Hard Strike'. According to news reports, he actually committed a relatively slight transgression. Later the punishment for him was commuted to life imprisonment and 18-year imprisonment respectively. In 1990, he was released on bail for medical treatment. However, in 2004, he was thrown into prison as he did not return to the prison promptly. The new sentence prolonged his imprisonment time to the year 2020 for the crime of hooliganism, which had been abolished from the Criminal Law at the time this new judgement was delivered. When the case was reported to the public by social media, it generated fierce debate in the Chinese society. The public opinion focused on his heavy punishment, justice, and criticism on the 'Hard Strike'. See 'The Tragedy of Hooligan Niu Yuqiang' <<http://www.docin.com/p-1778607730.html>> accessed on 24 September 2016.

<sup>442</sup> See Xingliang Chen, 'Reflection on "Hard Strike" Penal Policy' (360doc, 25 November 2016) <[http://www.360doc.com/content/16/1125/02/20353736\\_609310560.shtml](http://www.360doc.com/content/16/1125/02/20353736_609310560.shtml)> accessed on 24 September 2016.

<sup>443</sup> See Xingliang Chen, 'Reflection on "Hard Strike" Penal Policy', *ibid*

crime have been less subject to death sentences in recent years. This includes situations where the criminal was not in reality executed, i.e. where the criminal was sentenced to death with a two-year reprieve<sup>444</sup>, or those who were directly sentenced to life imprisonment or fixed term imprisonment. By examining all of these conditions and analysing critical attitudes to these judgments, I will answer the above raised two questions.

#### **5.4.1 The SPC Annual Report**

In this section, crimes relevant to death offences from 2008 to 2016 in the SPC's reports will be analysed.<sup>445</sup> The first one is the 2016 report, which illustrates the information of crimes judged in 2015<sup>446</sup>. In 2015, amongst all concluded 1,099,000 criminal cases of first instance (an increase of 7.5% compared with 2014), murder, robbery, and arson constituted 262,000, drug-related crimes 139,000, embezzlement and bribery 34,000, trafficking and sexually assaulting women and children 5,446, and crimes of endangering national security and violent terrorist crimes 1,084. Pie chart 5.4 shows the proportion of crimes in the 2016 report:

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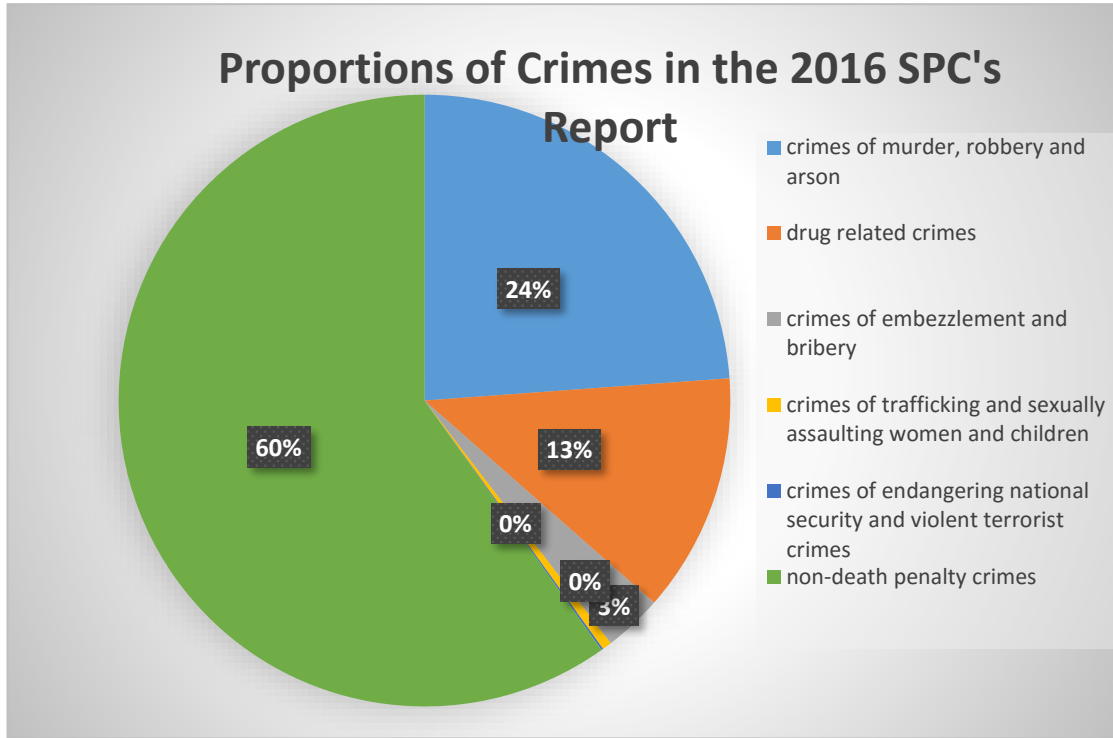
<sup>444</sup> It is not an independent punishment in China's Criminal Law. Its application is attached to the sentence of the death penalty. This is a special prescription in China's Criminal law. Its Article 50 stipulates that: 'If a person sentenced to death with a two-year reprieve does not commit an intentional crime during the period of suspension, his punishment shall be commuted to life imprisonment upon the expiration of that two-year period; if he performs great meritorious service, his punishment shall be commuted to fixed-term imprisonment of not less than 15 years and not more than 20 years upon the expiration of that two-year period; if it is verified that he has committed an intentional crime, the death penalty shall be executed upon the approval of the Supreme People's Court.'

<sup>445</sup> The reports can be found on the SPC's website <<http://en.chinacourt.org/>> accessed 3 March 2016. The reason to use them is because these are official reports from the Supreme Court and they have been under the examination and deliberation of the National People's Congress, and so they are relatively more credible than other sources.

<sup>446</sup> All the SPC's reports are the conclusion of the last year's work, for instance, its 2016 report illustrates what all levels of courts have done in 2015.



Figure 6 Pie Chart 5.4 the proportion of crimes in 2015 in China



It is evident that in this report concerning all capital crimes in China, murder, robbery, and arson collectively take up the largest proportion in total, following by drug-related crimes and crimes of embezzlement and bribery. Crimes of endangering national security and violent terrorist crimes make up less than 0.1% of all crimes (only 1,084). Rape is included in crimes of trafficking and sexually assaulting women and children. Compared with more than one million criminal cases, this kind of crime is in a small proportion of 0.5%.

The crimes' configurations in the SPC's 2015, 2014, and 2013 reports, which contain general information on criminal cases from 2008 to 2015, are similar to 2016, with murder and robbery being the most frequently committed capital crimes and accounting for the largest proportion in both.<sup>447</sup> The following discusses the three years' reports.

In the 2015 annual report, all levels of courts in China in 2014 saw 1,023,000 first instance criminal cases. The number of cases rose 7.2% from 2014. The cases of murder, robbery, and kidnapping were 248,000, cases of drug related crimes were 107,000, crimes of embezzlement and bribery were 31,000, crimes of abducting and trafficking in women or sexually assaulting children were 1,048. 876 offenders of these last two crimes were given sentences ranging from more than five years' imprisonment to the death penalty.

The number of all first instance criminal cases in the SPC's 2014 report was 954,000. Cases of murder, robbery, kidnapping, explosion, rape, abducting and trafficking in a woman or a child, crimes of mafia-style organizations, and so on totalled 250,000. There were 303,000<sup>448</sup> cases of property violation, and 29,000 cases of embezzlement and bribery. Cases relevant to food safety were 2,082.

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<sup>447</sup> The 2013 report concluded that the past five years work from 2008 to 2012, so from the 2013 report, it is possible to take a general view of five years of criminal cases; see each year's annual report from the SPC, <[http://www.gov.cn/test/2008-03/21/content\\_925627.htm](http://www.gov.cn/test/2008-03/21/content_925627.htm)> accessed 25 July 2016.

<sup>448</sup> In its report, the SPC does not clarify whether robbery, which is in this category of crime but has been included in the number of the former category of serious crimes, have been excluded from the number of 303,000. According to logic, robbery should not be repeated. Thus, after theft was abolished from the death penalty in this category, although the number of this kind of crime is huge, there should be no crimes subject to death.

The SPC's 2013 annual report summarised the past five years' work, which gave information from 2008 to 2012. During the period of five years, all levels of courts concluded 4,141,000 first instance criminal cases, an increase 22.3% compared with the previous five years. The number capital crimes is as follows: severe crimes such as murder, robbery, kidnapping, explosion, abducting and trafficking in a woman or a child, crimes of mafia-style organizations and so on were 1,357,000; crimes of producing or selling toxic or harmful food and producing or selling fake products, or products not in accordance with the standard of safety were 14,000; crimes of embezzlement, bribery, and dereliction of duty were 138,000.

Given the above fact, we can observe that the majority of capital crimes prescribed in Chinese criminal law are actually fairly rare. Crimes such as endangering national security and violent terrorist acts accounted for less than 0.1% of the total crimes committed in 2016; rape and crimes of trafficking and sexually assaulting women and children in total were less than 0.5%. In 2014, crimes of abducting and trafficking in a woman or sexually assaulting children took up 0.1% of that year's criminal cases. Arson, together with murder and robbery, totalled 262,000 in the 2016 report (which is about cases judged in the year 2015, the other reports are in the same way); in the 2015 report, murder, robbery, and kidnapping represented 248,000 crimes, and arson could just have taken up a very tiny proportion of these crimes. The crime of explosion should be in the same category as that of arson, since it was even not mentioned in the 2016 report. Therefore, the largest proportion of capital crimes is constituted by murder and robbery. Drug-related crimes made up the second largest proportion of criminal cases in both 2016 and 2015. Crimes of embezzlement and bribery followed these.

According to the above statistics, capital crimes can be divided into two categories: firstly, crimes that have actually been given the death penalty during the ten years from 2006 to 2016. They are mainly:

- a. murder, for which the death penalty is applied as the maximum penalty and discretionary sentences can be delivered by judges in the light of special circumstances;

b. robbery, kidnapping, arson, explosion, rape and trafficking women and children, where the death penalty as the maximum penalty is only applied if aggravating circumstances occur;

c. drug-related crimes, for which the death penalty is also discretionary according to the amounts of statutorily defined drugs involved, and to whether special aggravating circumstances occurred;

d. crimes of embezzlement and bribery, where the death penalty is the maximum punishment when a certain amount of money and several aggravating circumstances are involved.

Secondly are the remaining capital crimes, which are hardly committed in China today, and so no capital punishment has been imposed for these for a relatively long time (or the numbers of these crimes are too small to be counted). In terms of current international standards, these crimes have been abolished *de facto*.<sup>449</sup> This category of crime will be discussed in the last part of this section. I will first analyse non-violent crimes, beginning with crimes of embezzlement and bribery.

#### **5.4.2 Crimes of Embezzlement and Bribery**

I have selected some cases convicted during the period from 2003 to 2016, on the basis that all the involved criminals are high-ranking officials in the Chinese government. Correspondingly, the sums of money related to these cases are dramatically significant. Therefore, these are relatively more serious crimes than those committed by lower rank officials with small sums of money involved; if they can be exempted from death, then capital punishment could be considered for abolition in these cases. In addition, this time scale could be sufficient for people to grasp more precisely the trend of recent penal policy on punishment on crimes of embezzlement and bribery.

The following Table 5.5 gives information relating to 16 cases of crimes of embezzlement, bribery, and other corruption.

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<sup>449</sup> Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edition, rev edn Oxford University Press, Oxford 2015) 159.

	<b>Name</b>	<b>Sums of money involved in the case</b>	<b>Convicted Crimes</b>	<b>Punishments</b>	<b>Sentenced date (day/mon/year)</b>
1	Ling Jihua	77,080,000 Yuan	Bribery, Crime of illegally Obtaining state secrets and crime of abuse of authority;	Life imprisonment	11/06/2016
2	Ji Wenlin	20,460,000 Yuan,	Bribery	12-year imprisonment	30/03/2016
3	Ji Jianye	11,320,000 Yuan	Bribery	12-year imprisonment	07/04/2015
4	Zhou Yongkang	129,772,113 Yuan	Bribery, crime of deliberately disclosing state secrets and crime of abuse of authority	Life imprisonment	01/06/ 2015
5	Jiang Jiemin	14,039,073 Yuan	Bribery, crime of holding a huge amount of property with unidentified sources and crime of abuse of authority	16-year imprisonment	12/10/2015
6	Li Chuncheng	39,798,000 Yuan	Bribery and crime of abuse of authority	13-year imprisonment	12/10/2015
7	Wang Yongchun	48,563,011 Yuan	Bribery and crime of holding a huge amount of property with	15-year imprisonment	10/10/2015

			unidentified sources and crime of abuse of authority		
8	Liu Tienan	35,583,592 Yuan	Bribery	Life imprisonment	10/12/2014
9	Bo Xilai	20,447,376 Yuan	Bribery, embezzlement and crime of abuse of authority	Life imprisonment	21/09/2013
10	Liu Zhijun	64,600,000 Yuan	Bribery and crime of abuse of authority	Death penalty with two-year reprieve	08/07/2013
11	Xu Zongheng	33,000,000 Yuan	Bribery	Death penalty with two-year reprieve	09/05/2011
12	Chen Shaoji	29,590,000 Yuan	Bribery	Death penalty with two-year reprieve	23/06/2010
13	Wang Yi	11,960,000 Yuan	Bribery	Death penalty with two-year reprieve	30/03/2010
14	Chen Tonghai	195,730,000 Yuan	Bribery	Death penalty with two-year reprieve	15/07/2009
15	Wang Shouye	160,000,000 Yuan	Embezzlement and misappropriation of public funds	Death penalty with two-year reprieve	10/05/2006
16	Li Jiating	18,100,000 Yuan	Bribery	Death penalty with two-year reprieve	09/05/2003

Figure 7 Table 5.5 16 cases of crimes of Embezzlement

From this table, it can be seen that the sums involved in the cases are much larger than the lowest starting point of punishment: 5000 Yuan for bribery and embezzlement. In China, corruption crimes of bribery and embezzlement of great value are capital crimes. Admittedly, death remains the maximum instead of the mandatory penalty for these two crimes. Article 383 of the 1997 criminal law clearly sets the rules that: ‘an individual who embezzles not less than 100,000 yuan shall be sentenced to fixed-term imprisonment of not less than 10 years or life imprisonment and may also be sentenced to confiscation of property; if the circumstances are especially serious, he shall be sentenced to death and also to confiscation of property.’ Article 386 stipulates that the punishment for bribery is the same as that of embezzlement.

Obviously, the values in the above cases are all substantially larger than 100,000 yuan. The highest amount (129,772,113 yuan) is 1,000 times larger than that sum and even the least (11,320,000 Yuan) is a hundred times higher. Compared with the other two cases sentenced in 2000 (the cases of Hu Changqing and Cheng Kejie) in which the sums of money involved were similar (Cheng was 41,090,373 Yuan; Hu was even less at only 5,442,500 Yuan.), the mitigation in those later sixteen cases is clear. This indicates that as far as corruption crimes are concerned, authority has shown great leniency; this has become a trend, especially in the last three years, as the most influential officials were almost all sentenced to life imprisonment or death sentences with a two-year reprieve.

This tendency can also be seen from the newly amended criminal law and some judicial interpretations of it after 2015. On 29<sup>th</sup> August 2015, Amendment IX stipulated that in addition to the amount of money involved, special circumstances should be considered as another important factor when dealing with embezzlement cases. On 28<sup>th</sup> May 2016, a joint judicial interpretation issued by the SPC and the SPP changed the starting point from which capital punishment is applicable from 100,000 Yuan to 3,000,000 Yuan.<sup>450</sup> Among the above listed cases, only one was sentenced after this judicial interpretation issued; the rest of them were all convicted before it.

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<sup>450</sup> Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues concerning the Application of Law in the Handling of Criminal Cases concerning Bribery (as adopted at

Undeniably, during the same period, not all these kinds of crime obtained mitigation. On 29 May 2007, Zheng Xiaoyu was sentenced to death for crimes of bribery involving 6.5 million yuan and dereliction of duty. He was swiftly executed.<sup>451</sup> In the Zheng Xiaoyu case, however, the key factor which determined his death was a special aggravating circumstance: because of his bribery, some medical companies gained illegal benefit and produced fake medicines after they obtained permits for production and importation of medicines. Zheng Xiaoyu's corrupt behaviour endangered people's health and lives.<sup>452</sup> Hence, this is an exceptional case after the year 2001. According to *Legal Weekly*<sup>453</sup>, a statistic in 2011 shows that in the ten years from 2001-2011, among more than 100 officials involved in the corruption cases whose rank was higher than vice-minister level, there were only five sentenced to death. More than 95% of the total were given alternative punishments.<sup>454</sup> Since 2015, a new alternative punishment – life imprisonment without parole – started to be used. This is strongly opposed by some people. Because this punishment is only applied in cases of embezzlement and bribery, some people argue that since other more serious violent crimes including murder are not subject to this punishment, this stipulation is not reasonable. This is not a mandatory punishment, however, judges have discretionary power to choose whether to impose or not.

How, then, is public opinion formed on these corruption cases? In these cases, criminals might have been sentenced to death according to the law, but in recent years, less of them were subject to this extreme punishment, even if the amounts of money

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the 1,680th meeting of the Judicial Committee of the Supreme People's Court on March 28, 2016 and at the 50th meeting of the Twelfth Procuratorial Committee of the Supreme People's Procuratorate on March 25, 2016, is hereby issued, and shall come into force on April 18, 2016.)

<sup>451</sup> See 'Zheng Xiaoyu Executed in Beijing' <<http://news.qq.com/zt/2007/zhengxiaoyu/?tag/ocupy>> accessed 12 April 2015

<sup>452</sup> See the case report on Zheng Xiaoyu, 'Bulletin of the Supreme People's Procuratorate of the People's Republic of China' (2007) 6.

<sup>453</sup> This is an official publication of the Political and Judiciary Commission under the Central Committee of the Communist Party of China.

<sup>454</sup> <[http://www.legaldaily.com.cn/zt/content/2011-12/21/content\\_3221175\\_2.htm](http://www.legaldaily.com.cn/zt/content/2011-12/21/content_3221175_2.htm)> accessed 23 June 2015



involved in were hundreds or even thousands of times larger than the starting point. According to a report from Sina news<sup>455</sup> in 2011, public opinion turned a blind eye to this; people have seen too much of it, and therefore no longer consider it strange.<sup>456</sup> It could be argued that it has become acceptable that crimes of bribery and embezzlement are no longer subject to death sentences.<sup>457</sup>

According to the above, it is possible to conclude that after 2001, fewer criminals who committed embezzlement and/or bribery were sentenced to death with immediate execution; the alternative punishments are death with a two-year reprieve, life imprisonment without parole, life imprisonment with the possibility of parole, and fixed term imprisonment. Public opinion did not express strong dissatisfaction with the mitigation. These facts imply that the death penalty can be suspended for these two crimes.

#### **5.4.3 Drug-Related Crimes**

Drug-related crimes in the year 2014 and 2015 accounted for the second largest proportion in the total of capital crimes (the numbers were 107,000 and 139,000 respectively). My next research will therefore concern the possibility for the suspension of the death penalty for drugs-related offences.

As illustrated in section one of this chapter, all drugs offences were still not capital crimes in 1979 criminal law. In 1982, a special criminal law introduced the death penalty for smuggling, trafficking, transporting, and manufacturing narcotic drugs. This was not an isolated phenomenon just occurring in China at that time, but was a reaction to an

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<sup>455</sup> The reason for choosing the Sina news report as evidence is that according to statistics provided by China's Social Sciences Academy, in 2014 the users of Sina and Tencent microblog posted 0.23 trillion messages every day. (See the series of 'Blue Book of China's Society- Society of China Analysis and Forecast' (2015) Social Sciences Academic Press 234.) Microblog expositions of public opinion have become an important approach by which the majority of Chinese people, especially young people, display their views on every aspect of society. Sina news, therefore, can display people's true attitudes.

<sup>456</sup> Hao Wang, 'The Acceptability of Judicial Judgments among the Public' (2016) 3 Journal of Soochow University Law Edition 76.

<sup>457</sup> 'Eighteen officers who were vice-ministerial level arrested but none of them were sentenced to death' (*Legal Weekly*, 18 May 2011)

<<http://news.sina.com.cn/c/sd/2011-05-18/091522485226.shtml>> accessed 22 November 2014.

international situation from the 1980s onwards in which many countries in Asia (and also in some other parts of the world) introduced the death penalty for drug-related crimes amid concerns over the increase of illicit trafficking in narcotics.<sup>458</sup>

Later, this special law was merged into 1997 criminal law. Its Article 347 stipulates that ‘whoever smuggles, traffics in, transports or manufactures narcotic drugs and falls under any of the following categories, shall be sentenced to fixed-term imprisonment of 15 years, life imprisonment or death and also to confiscation of property: (1) persons who smuggle, traffic in, transport or manufacture opium of not less than 1,000 grams, heroin or methyl aniline of not less than 50 grams or other narcotic drugs of large quantities.’

The punishment is severe. 50 grams is the starting point at which a person is exposed to the death sentence. Since statistics regarding how many executions were carried out for these crimes are unavailable, the question of whether the use of the death penalty indeed effectively deters drug-related crimes can only be interpreted by other sources. According to a report issued by Hubei Higher People’s Court on 23<sup>rd</sup> June 2016, in Hubei province, the rate narcotics trafficking has surged quickly in recent years from 1,601 cases concluded in 2010 to 5,417 cases in 2015. Sentenced criminals increased from 1,672 in 2010 to 5,742 in 2015.<sup>459</sup>

The same situation can be found in Jiangsu province. Jiangsu Higher People’s Court issued its White Paper on Trial of Drug-related Crimes 2013-2015. It shows that compared with the year 2014, in 2015, drug-related crimes which the province’s courts accepted increased by 64.1% and the amount concluded increased by 62.4%. From 2013 to 2015, criminals who were sentenced to more than ten-year imprisonment, life imprisonment, or capital punishment were 1,958 in total, accounting for 11.3% of all

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<sup>458</sup> See Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edition, rev edn Oxford University Press, Oxford 2015) 160

<sup>459</sup> ‘Hubei Higher People’s Court Informed All Hubei Province Courts’ Work on Drug Control in 2015’ (*Chinacourt*, 23 June 2016) <<http://www.chinacourt.org/article/detail/2016/06/id/1977445.shtml>> accessed on 29 June 2016.

drug-related criminals. In addition, the number of young people aged 18-25 and females who committed drug-related crimes increased substantially.<sup>460</sup>

From the above, it is clear that, capital punishment fails to function properly as a deterrent for these crimes. Meanwhile, the UN has excluded drug-related crimes from its list of most serious crimes,<sup>461</sup> which, according to Article 6 of the ICCPR, is a standard for the application of the death penalty in non-abolitionist countries. Therefore, if China still retains the death penalty for drugs offences, it will hinder the ratification of the ICCPR. Before every annual International Day against Drug Abuse and Illicit Trafficking on 26<sup>th</sup> June, information is reported publicly by authorities who are involved in anti-drug abuse activities; there are some cases available to analyse. The following table 5.6 shows cases judged in 2015 and 2016.<sup>462</sup>

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<sup>460</sup> 'The White Paper on Trial of Drug-related Crimes, Jiangsu Higher People's Court' <<http://www.aiweibang.com/yuedu/127018061.html>> accessed on 29 June 2016.

<sup>461</sup> UN doc E/CN.4/2000/3

<sup>462</sup> Table 5.2 is formed of sources mainly from the 'Ten Typical Cases of Drug-related Crimes' issued by the SPC on the 23rd June 2016. Three of them – murder after taking drugs, robbery in order to obtain drugs and dangerous driving after taking drugs – are not capital offences in the category of drug-related crimes; they are however capital offences in other categories of crime, whilst the crime of harbouring others who take or inject drugs and the crime of trafficking in small amount of drugs are not capital crimes in any category, and thus I have excluded them from the table. I have only selected drug-related capital crimes in table 5.2; see 'Ten Model Cases Involving Drug-Related Crimes and Secondary Crimes Induced by Drug Abuse' (*People's Court Daily*, 24 June 2016) <<http://www.court.gov.cn/zixun-xiangqing-22521.html>> accessed on 29 June 2016. The last one is separately issued by Beijing Second Intermediate People's Court; see 'Trafficking in Nearly 2 Kilogram Narcotics, a 22-year Old Youth Sentenced to Death with 2-year Reprieve by the First Instance Court' (*CCNTV*, 23 June 2016) <<http://tv.chinacourt.org/14088.html>> accessed on 29 June 2016.

Drug-related cases sentenced in 2015 and 2016

	<b>Name</b>	<b>Crimes</b>	<b>Involved quantity of drugs</b>	<b>Special aggravated circumstance</b>	<b>Sentences</b>	<b>Other information</b>
1	Tang Xiaoping	smuggling, trafficking and transporting drugs	256740 g and 96450g of Methylaniline	1, Taking part in international drug trafficking activities; 2, a large quantity; 3, a recidivist	The death penalty	Executed on 17 <sup>th</sup> June 2016
2	Hong Haiyan	manufacturing drugs	Methylaniline 8605 g	1, unlawfully possessing guns and ammunition; 2, a large quantity of drugs involved	The death penalty	Executed on 24 <sup>th</sup> November 2015
3	Shu Yukun	Trafficking in drugs	Heroin 1194 g +1050.4g	1, the committal of a new crime in the probation period for his parole; 2, a recidivist of drug-related crimes <sup>463</sup>	The death penalty	Executed on 21 <sup>st</sup> June 2016

<sup>463</sup> He was sentenced to life imprisonment on 17<sup>th</sup> April 2000 because of trafficking in drugs. On 12<sup>th</sup> October 2011, he was paroled. The probation period for his parole was to 4<sup>th</sup> September 2014.

4	Sun Jing (female, and the only female in these six cases)	Trafficking in drugs	Methylaniline 1100g	1, trafficking in drugs online; 2, exploited juveniles to commit the crime	Life imprisonment	The judgement came into power on 26 <sup>th</sup> July 2015
5	Mo Jinyou,	Trafficking in drugs and using arms to cover up drug-related crimes	Ketamine 2.48g +0.79g; and Methylaniline 5.23g	When committing the crime, he brought a gun with him and shot policemen, but did not cause any injury and death	15-year imprisonment	The judgement came into power on 4 <sup>th</sup> December 2015
6	Zhu Mingwei	trafficked in	1,996.25 grams methyl aniline		The death penalty with two-year reprieve	Sentenced on 23rd June 2016 by the first instance court

Figure 8 Drug related cases in 2015 and 2016

From table 5.6, it can be seen that in cases 1, 2, and 3, three persons were sentenced to death not only because of the large quantity of the narcotics involved, which is a condition sufficient to be punished by the death penalty, but because of many other contributing factors. Any of these factors alone are eligible to be sentenced to death, such as taking part in international drug trafficking activities, committing new crimes during probation period of parole, holding arms to resist inspection, or a recidivist committing new crimes. If they were sentenced to the death penalty with a two-year reprieve, there would be mitigation shown in these cases.

A certain degree of mitigation exists in the last three cases, however. All of these three persons could have been sentenced to immediately executed capital punishment: two are cases of trafficking in huge quantity of methyl aniline, one criminal used arms to cover up trafficking in drugs. In the Sun Jing case, the most egregious circumstance is that she both used juveniles to commit the crime and also sold drugs online; any of these activities is a discretionary aggravating condition. Therefore, there are three aggravating circumstances in her case, but she was sentenced to death with a two-year reprieve, which is a sentence essentially equal to life imprisonment or fixed-term imprisonment.<sup>464</sup>

The last three cases provide an example that before total abolition, a two-year reprieve could be an alternative to immediately executed capital punishment. Under the prison environment, it is hard for criminals to commit new intentional crimes, which is the only real justification for reinstating the execution of the death penalty.

In summary, drugs offences are not on the list of the most serious crimes which could be punished by death sentences in the UN's documents. China currently still retains the

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<sup>464</sup> According to Article 5 of the Criminal Law, there are sufficient chances to transfer from the death penalty to alternative punishments, since it stipulates that: '[I]f a person sentenced to death with a two-year reprieve does not intentionally commit a crime during the period of suspension, he is to be given a reduction of sentence to life imprisonment upon the expiration of the two-year period; if he demonstrates meritorious service, he is to be given a reduction of sentence to not less than fifteen years and not more than twenty years of fixed-term imprisonment upon the expiration of the two-year period; if there is verified evidence that he has intentionally committed a crime, the death penalty is to be executed upon the approval of the Supreme People's Court.'

death penalty for these crimes at a legislative level. There are some signs that mitigation is possible and available in some cases, however. At present, the two-year reprieve of the death penalty is recommended for these kinds of crime.

#### **5.4.4 Crimes of Murder**

Following analysis of the third and the second largest proportion of all capital crimes, I will now analyse the first: murder and robbery. Murder accounts for the most death penalties worldwide, and when the European countries abolished the death penalty, it was the last ordinary crime to be exempted from capital punishment.<sup>465</sup> In China, the abolition of capital punishment for murder is the most sensitive and controversial topic. Although the majority of people might be prepared to accept abolition of capital punishment for crimes such as bribery and embezzlement, in the case of murder, public opinion is considerably different and there is also a clear gap between the opinions of officials, elites<sup>466</sup>, and ordinary people. In the years 2011 and 2016 respectively, two cases of murder were hotly debated nationwide, which showed this gap clearly.

The first is the Li Changkui case. On 16<sup>th</sup> May 2009, triggered by disputes in the neighbourhood and an old grudge, Li Changkui raped his former neighbour, a 19-year old girl, and then killed her and her three-year-old brother. Four days later, he voluntarily surrendered himself to the police. He was sentenced to death with immediate execution by the first instance court in July 2010. After appeal, the second instance court changed the sentence to two-year reprieve of the death penalty in March 2011. Then, on 20<sup>th</sup> June 2011, the victims' family posted the case online. In just several days, there were hundreds of thousands of comments. According to a poll, 97% of people who had engaged in an online interview supported immediate execution.<sup>467</sup> Surrendering to the pressure from the public, Yunnan Higher People's Court retried this case on 13<sup>th</sup> July. On 22<sup>nd</sup> August

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<sup>465</sup> See chapter 4, section one.

<sup>466</sup> Here 'elites' refer to well-educated people whose speeches do not represent official voices.

<sup>467</sup> 'The Case of Li Changkui; Listening to the Law' (*ifeng*, 20 July 2011)

<<http://news.ifeng.com/opinion/special/lichangkui/>> accessed 28 June 2016

2011, it repealed the second instance judgment and re-sentenced Li Changkui to immediate execution. A month later, Li was executed.

In this case, public opinion was widely divergent even among Chinese scholars, higher rank officials, and judges.<sup>468</sup> Some argued that Yunnan Higher People's court should not have surrendered to the public to retry this case, as it was a serious breach of the rule of law.<sup>469</sup> They argued that using violence to subdue violence is not an idea that modern society should pursue, based on respect for the right to life. Hence, they suggested, the policy of *'killing less and killing cautiously'* should become a consensus in judicial practice.<sup>470</sup> Others argued that the Yunnan Higher People's Court moved towards abolition too fast without considering the fact that, at the time, the majority of Chinese people still supported the use of the death penalty. If such an egregious crime could be exempted from capital punishment, no crimes would be sentenced to death in the future.<sup>471</sup>

The second instance judgement maintained that Li Changkui had some circumstances of mitigation, such as voluntarily surrendering himself to the police, a good attitude towards repenting and confessing his crime, and actively trying to compensate the victims' family. The sentence of the first instance and the retrial judgement, however, both insisted that the behaviour of Li Changkui was extremely brutal, that the

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<sup>468</sup> For discussion on the divergence see 'Xiaoping Liu, Legal China Needs an Inclusive Legal Frame' (2015) 5 Law and Social Development p168; see also Zhipeng Wa 'The Legitimacy of Public Opinions and Judgment in Measurement of Penalty' (2014) 1 Tianjin Legal Science 11.

<sup>469</sup> See Liu Shu and Peng Juan, 'On Risk Management of Public Opinion and Judicial Choice of Court' (2016) 1 Western Law Review 46; see also 'The Judge Who Handled the Li Changkui Case: the Retrial of the Case though Seems Just, It Actually Harmed the Rule of Law' <<http://news.eastday.com/c/20110803/u1a6033073.html>> accessed on 25 May 2016.

<sup>470</sup> 'Cao Peng: Comments on the Justifications for the Retrial of Yunnan Province's Li Changkui Case' (Tencent) <<http://view.news.qq.com/a/20110719/000016.htm>> accessed on 25th May 2016; see also Xun Zhang, 'The Ability of the Criminal Law, Journal of Henan University or Economics and Law' (2016) 1 Journal of Henan University or Economics and Law 64.

<sup>471</sup> Zhenqing Sun, Guilong Zhao, 'From Judicial Authority to Judicial Credibility' (2016) 10 People's Judicature 104; see also Aiqun Li, Meixiang Yang, Hao Liang, 'Resolve citizen's pain: the discussion of "the Evidence Judgement Open" the establishment of parties' option system' (2016) 2 Shandong Judges Training Institute Journal 40.



circumstance of crime was dramatically heinous, and that the social harmfulness was substantially massive that the existing circumstances of mitigation could not justify a refusal to sentence him to the death penalty with immediate execution.<sup>472</sup> Nonetheless, the opinions expressed in the first instance and retrial procedure reflected the majority of people's opinions that Li Changkui committed murder out of revenge: even a three-year old child was not saved from his cruel killing. Hence, his voluntarily surrendering, repenting, and confessing could not, in the view of this majority, be an excuse not to punish him with death by immediate execution.<sup>473</sup>

Even Chinese scholars, who advocate reforming the death penalty, were divided into two different groups on this case. Some argued that the use of immediate execution instead of a two-year reprieve of the death penalty would block the road to the judicial abolition of capital punishment in China. According to the current situation, the abolition of the death penalty would be a long-term aim at a legislative level; at a judicial level, however, to minimise the use of capital punishment would be a possible path to legislated abolition.<sup>474</sup> Others, including leading figures who had been advocating abolition, argued that in the light of present circumstance it was inappropriate to sentence Li Changkui to a two-year reprieve of the death penalty.<sup>475</sup> They argued that to minimise the use of the death penalty should be a progressive procedure, and swiftness was counterproductive.

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<sup>472</sup> See Lanjun Guo, 'The Plight and the Solution to 'Should Be Consulted' Guidance Cases' (2016) 1 Cross-strait Legal Science 91; see also 'The Second instance judgement changed the Li Changkui Case to Two-year Reprieve of the Death Penalty' (*caixin*) <[http://special.caixin.com/event\\_0929/#esgsh](http://special.caixin.com/event_0929/#esgsh)> accessed on 25 May 2016.

<sup>473</sup> Hao Wang, 'The Acceptability of Judicial Judgments among the Public' (2016) 3 Journal of Soochow University Law Edition 76; see also Zhichao Sun, 'Research of "Cruel Means" in Murder' (2014) 2 Criminal Law Review 552.

<sup>474</sup> Peng Cao, 'Comments on the Justifications for the Retrial of Yunnan Province's Li Changkui Case' (dffyw, 19 July 2011) <<http://view.news.qq.com/a/20110719/000016.htm>> accessed on 25 May 2016; see also Bingjian Zou, 'The Current Perspective of the Chinese Criminal Law Dogmatic' (2015) 6 Science of Law 36.

<sup>475</sup> Bingzhi Zhao, Xinlin Peng, 'Discussion on Practical Issues on the Application of the Death Penalty in China, from the Perspective of the Case of Li Changkui' (2012) 3 Contemporary Law Review 32; see also Qiliang Wang, 'Judicature, Public Opinion, and Politics at an Age of Disordered Legal World View- A Study Centered on the Case of Li Changkui' (2012) 3 The Jurists 1.

They also argued that if courts wanted to reform the public's conception of the legal system and to lead people towards abolition through their judgements, they should select a method that people could accept, instead of judges obstinately pushing their own ideas.<sup>476</sup>

It would be wrong, however, to draw the conclusion that the majority of Chinese have a zero-tolerance approach to murder. This was shown when a new case sentenced in 2016 triggered another nationwide round of discussion about the abolition of the death penalty. This time the situation was exactly reversed in that the majority of Chinese people called for mercy, but the three levels of courts (the intermediate court, the higher people's court, and the SPC) insisted on applying the immediate execution of the death penalty. It also showed a dramatic divergence between official voices and ordinary people's voices.

The basic information of the case is as follows. Jia Jinglong was a peasant living in the suburb of Shijiazhuang, the capital of Hebei province. He and his father co-owned a three-storey building, which they wanted to use as his wedding building. With the city expanding, the suburb was facing a transformation from a village to a city and the building was due to be demolished to make room for new apartment buildings. Because he thought the compensation for the building was lower than its value, Jia refused to move out of it. His father, without his consent, signed the name which represented the whole family and they all moved out from the building except Jia. The building was demolished by force under the lead of the village Communist Party's secretary. His wedding was then cancelled because of the timing of the demolition. Believing this to be the fault of this secretary, Jia Jinglong killed him with a firearm in February 2015.<sup>477</sup> He was sentenced

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<sup>476</sup> Ibid 1. See also Fenfei Li, 'On the Judicial Self-consistency in Public Voice: On the Basis of the Simulation Experiment Analysis on the Case of Li Changkui' (2016) 1 *China Legal Science* 269; see also Huaizhi Chu, Yu Yan, 'Fulfil the Integrity of Criminality' (2013) 2 *China Legal Science* 139. Hao Che, 'Analysis of "Neighbourhood Dispute" and "Cruel Means" from the cases of Li Changkui' (2011) 8 *Law Science* 35.

<sup>477</sup> For a report of the case, see 'The Death Sentence to Jia Jinglong Was Approved, Many Professors Appeal for "Not Killing"' (*Phoenix Television News*, 23 October 2016) <[http://news.ifeng.com/a/20161023/50142825\\_0.shtml](http://news.ifeng.com/a/20161023/50142825_0.shtml)> accessed 25 October 2016

to death with immediate execution by the first and second instance courts in November 2015 and May 2016 respectively. In October 2016, the SPC approved the death sentence. His sister applied for the suspension of the execution of the death sentence to the SPC in November 2016, but this was refused. Then, in November 2016, he was executed.

Many scholars, lawyers, and journalists involved in the discussion mainly focused on the legal legitimacy of the sentences under the general background of the urbanization movement and rural governance in China.<sup>478</sup> They argued that Jia's killing had special extenuating circumstances. Because his right to private property was infringed by the local authority and he had no opportunity for it to be remedied, he was obliged to choose this extreme path. Hence, they argued, he was not an egregious criminal. If he were killed, it would breach both the criminal policy of 'killing less, killing cautiously,' and social justice.<sup>479</sup> According to an online social network software survey of 28,000 netizens, 97.8% of them supported showing mercy to Jia Jinglong.<sup>480</sup>

The SPC approved the death penalty in this case, however, because Jia deliberately killed the victim due to his dissatisfaction with the legal demolition of his building in a time gap of two years. This was premeditated revenge; hence, the criminal circumstance in this crime was extremely heinous and his crime was substantially serious.<sup>481</sup> This opinion was broadly criticised by many people, who argued that the depiction of Jia's case as 'extremely heinous and substantially serious' was an unsubstantiated statement

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<sup>478</sup> Explanation of the term 'urbanization'.

<sup>479</sup> 'The Approval of the Death Sentence to Jia Jinglong by the SPC Provoked the Storm of Public Opinion' (8 November 2016)

<[https://zixun.html5.qq.com/coolread/share?ch=060000&tabId=0&tagId=MttTagSource&docId=553776713&url=http%3A%2F%2Fnews.sohu.com%2F20161108%2F472649569.shtml&clientWidth=375&dataSrc=76&qurl=qb%3A%2F%2Fext%2Fread%3Fcid%3DMttTagSource%26type%3D0%26mttsummaryid%3D553776713%26b\\_f%3D060000%26bizid%3D1&sc\\_id=OP7UnDA](https://zixun.html5.qq.com/coolread/share?ch=060000&tabId=0&tagId=MttTagSource&docId=553776713&url=http%3A%2F%2Fnews.sohu.com%2F20161108%2F472649569.shtml&clientWidth=375&dataSrc=76&qurl=qb%3A%2F%2Fext%2Fread%3Fcid%3DMttTagSource%26type%3D0%26mttsummaryid%3D553776713%26b_f%3D060000%26bizid%3D1&sc_id=OP7UnDA)> accessed 12 December 2016. Admittedly, it could be interpreted as a bias, because the victim is a member of the Communist Party.

<sup>480</sup> Ibid.

<sup>481</sup> 'Why Jia Jinglong Should Be Executed? The Head of the SPC's Third Criminal Court Answered Journalists' Questions on the Review of the Death Sentence to Jia Jinglong.' (*Xinhua*, 15 November 2016) <<http://www.chinacourt.org/article/detail/2016/11/id/2349424.shtml>> accessed 12 December 2016

with little fact to back it up.<sup>482</sup> Nonetheless, the official media supported the SPC's view, by saying that public opinion could not be permitted to become 'China's supreme court'.<sup>483</sup> This criticism, however, entirely ignored the point that, in the Li Changkui case, it was the demands of public opinion that led to the retrial and execution of Li.<sup>484</sup>

To sum up, the above analysed two cases which triggered significant nationwide discussion of the death penalty amongst authorities, judges, Chinese scholars, and the ordinary population. In one case, the majority of people called for a death sentence, whilst in the other case they called for mercy. There is a common point here, however. Whether ordinary people or the authorities call the immediate application of the death penalty, it is obvious that at both levels the death penalty is deemed necessary in some cases. The difference is that the diverse interested groups ask in the name of justice for the death penalty to be applied to different kinds of case situations. Hence, murder, as a capital crime, can only be removed from the criminal law at present with difficulty. The only way to restrict the use of capital punishment is by using the application of a two-year reprieve by judges, which sometimes seems impossible under conflicting opinions. Therefore, one concern raised here with respect to the rule of law and national justice is that the arbitrary imposition of the death penalty showed a disrespect for the rule of law.

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<sup>482</sup> Qiu Xinglong: Challenges brought by the Jia Jinglong Case to the SPC and the Due Reaction from the SPC.

<sup>483</sup> 'Editorial: Don't Let Public Opinions Become "China's Supreme Court"' (Global Times, 15 November 2015)

<[http://mp.weixin.qq.com/s?\\_\\_biz=MzA5NjA4NDU5NQ==&mid=2650762222&idx=1&sn=f8b0687156e69be136eee84c2ce9320a&chksm=88bebcf2bfc935e40a72255b71bd8f8db54a96077585b91c271bee1ad32427021555a53f0976&mpshare=1&scene=5&srcid=1115Sz2nfLWC5Pp54VOzveJE#rd](http://mp.weixin.qq.com/s?__biz=MzA5NjA4NDU5NQ==&mid=2650762222&idx=1&sn=f8b0687156e69be136eee84c2ce9320a&chksm=88bebcf2bfc935e40a72255b71bd8f8db54a96077585b91c271bee1ad32427021555a53f0976&mpshare=1&scene=5&srcid=1115Sz2nfLWC5Pp54VOzveJE#rd)> accessed 11 December 2016

<sup>484</sup> For an analysis see Hongjie Chen, 'On the "Public Trial" and the Judicial Subjectivity Crisis' (2015) 1 Xiamen University Law Review 209; also see Hongjie Chen 'How Citizens Carry Out Justice: the Reflection of Politics and Philosophy of Citizen's Justice' (2015) 1 Journal of East China University of Political Science and Law 43.

### 5.4.5 Robbery and the Other Serious Violent Crimes

This section will discuss the possibility of abolition for robbery and other violent crimes from an international perspective.

Robbery, according to the criminal law, under some special situations, can be punished by the death penalty. The eight special situations are: (1) committing the crime in a home; (2) on a public transportation vehicle; (3) in a bank or other financial organisations; (4) committing robbery repeatedly or robbing a huge sum of money; (5) causing serious injury or death to another person in the course of a robbery; (6) impersonating a serviceman or policeman during the robbery; (7) robbing with a gun; (8) robbing military materials or materials for emergency rescue, disaster relief, or social relief. Here, the death penalty is the discretionary maximum punishment for this crime.

If we analyse this issue within international human rights law domain and take the other country's legal practice as a reference, it can be seen that of the above aggravated situations, only causing death is in accordance with the later interpretations of the ICCPR's stipulation of 'most serious,' and is thus suitable to receive the death penalty. Since the U.S.A. is deemed as a retentionist country<sup>485</sup>, it is feasible to select this country as an example to do research. In the U.S.A., if killing is involved in robbery and other felony crimes, then the case of robbery is merged into the case of murder in the first degree.<sup>486</sup> According to the Model Penal Code in the U.S.A., any person who participates in a felony that results in a death has first-degree murder liability.<sup>487</sup> Hence, an American scholar argued that 'a killing during the course of a felony, whether accidental or intentional, equals first degree murder.'<sup>488</sup> At the same time, some American scholars

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<sup>485</sup> By 2016 October, 18 states in the U.S.A. had abolished the death penalty; among the rest of the retentionist states, 7 have not carried out an execution in at least 10 years. See the 'Broken Beyond Repair' (*Amnesty International*) <<http://www.amnestyusa.org/our-work/issues/death-penalty>> accessed December 13 2016

<sup>486</sup> See Hitchler, W. H., 'Murder in the Commission of Robbery' (1938) 42 (2) *Dickinson Law Review* 85. See also Morrison, Steven R., 'Defending Vicarious Felony Murder' (2014) 47 (1) *Texas Tech Law Review* 129.

<sup>487</sup> Morrison, Steven R. 'Defending Vicarious Felony Murder' (2014) 47 (1) *Texas Tech Law Review* 129.

<sup>488</sup> Leonard Birdsong, 'The Felony Murder Doctrine Revisited: A Proposal for Calibrating Punishment

point out that there should be limitations in the application of the transfer from felony to first degree murder. They concluded that the limitations are mainly as follows: firstly, the underlying felony must be dangerous to life;<sup>489</sup> secondly, a merger is only imposed if the felony is independent of the killing;<sup>490</sup> thirdly, the death penalty should be restricted to actual killers.<sup>491</sup>

The stipulation on the transfer of felonies in American criminal law provides China with a useful reference on how to deal with serious crimes. If China were to adopt this approach, robbery, rape, arson, explosion, and other serious violent crimes could be separated from capital offences. In this way, not only would the Chinese criminal law be in compliance with the international law it signed, but it would also provoke less objection from the Chinese people when it effectively decreases the number of capital crimes. Hence, eventually, capital crimes existing in China's criminal law could be reduced to murder only.

## **5.5 THE WOULD-BE ALTERNATIVES FOR THE DEATH PENALTY**

The above analyses have shown that it could be feasible within the Chinese legal system capital punishment could be abolished for crimes other than murder at a criminal law level. It is as yet unclear how to establish viable alternatives that remain proportionate to the gravity of the crime while controlling criminals whose release would risk public safety. In this context I will now discuss whether a two-year reprieve of the death penalty, life imprisonment, and/or fixed-term imprisonment would be ideal to substitute for the death penalty.

There are five 'categories' in Chinese criminal punishment: the death penalty, life imprisonment, fixed-term imprisonment, criminal detention, and public surveillance. The

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That Reaffirms the Sanctity of Human Life of Co-Felons Who Are Victims' (2007) 33 OHIO N.U. L. Rev 497.

<sup>489</sup> See Guyora Binder, *Felony Murder* (Stanford Law Books 2012).

<sup>490</sup> See David Crump, *In Defense of the Felony Murder Doctrine* (South Texas College of Law 1985) 370; also see Michelle S. Simon, 'Whose Crime Is It Anyway? Liability for the Lethal Acts of Nonparticipants in the Felony' (2011) 71 U. DET. MERCY L. REV. 228.

<sup>491</sup> Sam Kamin & Justin Marceau, 'Vicarious Aggravators' (2012)

two-year reprieve of the death penalty is not treated as a separate ‘category’ but is attached to the category of the death penalty. The current criminal law sets as a rule for the application of the two-year reprieve that ‘in the case of a criminal who should be sentenced to death, if immediate execution is not essential<sup>492</sup>, a two-year suspension of execution may be announced at the same time as the sentence of death is imposed.’<sup>493</sup>

According to Article 50, there are three consequences after two years. Firstly, if a person sentenced to a two-year reprieve of the death penalty does not intentionally commit a crime in prison during the period of suspension, he or she is to be given a reduction of their sentence to life imprisonment.<sup>494</sup> Secondly, if he or she has done a dramatically good deed of merit<sup>495</sup>, the person is to be given a sentence reduction to 25 years of fixed-term imprisonment. Thirdly, if there is verified evidence that this person has intentionally committed a crime and the circumstance is execrable, the death penalty is to be executed.

The overall statistics relating to the numbers actually executed are unavailable, but, according to one Chinese scholar’s study, 99.9% of criminals sentenced to the two-year reprieve of the death penalty had their sentences eventually commuted to less harsh punishments.<sup>496</sup> Because either a dramatically good deed of merit or intentional commitment of a new crime with execrable circumstances is very hard to carry out in a

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<sup>492</sup> This situation is discretionarily decided by judges. According to a survey by two Chinese scholars who examined 74 intentional murder cases, which all applied the two-year reprieve to criminals, victims’ relatives were compensated in 32% of cases and thus criminals were condoned by them; 28% of criminals voluntarily surrendered to the police, while 13% are cases triggered by disputes between neighbourhood or within families, and 8% make up the other reasons, such as criminals just over the age of 18, confessing the crimes honestly and so on. See Liangfang Ye, ‘An Pengming, A New Probe into the Condition of Changing Death Penalty with Suspension to Death Penalty’ (2015) 5 *Present-day Law Science* 25.

<sup>493</sup> Article 48.

<sup>494</sup> This sentence is not automatic. It needs the prison gives report of whether the inmate is eligible to be commuted to life imprisonment or other less harsh punishment, then the original court will deliver the sentence.

<sup>495</sup> Here the Criminal Law does not define what deeds are dramatically good; it is decided discretionarily by judges.

<sup>496</sup> Yunteng Hu, ‘The General Theory of the Death Penalty’ (1995) China University of Political Science and Law Press 241.

prison environment, the most common consequence after the expiration of the two-year period is that those inmates had their sentences commuted to life imprisonment, and after thirteen years in prison, such criminals could have the possibility to be granted parole.<sup>497</sup>

This, as mentioned in the former section, is becoming common practice for embezzlement crimes. Some Chinese scholars suggest there should be a change in the sequence of the application of the death penalty, and that two-year reprieve should be given priority over immediate execution.<sup>498</sup> In the short term, both of the suggestions are adoptable. The two-year reprieve could be an ideal alternative to minimise the use of capital punishment at present.

Admittedly, there are always critics of the two-year reprieve. Their first argument is that according to the legal practice, it was mainly applied to economic crimes and embezzlement crimes. This punishment generated judicial unjust.<sup>499</sup> Their second argument is that it is cruel and inhuman because the convict will be in a state of anxiety for two years over whether he or she would eventually face execution. Therefore, it breaches the rule of the prohibition against cruel, inhuman, and degrading punishment in the ICCPR.<sup>500</sup>

However, the criticisms of the above views are:

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<sup>497</sup> See Article 81 of the Chinese Criminal Law: ‘a criminal sentenced to life imprisonment of which not less than 13 years has actually been executed, may be granted parole if he earnestly observes prison regulations, undergoes reform through education, demonstrates true repentance, and will not cause further harm to society after being paroled. If special circumstances exist, with the approval of the Supreme People’s Court, the above restrictions relating to the term executed need not be imposed.’

<sup>498</sup> See Hong Li, ‘The Restriction of the Commutation on the 2-year reprieve and its Application --- Take Two Cases Issued by The SPC as Entry Point’ (2013) 5 Chinese Journal of Law; also see Yinsheng Jia, ‘Discuss the Nature and Application of The Restriction of the Commutation on the 2-year reprieve’ (2016) 1 Journal of Shanghai University of Political Science & Law 23.

<sup>499</sup> Seet, Matthew. ‘China’s Suspended Death Sentence with a Two-Year Reprieve: Humanitarian Reprieve or Cruel, Inhuman and Degrading Punishment?’ (2017), [http://law.nus.edu.sg/wps/pdfs/006\\_2017\\_Matthew%20Seet.pdf](http://law.nus.edu.sg/wps/pdfs/006_2017_Matthew%20Seet.pdf), <accessed on 28 December 2017>; see Shaochuan Leng & Hongdah Chiu, ‘Criminal Justice In Post-Mao China: Analysis And Documents’ 9(1985)2 Maryland Journal of International Law 106.

<sup>500</sup> Lai Cheong Sing v. Minister of Citizenship & Immigration, [2007] F.C. 361 (Can.)



Firstly, in the light of historical legal practice, the non-violent economic and embezzlement crimes were the first crimes abolished wherever in the world. The suspension of the death penalty on those crimes is following this trend of abolition.

Secondly, judicial unjust should be eliminated by the establishment of a sound system instead of by not applying a lighter punishment.

Thirdly, by examining the jurisprudence of the Human Rights Committee, the European Court of Human Rights and the Judicial Committee of the Privy Council on the 'death row phenomenon', Matthew Seet points out that China's suspended death sentence does not violate the prohibition against cruel, inhuman and degrading punishment under international law.<sup>501</sup> Also, according to the previous research in this chapter that the rate of eventual execution of the death penalty with a two-year reprieve is less than 1%, the result testifies that by decreasing the actual execution, two-year reprieve does not violate the ICCPR.

The second alternative to capital sentences is life imprisonment. There are two kinds of life imprisonment in the criminal law at present after Amendment IX: life imprisonment with the possibility of parole, and life without parole (LWOP). One controversial aspect was that this punishment existed for the crime of embezzlement only. Critics argued that this was inequitable, and that there was no reason to single out embezzlement in this way; moreover, they argued, it was not economically viable since there were a large number of crimes of embezzlement, and this prescription would

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<sup>501</sup> Seet, Matthew. 'China's Suspended Death Sentence with a Two-Year Reprieve: Humanitarian Reprieve or Cruel, Inhuman and Degrading Punishment?' (2017), [http://law.nus.edu.sg/wps/pdfs/006\\_2017\\_Matthew%20Seet.pdf](http://law.nus.edu.sg/wps/pdfs/006_2017_Matthew%20Seet.pdf), <accessed on 28 December 2017>. For related discussion see Zhao Zuojun, *The Suspension-of-Execution System and Limiting the Application of the Death Sentence*, 1 (2005) *Contemporary Chinese Thought* 74; see Susan Trevaskes, 'China's Death Penalty: The Supreme People's Court, the Suspended Death Sentence and the Politics of Penal Reform', 53(2013) *British Journal Of Criminology* 482; see 8 Franklin Zimring & David Johnson, 'Public Opinion and Death Penalty Reform in the People's Republic of China', 3 (2012) *City University Of Hong Kong Law Review* 189; Margaret Lewis, 'Leniency and Severity in China's Death Penalty Debate', 24(2011) *Columbia Journal Of Asian Law* 303- 325.

substantially increase the number of inmates, which would directly lead to the growth of fiscal expenditure.<sup>502</sup>

From an international perspective, the LWOP has also received significant criticism internationally because it is deemed to be inconsistent with the established rules of humane punishment.<sup>503</sup> Some argue that the LWOP will soon be prohibited from being used in Europe as a matter of regional human rights law.<sup>504</sup> Objectively speaking, looking to other countries for guidance, many countries who do not have the death penalty or life without parole are still able to maintain public safety<sup>505</sup>: it is not advisable for China to set LWOP as a general alternative to the death penalty.

If we examine the experience of abolitionist countries, life imprisonment with the possibility of parole and fixed-term imprisonment – as alternatives to capital punishment – are widely accepted by those countries who have abolished the death penalty.<sup>506</sup>

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<sup>502</sup> Li Su, 'The Awareness of Question: What the Question is and Whose Question it is.' (2017) 1 Wuhan University Journal(Philosophy & Social Sciences) 10. In this article, the author analysed a case in which a former higher rank official was sentenced to life without parole. He give his arguments of life without parole, which are not acceptable in current China whether from a economic or legal perspective. See also See, Jianlong Yao, Qian Li, 'Discuss a Series of Issues concerning Life Imprisonment of Bribery.' (2016) 2 People's Procuratorial Semi-monthly 24; also see Lifeng Li, 'Life Imprisonment: Redefine and Establish Under the Context of Abolishing Death Penalty' (2012) 30 (1) Criminal Law Review 435. See also Xiang Li, 'Discussion of Revising Criminal Law and Adjusting the structure of Criminal Penalty' (2016) 4 Journal of East China University of Political Science and Law, 124.

<sup>503</sup> O'hear, Michael M. 'The Beginning of the End for Life Without Parole?' (2010) 23 (1) Federal Sentencing Reporter 1. See also D'elia, Carole. 'Less than we might: meditations on life in prison without parole.' (2010) 23 (1) Federal Sentencing Reporter 10; also see Ristroph, Alice. 'Hope, Imprisonment, and the Constitution.' (2010) 23 Fed. Sent'g Rep.75. These articles discussed concerning human rights and constitution, problems of life without parole.

<sup>504</sup> Van Zyl Smit, Dirk. 'Outlawing Irreducible Life Sentences: Europe on the Brink?' (2010) 23 (1) Federal Sentencing Reporter 39; See also Demetriades, Achilleas, Silvia Bartolini, and Theodora Christodoulidou. 'Life Imprisonment as Inhuman and Degrading Treatment: The Case of Kafkaris v. Cyprus before the European Court of Human Rights.' (2008) EUR. HUM. RTS. L. REV. 656; and Pettigrew, Mark, 'Whole of life tariffs in the shadow of Europe: Penological foundations and political popularity.' (2015) 54 (3) The Howard Journal of Crime and Justice 292; And also Van Zyl Smit, Dirk. 'Abolishing life imprisonment?' (2001) 3 (2) Punishment & Society 299.

<sup>505</sup> See Catherine Appleton & Bent Grover, 'The Pros and Cons of Life Without Parole' (2007) 47 BRirr. J. criminology 597.

<sup>506</sup> Such as in Canada and Israel, the penalty for murder, which was a capital crime before in those two countries, is a mandatory sentence to life imprisonment with the possibility of parole. And some other

According to research, in practice, Chinese inmates whose two-year reprieves of the death penalty were commuted actually served between 14 to 18 years in prison. For convicts who were sentenced to life imprisonment, the shortest period that they stayed in prison was 12 years, and the average was 16 years.<sup>507</sup> An investigation by the Shandong Bureau of Prison Administration showed that in 2004 in Shandong province, of those whose former sentences were 10 to 15-year imprisonment, 7.4% reoffended, of those whose former sentences were 15 to 20-year imprisonment, 2.5% reoffended, and of those whose former sentences were life imprisonment or two-year reprieves, only 0.4% reoffended after discharge. Another survey conducted by a Fujian prison administrative organisation showed that in Fujian province in 2005, the recidivism crime rate amongst convicts who were formerly sentenced to the two-year reprieve was zero; those who were formerly sentenced to life imprisonment made up 1.5%, and those who were formerly sentenced to more than ten-year life imprisonment constituted 9.5%.<sup>508</sup> Some evidence also shows that the use of LWOP actually is not necessary in China.

In order to incapacitate convicts who continue to pose a genuine threat to the whole society, however, the essential assessment should be carried out by the authorities to review the convict's suitability for release.

In summary, firstly, at present the complete abolition of the death penalty for crimes such as murder would still not be acceptable for the majority of Chinese people. For this reason, in the first stage of reform of the death penalty, the use of immediate execution could be limited and be diminished gradually. As a first step, a two-year reprieve of the death penalty would be an appropriate punishment to replace it. Despite the fact that capital punishment is nominally still in place, this does lead to a significant decrease in the numbers of people executed. Secondly, life imprisonment without the possibility of

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countries use fixed term imprisonment as an alternative. See UN Secretary-General, Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, UN doc E/2010/10 (2009) para 10, cited from Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edition, rev edn Oxford University Press, Oxford 2015) 472

<sup>507</sup> Yinsheng Jia, 'On the attribute and Application of Restriction of Commutation of the Two-year Reprieve of the Death Penalty' (2016) 1 Journal of Shanghai University of Political Science and Law 23.

<sup>508</sup> Ibid 23.

parole has its own challenges, as it is controversial and raises human rights issues. Therefore, it is not an ideal alternative to the death penalty. In the long term, life imprisonment with the possibility of parole and fixed-term imprisonment could be two viable alternatives.

## 5.6 CONCLUSION

As mentioned in the introduction, there have long been conflicts in China between those who want to follow neo-liberal cosmopolitan policies to reform the death penalty, and those who instead want to maintain a more conservative policy with less emphasis on international relationships. This conflict is based around amendments to the criminal law relevant to the death penalty, although China has moved more in the direction of neo-liberal cosmopolitan ideas overall. This can be seen from the reduction of the number of capital crimes, the vanishing '*Hard Strike*' campaigns, and the changing penal policies towards the rule of law.

Meanwhile, the rule of law and human rights were enshrined in the Chinese Constitution in the late 1990s and early 2000s respectively, which in part signifies the influence of Enlightenment liberalism in China. The changed penal policy suggests a shift from treating the death penalty as an instrument of governance to a more modern way of ordering society according to law. This change has objectively affected reform of capital punishment at both legislative and judicial levels. Given the accumulating judicial experience and the increasingly improving Chinese economy and society, it may become possible to restrict the death penalty to cases of murder, although public opinion is unlikely at present to want its total abolition.

The other change is that China is now on the way to fulfilling its international obligation to protect 'human rights'. Some evidence can be seen in the amended 1997 criminal law which includes the entire abolition of capital punishment for juvenile offences. Through such abolition, China shows its respect to international law as a higher authority over its territory. Admittedly, as is evident from the vocal opposition to the

abolition of the death penalty, conservatism is and will remain a dominant ideology in China in the long run. This increases the difficulty of reform.

In this chapter, addressing from both socio-economic and legal perspectives, the arguments behind the amendments to the criminal law regarding the death penalty were discussed. This chapter showed that the death penalty did not in fact act as an effective deterrent, especially in the case of drug-related crimes, although this case has been argued by those of a conservative view. It could be argued that control over crime rates is not only a legal issue, but also involves complicated socio-economic policy. Therefore, the use of the death penalty cannot be considered as the first choice option in the governance of a modern country. By analysing this and related issues, it is concluded that there are still opportunities at the legislative level to amend Chinese criminal law further in order to abolish or suspend the death penalty for more non-violent crimes, instead of relying only on judicial controls on its use.

This chapter analysed some capital cases from the SPC's annual reports during a period between 2008 and 2016. Those cases are involved in crimes of embezzlement, drug-related crimes, crimes of murder and robbery and other serious violent crimes. It concluded that there was a tendency of leniency concerning the use of the death penalty for the crimes of embezzlement and drug-related crimes, especially after 2000, more serious cases were exempted from death. However, for the murder cases, the attitude was dramatically different. Sometimes there was a discrepancy between general people and officials, while in other situations their aims were coincident with each other- to sentence the convicted to immediate execution without a reprieve. This chapter also suggested that robbery and other violent crimes should be only categorised as capital crimes when they caused the death of people. In this way, finally, the death penalty could be limited to the crime of murder in the Chinese Criminal Law.

The possible alternatives to the death penalty were also discussed in this chapter. It has been shown that a two-year reprieve could be used as an effective way to minimise the number of executions. Therefore, in the short term, ahead of total abolition, this would be an ideal alternative to immediate execution. Considering other alternatives, life

without parole as a newly added punishment has its own problems related to human rights. It was also argued, with reference to judicial practice, that this method of punishment is unnecessary and fiscally unrealistic. Consequently, it was not suggested as a workable alternative for the death penalty. By contrast, in next chapter, the research will be continued at the level of criminal procedure law.

## **CHAPTER 6 CHALLENGES TO DEATH PENALTY IN CHINESE CRIMINAL PROCEDURE LAW**

### **6.1. INTRODUCTION**

Chapter 5 analysed how the Chinese substantive law has evolved to limit the use of the death penalty amid conflicts between neo-liberal cosmopolitanism and conservatism. Different crimes were also examined in order to discuss whether it would be possible to remove some non-violent crimes from the list of capital crimes in the current criminal law, and if this was realised, what the suggested alternative punishment for those crimes would be.

With the aim of achieving reform as a whole, however, possible changes in Chinese procedure law should also be considered. The achievement of a successful reform of the death penalty cannot be confined merely to issues of substantial law, which is only an aspect of this restructuring; achieving integrity means all-round reform.

This chapter will continue to discuss disputes between neo-liberal cosmopolitanism and conservatism through analysis of how the Chinese criminal procedure law has evolved during the previous two decades. The first section will analyse why due process is important in the application of the death penalty and how the Chinese criminal procedure law evolved. The second section will discuss what defects still exist in the criminal procedure law, and what needs to be improved in the future. I will examine the extent to which China is moving forward, in terms of being in compliance with international treaties, such as the ICCPR and the CAT.

### **6.2 THE IMPORTANCE OF DUE PROCESS CONCERNING CAPITAL PUNISHMENT**

John Rawls argues that ‘a theory however elegant and economical must be rejected or revised if it is untrue; likewise, laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.’<sup>509</sup> Undoubtedly, if a country

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<sup>509</sup> John Rawls, *A Theory of Justice* (Clarendon Press 1972) 3.

does not abolish the death penalty, its procedure law must be so well established that it will not generate miscarriages of justice, given that the execution is irreversible. Nevertheless, as Roger Hood argued: ‘no one can deny that no system for administering capital punishment has been devised which does not debase human dignity, is always error free, and never amounts to cruel, inhuman, or degrading punishment or treatment.’<sup>510</sup> He drew this conclusion through his examination of the criminal procedure law in the U.S.A.. He found that its procedure law remained far from perfect and had generated substantial numbers of mistaken criminal convictions when concerning the death penalty.<sup>511</sup> As in China, judicial justice has become the first item for consideration when Chinese people discuss miscarriages of justice.

According to what was outlined in Chapter 2, the exposure of wrongly decided capital crime cases shows that the current judicial safeguarding procedures in the Chinese criminal procedure law are not a cause for optimism. Among all the arguments, the use of confession obtained through torture was deemed to be the principal concern. Admittedly, most of the misjudged cases, which have led to understandable anger from the majority of Chinese people, happened before 2005, or even earlier, in the 1990s. According to several reports, however, there are still some unjust cases, generated after 2005<sup>512</sup>, which the Supreme People’s Court (hereinafter the SPC) corrected recently. This shows that problems still exist in the current procedural system.

Bingzhi Zhao and Ke Zhang point out that although due process cannot bring about abolition, it can safeguard human rights, and because the existing legal structures in China exhibit a lack of concern and respect for perpetrators, it is still necessary to consider this

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<sup>510</sup> Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edition, revised and updated edn Oxford University Press, Oxford 2015) 48.

<sup>511</sup> Ibid.

<sup>512</sup> See ‘In Many Places in China, 20 Substantially Mistaken Criminal Convictions Were Corrected in the Last Two Years.’ <<http://news.qq.com/a/20141204/036262.htm>> and See ‘The SPC: 2013-2015 23 Wrongly convicted Criminal Cases Were Corrected.’ <[http://news.xinhuanet.com/legal/2016-02/29/c\\_128762026.htm](http://news.xinhuanet.com/legal/2016-02/29/c_128762026.htm)>. accessed 30 March 2017



in the case of legal reform.<sup>513</sup> Mingyuan Wang suggests that in order to prevent miscarriages of justice concerning death penalty sentences, China should first improve the judicial system in order to build a more effective mechanism. The lessons from former miscarriages of justice in death penalty cases show that the procuratorate organisations and courts all failed to fulfil their obligations as judicial organs. If this key problem cannot be resolved sufficiently, many other facets such as evidence systems, defence systems, systems of coercive measure, and the perfection of the investigation, prosecution, and trial procedures will be hindered by this imperfect judicial system.<sup>514</sup>

Allan points out that ‘the principles of equality and due process lie at the heart of the rule of law, when interpreted as an ideal of constitutionalism, based on each citizen's equal dignity.’<sup>515</sup> A well-designed procedure law not only protects innocent people from being wrongly convicted, but also expresses the spirit of the rule of law. Hence, in this aspect, criminal procedure law is more important than substantive law. Nevertheless, even if the trial was fair, it would not stop the imposition of the death penalty; it would only minimise miscarriages of justice, and would reduce the number of executions in present-day China in this way.

Given the Chinese people’s awareness of the importance of safeguarding human rights through procedure law, they have found many flaws existing within it, which have dramatically hindered the realisation of due process. After 1996, the Chinese procedure law had been amended several times, at the same time as relevant judicial interpretations attempted to prevent the courts from allowing more unjust capital cases. Therefore, I will research the evolution of the Chinese criminal procedure law and judicial interpretations of criminal procedural attributes respecting the application of capital punishment. The process of the evolution is entwined with conflicts between liberal cosmopolitanism and

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<sup>513</sup> Bingzhi Zhao and Ke Zhang, ‘The Tradition and the Modern: the Reform of the Death Penalty and the Change of the Conception of ‘Humanity’ in Ordinary People,’ (2016) No. 2 Contemporary Law Review 11

<sup>514</sup> See Mingyuan Wang ‘Conversation by Writing: Mistaken Criminal Convictions, the Death Penalty and the Rule of Law’ (2015) No 3 Peking University Law Journal 565

<sup>515</sup> T R S Allan *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press 2003) 55.

legal positivism. There is also an ongoing process of transplantation of modern legal ideas into China's soil, which should lead to the eventual triumph of human rights law and the spirit of the rule of law.

### **6.3. EVOLUTION OF CRIMINAL PROCEDURE LAW**

#### **6.3.1 Reform of Criminal Procedure Law from 1979 to 1996**

The first Criminal Procedure Law of the PRC was enacted in 1979, at the same time as the promulgation of the substantial law, the context of which was introduced in Chapter 5.<sup>516</sup> This criminal procedure law is the first law systematically prescribing the basic foundation system of procedure. It began the era of legalisation of criminal procedure. Before this, there was no equivalent in China, as was illustrated in Chapter 5. After the end of the 'Cultural Revolution', there was a process of rebuilding the legal system in China. Although it entrenched some principles of modern procedure law and laid the groundwork for the basic system of evidence, defence, coercive measure, and process of investigation, prosecution, and trial, there were still various defects, which later led to many miscarriages of justice.

Among all the flaws, the most severe one was that there was no prescription on how to deal with illegal evidence, which was gained through breaches in procedure law. Although its Article 32 prescribed that 'it should be strictly forbidden to extort confessions by torture and to collect evidence by threat, enticement, deceit or other unlawful means', it did not set rules on how to carry out this article if judicial organisations<sup>517</sup> breached it, and did not answer whether evidence acquired by the above prohibited methods could be used as legal evidence or should be discarded as illegal. This

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<sup>516</sup> As mentioned in Chapter 5, the context of the promulgation of the criminal law and the procedure law were the same; for this please see the first section in Chapter 5.

<sup>517</sup> It is different from the judicial system in the UK: in China, according to its legal tradition, the term 'judicial system' refers to the system of the police, the court, and the procuratorate. The procuratorate has the power of supervision of the other two judicial organs. Also, the term 'judicial organs' refers to the above mentioned three organisations.

later led to severe abuse of the use of coerced confession, lengthy detention, deprivation of suspects' rights to be defended by competent counsels, hindering criminal lawyers from performing their duties.

This provoked substantial criticism, as Wang Hongxiang, Chen Guangzhong and Chen Weidong all point out that the situation not only reflected the historical legal custom of ignorance of procedure law, the lower professional quality of judicial persons, and the impact of 'Hard Strike' campaigns, but also exposed the imperfect criminal procedure system.<sup>518</sup> Overseas scholars also point out those problem.<sup>519</sup> Against this background, the second criminal procedure law was enacted in 1996.

The process of amendment also involves conflicts between reform and retention of the old legal order, namely, a battle between neo-liberal cosmopolitanism and conservatism.<sup>520</sup> A Chinese scholar who participated in the amendment process points out that at the time among circles of academic law and practising professionals, people's views were often contradictory. Some reacted strongly against the attempt to strengthen the protection of human rights in criminal procedure law, arguing that it would impair the progress of the '*strike*' on crime.<sup>521</sup>

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<sup>518</sup> Wang Hongxiang and Chen Guangzhong, 'Reflection on Problems of Code of criminal Procedure' (1991) No 5 Tribune of Political Science and Law 2; see Chen W, 'Retrospection and Perspective: Chinese Criminal Procedure Law (1979-2009).' (2010) 5(4) *Frontiers L China* 510.

<sup>519</sup> Hansen O, 'Legality and Lawlessness in China - An Analysis of Chinese Criminal Law and Procedure.' (1980) 6(1) *Poly L Rev* 46; Brown, Ronald C. *Understanding Chinese courts and legal process: Law with Chinese characteristics.* (Kluwer law international, 1997); Tanner, Murray Scot. *Strike hard! Anti-crime campaigns and Chinese criminal justice, 1979-1985* (Cornell University Press, 2004); Shum C, 'The Role of Chinese Lawyers in Criminal Proceedings.' (1989) 5(4) *China L Rep* 213.

<sup>520</sup> For the category of these two competing groups, please see Chapter 1, note 6. At present amongst people who object to the reform/abolition of the death penalty, some are legal positivists who oppose Natural-law of human rights, while some are realists who oppose reforming/abolishing the death penalty by accentuating the Chinese reality or the Chinese special characteristics. The others are purely conservative, who out of interest in maintaining the status quo oppose changing the present social order by reform. Some are nationalists/populists; they argue against reform by insisting that China should not adopt western legal theory, Enlightenment theory, or liberal theory to change China's legal system. In China there is no systematic theory directly pinpointing legal positivism, realism, or nationalism/populism, so Chinese scholars often avoid using these western terms. Here, they are all categorised as conservatives.

<sup>521</sup> Chen Guangzhong 'The Insistence of Combination of Punishment of Crimes and Protection of Human Rights on the Background of China's Situations with Reference to Foreign Experiences- Reflection on the

The main contrary arguments between reformists or neo-liberal cosmopolitans and conservatives revolve around the amendment of criminal procedure law. Firstly, the neo-liberal cosmopolitan viewpoint on adopting the principle of ‘presumption of innocence’ is that this principle was formed alongside the principle of legally prescribed penalty (*nulla poena sine lege*) through the denial of an inquisitorial-litigation model<sup>522</sup> within feudal society. The above were considered to be basic principles in the modern criminal legal system, and they had been confirmed by many countries in their constitutional laws. In China, however, due to historical reasons, these legal principles had long been misunderstood. The principle of ‘presumption of innocence’ was universally acknowledged, and China did not reserve/exclude this principle when it signed international covenants passed by the UN. Therefore, China should lay down the rule of ‘presumption of innocence’ in its criminal law according to the conception of many international covenants.<sup>523</sup>

The conservative argument is that these international treaties contradict the Chinese legal system and its long-term legal tradition. The principle of ‘presumption of innocence’ breaches the principle of ‘seeking truth from facts’ (*shi shi qiu shi yuan ze*),<sup>524</sup> and so is not in accordance with China’s contemporary situation. Its application would contravene the penal policy of ‘lenient punishment to those who confessed their crimes, and severe punishment to those who resist confession’. Conservatives, therefore, are concerned that

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Participation in Amendment of Criminal Procedure Law’ (1996) No 6 Tribune of Political Science and Law 25.

<sup>522</sup> ‘Inquisitorial-litigation model’ (*jiu wen shi su song*) is a legal term used to explain the trial procedure as opposite to ‘confrontational procedure’ (*dui kang shi su song*). Western scholars usually refer to the criminal trial modes of two legal systems as ‘ex officio trial mode’ (inquisitional procedure) and ‘adversary trial mode’ (confrontational procedure). For the relevant analyses, see G Liu ‘Criminal trial from a crime control perspective’ (2007) 2(2): *Frontiers of Law in China* 281. See also G W Biddle ‘An Inquiry into the Proper Mode of Trial’ 1885, 8: *Annu. Rep. ABA* 201.

<sup>523</sup> *Ibid* 25-6

<sup>524</sup> The principle of ‘seeking truth from facts’ (*shi shi qiu shi yuan ze*) is a basic principle in the Chinese criminal law and the procedure law – it means finding truth relied on empirical investigation. For a discussion see F Sapio ‘Seeking Truth from Facts in Party Discipline’ Legislation” (2015) Paper presented at the 10th Annual Conference of the European China Law Studies Association, Cologne, 25-27 September 2015.

it would give a shield for suspects and defendants to avoid being convicted. It also would present problems for public security organisations when investigating the facts of crimes.<sup>525</sup>

Another divergence was in regard to the reform of the 'criminal trial mode'. Arguments over whether this reform should draw experience from European continental countries or should be grounded in China's own situations represented the main disagreement between reformists and conservatives. Some Chinese scholars cited the successful experience of reform of the 'criminal trial mode' in many traditionally continental legal systems,<sup>526</sup> such as Japan and South Korea in Asia and Italy in Europe, to justify their arguments. They argued that the contemporary trial mode trend was shifting from an 'ex officio trial mode' (inquisitional procedure) to 'adversary trial mode' (confrontational procedure).<sup>527</sup> In the old trial mode, judges actively took all necessary measures and procedures to investigate the truth, often leading them to prejudge the outcome before the trial. In this case, the opinions of the defence were ignored, and on some occasions it generated direct confrontation between judges and the defence. At the same time, because of the leadership of the courts and the existence of judicial committees, judges who had directly heard cases were not authorised to deliver judgement, while members of judicial committees had the authority to judge cases which they did not hear

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<sup>525</sup> Ibid 25-26. Another question here needs to be clarified. There also are issues of the difference between the balance of probabilities and being proven beyond all reasonable doubt; not only general and obscure prescription of the fact of a case is clear and the evidence is concrete and sufficient. In 1996 criminal procedure law, article 162 sets rules on the standard of proof that require that the fact of the case is clear, the evidence is concrete and sufficient. The 2012 equivalent adds a new article to interpret what is the concrete and sufficient evidence. Article 53 prescribes that: “ (1) All facts for conviction and sentencing are supported by evidence; (2) All evidence used to decide a case has been verified under legal procedures; and (3) All facts found are beyond reasonable doubt based on all evidence of the case.” It defines what evidence should be considered as being in accordance with the above standard.

<sup>526</sup> Here I use this term as opposite to the Anglo-American legal system, because some Asian countries, such as Japan, South Korea, and China, transplanted the European continental legal system into their own from Germany or France when they reformed their old feudal legal systems. Although they are Asian countries, they are considered as belonging to the family of the European continental legal system.

<sup>527</sup> LIU Guangsan 'Criminal Trial from A Crime Control Perspective-Mode, Function and Judge's Attitude' (2007) 2(2) *Front. Law China* 281

directly. This led to judges having little independence, which is detrimental to judicial justice.<sup>528</sup> Conservatives argue that on the grounds of China's special situation and Chinese legal characteristics, reform is both impossible and unwise.<sup>529</sup>

Consequently, as the result of this confrontation, the 1996 criminal procedure law presented a mixture of thought from neo-liberal cosmopolitanism and conservatism with a greater emphasis on the former, such as the newly added incomplete evidence system. On the one hand, this established a set of rules concerning the principle of evidence according to the modern legal spirit, but, on the other hand, failed to stipulate a precise principle for the exclusion of evidence obtained illegally. The following are explanations of why there were some clear 'neo-liberal cosmopolitan' changes made in the 1996 criminal procedure law over the 1979 one.

Firstly, it established the rule of 'no person should be found guilty without being judged as such by a People's Court according to law.'<sup>530</sup> Admittedly, this was not the principle of 'presumption of innocence'. It was the consequence of compromise between the two competing views on this principle outlined above. Yet at the same time, it affirmed the principle of 'if the evidence is insufficient, the defendant cannot be found guilty, he or she should be pronounced innocent accordingly on account of the fact that the evidence is insufficient and the accusation unfounded.'<sup>531</sup>

Secondly, the reform of the trial mode gave authority to judges in the collegiate bench (*he yi ting*)<sup>532</sup> when trying general cases, whilst only complicated, severe and perplexing cases were submitted to the judicial committee for discussion. In general, these cases were primarily capital cases. This removed pre-investigation by judges before the

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<sup>528</sup> Chen Guangzhong 'The Insistence of Combination of Punishment of Crimes and Protection of Human Rights on the Background of China's Situations with Reference to Foreign Experiences- Reflection on the Participation in Amendment of Criminal Procedure Law' (1996) No. 6 Tribune of Political Science and Law 25.

<sup>529</sup> Ibid 25.

<sup>530</sup> Article 12 of the Chinese criminal procedure law.

<sup>531</sup> Article 162(3) of the Chinese criminal procedure law.

<sup>532</sup> This is a Chinese legal term. When hearing a case, a court often consists of three or five judges, who give their own opinions on the case and decide the judgement of the case by the majority principle. The form of this is called '*he yi ting*', or collegiate bench.

formal trial and prescribed that the chief judge should preside over the court while the prosecutor and the defence should adduce evidences and debate with each other. It is apparent that the law absorbed more from the Anglo-American legal system's 'adversary trial mode'. Nonetheless, it was not a completely Anglo-American style reform, as it retained some so-called 'Chinese characteristics'. Judges were not passive adjudicators: they could actively investigate certain pieces of evidence, they were empowered to question defendants and witnesses, identify or evaluate experts.

Thirdly, in terms of the protection of human rights, criminal procedure law is regarded as a 'miniature constitution' in China, because it influences citizens' freedom and personal rights, rights to property, and democratic rights. The 1996 amendment adopted several steps to protect the rights of suspects and defendants. Its Article 33 prescribed that: 'A criminal suspect in a case of public prosecution should have the right to entrust persons as his defenders from the date on which the case is transferred for examination before prosecution'. Before the amendment, these people's rights were not considered as being eligible for protection, because they were criminals that should be 'struck' hard.

As a result, the compromise between two competing views led to partial reform. Chinese scholars who hold neo-liberal cosmopolitan views argued that this illustration still breached the international treaties that China had signed and ratified.<sup>533</sup> They used the basic principles regarding the role of lawyers, which were adopted by the Eighth UN's Congress on the *Prevention of Crime and the Treatment of Offenders* in 1990, as an example to point out the noncompliance of Chinese procedure law with these international principles. Its Article 1 stipulated that: 'all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.'<sup>534</sup> Moreover, its Article 5 established the following rule: 'governments should ensure that all persons are immediately informed by

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<sup>533</sup> Chen Guangzhong and Wang Hongxiang 'Reflection Oil Problems of Code of criminal Procedure' (1991) No 5 Tribune of Political Science and Law 2.

<sup>534</sup> Article 1 of the Chinese criminal procedure law.

the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.’<sup>535</sup>

### 6.3.2 Reform after 1996

As a result of the partial reform, miscarriages of justice were unavoidable, especially under the background of harsh policy regarding punishment. From 1996 to 2011, a substantial number of wrongly decided capital cases emerged, which made defects in criminal procedure law intolerable. The law faced criticism over several key aspects, including the use of coerced confession by torture, the infringement of human rights, judicial practice incompatible with the criminal procedural law, the total absence of ‘presumption of innocence,’ and so on. Even ordinary people began to call for judicial justice and the protection of human rights concerning the abuse and use of the death penalty.<sup>536</sup> This time the views of neo-legal cosmopolitans overwhelmed those of conservatives.<sup>537</sup> At the same time, the backdrop had been changed when China signed the ICCPR and other relevant international human rights treaties. The Chinese Constitution has been amended twice, increasing the prescription of governance by the rule of law and the protection of human rights in China, in 1999 and 2004. All of the above events shifted the direction of change in the legal system.

An increasing number of Chinese scholars take the position of neo-liberal cosmopolitanism and advocate that when considering amendments to criminal procedure law, it is necessary to place the role of international law above that of domestic law.<sup>538</sup> Fan Chongyi and Xia Hong argue that international treaties are a prerequisite for international communication and cooperation, and that adherence to treaties signed and

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<sup>535</sup> Article 5 of the Chinese criminal procedure law.

<sup>536</sup> See the series of comments from people.cn, Maintaining Judicial Justice, We Do Not Need the Delayed Justice. <<http://opinion.people.com.cn/n/2013/0112/c1003-20180574.html>> accessed 30 March 2017

<sup>537</sup> See Chen Weidong ‘On several Issues of the Re-amendment of the Criminal Procedure Law’ (2007) 5 China Law 14, and Chen Weidong and Liu Jihua ‘New Theoretical Probe on Criminal Procedure Area’ (2008) 1 The Jurist 98; also see Ren Huazhe and Cheng Yuanyuan ‘Thinking on Re-modification of the Criminal Procedure Law’ (2008) 2 Law Review 101.

<sup>538</sup> Ibid.



ratified by a sovereign state is therefore essential to integration into international society. China, as a permanent member of the UN Security Council, has its own special duties to the UN. Since China has signed and ratified ICESCR and signed the ICCPR, there is no reason for China to continue to refuse to carry out the principles established in these treaties<sup>539</sup>, which contend that the basic principles of criminal litigation, rule of evidence, human rights standards in criminal procedure, and so on are the preeminent achievements of and for all human beings. Hence, China cannot use the excuse of ‘China’s special situation’ and ‘immature circumstance’ to refuse to apply even the lowest standard of criminal procedure.<sup>540</sup> They maintain that through the rigorous restriction of criminal procedure regarding the application of the death penalty, it should be abolished in stages.<sup>541</sup>

The above arguments undoubtedly faced strong opposition from conservatives, especially from the public security organisations. They insisted that firstly, the amendment of the criminal procedure law could not ignore China’s socio-economic situation as a developing country, and, therefore that China could not directly copy developed countries’ legal practice. Some argued that universal application is not a correct logical premise concerning the transplantation of criminal procedure law.<sup>542</sup> Secondly, even if there was a need to amend criminal procedure law, its basic function in preventing crimes could not be undermined. Because of the increasingly high crime rate in China, they argued, the police should be given more power, including special measures to handle crimes swiftly. Thirdly, in regards to the protection of human rights of defendants, the rights of victims should be protected equally; the system should not ignore the latter while

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<sup>539</sup> Fan Chongyi and Xia Hong ‘The Criteria of the UN’s Criminal Justice and the Re-amendment of the Chinese Criminal Procedure Law’ (2007) 1 People’s Procuratorial Semi-monthly.

<sup>540</sup> Fan Chongyi ‘Rationally Thinking About the Second Revision of China’s Criminal Procedure Law’ (2008) 2 Law Science Magazine 42; See also Bian Jianlin ‘Envisaging the Re-amendment of the Criminal Law’ (2007) 5 China Law 9.

<sup>541</sup> Fan Chongyi ‘Rationally Thinking About the Second Revision of China’s Criminal Procedure Law’ (2008) 2 Law Science Magazine 42.

<sup>542</sup> Wang Haiyan ‘The Elimination of the Evil and the Re-construction: The Transplantation of Criminal Procedure Law and Its Localisation’ (2007) 2 Tribune of Political Science and Law 22.

focusing on the former. Fourthly, the amendment of the criminal procedure law should also take cost and expenditure into account, and if the reforms were too complicated, it would exceed the fiscal budget of the state.<sup>543</sup>

It is apparent that the main conflict between these two different views centres on the question of reform. On the one hand, there are ‘reformists’ who wish to integrate the principles of the modern legal spirit generated from the Enlightenment movement in European countries, and use the concept of human rights in reforming the Chinese legal system. On the other hand, there are ‘conservatives’ who are security-oriented and give emphasis to popular sentiment as well as social control and public security issues.

Entwined with the disputes illustrated above, the second amendment of the criminal procedure law was launched in 2011 and took effect in 2012. Its aims were to improve the system of evidence, compulsory measures, defence measures, investigation measures, trial procedures, the enforcement prescription, and special procedures, which all focus on the concept of justice. Due to the exposure of substantial numbers of wrongly decided capital punishment cases, the amendment acted to prohibit the use of coerced confessions by torture, to exclude illegal evidence, to support witnesses testifying in court, and to safeguard the defence counsel’s right – all issues that have gained more social attention.

It could be said that neo-liberal cosmopolitan thought had a substantial influence on this process of amendment. For the first time, it added into criminal procedure law the words ‘to respect and protect human rights.’ This shows the penal policy changing from trying simply to combat crimes to focusing on protecting human rights as well. Tang Binbin and Chen Guangzhong argue that the concept of human rights is broader than the concept of people’s rights. ‘People’ in China is a political concept, excluding criminals and the so-called ‘class enemy’.<sup>544</sup> The prescription of the protection of human rights can be seen as China stepping away from the law’s purely instrumental function towards its universal application. It also serves to highlight China’s respect for the international

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<sup>543</sup> Chen Yongsheng ‘Theoretical Misunderstanding that should Clarify during the Re-amendment of Criminal Procedural Law’ (2008) 4 *Tribune of Political Science and Law* 106.

<sup>544</sup> Tang Binbin and Chen Guangzhong ‘Discussion on Some Key Issues of Deepening the Judicial Reform and the Amendment of the Criminal Procedure Law’ (2016) 6 *Journal of Comparative Law* 12.

human rights treaties it has signed. Hence, it is a significant change not only in criminal procedure law, but also in China's legal history.

In addition to the above, there are several other major revisions in the 2012 Criminal Procedure Law to protect the rights of suspects and criminals concerning the death penalty. First, in the system of criminal advocacy, it prescribes that a criminal suspect can meet a defence lawyer during the investigation period; the previous two criminal procedure laws both stipulated that suspects could only do so after the case was delivered to the procuratorate to file a lawsuit. It also improved procedures of meeting with lawyers and of file reading, as well as enlarging the range of application of legal aid. It further eliminated obstacles from its predecessors preventing defence counsels from completely fulfilling their duties. For instance, Article 96 in the 1997 Criminal Procedure Law provided that when the lawyer met with the accused suspect in custody, the investigating organisation could send investigators to meeting if necessary, in light of the seriousness of the crime. The newly amended law removed this prescription; it set the rule that the defence lawyer should not be monitored when meeting the accused suspect or defendant.

Secondly, the system of evidence prescribes that nobody should be forced to attest his own guilt, and specifies a system for excluding illegal evidence. It added five new articles describing lucidly what type of evidence is illegal and how to exclude it. Article 54 precisely illustrates that confessions from a criminal suspect or a defendant extorted by torture or other illegal means, along with witness testimonies and victim statements collected by violence, threat, or other illegal methods should be excluded. Compared to the former law, it further complies to international treaties, such as the Convention Against Torture.

Thirdly, concerning the compulsory measures, it restricts the exceptional prescription of not informing a suspect's family members when he or she is under a compulsory measure. Its Article 83 stipulates that within 24 hours after a person has been detained, he or she should be immediately sent to the house of detention. Excluding circumstances where it is impossible to notify his/her family or such notification would hinder the investigation because he/she is involved in crimes endangering state security

or terrorism crimes, his or her family should be notified within 24 hours after his detention. When the circumstances hindering the investigation disappear, his family should be notified immediately; in former procedure law there was no restriction on how long investigation organisations could detain suspects.

If this measure can co-operate well with other approaches, such as the supervision of investigation activities, it is able to minimise the use of torture. Article 116 orders that after the criminal suspect has been delivered to the house of detention, the investigators should conduct the interrogation there. Article 117 prescribes that the duration of the interrogation through summons or constrained appearance should not exceed twelve hours. Where the case is major or complex and it is necessary to extend the length of detention or arrest, the duration of the interrogation throughout the summons or summons by force should not exceed 24 hours.

It also instructs that a criminal suspect should not be imprisoned under the disguise of successive summons or summons by force. If a criminal suspect is interrogated throughout this procedure, food and necessary rest for the criminal suspect should be guaranteed. Article 121 sets out that investigators may, when interrogating a criminal suspect, record sound or images from the interrogation; the sound or images of the interrogation should be recorded for cases in which life imprisonment or the death penalty is possible, or other major criminal cases. Audio or video recording of the interrogation should be conducted thoroughly and completely. Compared to former procedure law, this prescription provides a concrete enforcement standard. All the measures target the elimination of coerced confessions.

Fourthly, it adds a new chapter as one of the special procedures to protect the rights of adolescents who are under the age of 18. It establishes the main principle that if a minor has committed a crime, education is a priority over punishment. It prescribes that when dealing with criminal cases committed by minors, the court, the procuratorate, and the public security organisation should guarantee the litigation rights of minors, and ensure that they can obtain relevant legal assistance. Judges, procurators and investigators who are familiar with the physical and mental characteristics of minors should be selected to

handle the cases. When a juvenile delinquent does not have a defender, judicial organisations should notify the legal aid agency to designate a lawyer to undertake the defence. At the same time, the public security organisation, the procuratorate, and the court may, according to the situation of the case, conduct an investigation on the domestic background, reasons for committing a crime, and education of the minor criminal suspect or defendant.

This new amendment is in compliance with the international treaties which China signed and ratified in order to protect the rights of children and young people under the age of 18.<sup>545</sup> In light of this, concerning the possible ratification of the ICCPR in the foreseeable future, it is not likely that protecting human rights is merely diplomatic rhetoric or, as some Western commentators might claim, ‘communist propaganda.’ It demonstrates that as a rising power on the world stage, the Chinese government is willing to fulfil its international obligations as a responsible nation.

Peerenboom points out that Criminal Law and Criminal Procedure Law in China have been amended to bring them more into line with international standards.<sup>546</sup> He also notes that this kind of substantive theoretical move towards the rule of law with its potential political significance has often been simply dismissed by western societies as mere political propaganda. Western journalists and scholarly circles, with some rare exceptions, only focus their attention on breaches of human rights or deficiencies in the legal system and the special socio-economic and cultural background that generated it.<sup>547</sup> Peerenboom also argues that although the Chinese legal system does have various problems, even western people, who unduly ignore it, can see the remarkable progress

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<sup>545</sup> See international human rights treaties that China has signed, chapter 3.

<sup>546</sup> Randall Peerenboom *China's Long March toward Rule of Law* (Cambridge University Press 2002) <ProQuest ebrary> accessed 14 August 2016.

<sup>547</sup> For example, in his article, ‘“Building Up” China's Constitution: Culture, Marxism, And The WTO Rules’, . Ulric Killion then argues that ‘as a measure of constitutionalism, the rule of law became a tool of government, actual rule by law, or a policy-driven model because of its usage in crackdowns against those labelled as political dissidents.

that China has achieved.<sup>548</sup> His opinions on the progress in Chinese criminal law and criminal procedure law reflect the progress China has made as a whole. On the one hand, after many amendments as part of wider legal reform in China, Chinese criminal procedure law has achieved a substantial accomplishment in a relatively short period of three decades. On the other hand, we need to acknowledge that there are still some deficiencies hindering the ultimate aim of the fulfilment of the rule of law in China.

After analysing the development path of Chinese criminal procedure law, I will now study the problems that still exist, and how they can be improved, or – in order to restrict the use of the death penalty – what possible reform could be enacted. Meanwhile, I will investigate how such reform, from a neo-liberal cosmopolitan view, could also make Chinese criminal procedure law more compliant to the ICCPR, the CAT, and other international treaties with regards to protect human rights in China.<sup>549</sup>

## **6.4 POSSIBLE REFORM IN THE CRIMINAL PROCEDURE LAW**

### **6.4.1 Criminal Procedure Law Concerning the Use of the Death Penalty**

Firstly, China signed and ratified the CAT in 1986 and 1988 respectively. Its Article 1 lays out the precise definition of torture.<sup>550</sup> Its Article 2 sets out the obligations of and to member states.<sup>551</sup> The ICCPR, which China has signed, prescribes the prohibition of torture also. Its Article 7 reads: ‘[N]o one shall be subjected to torture or to cruel, inhuman

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<sup>548</sup> Randall Peerenboom *China's Long March toward Rule of Law* (Cambridge University Press 2002) <ProQuest ebrary> accessed 16 August 2016.

<sup>549</sup> In the Conclusion of this thesis, I will analyse why neo-liberal cosmopolitan theory is in favour of reform and abolition of the death penalty and why it is of legitimacy and of morality concerning reform.

<sup>550</sup> Article 1: The term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

<sup>551</sup> Article 2: Each State Party should take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.’

Therefore, according to the two treaties, China should make efforts to promote its realisation in its own domestic laws, especially in the case of criminal procedure law. Importantly, the exposure of wrongly decided death penalty cases showed that the Chinese government had failed to fulfil its obligation to this treaty completely. Since the Chinese Criminal Procedure Code precisely prohibits torture, part of the reason that the law has lacked effective implementation is that the exclusion of illegal evidence is not a peremptory rule. If evidence that breaks the rules (through the involvement of torture or other illegal methods concerning its collection) is firmly excluded as illegal, whether it is factual or not, miscarriages of justice will substantially decrease. This is because this situation would lead to the application of Article 195 (3), and the defendant would be acquitted.<sup>552</sup>

Hence, the rules regarding evidence in criminal procedure law, as a result of a compromise between two conflicted views, is at present inconsistent. Taking the rule set in article 54 as an example, it provides a legitimate and legal excuse to use evidence gained by breaching the law, which should have been excluded concerning due process.<sup>553</sup> This allowance of the correction and justification of illegally gathered evidence is responsible for the breach.

The use of illegally gathered evidence, such as coerced confessions from torture, will also lead to the serious consequence of ‘lazy investigation’, where investigators place undue trust in the confession and omit to collect the evidence, such as blood, hair, and other biometric signs. Some Chinese scholars have raised cases against this imperfect rule of evidence. In the case of She Xianlin, which was analysed in Chapter 2, the public security organisation, the procuratorate, and the court judged the unnamed corpse to be

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<sup>552</sup> Article 195 (3): ‘if the defendant cannot be found guilty for insufficient evidence, the collegial panel should render an acquittal sentence stating that the charges are denied for insufficient evidence.’

<sup>553</sup> It stipulates that: “If any physical or documentary evidence is not gathered under the statutory procedure, which may seriously affect justice, correction or justification should be provided; otherwise, such evidence should be excluded”.

She's wife solely on the basis of her relative's identification, whilst eyewitnesses' testimonies of Zhang being alive were entirely ignored. In the Du Peiwu case, even when Du showed his blooded clothes to testify that he was tortured, the court simply dismissed the evidence. In the Hugjitu case, the investigator did not compare Hugjitu's seminal fluid with the remaining seminal stain in the victim's body.<sup>554</sup> Although these cases all happened before the passage of the new amendment to the procedure law, the problems it caused should not be overlooked even today. If we were to ask whether the same miscarriages of justice would occur nowadays, according to the SPC's annual report, the answer is yes.<sup>555</sup>

In order to be more in compliance with the ICCPR and the CAT, then, it is essential to lay down an even more restricted burden of proof for public security organisations and procuratorates. All illegally gained evidence should be peremptorily excluded. At the same time, if the accused contends that there has been torture during the course of the collection of a confession, the investigator and prosecutor must testify otherwise. According to the judicial interpretation from the Supreme People's Procuratorate (hereinafter the SPP) in 2014 and the regulation from the Ministry of Public Security in the same year, they require investigators to record the whole process of interrogation, which makes the provision of such testimony possible.<sup>556</sup>

Undeniably, one or two decades ago in China, the techniques of DNA testing or biological and other advanced modern technical methods were not developed well enough that investigators could distinguish the innocent from the guilty. Nowadays, however, new technologies can help them in investigations. There was a successful case concerning the use of new technology to catch a suspect in August 2016, when a person who

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<sup>554</sup> Wang Minyuan 'Conversation by Writing: Mistaken Criminal Convictions, the Death Penalty and the Rule of Law' (2015) 3 Peking University Law Journal 565.

<sup>555</sup> See 2014, 2015, 2016 annual report from the SPC, which I have analysed in chapter 5, every year it corrected some wrong cases occurred in recent years.

<sup>556</sup> See the SPP Notice of The Launch of Decision on Procuratorates Investigating Job-related Suspects Should Video the Whole Process. (26 May 2014) <[www.spp.gov.cn/site2006/region/00185.html](http://www.spp.gov.cn/site2006/region/00185.html)> accessed 20 September 2014.



committed the serial killing of eleven people during a time span of 28 years was discovered by a DNA test result.<sup>557</sup>

Second, in respect of the death penalty, the law could establish a special procedure for trying potential capital crime cases. Wherever capital punishment is used, invariably there are executions of innocent people.<sup>558</sup> Since currently it is still impossible to abolish the death penalty in China entirely, a special procedure would add more restrictions to its application; this is a realistic way to minimise the number of irreversible miscarriages of justice.

Among all the mechanical designs, to prolong the trial procedure of potential capital crimes is a feasible measure. It could extend the period of trial, which would possibly lead to fewer death sentences. From the former lessons analysed in Chapter 5, judges are sometimes subject to greater political and public pressure in deciding capital cases than deciding those that have attracted less public notice. This situation often led to death penalty sentences being handed down.<sup>559</sup> Nonetheless, the subsequent backlash often reflected the fact that these death sentences were rushed, which entirely resulted from the pressure of public opinion. Blume and Eisenberg point out: 'so the most extreme variations in death-seeking behaviour likely fade by the time reviewing courts address the residue of appealed death penalty cases.'<sup>560</sup> If the time limit on trials in China was prolonged, after public anger declined, judges, who would no longer face such strong pressure, would tend to deliver more reasonable judgements.<sup>561</sup> At present, however, the

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<sup>557</sup> <http://news.sina.com.cn/c/2016-08-29/doc-ixvixsh6882980.shtml> accessed 30 March 2017

<sup>558</sup> The analysis of the fact, see Roger. See Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edition, revised and updated edn Oxford University Press, Oxford 2015)

<sup>559</sup> In Chapter 5, I analysed the Li Changkui case. Under pressure from the majority of people who asked for the immediate application of the death penalty, Li was eventually sentenced to death and executed very quickly.

<sup>560</sup> John Blume and Theodore Eisenberg 'Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study' (1999) 72 *Issues 2 & 3 Southern California Law Review* 465

<sup>561</sup> There are some articles in China reflecting this problem with case study. For discussions see Yongkun Zhou, *The Balance between Authority of Rules and Political Morals: the Reflection on Yao Jiabin's case* (2012) 3 *Gansu Social Sciences* 142; see also Yujun Xie, 'Public opinion Influence on the Judiciary: the Reflection on Yao Jiabin's case' (DPhil thesis, Southwest Politics and Law University, 2012).

time limitations in trials are too short to ease the tension between ordinary people and judges. One extreme example is the Huguiltu case, depicted in Chapter 2: from the day the crime was committed by the real culprit to the day Hu was executed was a period of only 62 days.

When we examine criminal procedure law, even the 2012 amendment does not give special consideration to time limitations in trials regarding the death penalty. Article 202 establishes its rules as follows:

‘A people's court should announce a sentence for a case of public prosecution within two months, or three months at the latest, after accepting the case. For a case with the possibility of a death penalty or a case with an incidental civil action or under any of the circumstances as set forth in Article 156 of this Law, the period of trial may be extended for three months with the approval of the people's court at the next higher level; and, if more extension is needed under special circumstances, the extension should be reported to the Supreme People's Court for approval.’

The time constraints on trials by first instance courts of cases with the possibility of the death penalty is two months if there is no application for an extension. At the same time, any extension needs to be approved by higher level courts, without a distinction being made between death penalty cases and others.

Then, concerning trials at the level of the second instance, Article 232 stipulates:

‘[A]fter accepting an appellate case, a people's court of second instance should close the trial of the case within two months. For a case with the possibility of a death penalty or a case with an incidental civil action or under any of the circumstances as set forth in Article 156 of this Law, the period of trial may be extended for two months with the approval or decision of the higher people's court of a province, autonomous region, or municipality directly under the Central Government; and, if more extension is needed under special circumstances, the extension should be reported to the Supreme People's Court

for approval. The period for the Supreme People's Court to try an appellate case should be decided by the Supreme People's Court.

The procedure is similar to that of the first instance court. Hence, generally, the longest period a trial can cover, including the first and the second instance, is nine months. In special circumstances, after the SPC's approval, the period can be longer than this, without specific regulation of how long it should be. Concerning the procedure for review of death sentences, however, there is no time limitation. This has historically caused disputes. Some argue that there should be a time limitation in this special procedure and suggest one month, while others object to setting a time limitation on the restriction of the use of the death penalty, since it can unlimitedly prolong the review time to save the life of the convicted.<sup>562</sup> The legal practices vary depending on the review procedure. According to the SPC's published rulings on reviews of the death penalty, in regard to the same crime of robbery, one case took approximately one year to review, while another took less than four months.<sup>563</sup>

Concerning the period from the delivery of the SPC's review ruling of the confirmation of the death sentence to the eventual execution, Article 251 stipulates that after receiving an order from the Supreme People's Court to execute a death sentence, a people's court at a lower level should deliver the convict for execution within seven days. Combining Article 248 – 'Sentences and rulings should be executed after taking effect. The following sentences and rulings are effective sentences and rulings: (3) a death sentence approved by the Supreme People's Court' – and Article 250 – 'For a death

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<sup>562</sup> See Li Jianling and Guo lin 'There Should Be Time Limitations on the Death Penalty Sentence Review Procedure' (2003) No 9 People's Procuratorial Semi-monthly 49. Also see Jiang Bingyi and Gao Song 'We Should Set Time Limitations on the Death Penalty Sentence Review Procedure' (1999) No 6 People's Procuratorial Semi-monthly 55.

<sup>563</sup> See the SPC's judgements and rulings on its website, The case of Yun Peng and Hao Yingjie respectively.

<http://www.court.gov.cn/wenshu.html?keyword=%E6%AD%BB%E5%88%91%E5%A4%8D%E6%A0%B8%E8%A3%81%E5%AE%9A%E4%B9%A6&caseid=&starttime=2000&stoptime=2016>.> accessed 30 March 2017

sentence with immediate execution rendered or approved by the Supreme People's Court, the President of the Supreme People's Court should sign and issue an order to execute the death sentence' – the delivery of the SPC's approval of the death sentence triggers the legitimacy of the execution, and seven days after the President of the SPC signs and issues the order, the convict will be executed. There are no regulations on how long the time should be between the day that the death sentence is approved and delivered and the day the President of the SPC signs and issues the order. In some cases, it can be very short, such as in the Li Changkui case; according to the report, they were delivered and executed on the same day.<sup>564</sup>

Many Chinese scholars suggest that the time limit from sentencing to execution must be reformed and improved, and that the extension of the implementation of the death sentence should be longer than one year. They argue that if the period were to be prolonged from seven days to one year, this could provide sufficient time to launch a new process to change the death sentence, or to apply for a trial supervision procedure.<sup>565</sup> The prisoner on death row would seek further legal measures to protect their own rights, such as engaging a defence lawyer, finding new evidence, lodging appeals, and so on. Hence, they suggest adding a special appeal system for the death penalty sentence, and that during this period, the execution should be suspended.<sup>566</sup> If this suggestion can be adopted in the future, it may reduce the chance of miscarriages of justice.

#### **6.4.2 Research on Time Limitation on Trial in the U.S.A. and Japan**

In terms of researching time limitations in trials and executions, other countries can provide lessons for China's own reform. Here, the US and Japan are chosen as they are often recognised as two developed and democratic countries who retain the death

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<sup>564</sup> 'Li Changkui Has Been Executed According to the SPC's Approval', *Xinhua Net*, (29 September 2011) <<http://news.cntv.cn/law/20110929/119559.shtml>> last accessed 30 March 2017.

<sup>565</sup> See Wenyi Huang, 'An Analysis on the Basic Approach of Chinese Judicial Reform' (2017) 2 *Law and Social Development* 5; see also Feng Chang 'Reform of the Criminal Law within the Context of the Rule of Law' (2015) 23 *People's Procuratorial Semi-monthly* 34.

<sup>566</sup> *Ibid.*

penalty.<sup>567</sup> According to the Death Penalty Information Centre, death row inmates in the US usually spend more than ten years awaiting execution. Some prisoners have been on death row for over 20 years.<sup>568</sup> At the time of the founding of the U.S.A., the time between the last appeal to execution was days or weeks.<sup>569</sup> This situation has since been changed, and special procedures were added later because 'people [were] adamant . . . that every avenue should be exhausted to make sure there is no chance (the condemned) are not guilty,' according to the former Georgia Attorney General Mike Bowers in 2001. 'The surer you are, the slower you move.' (Atlanta Constitution, October 27, 2001).<sup>570</sup>

There are essentially four procedures by which the waiting period between initial conviction and eventual execution can be prolonged: a direct appeal to the state Supreme Court, applications for a stay of execution, a writ of habeas corpus to the state Supreme Court, and a writ of habeas corpus to the federal district court.<sup>571</sup> All the above procedures can delay the execution.

In the U.S.A., not all states retain the death penalty: there are eighteen abolitionist states, while the rest are retentionists. Considering the fact that there are so many states, it is sensible to take one as an example. Here California is selected because of easy access to information.<sup>572</sup> According to the California Commission on the Fair Administration of Justice Final Report: first, it takes four years for judgement of death by trial court. Second, another 3-5 years is expended appointing a counsel to handle the direct appeal. Third, an average of 2.25 years are spent on scheduling a case to the California Supreme Court. Fourth, there is 8-10 years' delay in appointing a counsel for the state habeas petition.

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<sup>567</sup> See Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edition, revised and updated edn Oxford University Press, Oxford 2015) 128.

<sup>568</sup> 'Time on Death Row' Death Penalty Information Center <<http://www.deathpenaltyinfo.org/time-death-row>> accessed 6 October 2016.

<sup>569</sup> Ibid.

<sup>570</sup> Ibid.

<sup>571</sup> A Reporter's Guide to Applications Pending Before The Supreme Court of the United States, <<https://www.supremecourt.gov/publicinfo/reportersguide.pdf>>, accessed 6 October 2016.

<sup>572</sup> California Commission on the Fair Administration of Justice Final Report 121, <<http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1000&context=ncippubs>> accessed 6 October 2016.

Fifth, 22 months should be taken in deciding the state habeas petition. Sixth, a federal district court in average spends 6.2 years making a decision on the federal habeas petition. Seventh, delays in appealing the federal habeas petition to the 9th District take another 2.2 years. Hence, in total, the average time from judgement of death to execution is 20 to 25 years in California.<sup>573</sup>

In Japan, the average period between final judgement and execution in 1998 was 8 years 7 months; in 1999 it was 9 years 7 months, then from 2000 to 2005 it fluctuated between 6 years 8 months and 3 years 2 months. In 2006 it rose to 11 years 9 months, followed by a decrease: by the year 2010, the period dropped to 3 years 2 months again.<sup>574</sup> Japanese scholar Maiko Tagusari points out that the execution numbers and the waiting period entirely depend on the justice ministers.<sup>575</sup>

Nonetheless, the length of the time that prisoners spend on death row in the U.S.A. has drawn public attention and raised questions on the constitutionality of this additional punishment.<sup>576</sup> Compared with the execution of innocent people, however, it is undeniable that haste in a criminal procedure should be considered inappropriate and negligent, given the irredeemable nature of the death penalty.

The above research showed that in these two developed countries, the procedure of trials and execution is remarkably longer than that in China. Considering both the current political and public pressure facing judges, the extension of the procedure is necessary. The suggestion of reforming and prolonging each period of trials and execution to one year is reasonable, and this could be taken into account in the consideration of further revising the criminal procedure law.

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<sup>573</sup> Ibid.

<sup>574</sup> Maiko Tagusari 'Death Penalty in Japan' (2010) Vol 1 No 2 93 East Asian Law Journal 100.

<sup>575</sup> Ibid.

<sup>576</sup> 'Time on Death Row' Death Penalty Information Center <<http://www.deathpenaltyinfo.org/time-death-row>> accessed 6 October 2016.

### 6.4.3 Debates on Trial of Third Instance

It is important to analyse the practicality of calls for increasing trials of third instance to substitute for the special procedure of review of death sentences.

The restoration of the power of review<sup>577</sup> over sentences of capital punishment from higher people's courts to the SPC is part of the reform of the death penalty carried out by the SPC's own judicial practice. The aim is to reduce the number of executions and also to eliminate arbitrariness and ensure proportionality. According to an interview with the vice president of the SPC published by Outlook News Weekly in 2007, after the SPC regained the final review power over death sentences in 2007, the number of executions had dropped dramatically half a year later, though we do not have precise statistics.<sup>578</sup> Undoubtedly, this reform faced strong opposition from conservatives. They were concerned that this would generate high crime rates thus eventually lead to failure.<sup>579</sup> From nearly a decade between 2007 to 2016, however, this judicial practice shows that the procedural reform has been successful.<sup>580</sup> Some Chinese scholars argue that after the restitution of the power, the approval of the death sentence became a normative and regular procedure instead of an uncertain campaign mode. This development actually accelerated the improvement of the whole criminal legal system and defence system, because the SPC sets greater restrictions and higher standards than the higher courts when considering whether to approve death sentences.<sup>581</sup>

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<sup>577</sup> About this please see the analysis in Chapter 5.

<sup>578</sup> Dong Ruifeng 'Checking the Retrieve of the Review Power- the Interview of the Vice President of the SPC' (2007) Outlook News Weekly 36.

<sup>579</sup> See Liu Renwen 'Retrospect and Prospect of China's Death Penalty Reforms' (2012) No 2 Journal of Henan University of Economics and Law 1.

<sup>580</sup> It is said that the number of executions in 2014 was only equal to the 1/10 of that in the highest year after 1979, the first criminal law and criminal procedure law enacted. See a report 'After 8 Years' of the Retrieve of the Review Power, How Did the SPC Save Lives from the Execution' (2014-10-16) Southern Weekly, <http://www.infzm.com/content/104788/> accessed 30 March 2017

<sup>581</sup> See a report: 'Scholars: the Retrieve of the Review Power Leads to the SPC Killing Much Fewer People' (2016-09-12) The Paper news (Peng Pai Xin Wen) 19:01:00 <<http://news.163.com/16/0912/19/C0PLDH5K00014SEH.html>> accessed 30 March 2017

Other Chinese scholars, however, argue that in this special procedure, there is no hearing in public or private. The review is based on written documents that makes this procedure secret and internal. Hence, they suggest that this procedure should be transformed to the trial of third instance.<sup>582</sup> Nonetheless, the SPC realistically has to accept considerable death sentences to review after the restoration of the power. In order to resolve this problem, the SPC allocated several hundred judges to review these cases, which makes the SPC the largest organisation in terms judge numbers in the world.<sup>583</sup> If all of these cases are to be tried in the third instance, a limited number of judges cannot achieve this task. Some Chinese scholars suggest that judges could select some cases that they consider to be problematic in terms of facts or in the application of laws. They call this the conditional third instance, which does not apply to all cases, but to those chosen by a judge's discretion.<sup>584</sup>

Objectively speaking, firstly, the conditional third instance is a breach of the rule of law. If judges decide which cases should enter into a trial of the third instance by discretion, it will be very hard to avoid unequal decisions. This will jeopardise the universal and equal application of the law. Secondly, the review procedure at present is actually an administrative procedure to supervise and circumscribe the use of the death penalty. This administrative function has made the SPC the largest organisation in the world concerning the ratio of judges to total employees.<sup>585</sup> Increasing the cases of third instance, whether through professional or fiscal considerations, is unrealistic. In order to

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<sup>582</sup> Ibid.

<sup>583</sup> See Liu Renwen 'Retrospect and Prospect of China's Death Penalty Reforms' (2012) No 2 Journal of Henan University of Economics and Law 1.

<sup>584</sup> Ibid.

<sup>585</sup> For example, there are twelve justices in the supreme court of the UK, and there are estimated 65 million people: the ratio of justices to people is approximately 1:5.4 million. There are nine justices in the supreme court of the US, and there are 318 million people, the ratio is 1:35 million. Admittedly, their functions are different; in the US the supreme court's justices can choose cases to judge, and in the UK, concerning criminal cases, it does not judge appellate cases from Scotland. In China, respecting its appellate court's attribute, the SPC cannot select cases. Because a concrete number of judges in the SPC cannot be found, according to an estimate, there are several hundred judges in the court for reviewing death sentences, and there are approximately 1.3 billion people in China; the estimated ratio of reviewing judges to people in total is between 1:0.25 million to 1:0.3 million.



resolve the problem of internal and secret reviewing of death penalty cases, the SPC prescribed that 'where a defence lawyer requests to state opinions in a face-to-face manner, the judge handling the case should make arrangement in a timely manner' in the 2014 judicial interpretation.<sup>586</sup> Undeniably, this is only a small step, but it shows that the SPC is willing to improve the review procedure. Hence, gradual improvement is more realistic than the establishment of a third instance procedure.

#### 6.4.4 Problems with the Execution

There are several problems concerning execution. The first one is that in order to restrict the death penalty further, it is essential to separate the power to sign and to issue an order of execution of the death sentence from the SPC.

As illustrated above, this power is exercised by the President of the SPC. It is conspicuous that the President's power to launch the execution is only a formal procedure, without more inspection. From a comparative perspective, in the U.S.A., governors of states exercise this power.<sup>587</sup> In Japan, the Minister of Justice does it.<sup>588</sup> In China, the Ministry of Justice is in charge of the implementation of all life imprisonment and fixed-term imprisonment, and it is not involved in any of the previous procedures. Therefore, its head is a more suitable choice to review capital sentences judicially than others when this power is triggered by the delivery of the last sentence.

Another problem with the enforcement of the death penalty is how to deal with the corpse after the execution. This is a legal vacuum in the Chinese legal system. There is

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<sup>586</sup> In 2014, the SPC released a judicial interpretation of *Measures of the Supreme People's Court for Listening to Opinions of Defense Lawyers in the Handling of Death Penalty Review Cases*, which stipulated that "Where a defense lawyer requests to state opinions in a face-to-face manner, the judge handling the case should make arrangement in a timely manner."

<sup>587</sup> NOTES ADMINISTERING THE DEATH PENALTY, Citation: 39 Wash. & Lee L. Rev. 101 1982, Fri Sep 30 10:17:57 2016; and THE U.S. CONSTITUTION, THE SUPREME COURT AND CAPITAL PUNISHMENT: SHOULD THE U.S.A. PUT THE DEATH PENALTY TO DEATH? Citation: 50 N. Ir. Legal Q. 50 1999, Content downloaded/printed from HeinOnline, Fri Sep 30 10:16:18 2016.

<sup>588</sup> See Joachim Herrmann 'The Death Penalty in Japan: An Absurd Punishment' (2002) Vol 67 Issue 3 Brooklyn Law Review 827 and Maiko Tagusari 'Death Penalty in Japan' (2010) Vol 1 No 2 East Asian Law Journal 93.

no prescription on this problem in the criminal law. The Interpretation of the Supreme People's Court on the Application of the Criminal Procedure Law of the People's Republic of China simply stipulates that after the execution, the implementing court should inform the criminal's relatives to receive the ashes of the dead. If the body of the dead cannot be cremated for ethnic, religious, or other reasons, the court can ask the relatives to collect the body. This situation has drawn criticism from international society.<sup>589</sup>

Given this, Chengbin He suggests that in the international legal domain, the Criminal Law of Modern Bio-Medical Techniques passed by the 14<sup>th</sup> Congress of the International Association of Penal Law, which sets rules on the use of organs and corpses, could be used by China as a reference.<sup>590</sup> This document prevents the commercialization of human organs and tissues. It also prescribes that 'in deciding whether an organ or tissue may be transplanted from a deceased person, his or her prior express or presumptive will is primarily decisive' as well as that there should be 'legal regulations for the conditions and procedures of organ transplantations'.<sup>591</sup>

Others argue that the judicial interpretation from the SPC should be reversed, meaning that the implementing court should ask the relatives to collect the corpse of the executed. If in this situation there is nobody to claim the body, then the court could cremate the corpse or contract another organisation to dispose of it.<sup>592</sup>

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<sup>589</sup> See Allison K Owen 'Death Row Inmates or Organ Donors: China's Source of Body Organs for Medical Transplantation' (1995) 5.2 *Indiana International & Comparative Law Review* 495; see also Kelly M Brown 'Execution for Profit - A Constitutional Analysis of China's Practice of Harvesting Executed Prisoners' Organs' (1996) 6.3 *Seton Hall Constitutional Law Journal* 1029

<sup>590</sup> Chengbin He 'Retrospective Thinking and Improving of the Enforcement Procedure of the Death Penalty in China' (2004) No 4 *Modern Law Science* 80.

<sup>591</sup> See Resolutions of the Congresses of the International Association of Penal Law (1926 – 2014) Edited by:

José Luis DE LA CUESTA, Honorary President, Isidoro BLANCO CORDERO Deputy of the Secretary General and Treasurer. Director of the ReAIDP / e-RIAPL, p.358-59.

<sup>592</sup> Weixia Xu, 'Research on the Transplantation of Organs from the Executed', (2006) 4 *Journal of Henan Judicial Police Vocational College* 2.

Some people working in the procuratorate suggest that there should be a special stipulation in criminal procedure law to endow the procuratorate with the power to supervise the execution.<sup>593</sup>

All the above suggestions have their own reasonable parts. First, in order to prevent a situation where profit is earned from the executed bodies, supervision from different organisations is essential. Since the procuratorate has its special supervising function in the system of anti-corruption in the Chinese legal system, it is realistic for it to take this responsibility. Second, if there is no new law on the transplantation of organs, then special rules should be set in the criminal procedure law to eliminate the harvesting of organs from executed criminals. Third, after execution, if the conditions allow, the implementing court should request the relatives of the executed to collect the whole and complete corpse of the dead, instead of the ashes. In this way, relatives will be able to tell if the organs of the dead have been taken away.

## **6.5 CONCLUSION**

Several issues have been analysed in this chapter, highlighting judicial justice in the Criminal Procedure Law concerning death penalty reform. In the first section, the importance of due process in the trial of capital cases was discussed, showing that, since China still retains the death penalty at present, a fair and just trial is essential in safeguarding human rights. Then, the evolution of the Criminal Procedure Law in the past three decades was addressed and the two competing views on its amendment – neo-liberal cosmopolitanism and conservatism – were analysed.

The research in this chapter has shown that ‘due process’ is a requirement of international human rights law, with the rules set down by the ICCPR and CAT. However, China has historically paid more attention to the substantive law than to procedure law. After the founding of the PRC, this unique legacy retained its influence on the legal system and the attitude to ‘due process’, including that of legal professionals. The slogan

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<sup>593</sup> Huiming Yang and Peichang Li, *On the Improvement of the Supervision on the Execution*, (2014)18 *People's Procuratorial Semi-monthly* 70.

of 'seeking truth from facts' reinforced this inclination to ignore rules of criminal procedure, because it implied that 'the ends justify the means'. To obtain the truth, people could sacrifice the due process. There was no specific criminal procedure law until 1979, when the reconstruction of the judicial and legal system began; and even after the 1979 Criminal Law was enacted, the tendency to overlook due process still dominated. Consequently, the abuse of torture and miscarriages of justice became crucial problems which led to the two amendments to the Criminal Procedure Law in 1996 and 2012.

The processes of these two amendments were entwined in both cases with conflicts of views between conservatives and neo-liberal cosmopolitans. The core of the disputes was around whether to adopt modern legal principles to transform the Chinese Criminal Procedure Law. Eventually, neo-liberal cosmopolitan thinking played a more significant part in the latest amendment, which made the procedure law more compliant with the ICCPR and CAT. However, there are still some problems existing in the Criminal Procedure Law.

This chapter identified several main problems in the current criminal procedural system. In order to learn lessons from other countries, legal practice in the USA and Japan was examined regarding relevant systems of criminal procedure law. Through these comparisons, some possible approaches towards these problems concerning reform of the death penalty were suggested from an empirical perspective.

This chapter concluded that there should be a stricter rule on the use of evidence and that all illegally gathered evidence should be peremptorily excluded. The research suggested that an even more restricted burden of proof should be established for public security organisations and procuratorates; this would be made possible by the adoption of advanced technology. In respect of the death penalty sentence process, this chapter also suggested that the law could establish a particular procedure for trying potential capital crime cases. One approach would be to extend the period of trial in both the first and the second instances as well as improving the death penalty review system to a reasonable and more extended period. For economic and professional reasons, I argued that it was not workable to set up a trial of the third instance at present. In respect of the problems of

execution, this chapter provided a possible solution in separating the power to sign and issue an order of execution of the death sentence, moving it from the president of the SPC to the Minister of Justice. This chapter also found that there was a legal vacuum in the Chinese legal system regarding how to deal with the corpse after execution, and provided three suggestions concerning the protection of the bodies of executed people.

## CHAPTER 7 TOWARDS FURTHER REFORM

### 7.1 INTRODUCTION

This chapter has two sections. In the first section the neo-cosmopolitan and conservative viewpoints will be discussed with respect to the question of the necessity of the reform of the death penalty, and conclusions drawn as to whether reform is necessary and advisable from both a legal and a socio-economic perspective. Here I argue that a neo-liberal cosmopolitan view of reform of the death penalty with the ICCPR as yardstick is not incompatible with a single party socialism, therefore, it is not necessary to fail in the future. In the second section, some possible measures for reform will be discussed.

### 7.2 THE NECESSITY OF THE REFORM OF THE DEATH PENALTY

The debate on the reform or abolition of the death penalty, both within and external to China, has never ceased.<sup>594</sup> In international society, there are also vocal voices for and against abolition (see Chapter 1). President Erdogan of Turkey and President Duterte of the Philippines both strongly oppose the abolition of the death penalty in their countries. Duterte has dismissed the fact that the Philippines had been the first abolitionist country in Asia from 1987 to 1993,<sup>595</sup> and had abolished the penalty again in 2006 after the last execution in 2000.<sup>596</sup> More recently he has denied putting pressure on Congress to reintroduce the death penalty, though his police have reputedly been applying it summarily and without trial.<sup>597</sup> Those are recent anti-abolitionist examples in international society.

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<sup>594</sup> For a discussion in China, see N Zhang, 'The debate over the death penalty in today's China' (2005) 62 *China Perspectives*.

<sup>595</sup> Seema Kandelia 'Incestuous Rape and the Death Penalty in the Philippines: Psychological and Legal Implications' (2006) 80 (4) *Philippine Law Journal* 697.

<sup>596</sup> Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edition, revised and updated edn Oxford University Press, Oxford 2015) 505.

<sup>597</sup> See Nestor Corrales, 'No pressure from Duterte to reimpose death penalty—Palace' (*Inquirer.net* 13 January 2017)

<<http://newsinfo.inquirer.net/861943/no-pressure-from-duterte-to-reimpose-death-penalty-palace>>  
accessed 15 January 2017.

In China, the debate between two groups also continues. Chinese conservatives argue that, since China is such a big country in terms of both population and territory, it has its own special historical culture; China does not need to emulate other countries in abolishing or reforming the death penalty.<sup>598</sup> China does not even need to do this just because of international pressure. Turkey arguably abolished the death penalty because it wanted to become a member state of the European Union, and thus needed to comply with EU law. Russia has imposed a moratorium for the same reason.<sup>599</sup> China, however, does not have these requirements, and has become the world's second largest economic power. Therefore, as a new rising power, China does not have to introduce reform of the death penalty under any circumstances of pressure. A Chinese scholar even argued that China should break from the Western hegemony to establish its own legal framework with China's socialist characteristics, which is the premise of judicial reform. Only by the resisting western jurisprudence can China find its own way of judicial reform.<sup>600</sup>

Chinese neo-liberal cosmopolitans argue that China, as a member of international society, should respect international law and should reform and eventually abolish the death penalty according to the requirement of international human rights law. This viewpoint exists in many Chinese scholarly works.<sup>601</sup> As one Chinese scholar argues, when reforming the legal system, China should use the modern legal spirit as guidance.<sup>602</sup> Others argue that in modern times, reforms can be classified into two types. One is reform generated within society by its own logical development. The other is that of

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<sup>598</sup> See JY Yang, , 'On the Entire Abolition of the Death Penalty Should be Suspended' (2008) 7 Essay monthly 18; see also S Jiangan and others. 'Reasons for death penalty attitudes among 'Chinese citizens: Retributive or instrumental?' (2009) 37 (3) Journal of Criminal Justice 225; see also X K Liang, 'It Is Not Feasible for China to Consider Light Punishment at Present' (1990) 4 Hebei Law Science 9.

<sup>599</sup> Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edition, revised and updated edn Oxford University Press, Oxford 2015) 63.

<sup>600</sup> Liu Ruifu, 'The Underlying Distinction between China's Independent and Just Judiciary and Western Countries "Judiciary Independence"', (*Red Flag Manuscripts*, 2014) <[http://www.qstheory.cn/dukan/hqwg/2014-12/25/c\\_1113778742.htm](http://www.qstheory.cn/dukan/hqwg/2014-12/25/c_1113778742.htm)> accessed on 25 November 2015.

<sup>601</sup> See Chapter 5 and 6; Zhang Ning, 'The Debate over the Death Penalty in Today's China'(2005) 62 China Perspectives

<sup>602</sup> Changshan Ma, 'We Need to Rebuild the Value of Rule of Law to Comprehensively Promote Rule of Law' (2015) 1 Journal of National Prosecutors College 3.

underdeveloped countries under pressure from advanced countries seeking reform. The latter kind of reform often occurs by taking experience from the outside world to resolve internal problems. Although problems can be caused by following the example of other countries' successful experience, underdeveloped countries often truncate the process of modernisation by taking advantages of learning from developed countries.<sup>603</sup>

Objectively speaking, from both the aspect of legitimacy and the perspective of the current socio-economic needs in China, the neo-cosmopolitanism of death penalty reform seems more realistic. As a western journalist states:

[I]t is not a reaction to the routine Western assumption that the West knows everything and everyone else must learn what the West knows. Asian leaders want to emulate much of what they recognise as Western success, and much of the system that produces that success'.<sup>604</sup>

From the legal perspective, as a member state of the Vienna Convention, China should be bound by the international treaties it ratified, and for those signed but not ratified, China should create the conditions for ratification out of good faith (see Chapter 3). Although the ICCPR does not prohibit the death penalty, it restricts its use to the most serious crimes. China still has a large number of capital crimes and, to ratify, China should amend its law to make it accordant with the ICCPR.

The necessity and possibility of reform also need to be considered from a socio-economic perspective. Any reform needs to consider those non-law factors such as socio-economic factors, and the current socio-economic situation in China is that with the launch of the economic plan of 'one belt, one road',<sup>605</sup> China has established a globalisation policy which will involve the co-operation of different countries with different jurisdictions and legal systems. Therefore, it is not possible for the Chinese

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<sup>603</sup> Zhu Han, 'Which Kind of The Movement of the "Enlightenment" Does China Need?' (*Guancha Syndicate* 2014) <[http://www.qstheory.cn/politics/2014-12/24/c\\_1113759106.htm](http://www.qstheory.cn/politics/2014-12/24/c_1113759106.htm)> accessed 19 March 2015

<sup>604</sup> G Sheridan *Asian values, Western dreams: Understanding the new Asia* (Allen & Unwin 1999).

<sup>605</sup> In the policy 'one belt one road', here 'belt' is meant as a kind of sea equivalent of the 'silk road'. 'Road' means the ancient silk road. This policy aims to build economic cooperation among the countries who sit along the ancient silk road and the 'sea silk road'.



government to take a conservative view and to treat its legal system as superior to international law. For the purpose of development and modernisation, China will continue to be open to the world, which makes the neo-liberal cosmopolitanism approach more practical and viable. This will show the world that China respects international rules as a strategy to build a good international image.

For this, President Xi Jinping of China delivered a conspicuous message in his Keynote Speech at the Opening Session of the World Economic Forum Annual Meeting 2017 (the following is quoted directly from the official translation on the website of Davos):

Countries, ...enjoy rights and fulfil obligations on an equal basis. ...We should honour promises and abide by rules. One should not select or bend rules as he sees fit'. ... 'We must redouble efforts to develop global connectivity to enable all countries to achieve inter-connected growth and share prosperity. We must remain committed to developing global free trade and investment; promote trade and investment liberalisation and facilitation through opening-up and say no to protectionism.

Over three years ago, I put forward the 'Belt and Road' initiative. Since then, over 100 countries and international organisations have given warm responses and support to the initiative. More than 40 countries and international organisations have signed cooperation agreements with China, and our circle of friends along the 'Belt and Road' is growing bigger.

China will keep its door wide open and not close it. An open door allows both other countries to access the Chinese market and China itself to integrate with the world.<sup>606</sup>

The 'one belt one road' policy covers countries from Asia to Europe and different legal systems. Amongst the European countries involved, all but the Republic of Belarus

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<sup>606</sup> For a full transcript, see the official website of Davos, 'President Xi's speech to Davos in full' (*World Economic Forum*, 17 January 2017) <<https://www.weforum.org/agenda/2017/01/full-text-of-xi-jinping-keynote-at-the-world-economic-forum>> accessed 31 January 2017.

in Europe have abolished or suspended the use of the death penalty. This calls for China to reflect on its own legal system because European countries have adopted a policy of ‘working towards the abolition of the death penalty’ in those countries that still retained it.<sup>607</sup> The EU also made a resolution on ‘The Death Penalty in the World’<sup>608</sup> in July 2001, calling for a worldwide moratorium on executions, stating that this is ‘an essential element in relations between the European Union and developing countries and one that should be taken into account, in concluding agreements with developing countries’.<sup>609</sup> China needs to adjust its traditional death penalty policy to be able to economically cooperate with these countries. Therefore, reform and the eventual abolition of the death penalty should be a long-term goal.

In addition to the above two reasons, abolition is also a result of the development of social civilisations. Throughout human history from classical society to feudal society to modern society, there have been numerous inhuman, cruel and degrading punishments for various crimes, all of which ceased with the advent of modern civilisation, and the death penalty will follow this trend. With economic development come improvements in education and the increased awareness of human rights; as the then Premier Wen Jiabao said, ‘the death penalty will be phased out from criminal punishments in China’.<sup>610</sup> The European Union also declared that: ‘[t]he death penalty has no legitimate place in the penal systems of modern civilised societies, and its application may well be compared with torture and be seen as an inhuman and degrading punishment’.<sup>611</sup>

Admittedly, some would argue that relying on a comparative law context of predetermined theories drawn from the experiences of very different countries is dangerous. The problem with this argument is that from the perspective of legal history,

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<sup>607</sup> Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edition, revised and updated edn Oxford University Press, Oxford 2015) 22.

<sup>608</sup> *Ibid* 49.

<sup>609</sup> Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edition, revised and updated edn Oxford University Press, Oxford 2015) 31.

<sup>610</sup> See in Chapter 1, introduction, the cited words of Wen Jiabao.

<sup>611</sup> Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edition, revised and updated edn Oxford University Press, Oxford 2015) 30.

as some Chinese scholars have pointed out, throughout the 20th century with the spread of western legal ideas and legal systems, the Chinese law was in a process of constant learning, borrowing and absorbing foreign laws.<sup>612</sup> Randall Peerenboom also notes:

[A]s a result of economic reforms, China increasingly has a market-oriented economy. As a result of legal reforms, China has passed many laws and established institutions similar to those in other countries. As result of its policy of opening to the outside world, China's citizens now enjoy a wide variety of cultural products enjoyed by others around the world.<sup>613</sup>

The entire modern history of the Chinese legal system is a history of transplantation from the west, and it has shown its success in China. This transplantation is cosmopolitan. Consequently, objectively speaking, neo-cosmopolitanism is more favourable to China's development.

The analysis so far in this chapter has discussed the necessity of the reform. Next section involves discussion and research concerning the possible measures of reform.

### **7.3 POSSIBLE MEASURES FOR REFORM**

Undeniably, since there is a relatively high number of executions in China, people should have no illusions about the scale of the task of reform. Some people argue that abolition of the death penalty would be a long-term goal, and in China this issue has actually been dormant for some time.<sup>614</sup> From an international perspective, in 1986 some scholars held similar opinions on abolition worldwide, arguing that it was hard to make progress on this

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<sup>612</sup> Peng Liu, and others 'The Research on the Issue of the Construction of Criminal Legal System- the Process of Building the Criminal Legal System' (2008) 4 Journal of Guizhou Police Officer Vocational College; see also Shanshan Xiao, *The Reflection on the Transplantation of Law from the Soviet Union to the People's Republic of China* (Guizhou University 2007); also see Chen Gang, 'On the Introduction of the International Law to the Qing Dynasty and the Modernisation of the Chinese Law' (2013) 26 (1) Journal of Tangshan College 64.

<sup>613</sup> Peerenboom, Randall, *China's Long March toward Rule of Law* (Cambridge University Press 2002) 25.

<sup>614</sup> Wen Zhang and Weiming Huang 'Death Sentence with a Two-Year Reprieve Shall Be an Inevitable Due Process' (2004) 4 Modern Law Science 75.

issue.<sup>615</sup> However, history showed that the subsequent decades witnessed a dramatic leap in abolition throughout the world.<sup>616</sup> Hence, people might also be able to hold an optimistic attitude to reform and eventually abolish the death penalty in China. This is not out of the unrealistic imagination but based on facts of the amendment of the Constitution, the criminal law and the criminal procedure law towards the protection of human rights and the application of rule of law in recent years.

The possible measures for the reform are from both the legislative and the judicial level in the light of the consideration of the international human rights law, mainly international treaties China has signed or ratified.

### **7.3.1 Establishing China's Death Penalty Related Legal System**

International rules for the limitation on the use of the death penalty afford Chinese people useful references that merit study. In introducing restrictions on the abolition of the death penalty, the UN and other international organisations have made many international covenants or conventions. Amongst them, the most important are the UDHR (1948), the ICCPR (1966), the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (adopted by the UN Economic and Social Council in 1984), the CAT (1984), the Second Optional Protocol to the ICCPR (adopted by the UN General Assembly in 1989), the UN's Resolution 1997 or 12 (adopted by the UN Commission on Human Rights on 3 April 1997). These international human rights laws provide China with a frame for a legal regime. Chinese people can absorb some of the rules from these covenants and combine them into domestic law to establish its own death penalty related legal systems, such as the systems of amnesty, reconciliation, alternative punishment and review of death sentences.

First, China could build its own amnesty system for the death penalty, based on the relative prescription of the ICCPR. Article 6(4) of the ICCPR prescribes that '[A]nyone

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<sup>615</sup> Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edition, revised and updated edn Oxford University Press, Oxford 2015) 22.

<sup>616</sup> *Ibid* 22.

sentenced to death shall have the right to seek pardon of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases’.

Amnesty is not novel in China. As mentioned in Chapter 2, its long history can be dated back to China’s primitive society.<sup>617</sup> After the founding of the PRC, its 1954 Constitution prescribed the system of amnesty and pardon. The power of amnesty was exercised by the NPC and the power of pardon by the Standing Committee of the NPC. The current constitution has abolished amnesty but retained pardon. However, this special amnesty system was dormant between 1975 and 2015.<sup>618</sup> In 2015, before the National Day parade, President Xi re-introduced special amnesty to some criminals after 40 years, but none was a prisoner under sentence of death. Embezzlement, bribery, very violent crimes of endangering public security or national security, crimes of terrorism, drug-

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<sup>617</sup> See the first section of Chapter 2. For more information also see Hu Xiaoming ‘The Investigation and Discussion on Amnesty’ (2002) 4 Social Sciences in Nanjing 38.

<sup>618</sup> The 1975 Chinese constitution did not have a speculation on the system of amnesty. The 1978 and 1982 Chinese constitution both prescribed pardon/special amnesty but no amnesty. The 1979 and the current 1997 criminal law both have special rules on pardon/special amnesty. Article 65 of the 1997 criminal law stipulates that: ‘If a criminal commits another crime punishable by fixed-term imprisonment or heavier penalty within five years after serving his sentence of not less than fixed-term imprisonment or receiving a pardon, he is a recidivist and shall be given a heavier punishment. However, this shall not apply to cases of negligent crime’. Its Article 66 stipulates that: ‘If a criminal of endangering national security commits the same crime again at any time after serving his sentence or receiving a pardon shall be dealt with as a recidivist’. Also, in the Chinese criminal procedure law, there is a prescription of pardon/special amnesty. Article 15 of 2012 Criminal Procedure Law sets rules that: ‘Under any of the following circumstances, a person shall not be subject to criminal liability, and if any criminal procedure has been initiated against such a person, the case shall be dismissed, a non-prosecution decision shall be made, the trial shall be terminated, or the person shall be acquitted: (3) exemption of criminal punishment has been granted in a special amnesty decree’. The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China and The Basic Law of the Macao Special Administrative Region of the People’s Republic of China also stipulate pardon. According to these two laws, the chief executive of Hong Kong/Macao exercises the power of pardon and commutation. In addition to the above laws, there are also other laws involved in the prescription of pardon/special amnesty. Extradition Law of the People’s Republic of China sets the rule that the request for extradition made by a foreign state to China shall be rejected if under the situation that the person sought is, under Chinese laws or the laws of the Requesting State, immune from criminal responsibility because, at the time the request is received the person is pardoned.

related crimes, crimes committed by mafias, murder, rape and other violent crimes committed by recidivists were all excluded from the option of pardon.<sup>619</sup>

With respect to the restriction of the death penalty, there is a need to reintroduce amnesty and pardon according Article 6(4) of the ICCPR, and ensure it is enshrined in the Chinese legal system. This could be achieved at the constitutional level.

Second, there could also be introduced a system of criminal reconciliation regarding the death penalty to criminal law giving victims' families a veto over the death penalty.

After the Criminal Procedure Law was amended in 2012, there is a prescription of victim-offender reconciliation but criminals under sentence of death are excluded. Concerning the victims' families, some Chinese scholars argue that excluding capital crimes is irrational, because it deprives victims and their families of their rights.<sup>620</sup> The rights of victims and their families are limited in the current criminal procedure law, and they do not have a valid approach to remedy their eroded litigating rights and substantive rights. If a system of criminal reconciliation is introduced in death penalty cases, it will improve the victim families' rights by permitting them to choose whether to accept compensation from the defendant.<sup>621</sup>

The introduction of criminal reconciliation to capital crimes could benefit both defendants and victims' families. If defendants can repent sincerely and actively seek to compensate the bereaved and gain their forgiveness, they could be exempted from the death sentence. The victim families could exercise their rights to choose whether or not they accept the repentance and compensation. The compensation could be fulfilled in many ways, not only limited to money. It could also be a service or other non-monetary compensation that could be accepted by the two parties as long as it was compliant with

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<sup>619</sup> 'Why after 40 Years China Granted Pardon on Criminals again?' (*Chinanews*, 25 August 2015) <<http://www.chinanews.com/gn/2015/08-25/7487718.shtml>> accessed 26 May 2016

<sup>620</sup> See Lu Jianping and Liu Chuangao, 'Re-discussing Comprehensive Approaches to the Restriction on the Death Penalty' (2014) 21 *People's Procuratorial Semi-monthly*. Lu Jianping and Liu Chuangao, 'The Re-discussion on the Comprehensive Way to Restrict the Use of the Death Penalty' (2014) 21 *People's Procuratorial Semi-monthly*; also see Chen Guangzhong, 'Prospects of Relevant Issues of Revising the Criminal Procedure Law' (2008) 6 *Law Science* 4.

<sup>621</sup> *Ibid* 4

law and social morality. It could provide the opportunity for poor defendants to redeem themselves.

Undeniably, this method is involved in the administration of justice. According to a survey conducted in 2016 by Tencent, which is an influential complex of social media platforms in China, it is clear that many Chinese people's concerns are over justice.<sup>622</sup> They are concerned that people from privileged groups are often saved from the death penalty, but poorer people are executed. Therefore, it is essential to design a rigorous mechanism within this system to ensure the achievement of justice. For poor defendants, the Chinese government could set up a judicial assistance fund. If these defendants repent sincerely and try to compensate the bereaved families, the fund could help them to do this to be exempted from execution. Therefore, while building the system of criminal reconciliation, another system of transparent and just social assistance to poor offenders and their families should also be established to achieve justice across society. In this way, the situation that the rich could buy their lives but the poor could only be executed would be restrained.

Third, a system of alternative punishment could also be established. As mentioned in Chapter 2, in ancient China, some alternatives as the replacement of the death penalty had been used frequently. The system of alternative punishment was also developed sophisticatedly in ancient China. Since the would-be alternatives have been discussed in Chapter 5 in detail, here it will not be explored repeatedly.

Fourth, a system of review of the death penalty could also be perfected in the future. As also mentioned in Chapter 2, this system had been existing in the Chinese legal history for a long time. It was reintroduced to the criminal procedure law after 1979. However, the power was rapidly delegated from the SPC to lower level court, which made it

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<sup>622</sup> 'How Is the Death Penalty's Existing situation?' (*Tencent Newspedia*, 15th November 2016)  
<[https://zixun.html5.qq.com/coolread/share?ch=060000&tabId=0&tagId=MttWXSsource&docId=1303855643&url=http%3A%2F%2Fmp.weixin.qq.com%2F%3F\\_\\_biz%3DMjM5ODE0MzgWMA%3D%3D%26idx%3D1%26mid%3D2650900356%26sn%3Da4f541ce0dd6ae2b746a56d120197853&clientWidth=375&dataSrc=85&qurl=qb%3A%2F%2Fext%2Fread%3Fcid%3DMttWXSsource%26type%3D0%26mtsummaryid%3D1303855643%26b\\_f%3D060000%26bizid%3D1&sc\\_id=1jgtxoA](https://zixun.html5.qq.com/coolread/share?ch=060000&tabId=0&tagId=MttWXSsource&docId=1303855643&url=http%3A%2F%2Fmp.weixin.qq.com%2F%3F__biz%3DMjM5ODE0MzgWMA%3D%3D%26idx%3D1%26mid%3D2650900356%26sn%3Da4f541ce0dd6ae2b746a56d120197853&clientWidth=375&dataSrc=85&qurl=qb%3A%2F%2Fext%2Fread%3Fcid%3DMttWXSsource%26type%3D0%26mtsummaryid%3D1303855643%26b_f%3D060000%26bizid%3D1&sc_id=1jgtxoA)> accessed on 12 December 2016.

performed practically no function. After the SPC retrieved its power of reviewing death sentences, many measures have been taken to improve this procedure. However, they are still not enough to prevent huge number of executions. The SPC should also adopt public hearing as a complementary measure to reviewing solely on written documents. This review procedure should also be reformed under the requirement of international human rights law. Since it was also discussed in Chapter 6, it will not be explored here again.

The above addressed the reform from the aspect of establishing necessary legal systems within international legal frame, next I will examine the issue from the legislative angle.

### **7.3.2 Reform at the Legislative Level.**

In Europe, *de facto* abolition resulted from the generalisation of measures of clemency and allowance for extenuating circumstances and from legal restrictions on the application of the death penalty either by a reduction in the number of capital charges or by the introduction of an alternative penalty. Since these methods have proved successful in the process of abolition, China could adopt them to reduce the number of capital crimes as the first step. Since now there are still 46 capital crimes in the penal code, there is a need to further limit them to violent crimes. Then the second step is to limit the death penalty to murder only. People could set a 3 or 5 years' time limitation to phase out those nonviolent capital crimes.

Second, China could introduce a pilot programme at the legislative level by enlarging the use of the two-year reprieve of the death penalty. This method has been shown to effectively decrease the number of executions (see Chapter 5). Therefore, before abolition China could apply the two-year reprieve to all capital crimes and set a period to assess its success. This would only be a temporary measure, since there are still risks that convicts would be executed after the two-year suspension.<sup>623</sup>

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<sup>623</sup> For the relevant analysis see Chapter 6.



This punishment could later be evolved into a moratorium, which Russia at present adopts as an approach to abolition *de facto*.<sup>624</sup> In the US there are also debates on the moratorium on the death penalty.<sup>625</sup> This would be the next step of reform after the two-year reprieve operates smoothly and is universally accepted by the Chinese people.

Third, concerning the constitutional issues in the death penalty cases, the SPC could be set as the constitutional court in China to exercise judicial oversight of the breach of the Chinese Constitution. There is no constitutional court in China at present. The NPC and its standing committee have the power of the supervision over breaches of the Constitution. However, this is a controversial topic in China due to its defect of non-operational implementation.<sup>626</sup> Because at present there are estimated to be more than 2,000 executions per year in China,<sup>627</sup> it would be unworkable to review or rehear so many cases. After further reform going and the substantial diminution of the number of death sentences in the future, it would be financially and professionally possible to set up a special court at the SPC level to examine the death penalty related or other constitutional issues. Therefore, offenders could be given a right to challenge a death sentence on the ground of procedure or on breach of the Constitution.

The above analyses are from the legislative angle to suggest the possible measures to reform. Next, I will analyse the would-be measures from the judicial perspective.

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<sup>624</sup> See 'Russia's Accession to The Council of Europe And Human Rights: Four Years On' (2000) 4 E.H.R.L.R.362, also see Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edition, revised and updated edn Oxford University Press, Oxford 2015) 62.

<sup>625</sup> See J L Kirchmeier 'Another place beyond here: The death penalty moratorium movement in the United States' (2002) 73 U. Colo. L. Rev.1. See also C S Lanier and J R Acker 'Capital punishment, the moratorium movement, and empirical questions: Looking beyond innocence, race, and bad lawyering in death penalty cases' (2004) 10 (4) *Psychology, Public Policy, and Law* 577. See also R K Little 'Why a Federal Death Penalty Moratorium' (2000) 33 Conn. L. Rev.791.

<sup>626</sup> See Xiaohua Hu 'Expectation of China's Constitutional Court' (1989) 3 (1) *Journal of Comparative Law* 19. See also Derui Zhang, 'The Revelation from the European Constitutional Court to the Construction of China's System of Examination of Violation of The Constitution' (2007) 26 (2) *Journal of China Youth College for Political Sciences* 89; see also Chen Wenxing, 'Why Does China Need the Constitutional Court?' (2010) 11 *Justice of China* 85.

<sup>627</sup> See Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (5th edition, revised and updated edn Oxford University Press, Oxford 2015) 98.

### 7.3.3 Reform at the Judicial Level

Abolition of the death penalty for all crimes in China is far in the future and so control of death sentences at the judicial level is more important. The retrieval of the power of the review of death sentences from high courts to the SPC is an effort to control the use of the capital punishment by the judiciary (for relevant discussion see Chapter 6). In China, the judiciary is not independent, so without political reform any discussion of the introduction of judicial independence or reform of the death penalty will be unworkable. Therefore, within this thesis, the dependent situation of the judiciary will not be challenged and discussed. All discussions will be based on options which are possible to achieve in the future.

First, there is a need to broaden the discretion of courts or judges, empowering judges to deliver judgements by deliberation of extenuating circumstances. Although the death sentence is not mandatory, many judges hesitate to deliver a non-death penalty sentences because of public opinion and a possible prosecutor's appeal against the sentence.<sup>628</sup> Therefore, it is necessary to establish safeguards for judges so that they cannot be removed from their position by favouring of non-death penalty sentences,

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<sup>628</sup> See Chapter 5 case study, in Li Changkui case, because of a judgement of death sentence with two-year suspension, the case was re-tried and changed to death with immediate execution.

absent corruption.<sup>629</sup> Then it also should be established that prosecutors<sup>630</sup> cannot lodge an appeal against non-death penalty sentences or death sentences with a two-year reprieve.

The SPC has delivered a judicial interpretation on criteria for imposing all penalties including the death penalty (see Appendix 7)<sup>631</sup> according to the special extenuating or aggravating circumstances of the case. The advantage of the use of criteria is that it will balance the penalty for the same crime committed in different areas in China and bring consistency. The disadvantage is that it leads to less discretion being exercised by judges.<sup>632</sup> Mitigating circumstances might consist of forgiveness from victims or their families, compensation, confession, remorse and a guilty plea. Aggravating situations might include recidivism, crimes committed during epidemic or disaster, or a record of bad behaviour.

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<sup>629</sup> Since in China, at present the selection and appointment of judges and financial budget for courts are decided by local governments and local people's congresses, under the slogan of building the harmonious society, local governments often set rules that if there is a person appealing to a higher administrative authority for help instead of a normal legal appeal to the higher court, judges would be maybe removed from their position. The relevant discussions see Yang Fei 'The Discussion on the Improvement of Several Mechanisms to Resolve the Judiciary-related Appeal to Higher Authority' (2006) 2 Shannxi Procuratorial 26. Also see Yang Yu, 'Research on the Judiciary-related Appeal to Higher Authority' (2013) Shanghai University. Also see Daocai Hu, 'The Establishment of a Mechanism to Terminate the Judiciary-related Appeal to Higher Authority'. (2004) 12 (6) Journal of National Prosecutors College 93. Wenguo Zhang, 'On the Plight of Mechanism of the Judiciary-related Appeal to Higher Authority and the Way out' (2007) 39 (2) Journal of East China University of Political Science and Law (Philosophy and Social Science Edition) 86. And also see Yi Hong, 'The Combination and Merge of Mechanism of Resolution of the Judiciary-related Appeal to Higher Authority' (2010) 2 Jiangxi Social Sciences 164.

<sup>630</sup> As mentioned above, judicial system is a broader concept than that in the UK, it consists of judges, prosecutors and polices.

<sup>631</sup> 'The Guidance to Measurement of Penalty by the SPC' (*The Supreme People's Court of the People's Republic of China*, 31 July 2014) <<http://www.court.gov.cn/shenpan-xiangqing-6622.html>> accessed 12 December 2014.

<sup>632</sup> Some may question that whether judges in fact would exercise their discretion in China, in the majority of death sentences, it could be seen that judges have exercised this power. See Li, Zhiping, 'Discussion on Judges' Discretion and the Control of It' (1994) 4 China Legal Science 93. Zang, Dongbin, 'On the Balance between the Criteria for Imposing Penalties and the Discretion of Judges' (2007) 25 (12) Hebei Law Science 113; see also Zhang, Guilin, Wu, Xiaorong, 'Discussion on the Criteria for Imposing Penalties and the Discretion of Judges' (2009) 23 (3) Journal of Wuhan Public Security Cadre's College 10.

Second, as mentioned in Chapter 6, banning the harvesting of body organs without the consent of criminals should also be considered (see Chapter 6). Some suspect that the practice of organ harvesting from executed convicts in China has led to unnecessary death sentences,<sup>633</sup> and the Chinese government has tried to suppress this. According to an official report, since 1 January 2015, China has stopped using organs from executed prisoners entirely.<sup>634</sup> However at present there are no organ donation laws or regulations in China following this announcement, which means this kind of transplantation of organs is still to be outlawed. Enacting a law to denounce this activity is the first thing that China needs to consider, and before this, judicial practice becomes crucial in prohibiting it. The direct application of international human rights law could be considered by courts.

Third, with respect to people's concern over repeat offenders, there is a need to assess whether or not a recidivist will bring risk to Chinese society when he or she is going to be discharged from a prison. The appraisal of the risk could be conducted by a special judicial organisation. The suggestion would be that the Ministry of Justice could establish a committee to appraise the degree of danger. After the appraisal, the committee form a report to the court which has heard the case before. The court should deliver a new sentence according to the report. This new sentence is also appealable to protect the prisoner's right.

The above discussed the proposed approaches to reform from the judicial practice perspective. Next, the possibility to treat different areas with a different penal policy of the death penalty is to be considered.

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<sup>633</sup> For the relevant discussion, see 'The Picture of the Execution Ground for Nie ShuBin: Sandy, Snowy or 'Kidney' Ground?' (*Tianya*, 2 May 2015) <<http://bbs.tianya.cn/post-free-5081368-1.shtml>> accessed 30 May 2015.

<sup>634</sup> See the report from the BBC News, 'China Totally Stopped the Transplantation of Organs from Executed Prisoners from 1 January' (*bbc.cn*, 3 January 2015), [http://www.bbc.com/zhongwen/simp/china/2015/01/150103\\_china\\_organ\\_donation](http://www.bbc.com/zhongwen/simp/china/2015/01/150103_china_organ_donation) accessed 1 September 2016.

### 7.3.4 Possibility of Differential Treatment

Because China is a vast territory with the largest population in the world, the enormous regional disparity generates difficulties in the application of the same law in big cities such as Beijing, Shanghai, Guangzhou and Shenzhen, where the average income per capita is similar to developed countries, and the rural areas, where the majority of people still live in poverty.<sup>635</sup> A study of Shanghai's legal reform suggests that Shanghai could possibly serve as a model for legal reforms.<sup>636</sup>

Although there are differences within China between different types of area, China does not have a Federal system like the US where 18 states have abolished the death penalty but the rest of the country still retains it. China has a similar territorial area and larger population, but its history, culture, legal system and political regime are all different. China is governed by a highly-controlling central government while the US has a federal government. However, this does not mean China could not adopt a method to abolish or suspend the use of the death penalty first in some cities or provinces. Compared with its own successful economic reform which started in 1978, the central government has chosen Guangdong province and Fujian province as the first pilot areas to launch an experimental economic reform. The remarkable economic achievement can be clearly seen by everyone.

If this example from the socio-economic domain which took place in the late 1970s and early 1980s is adopted, the latest and most relevant judicial reform in China, launched in June 2015, could be used to compare and research this possibility of reform of the death penalty. The 2015 judicial reform plan selected 6 provincial level areas from the east, middle and west of China to conduct a pilot reform of regional imbalance of economic and social development. Those selected were the Shanghai municipality, and Guangdong,

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<sup>635</sup> In 2014, per capita GDP in Shanghai was 97370 RMB (about \$14670), Beijing 99995 RMB (\$15066), Gansu, 26432, (about \$3982) <www.stats.gov.cn.>

<sup>636</sup> Mei Ying Gechlik, 'Judicial Reform in China: Lessons from Shanghai' (2005) 19 Colum. J. Asian L.97. Recited from M. Ulric Killion, 'Building Up China's Constitution: Culture, Marxism, And the WTO Rules' (2007) 41 Loy. LAL Rev.563.

Jilin, Hubei, Hainan and Qinghai provinces.<sup>637</sup> Although this is a general judicial reform, its influence will be also significant for the reform of the death penalty. The selection of the pilot areas also could give the inspiration to the latter reform.

Comprehensive research first needs to be carried out to decide which areas are satisfactory to be set as pilots of reform. In the economic reform, the selection of Guangdong and Fujian provinces was mainly out of the consideration that they were far away from the political centre in Beijing and near to Hong Kong, Macau and Taiwan. These factors meant that, even if the economic reforms failed, it would only generate minor influence on the political regime. The provinces would also benefit from different outside forces to develop their economy because of their geographical advantage. An additional factor was that people in Guangdong and Fujian provinces had a pioneering spirit to explore new reforms.<sup>638</sup> Hence, the reformers of the death penalty could draw experience from this when deciding to select pilot areas.

Second, in those pilot cities or areas, the retention of the death penalty but its suspension in practice other than in emergency situations could be adopted. In addition to this, sunset clauses for one-off campaigns like anti-corruption, producing dangerous food and other non-violent crimes could be set. Then every five years the Chinese government could organise relevant organisations to conduct a survey of popular attitudes and different arguments for and against the use of the death penalty, both nationally and within each province. At the same time, it would need to carry out an appraisal to review the achievements, benefits and defects of the past period of reform to make the next five-year plan of reform.

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<sup>637</sup> Shiwei Xing, 'Why Shanghai, Guangdong, Hainan and other Provinces Are Chosen as the Pilot Areas for Judicial Reform?' (*ifeng*, 6 January 2015) <[http://hainan.ifeng.com/news/zaobanche/detail\\_2015\\_01/06/3386803\\_0.shtml](http://hainan.ifeng.com/news/zaobanche/detail_2015_01/06/3386803_0.shtml)> accessed 13 March 2015.

<sup>638</sup> For a discussion see Weiming Liu, 'Selection by History- Discussion on the "Economic Reform and Opening" Policy in Guangdong' (1991) Guangdong Higher Education Press. See also Guangdong Editing Group *The "Economic Reform and Opening" Policy in Guangdong* (Guangdong People's Publishing House 1988). Also see Huaming Duan, 'The Experience and Process in the Period of 30 Years of "Economic Reform and Opening" Policy in Guangdong' (2008) 6 *Seek* 4. And Shoudong Gong and Juan Wang, *25 Year of "Economic Reform and Opening" in Fujian* (Fujian People's Publishing House 2004)

Last, obedience to the legal principle of the rule of law and human rights is key in the reform. It is conspicuous that the general direction of reform should be sticking to these two constitutional principles. For the Chinese people, in the past, all kinds of ‘campaigns’ have substantially influenced the reform of the death penalty. A Chinese scholar points out that during the period of deliberation of the Amendment Eight to the Criminal law in 2011, the campaign of ‘eliminating pornography and illegal publications’ was conducted. The suggestion to abolish the death penalty for crimes of organising and forcing other persons to engage in prostitution was delayed because there was a concern that the abolition for these two crimes would influence this nationwide campaign. Then until 2015, the Amendment Nine to the Criminal Law exempted these two crimes from death.<sup>639</sup> If the situation remains unchanged in China, it will be hard to achieve complete reform.

It could be possible to select some pilot areas in China and suspend the use of the death penalty in these areas. The premise is that there needs to be a deliberate and scientific analysis before the process starts, and after it launches it is essential to conduct a critical review of the arguments for and against this reform to adjust the pilot penal policy in time.

#### **7.4 CONCLUSION**

This chapter has addressed the legitimacy and possibility of reform of the death penalty, both from the legal domain and from the socio-economic perspective. Two opposing views of the use of the death penalty were discussed, categorised as neo-liberal cosmopolitanism and conservative. The conclusion drawn from the analysis is that, objectively speaking, the neo-liberal cosmopolitan standpoint of reform is in accordance with international human rights law as well as the requirement of economic development

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<sup>639</sup> ‘Experts Declared in the Future Probably only Murder remains the Capital Crime’ (*The Paper*, 28 October, 2014)  
<[http://www.pkulaw.cn/fulltext\\_form.aspx?Db=news&Gid=70304&keyword=1979%E5%88%91%E6%B3%95&EncodingName=&Search\\_Mode=like](http://www.pkulaw.cn/fulltext_form.aspx?Db=news&Gid=70304&keyword=1979%E5%88%91%E6%B3%95&EncodingName=&Search_Mode=like)> accessed 18, June 2016.

in China. Therefore, reform of the death penalty favours China's long-term strategy and nation's interest more, which made it workable in the future.

By exploring the possible approaches, it suggested that the reform needed to be conducted from several different levels. This involved the international legal domain respect, the legislative perspective, the judicial level, and differential treatment in selected pilot area. In the international legal domain, the Chinese government would be suggested to consider the accordance with the international human rights law. Some systems, such as leniency, amnesty and criminal reconciliation, which worked successfully in some abolitionist countries during the period of abolition of the death penalty, could be transplanted with some amendment according to China's present situation.

From the legislative respect, decreasing the number of capital crimes and the consideration of using the two-year reprieve first instead of immediate execution are two viable methods. At the judicial level, suggestions for reform were to give more discretion to judges, the prohibition of the harvesting of body organs from convicts without their consent, stronger safeguards related to fair trial provisions, and the system of appraisal of the discharge of recidivists.

Finally, the possibility of setting pilot areas as pioneers of reform was discussed from a socio-political perspective. The conclusion was that it would be realistic to suspend the death penalty in some selected parts in China, following the example of selective economic experiments, and recent plans of judicial reform. Admittedly, this should be a top-down initiative, because without the government sponsoring, it would be impossible to achieve. Therefore, this suggestion is for the policy-maker to consider.



## GENERAL CONCLUSION

As the previous chapters have illustrated, China has a long history of use of the death penalty. In feudal times, there were many cruel and inhuman methods used to execute inmates who were sentenced to death. There was also a short period, however, when the death penalty was suspended during the Tang Dynasty. Although this was a short and rare phenomenon in Chinese legal history, it shows that China has not constantly and solidly retained the death penalty. Humane thought was dominant for some time, although some scholars have suggested that China has lacked a humanitarian basis throughout its history. With the further concentration of power to the central government, the later dynasties' emperors adopted much crueller execution methods than emperors in the Tang Dynasty. After the collapse of the Qing Dynasty, China gradually started on its journey to modernisation, and as part of that journey the reform of the death penalty in China has always been a tough and undulating way entwined with conflicts between the different views of neo-liberal cosmopolitans and conservatives.

The proper modern reform of the death penalty in the legal domain in China began at the end of the Qin Dynasty. Since then, for a period of more than 100 years, reform has advanced progressively, with its development influenced by the different political regimes. After the founding of the PRC, the possibility of reform fluctuated because of political movements. The Chinese PRC government first resisted the idea of abolition of the death penalty. As the international society moved towards abolition, China increased the number of capital crimes in its Criminal Law. In recent years, the nation has changed its attitude to react to this trend of abolition, however: China has made efforts to restrict the use of the death penalty and signed more than twenty international human rights treaties. China has amended the Constitution, the Criminal Law and the Criminal Procedure Law. For the first time in the PRC's history, it has enshrined the protection of human rights and governance under the rule of law in its Constitution. It has also launched judicial reform since 2014. One possible reason for this has been the awareness of what were later revealed to be wrongly sentenced capital crimes.

This thesis examined the current trend in the use of the death penalty worldwide, and China's reactions to this trend in recent years, from the initial resistance to a later open attitude to reform. It also analysed the two leading opinions in China: neo-liberal cosmopolitans (who propose utilising European countries' advanced legal spirit and successful experience to reform the death penalty) and conservatives (who are security-oriented and give emphasis to popular sentiment as well as social control and public security issues). These two schools of thought have interacted, competed with each other, and variously influenced the reform of the death penalty since 1979 when China began its economic reform. This thesis also explored from an international perspective, looking in depth at the successful experience of the European countries that have entirely abolished the death penalty.

The thesis also has drawn some general observations. First, the abolition of the death penalty is a relatively new phenomenon in the field of international law. Its emergence and development from a marginalised ideology to the mainstream of international law has taken place since the Second World War. Second, although the right to life has been placed in a cardinal position, from the UDHR to the ICCPR to the ECHR, the death penalty has been preserved in these three most important international treaties. It is nonetheless confined within certain limits that it can only be imposed under rigorous procedural safeguards. Some protected categories of persons, for example, pregnant women, juveniles and the elderly, are excluded from its application.

This thesis researched the theoretical underpinnings of divergent interpretations of the meaning, scope and rationale of the death penalty, as set out in the incompatible jurist ideas and philosophies of Beccaria, Kant, Hegel and Bentham. The relevant arguments in favour of abolition by Beccaria and those in favour of retention by Kant and Hegel were identified, critically analysed, and then contrasted with the more ambiguous position of Bentham. It was demonstrated that these issues were important, both in themselves, but also because they connected such underlying philosophical positions with the changing statements made by China's post-1949 leaders with respect to the rationale for the state's retention of the death penalty. This thesis showed that the leadership's position was not

based on any express theory, but – in terms of its commitments – was closer to the positions taken and defended by Hegel and Kant than it was to those of Bentham. This cross-referencing of theoretical underpinnings with the level of express policy imperatives provided an original contribution to academic knowledge that was both intellectually significant in itself and relevant to the assumptions being made at the policy level about the death penalty law in action.

The analysis of Shen Jiaben's reform in this thesis illustrated how this successfully combined aspects of traditional Confucianism with modern legal thought particular to the legal thinking of France, Germany and Japan. His reform of the death penalty replaced the legacy of feudalism with a more humane understanding of the limited circumstances within which the use of the death penalty can be justified. This thesis has shown that his reform could be taken as an important case study of the benefits of cross-referencing traditional Chinese models of criminal justice with those of continental Europe in ways that refute the idea that each system is utterly self-contained and unique. These conclusions supported aspects of comparative research which, following in his footsteps, also sought to open up debates within China to wider perspectives based on the experience of abolitionist and retentionist states, which experience very different cultural traditions.

This thesis also provided an analysis of several different cases involving the death sentence. It was demonstrated how these cases could be critically interpreted as exposing a deep gap and discrepancy between China's Criminal Law, its Criminal Procedure Law and the requirements of international law, particularly international human rights law. This thesis mainly used the ICCPR and the CAT as reference points.

The thesis has further shown that there are powerful counterarguments that claim that China's practice of the death penalty has remained within the strict letter of at least some applicable human rights measures, including those such as the ICCPR, even though the overall tendency in this area of law is towards abolitionism. The argument here in this thesis shows that there are resources within the current legal stance that are capable of supporting a drastic reduction in the circumstances where the death penalty is imposed, including constitutional arguments, as well as those derived from broad trends within

customary international law. This thesis showed that even at the highest levels of the court hierarchy, China's judges did not enjoy the same scope for creative interpretation and judicial review as was the case within common law states such as the US, where procedural laws have been used to challenge substantive legal values in cases, for example, of school racial segregation and abortion. Hence, we needed to be careful when drawing lessons from procedural law challenges to substantive Criminal Law provisions in China.

This thesis also has discussed the fact that China do not possess a constitutional court capable of judicially reviewing the constitutionality of state practices such as the death penalty, and this further limits the relevance of US precedent involving a transition from constitutional provisions of a procedural nature to substantive values such as the right to life. In addition, China's legal system prohibits judges from referring to China's constitution as an express source of law, which further limits the possibility of legal challenges to the death penalty on the grounds of its alleged violation of either substantive or procedural provisions within China's constitution. It was also shown in this work that even where such possibilities exist, such as in the US, the judiciary have failed to support a successful constitutional challenge to this state's death penalty. Hence, we should be cautious in expecting a successful challenge of this kind within the far less promising context of China's judicial system.

This thesis further provided an interpretation of the possible relevance of international law generally, and international human rights law in particular, to questions concerning the possible abolition of China's death penalty. It has been argued that at the criminal law and international human rights levels that are relevant to the legality of the death penalty, the Chinese legal system is predominantly dualist. For example, by custom at least, China's judges are prohibited from directly citing international human rights law as a source of Chinese domestic law. By contrast, at the civil law level this state broadly follows a monist system. However, my analysis remained empirical, and did not suggest any mechanical following of rigid principles or make claims that this system was 'essentially' dualist or monist.

The analysis of the theoretical foundation for abolition in European countries showed that the Enlightenment movement contributed to this achievement in human rights. Through comparing the cultural and socio-political foundation of the abolition in Europe, this thesis found that the modern legal spirit and legal system reflected the achievement of the civilisation of and for all human beings. Therefore, concerning the reform of the death penalty, the common principles and rules of legal activities were worthy of both serious study and effective application. By researching the legal processes of abolition in these European countries in the 19th and 20th centuries, this thesis showed that the common process in this abolishing procedure was to first minimise the number and span of capital crimes and then pass through a period of *de facto* abolition, before the death penalty was entirely abolished. It was argued that China could draw from these experiences to reduce the number of executions and limit its use of the death penalty on both the legislative and judicial level.

The thesis also examined the evolution of the Chinese Criminal Law and Criminal Procedure Law and their remaining defects, which affected the application of the death penalty and the safeguarding of human rights. Through the discussion, the thesis showed that the conservative viewpoints against the reform made difficult the attempt to reduce the number of capital crimes and to ensure a due process for defendants. Nonetheless, there were still movements towards the international trend of abolition with at some aspects the neo-liberal cosmopolitanism having triumphed.

Finally, by examining the arguments and counterarguments of neo-liberal cosmopolitanism and conservatism, this thesis showed that the former was in line with the current Chinese ‘Economic Reform and Opening (to the world)’ policy. This research was conducted from a socio-economic perspective by analysing both historical economic reform in China in the last three decades and the latest speech addressed by President Xi in the Davos forum in 2017. Through these analyses, thesis showed that reform and eventual abolition of the death penalty were both legitimate and in accordance with the nation’s interest, therefore, it would be workable and realistic. The final part of this thesis suggested possible measures by which to reform at the legislative and judicial aspects. It

suggested that the main death penalty-related systems – the amnesty/pardon system, the review of the death penalty system, the system of alternative punishment and the appraisal of risk system – could be reformed by drawing on the experience of European abolitionist countries within the international human rights domain. Some reform measures, according to the neo-liberal cosmopolitan view, could be transplanted directly from these countries.

The survey in the appendix on public opinion on the application of the death penalty, which was conducted by various Chinese or overseas scholars as well as by the author, consistently showed that reform and abolition of the death penalty, unlike the economic and judicial reform of the era, was never going to obtain a majority of public acceptance in China, especially with the rising crime rates due to China's rapid modernisation, and violent crimes that generate a risk to the security of public order and/or people. It was clear that if the Chinese government waited for changing attitudes to favour the abolition, it would be unable to abolish the death penalty in the foreseeable future.

This thesis has shown that there would be difficulties for China if it abolished the death penalty at present, but there is some space for the state to reform and limit its use. When the present leading party, the CCP, was first founded, it set the abolition of the death penalty as one of its future objectives in its party's charter in 1921. Marx, whose doctrine is the foundation of the present CCP's socialist theory, also believed in abolishing the death penalty. After the CCP came into power in 1949, however, the use of the death penalty was treated as a governing instrument. This situation changed dramatically after 1990 when the party raised the rule of law as its fundamental policy of governance. Although this policy cannot help China abolish the death penalty right now, it does provide the opportunity for China to reduce the use of the death penalty and to accelerate the adoption of due process step by step. At the same time, the dynamic trend of abolition movement worldwide has generated, whether explicit or implicit, an influence on the Chinese government's behaviour. The Chinese government's attitude to reform has become increasingly open since 2000. Otherwise, the research into the reform would be meaningless. It is reasonable to be optimistic on this issue of reform, especially

considering the signing of the ICCPR by the Chinese government. On various different occasions, the leaders have signified that the Chinese government would make efforts to ratify this covenant in the future. Reforming the death penalty will pave the way for the ratification of the ICCPR, whilst the ratification itself can help China to expedite the progress of the abolition initiative.

It is clear that reform of the death penalty is on its way in China, though its progress is slow and often is influenced by political reality. The entire legal system for protecting human rights and complying with international human rights treaties, especially the ICCPR, remains weak with a lack of effective implementation. This is generated by complicated and combined factors. Public opinion, whether from the general population or from the well-educated younger generation, still favours the use of the death penalty. Whatever the problems with the present system, and there are many, the fact that China is now executing fewer people, however, is in itself a good sign and shows goodwill towards the implementation of human rights treaties as well as the reform of the death penalty. International interaction, such as cooperation projects on the reform of the death penalty in China with China's academic institutes under the auspices of the European Union further accelerates the reform. The initiative of death penalty reform was also inspired by China's remarkable success in economic reform in the last three decades and its newly launched judicial reform. From this successful economic reform, this thesis extrapolated that China could select some pilot areas to reform or suspend the use of the death penalty with regular appraisal to allow this penal policy to be more workable.

Above all, this thesis has provided an extensive review of how history, modern legal spirit, international human rights law, the provisions, processes applied and offered possible solutions to the application of capital punishment in China. This thesis did not aim to address all the problems within the issue of the death penalty due to time and space limitations; rather it focused on providing solutions to the significant legal problems by examining the Chinese legal system under the requirements of the ICCPR. It is hoped that the suggestions in this thesis will provide some inspiration to policymakers and scholars and thus it could play a role in some respects towards a successful reform.

## APPENDIX 1 THE PROCESS OF 14 EUROPEAN COUNTRIES ABOLISHED CAPITAL PUNISHMENT

Table 1 The process of 14 European Countries abolished capital punishment, the last abolished crimes and the abolition times<sup>640</sup>

Countries	The last abolished Ordinary crimes	The last abolished Military crimes	<i>De facto</i> time	<i>De jure</i> time	Note
Portugal	murder	Not known	1849	1867	1916-1918 execution took place for military crimes
Austria	1.Riot 2. murder 3. aggravated thefts 4. wilful incendiarism 5. Deliberate damage to the property of others 6. malicious acts or failures to act in particularly dangerous circumstances 7.wilful damage to State telegraph equipment or its destruction 8.certain crimes committed by the use of explosives.	1. Forcible resistance to a soldier in the presence of troops. 2. Mutiny resulting in serious consequences. 3. Mutiny, armed or otherwise. 4. In case of riot, continued violent resistance after the proclamation of a state of emergency. 5.Desertion. 6. Incitement to surrender. 7. Forcible resistance to the enforcement of a sentence. 8. Looting.	1950	1968	In 1950, it abolished the death penalty for all ordinary crimes.
Belgium	1. Crimes against persons and property: murder; parricide; infanticide; poisoning; murder committed in furtherance of theft or extortion; destruction or damage; or in order to avoid punishment therefor; 2. Crimes against the security of the State: attempt on the life or person of the King, the Heir Presumptive, the Queen, or relatives and connections of the King; conspiracy or intelligence with a foreign Power	1. Treason and espionage; 2; certain offences prejudicial to military duty; 3. Insubordination in face of the enemy; 4. revolt in time of war; 5. Premeditated violence in time of war; 6. Murder of a superior officer by his inferior; 7 Desertion to the enemy.	1950	1996	Since 1863 only one execution for murder taken place in 1918, and none for all offences since 1950.

<sup>640</sup> The source is from The Death Penalty in European Countries, Council of Europe- Strasbourg 1962, and The Fifth Edition of the Death Penalty A Worldwide Perspective, Roger Hood and Carolyn Hoyle.



Swiss Confederation	unknown	1. disobedience in face of the enemy; 2. Mutiny; 3. Surrender without exhausting all means of resistance or desertion of his post by a commander without having done all that would be required by military duty; 4. Voluntary self-disablement from carrying out duties in face of the enemy; 4. Desertion to the enemy; 5. Violation of national defence secrets; 6. Military treason; 7. Acts of war committed by those not having the status of legitimate belligerents; 8. Bearing arms against the Confederation; 9. Rendering services to the enemy; 10. Murder through ferocity or greed in order to conceal another offence; 11. Brigandage with violence resulting in death; 12. Pillage under the same conditions; 13. Forcible looting from the wounded or mutilation of the dead on the battlefield.	1944	1992	In 1942, it abolished for ordinary crimes in law
Denmark	1. Crimes against the person- homicide. 2. Crime against the security of the State – high treason; acts calculated to provoke in respect of the Danish State, or any State allied to that State in case of war, occupation or other hostile act; serious informing; acts aiming at changing the Constitution or hindering its operation by means of foreign aid, violence or threats.	1, treason; 2, military espionage; 3, needless desertion of post by an officer or N.C.O.; 4, murder of a superior officer or a sentry; 5, mutiny.	1950	1978	In 1933, Denmark abolished capital punishment for all ordinary crimes
France	1. Crimes against persons and property, 8 crimes including two kind of murders; 2. Crimes against the security of the state, 6 crimes including treason, espionage and so on.	In time of war, 1, ordinary law crimes: two, one is pillage and theft the other is treason; 2, military Codes of Justice , 8 crimes including treason, espionage desertion and so on.	1977	1981	
Greece	1, two crimes against life and property: voluntary homicide and brigandage. 2, three crimes of high treason and treason towards the country	Four general crimes including treason.	1972	2004	In 1993, it abolished capital punishment for all ordinary crimes.
Italy	Not known	24 crimes, including three desertions, aiding the enemy, military espionage and so on.	1947	1994	In 1947, it abolished for all ordinary crimes

Luxembourg	8 crimes against person including 4 murders, poisoning, flooding and so on; 10 crimes against the State including attempt against the life or person of the Grand Duke, and the heir presumptive, armed rebellion, collaboration with the enemy and so on.	3 war crimes including enrolment by the enemy and so on; 9 crimes including treason, espionage, surrender, desertion and so on.	1949	1979	
Norway	Not known	1. treason in time of war or during periods of unsettlement, it listed 12 situations could be defined by treason. 2. 11 crimes in its military law including military treason, surrender Espionage, murder of an enemy who surrenders, incitement to rebellion and so on.	1979	1948	1902 it abolished for all ordinary crimes
Netherlands	Not known	3 kinds of crimes in special courts including certain crimes against the security of the State and the dignity of the Crown; 2 kinds of crimes in military courts including desertion.	1952	1982	In 1870 it abolished the death penalty for ordinary crimes
Sweden	Not known	Four crimes: treason, serious espionage, serious offences against military discipline, mutiny.	1910	1972	In 1921 it abolished the death penalty for ordinary crimes.
The UK	1. 6 kinds of murder. 2. Piracy and setting fire to naval dockyards and arsenals. 3. High treason.	3 kinds of crimes including furnishing aid or information to the enemy; mutiny, incitement to mutiny, failure to repress a mutiny and so on.	1964	1998	Capital punishment for ordinary crimes was abolished in England, Wales and Scotland in 1965, in Northern Ireland it was in 1973

## APPENDIX 2 THE ROUTE OF HOW THE NUMBER OF CAPITAL CRIMES INCREASED

The route of how the number of capital crimes increased from 1980 to 1996 is the following:

(1) *Interim Regulations of the People's Republic of China on Punishment of Servicemen Who Commit Crimes Contrary to Their Duties*, which was enacted in June 1981. 10 new military crimes emerged.<sup>641</sup> The number of capital crimes rose from 28 to 38 after its enactment.

(2) Then in March 1982, the *Decision Regarding the Severe Punishment of Criminals Who Seriously Sabotage the Economy* added another seven crimes punishable by the death penalty, which all were neither new crimes nor death offences in the 1979 one.<sup>642</sup> The number further rose from 38 to 45. Drug-related crimes, smuggling and theft became capital crimes for the first time.

(3) In September 1983, with the launch of the campaign of 'Hard Strike' (*Yanda*), the *Decision Regarding the Severe Punishment of Criminals Who Seriously Endanger Public Security* added another 8 crimes punishable by capital punishment, none of which had been capital offences in the 1979 criminal law.<sup>643</sup> Among them, the hooligan crime had been applied frequently during the first 'Hard Strike'. Therefore, the total number of the death penalty offences increased into 53.

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<sup>641</sup> They are respectively stealing, spying into or offering military secrets to the enemies or foreigners; obstructing a commander or a person on duty from performing his duties by violent or threatening methods; stealing weapons, equipment or military supplies; vandalising weapons, equipment or military supplies; during wartime in collaboration with the enemies fabricating rumours to mislead others; deserting from the battlefield; disobeying an order during wartime; intentionally concealing or making a false report about the military situation; surrendering to the enemy; during wartime, cruelly injuring innocent residents or plundering their money or property.

<sup>642</sup> They are smuggling; illegal foreign exchange arbitrage; speculation; theft; manufacturing, selling and trafficking in narcotics; crime of stealing and exporting precious cultural relics and crime of bribe.

<sup>643</sup> These are: engaging in hooligan activities; intentionally inflicting bodily injury upon another person causing severe bodily injury or a person's death; abducting and trafficking in human beings; illegally manufacturing, trading in or transporting guns or ammunition or stealing or forcibly seizing the guns or ammunition; organising or using feudal superstition, superstitious sects or secret societies to carry on counterrevolutionary activities; forcing a woman to engage in prostitution; luring women or sheltering them into prostitution; teaching another person how to commit a crime.

(4) In January 1988, *Supplementary Provisions Concerning the Punishment of the Crimes of Smuggling* was enacted. This special criminal law divided the crime of smuggling into 8 branching crimes.<sup>644</sup> Because the crime of smuggling goods had been prescribed in 1982 as a death penalty offence, the number of crimes punishable by the death penalty actually increased by 7 in this special criminal law.(60 in total)

(5) In September 1988, *Supplementary Provisions Concerning the Punishment of the Crimes of Divulging State Secrets* stipulated the crime of stealing, spying on, buying or illegally providing state secrets or intelligence for an agency or organization or people outside China being punished by death sentence. As a result, 61 crimes were subject to the death penalty in 1988.

(6) In June 1991, *Supplementary Provisions Regarding the Punishment of the Crime of Excavating and Robbing Sites of Ancient Culture or Ancient Tombs* prescribed excavating and robbing sites of ancient culture or ancient tombs as the 62<sup>nd</sup> capital punishment crime.

(7) In September 1991, *Decision on the Strict Prohibition Against Prostitution and Whoring* stipulated the crime of arranging for another person to engage in prostitution punishable by death. At the same time, it abolished the death penalty for the crime of luring women or sheltering them into prostitution. There was no actual addition in the number of capital crimes. Then later in December the same year, *Decision Regarding the Punishment of the Criminals Engaged in Aircraft Hijacking* designated hijacking aircrafts as another crime punished by death (63).

(8) In July 1993 *Decision on Punishment of the Crimes of Production and Sale of Fake or Substandard Commodities* stipulated two crimes punishable by death, one was producing or selling fake medicine, the other was producing or selling toxic or harmful food. (65)

(9) In June 1995 *Decision on Punishment of Crimes of Disrupting Financial Order* stipulated four monetary crimes as capital crimes.<sup>645</sup> (69) Then in October the same year, *Decision on*

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<sup>644</sup> They are respectively: smuggling narcotic drugs; smuggling weapons, ammunition; smuggling counterfeit currency; smuggling cultural relics; smuggling precious and rare species of wildlife and its products; smuggling precious metals; smuggling pornographic materials; smuggling goods.

<sup>645</sup> These are: crime of counterfeiting currency; raising funds by means of fraud; committing fraud by means of financial bills; committing fraud by means of a letter of credit.

*Punishing Crimes of Falsely Making Out, Forging or Illegally Selling Special Invoices for Value-added Tax* added another 3 non-violent financial crimes to be punishable by the death penalty.<sup>646</sup>

(72)

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<sup>646</sup> These are: falsely making out special invoices for value-added tax; forging or selling forged special invoices for value-added tax; falsely making out any other invoices to defraud a tax refund for exports or to offset tax money.

**APPENDIX 3 COMPARISONS OF THE DEATH PENALTY OFFENCES IN THE 1979 CRIMINAL LAW AND THE 1997 ONE.**

1979 Criminal Law of the People's Republic of China; Part 2 Specific Provisions	The number of all crimes in every chapter and the proportion of capital punishment accounting for	Crimes punishable by the death penalty	1997 Criminal Law of the People's Republic of China; Part 2 Specific Provisions	The number of all crimes in every chapter and the proportion of capital punishment accounting for	Crimes punishable by the death penalty
Chapter I Crimes of counterrevolution	1. 20 crimes in all. 2. 15 crimes punishable by the death penalty in 9 articles (91-97, 100-101). 3. Proportion: 75%	1. Treason 2. plotting to subvert the government /dismember the state 3. instigating, luring or bribing a state functionary or a member of the armed forces, the people's police or the people's militia turn traitor or to rise in rebellion. 4. defecting to the enemy and turns traitor 5. armed mass rebellion. 6. gathering a group to raid a prison or organize a jailbreak 7. espionage 8. counterrevolution explosion; 9. counterrevolution arson; 10. counterrevolution breaching dikes; 11. counterrevolution sabotage; 11. stealing state records or military materials or plundering industrial or mining	Chapter I Crimes of Endangering the State Security;	1. 12 crimes in all; 2. 7 crimes punishable by the death penalty in 7 articles. (102-104, 108, 110-112) 3. Proportion: 58.33%	1. Treason 2. dismembering the state 3. armed rebellion/riot 4. defecting to the enemy and turns traitor 5. espionage 6. stealing, spying on, buying or illegally providing state secrets or intelligence for an agency or organization or people outside China 7. aiding the enemy during wartime.

		enterprises, banks, shops, warehouses or other public property; 12. hijacking ships, naval vessels, aircraft, trains, trams or motor vehicles; 13. directing the enemy to any bombing or shelling target; 14. manufacturing, forcibly seizing or stealing guns or ammunition. 15. counterrevolution spreading poisons, disseminating germs or killing or injuring people by other means			
CHAPTER II Crimes of Endangering Public Security	1. 20 crimes in all. 2. 9 crimes punishable by the death penalty in 2 articles (106;110). 3. Proportion: 45%	1. arson; 2. breaching dikes; 3. Explosion; 4. spreading poisons; 5. using other dangerous techniques resulting in serious human injury or death or great loss of public or private property 6. sabotages of a means of transport 7. sabotages of transportation facilities. 8. sabotages of electric power or gas facilities. 9. sabotages of inflammable or explosive equipment.	CHAPTER II Crimes of Endangering Public Security	1. 42 crimes in all. 2. 14 crimes punishable by the death penalty in 5 articles (115;119;121;125;127). 3. Proportion: 33.33%	1. arson; 2. breaching dikes; 3. Explosion; 4. spreading poisons; 5. using other dangerous techniques resulting in jeopardising public security 6. sabotages of a means of transport 7. sabotages of transportation facilities. 8. sabotages of electric power or gas facilities. 9. sabotages of inflammable or explosive equipment. 10. hijacking aircrafts. 11. illegally manufacturing, trading in, transporting, posting or storing guns, ammunition or explosives 12. illegally trading in or transports nuclear materials 13. stealing or forcibly seizing guns, ammunition or explosives

					14. robbing guns, ammunition or explosives.
Chapter III Crimes of Undermining the Socialist Economic Order	15 crimes in total.  0 crimes punishable by the death penalty.  3.Proportion: 0.	0	Chapter III Crimes of Disrupting the Order of the Socialist Market Economy	1. 96 crimes in all.  2. 16 crimes punishable by the death penalty in 10 articles (141,144,151, 153,170,192,194, 195,205,206).  3.Proportion: 16.66%	1.producing or selling fake medicine. 2.producing or selling toxic or harmful food 3.smuggling weapons, ammunition 4. smuggling nuclear materials 5. smuggling counterfeit currency. 6. smuggling cultural relics; 7. smuggling precious metals 8. smuggling precious and rare species of wildlife 9.smuggling goods 10.counterfeiting currency 11. raising funds by means of fraud 12. committing fraud by means of financial bills 13. using forged or altered settlement certificates of a bank 14. committing fraud by means of a letter of credit 15. falsely making out special invoices for value-added tax or any other invoices to defraud a tax refund for exports or to offset tax money 16. forging or selling forged special invoices for value-added tax
Chapter IV Crimes of Infringing upon Citizens' Right of	1. 23 crimes in total.  2. 2 crimes punishable by the death penalty in	1, intentionally committing homicide 2, rape	Chapter IV Crimes of Infringing upon Citizens' Right of the Person and Democratic Rights	1. 37 crimes in total.  2. 6 crimes punishable by the death penalty. in	1. intentionally committing homicide. 2. intentionally inflicting injury upon another person 3.rape 4. having sexual intercourse with a girl under the age of 14



the Person and Democratic Rights	2 articles (132,139).  3.Proportion: 8.7%.			5 articles (232,234,236,239,240)  3.Proportion: 16%. Note: Article 253 postal worker who opens, conceals or destroys mail or telegrams to steal money and property	5. kidnapping 6. abducting and trafficking in a woman or child
Chapter V Crimes of Property Violation	1. 9 crimes in total.  2. 2 crimes punishable by the death penalty in 2 articles (150,155).  3.Proportion: 22.22%	1. robbing 2. embezzlement	Chapter V Crimes of Property Violation	1. 12 crimes in total.  2. 2 crimes punishable by the death penalty in 2 articles (263,264) .  3.Proportion: 16.67%	1. robbing 2. theft  Note: theft was not a capital crime in 1979 criminal law, and has been abolished from the death penalty later in 2011.
Chapter VI Crimes of Obstructing the Administration of Public Order	1.26 crimes in total.  2. 0 crimes punishable by the death penalty.	0	Chapter VI Crimes of Obstructing the Administration of Public Order	1. 119 crimes in total.  2. 8 crimes punishable by the death penalty in 5 articles	1. teaching another person how to commit a crime 2. instigating a riot to escape from prison 3. gathering people to raid a prison with weapons

	3.Proportion: 0.			(295,317,328, 347, 358) . 3.Proportion: 6.72%	4. excavating and robbing a site of ancient culture or ancient tomb of historical, artistic or scientific value 5. excavating and robbing fossils of paleo anthropoids or paleo vertebrates of scientific value 6. smuggling, trafficking in, transporting or manufacturing narcotic drugs 7. arranging for another person to engage in prostitution 8. forcing another person to engage in prostitution
Chapter VII Crimes of Disrupting Marriage and the Family	1.6 crimes in total. 2. 0 crimes punishable by the death penalty. 3.Proportion: 0.	0	Chapter VII Crimes of Impairing the Interests of National Defence	1. 21 crimes in total. 2. 2 crimes punishable by the death penalty in 2 articles (369, 370) 3.Proportion: 9.5%	1. sabotaging weapons or equipment, military installations or military telecommunications 2. knowingly providing substandard weapons or equipment or military installations to the armed forces
Chapter VIII Crimes of Dereliction of Duty	1.9 crimes in total. 2. 0 crimes punishable by the death penalty. 3.Proportion: 0.		Chapter VIII Crimes of Embezzlement and Bribery	1. 12 crimes in total. 2. 2 crimes punishable by the death penalty in 2 articles (383, 386) 3.Proportion: 16.66%	1.Embezzlement; 2. Bribery

			Chapter IX Crimes of Dereliction of Duty	<p>1. 33 crimes in total.</p> <p>2. 0 crimes punishable by the death penalty.</p> <p>3. Proportion: 0.</p>	
			Chapter X Crimes of Servicemen's Transgression of Duties	<p>1. 31 crimes in total.</p> <p>2. 12 crimes punishable by the death penalty in 11 articles (421、422、423、424、426、430、431、433、438、439、446)</p> <p>3. Proportion: 38.7%</p>	<p>1. disobeying an order during wartime</p> <p>2. intentionally concealing or making a false report about the military situation</p> <p>3. refusing to convey a military order or conveying a false military order</p> <p>4. surrendering to the enemy</p> <p>5. deserting from the battlefield</p> <p>6. obstructing a commander or a person on duty from performing his duties</p> <p>7. serviceman defection</p> <p>8. stealing, spying into or buying military secrets for or illegally offering such secrets to the agencies, organizations or individuals outside the territory of China</p> <p>9. during wartime fabricating rumours to mislead others</p> <p>10. stealing or forcibly seizing weapons, equipment or military supplies</p> <p>11. illegally selling or transferring weapons or equipment of the armed forces</p>

					12. during wartime, cruelly injuring innocent residents or plundering their money or property
In total	8 chapters, 4 chapters prescribe death penalty crimes, 50%; 128 crimes, 28 death crimes, 21.8%.	15 articles in 4 chapters set 28 death penalty crimes	10 chapters, nine chapters prescribe the death penalty, 90% of the total chapters. 425 crimes, 69 death crimes, 16.23%.	46 articles in 9 chapters set 69 death crimes.	

Source: 1. 1979 Criminal Law and 1997 Criminal Law; 2. the SPC's Stipulation on Implementing the Criminal Law Confirming the Crimes, Judicial Interpretation (1997) 9, promulgated on 16<sup>th</sup> December 1997; 3. Numbers and names of 1979 crimes refer from The historical development on Interpretations of Chinese Criminal Law Crimes, Zhou Daoluan, Journal of National Prosecutors College, 2009 No. 5.

## **APPENDIX 4 SAFEGUARDS GUARANTEEING PROTECTION OF THE RIGHTS OF THOSE FACING THE DEATH PENALTY**

1. In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.
2. Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
3. Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.<sup>647</sup>
4. Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.
5. Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, 1948, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.
6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.
7. Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.
8. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.
9. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.

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<sup>647</sup> The Economic and Social Council Resolution 1984/50.

## APPENDIX 5 THE CURRENT CAPITAL CRIMES IN THE CHINESE CRIMINAL LAW

Criminal Law of the People's Republic of China; Part 2 Specific Provisions	Crimes punishable by the death penalty
Chapter I  Crimes of Endangering the State Security;  (7 capital crimes)	1. Treason 2. dismembering the state 3. armed rebellion/riot 4. defecting to the enemy and turns traitor 5. espionage 6. stealing, spying on, buying or illegally providing state secrets or intelligence for an agency or organization or people outside China 7. aiding the enemy during wartime.
CHAPTER II  Crimes of Endangering Public Security  (14 capital crimes)	1. arson; 2. breaching dikes; 3. Explosion; 4. spreading poisons; 5. using other dangerous techniques resulting in jeopardising public security 6. sabotages of a means of transport 7. sabotages of transportation facilities. 8. sabotages of electric power or gas facilities. 9. sabotages of inflammable or explosive equipment. 10. hijacking aircrafts. 11. illegally manufacturing, trading in, transporting, posting or storing guns, ammunition or explosives 12. illegally trading in or transports nuclear materials 13. stealing or forcibly seizing guns, ammunition or explosives 14. robbing guns, ammunition or explosives.
Chapter III  Crimes of Disrupting the Order of the Socialist Market Economy (2 capital crimes)	1. producing or selling fake medicine. 2. producing or selling toxic or harmful food
Chapter IV  Crimes of Infringing upon Citizens' Right of the Person and Democratic Rights	1. intentionally committing homicide. 2. intentionally inflicting injury upon another person 3. rape 4. having sexual intercourse with a girl under the age of 14 5. kidnapping 6. abducting and trafficking in a woman or child
Chapter V  Crimes of Property Violation (1 capital crimes)	1. robbing
Chapter VI  Crimes of Obstructing the Administration of Public Order (3 capital crimes)	1. instigating a riot to escape from prison 2. gathering people to raid a prison with weapons 3. smuggling, trafficking in, transporting or manufacturing narcotic drugs
Chapter VII  Crimes of Impairing the Interests of National Defence	1. sabotaging weapons or equipment, military installations or military telecommunications 2. knowingly providing substandard weapons or equipment or military installations to the armed forces

(2 capital crimes)	
Chapter VIII Crimes of Embezzlement and Bribery (2 capital crimes)	1. Embezzlement; 2. Bribery
Chapter IX Crimes of Dereliction of Duty	
Chapter X Crimes of Servicemen's Transgression of Duties (10 capital crimes)	1. disobeying an order during wartime 2. refusing to convey a military order or conveying a false military order 3. surrendering to the enemy 4. deserting from the battlefield 5. serviceman defection 6. stealing, spying into or buying military secrets for or illegally offering such secrets to the agencies, organizations or individuals outside the territory of China 7. during wartime fabricating rumours to mislead others 8. stealing or forcibly seizing weapons, equipment or military supplies 9. illegally selling or transferring weapons or equipment of the armed forces 10. during wartime, cruelly injuring innocent residents or plundering their money or property
In total	47 capital crimes

Source: 1. *The Chinese Criminal Law*; 2. *the SPC's Stipulation on Implementing the Criminal Law Confirming the Crimes, Judicial Interpretation (1997) 9, promulgated on 16<sup>th</sup> December 1997*; 3. *The eighth amendment of the criminal law*. 4. *The ninth amendment of the criminal law*.

## APPENDIX 6 THE SURVEY

There have been several surveys that have focused on the Chinese people's attitude to the death penalty in the last two decades. In 1995, the Institute of Law of the Chinese Academy of Social Sciences and the State Statistics Bureau jointly investigated public opinion on this question in three provinces in China.<sup>648</sup> In 2008 Germany's Max Planck Institute and Peking University jointly launched a survey on the Chinese people's attitude to the death penalty.<sup>649</sup> There were also some other surveys on public opinion in China.<sup>650</sup> These surveys were pragmatic and useful research on public opinion on the use of the death penalty, but they are all outdated since even the latest was carried out in 2008. To gauge the Chinese people's attitude to capital punishment, a survey was conducted amongst Chinese home and overseas university students and recent graduates by myself. The reason they were chosen as the targeting group was that they represent the well-educated individuals with different family backgrounds. They have a dynamic spirit and one day they will be the future decision makers in China. Therefore, the research is of significance in both the present and the future.

Obviously, the survey had to be based on a sample and not on a census. Only the government could do a census. In practice all sample-based social surveys tend to have flaws. A random survey (one in which each member of the target group had a calculable

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<sup>648</sup> The relative analysis of this investigation, see Jia Yu, 'An Investigation Report on Views of Death Penalty of Positivist Research' (2005) 3 Law Review 20.

<sup>649</sup> 'There Are Five Questions Should be Considered Over the Abolition of the Death Penalty in China' (*The Lawyer College of Renmin University of China*, 28 May 2015); <<http://lawyer.ruc.edu.cn/html/lvshijie/20150528/3779.html>> accessed 25 June 2015. See also Wen Fan, 'The Reform of the death penalty in China: the Present Situation, Problems and the Future' (aisixiang, 18 December 2014) <[www.aisixiang.com/data/81523.html](http://www.aisixiang.com/data/81523.html)> accessed on 28 June 2015.

<sup>650</sup> See Yuan Bin, 'Popular Opinions of Death Penalty and Their Internal Conflicts: An Investigation and Analysis' (2009) 1 Law Science 99. See also Jia Yu, 'An Investigation Report on Views of Death Penalty of Positivist Research' (2005) 3 Law Review 20. See also Liang B and others 'Sources of variation in Pro-death penalty attitudes in china an exploratory study of Chinese students at home and abroad' (2006) 46 (1) *British Journal of Criminology* 119; see also Wen Fan, 'The Reform of the death penalty in China: the Present Situation, Problems and the Future' (aisixiang, 18 December 2014) <[www.aisixiang.com/data/81523.html](http://www.aisixiang.com/data/81523.html)> accessed on 28 June 2015.



chance of inclusion) would have been ideal, but of course this again would be impossible in China without Government backing. Most actual surveys involve a degree of ‘self-selection’ (even if based just on response or non-response) which could introduce selection bias. The particular selection method I chose attempts to reach members of the target group both who study abroad and in China, and to encourage as wide a spectrum from this group as possible. The sample size (790) is large enough to reach reasonable conclusions.

In this survey, the wording was considered carefully. Leading questions, or skewed likert scales were avoided. Over vague questions were also avoided. For example, a question such as ‘do you believe the death penalty should be abolished’ was avoided because it would be too vague. An answer ‘yes’ might be because the respondent wanted it abolished immediately or abolished sometime in the almost indefinite future. The wording in the questionnaire on this point offers a range of possible views as to when they would like to see it abolished, one of which is ‘never’.

The data was collected from an online Chinese survey website ‘Wenjuanxing’.<sup>651</sup> An advertisement and a questionnaire with informed consent and confidentiality agreement was posted online in February 2017. There were 790 respondents from all over China, except Xizang (Tibet) Autonomous Region. Among them, 50 were educated in overseas universities in the UK or Germany. The survey instrument was originally written in English and Chinese, and then when it was posted on the Chinese website the English was deleted.

Here the Max Planck Institute and Peking University survey in 2008 (hereinafter the 2008 survey) is compared with the new survey to see whether public opinion changed with the time changing or whether public opinion is different among different samples.<sup>652</sup> The result supported 6 key points.

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<sup>651</sup> The website named ‘wenjuanxing’ <<https://www.sojump.com/>> The link is <<https://www.sojump.com/report/11775630.aspx>> it could be accessed before 8 April 2017. All the completed questionnaires could be and have been downloaded from this website before that day.

<sup>652</sup> Here the reason why Max Planck Institute and Peking University’s 2008 survey used as a comparison is that it was the first systemic, scientific and largest survey in recent years, which investigated 4472 people in Beijing, Guangdong and Hubei.

1. In the 2008 survey only 25% of participants replied that they were interested in this issue, which led them to draw the conclusion that common Chinese people were indifferent as to whether or not to abolish the death penalty. With respect to individuals' education level, the 2008 survey also concluded that the higher level of education the people had received, the more interest they showed in the question of abolition or retention.<sup>653</sup> In my survey all the respondents were at a higher education level and 73.67% of respondents cared about this question, which broadly confirms the 2008 result. (see Table 1)

2. In the 2008 survey the question was asked: since there are more than half of all countries in the world have abolished the death penalty, do you think whether China should follow this trend to abolish the death penalty?<sup>654</sup> 54.5% of respondents said no.<sup>655</sup> If therefore Chinese public opinion become more or less inclined to follow the trend of other countries, in this survey therefore a very similar question was asked that '*since 158 countries have abolished the death penalty in law or in fact amongst all 197 countries in the world, whether you think that China should follow this trend to abolish the death penalty*', 67.3% responded no. (see Table 2)

The two-tailed test of significance of these samples from 2008 and 2017 produced a Z value of 7.1, which indicates very strong evidence that the proportion is different between the populations of 2008 and 2017. The indications are therefore, that Chinese public opinion is becoming less inclined to believe that Chinese policy should be shaped by other nations. China should decide her own affairs without 'interference' (*ganshe*) from other countries.

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<sup>653</sup> For the relative analysis, see Wen Fan, 'The Reform of the death penalty in China: the Present Situation, Problems and the Future' (*aisixiang*, 18 December 2014) < [www.aisixiang.com/data/81523.html](http://www.aisixiang.com/data/81523.html) > accessed on 28 June 2015.

<sup>654</sup> The Chinese wording is: 世界上多一半的国家已经废除死刑而且每年有很多国家正在废除死刑。你认为中国应该紧跟这些国家的步伐废除死刑呢？还是中国不应该跟从这些国家？

<sup>655</sup> For the relative analysis, see Wen Fan, 'The Reform of the death penalty in China: the Present Situation, Problems and the Future' (*aisixiang*, 18 December 2014) < [www.aisixiang.com/data/81523.html](http://www.aisixiang.com/data/81523.html) > accessed on 28 June 2015.

Responses to the question of ‘*over what period of time do you think China should take to abolish this punishment*’ varied substantially; 11.67% participants responded ‘never’, 14.56% for 5 to 10 years, 16.08% for 10 to 20 years, 23.98% for 20 to 50 years, and the largest proportion was the group selecting after 50 years (29.87%) with comparison to only 4.3% backing the immediate abolition (Appendix 6, table 3). This shows that the doctrine of severe punishment still dominates the thought of China’s university students and recent graduates. It also shows that the majority of the Chinese students/graduates are against the abolition in 20 years’ time (65.52% in total), (see Table 3).

3. With respect to the question: ‘*the reason you support the use of the death penalty*’, 24.68% cited its deterrent effect, 6.08% cited retribution, 33.04% cited both, and 5.7% chose neither and gave various other reasons from the extent of receptiveness by Chinese people, China’s special social character, and inhumanity to criminals. By contrast, 80% in the 2008 survey supporting the death penalty’s retribution function.<sup>656</sup> The results indicate that the younger well-educated generation favour the retribution theory less than their parents’ generation do, compared with the former surveys mentioned above. (Table 4)

4. When those people who supported the abolition of the death penalty were asked the reason, only 4.56% cited international law and deemed the use of the death penalty as a breach of international law. The largest proportion (19.62%) replied that states have no right to deprive people of life. This indicates that the right to life for them is an inherent human right. From this perspective, the result also implies that the precise concept of human rights might still be obscure in the minds of Chinese people, although a general concept is forming. The finding suggests that in the future there may be a need for the Chinese government to promulgate a bill of human rights to define clearly which human rights are to be protected in China, and to give a precise concept of human rights.

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<sup>656</sup> Fan Wen, ‘The Reform of the death penalty in China: the Present Situation, Problems and the Future’ (*aisixiang*, 18 December 2014) < [www.aisixiang.com/data/81523.html](http://www.aisixiang.com/data/81523.html) > accessed on 28 June 2015.

None of the options in this question was favoured by more than 20% of participants; 15.46% considered that it was a punishment that used one violent method to try to prohibit another, 12.15% people chose the option that the death penalty was inhuman. There was also a very small proportion who replied that it would lead to the execution of people who were innocent (Table 5).

5. Considering the question: '*since at present in China there are 48 capital crimes, which capital crimes in the current criminal law do you support to retain?*', 221 respondents (27.97%) supported retaining murder as the only capital crime, and 119 (15.06%) chose the retention for all existing capital crimes. Some suggested that China should introduce some new capital crimes when they filled in the 'other opinions' item. The result also showed that people tended to favour retention for crimes risking the security of society, crimes targeting women and children, or crimes endangering the nation's security: jeopardising public security (42.41%); abducting and trafficking in a woman or child (40.51%); rape (36.84%); drug-related crimes (39.24%); treason (37.85%); espionage (30.38%); and military crimes against the state (44.43%). Non-violent crimes and those not a threat to the security of society and state were more easily tolerated. There also was a seemingly perplexing result that fewer respondents supported the death penalty for robbery and crimes of embezzlement and bribery, and this result is similar to that of the 2008 survey. (Table 6)

By contrast, in the 2008 survey 78% supported the death penalty for murder, and 50% of those supporting the death penalty felt it should be limited to the most serious crimes. Over 50% agreed to using the death penalty for crimes of murder, intentional injury which leads the victim to death, drug trafficking, and having sexual intercourse with a girl under the age of 14. The majority did not support the death penalty for non-violent crimes, including forging, manufacturing fake medicines, theft, embezzlement, bribery, organised prostitution and espionage, and the criminal law was amended in 2013 to exempt these crimes from the death penalty. Among the 14 capital crimes the questionnaire provided, murder, intentionally inflicting injury upon another person which leads to his/her death, trafficking-in drugs and having sexual intercourse with a girl under

the age of 14 obtained more than 50% participants favouring the use of the death penalty. To many non-violent crimes, such as embezzlement and bribery, the majority of respondents did not support the death penalty.

6. There was no clear difference between female and male subjects when answering Question 9 '*Among all 197 countries in the world, there are 158 countries have abolished the death penalty in law or in fact, do you think that this should influence the decision of China about whether or not to abolish it?*', some 66.97% of female subjects supported not to follow the trend to abolish the death penalty, which was a bit lower than males (68.22%). The Z value is 0.34, there is no evidence from this sample that males and females in the population differ.

Question 10 asked '*How long time do you think China should take to abolish the death penalty?*', 65.34% of female subjects supported the abolition of the death penalty within the next twenty years', which was a bit higher than males (64.4%). However, if we apply a two-tailed difference of proportions test the Z value is only 0.242 so there is no evidence from this sample that males and females differ.

However, with respect to their religious belief, a chi square test was done to see if atheists, Christians and Buddhists differed in their views on the abolition. This result was significant at the 5% level, meaning that there is some evidence from this sample for a difference between the religions in this respect.<sup>657</sup> A Chinese scholar has argued that in China, there is no longer any belief (*xinyang*) in the dignity of human life. The standard of social value became focused on money without consideration for other things. These circumstances are aggravated by the legal mind-set and by the country's current judicial practice of having recourse to the death penalty as a matter of routine. Such a situation makes any abolitionist education of the Chinese public difficult.<sup>658</sup>

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<sup>657</sup> For a chi-square to be valid the table was reduced to the three main groups (atheists, Christians and Buddhists) and to the three categories of 'abolition within twenty years' 'abolition but in twenty or more years time' and 'never'. The chi-square value was 11.57 with 4 df, and the 5% critical value is 9.49.

<sup>658</sup> Ning Zhang, 'The Debate Over the Death Penalty in Today's China' (*China Perspectives*, December 2005) <<http://chinaperspectives.revues.org/545>> accessed 23 September 2016

This survey revealed that the majority of respondents were atheist (77.85%). Nonetheless, they only take up the second largest proportion of pro-capital punishment with 68.46% of all. The first are respondents who are self-considered as Buddhists (71.43%). On the contrary, Muslims and Christians, who supported the use of the death penalty, took up 57.14% and 46.43% respectively.

Regarding the question of whether people who were educated or currently being educated overseas would support retention less, there was no clear difference between those two groups (62.55% and 62% respectively). Although only a small proportion of those surveyed were overseas students or graduates, the findings are supported by other surveys such as one conducted by some Chinese scholars of domestic and overseas Chinese university students, the percentage supporting retention was higher among overseas China students in the US than domestic ones.<sup>659</sup>

From these surveys from 1996 to 2017, it seems that that the death penalty is engrained in Chinese people's mind whether they are non-*university* educated people or educated university students recent graduates. Concerning students' attitudes, whether they are educated in China or overseas makes no difference. This shows that in this respect people are more easily influenced by their native inherited culture than by alien culture. Some people argue that if people say that they will not be in favour of abolition until the majority of Chinese people agree, then in China this punishment will never be abolished.<sup>660</sup>

Others argue that the issue of the death penalty is related to that of human rights and fulfilment of human rights should not be controlled by public opinion. Even if it seems to have the characteristics of democracy by representing majority will, every government and organisation cannot take it as an excuse to deprive an individual of their human rights.

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<sup>659</sup> Liang B, Lu H, Miethe T D, et al. 'Sources of variation in Pro-death penalty attitudes in china an exploratory study of Chinese students at home and abroad' (2006) 46 (1) British Journal of Criminology 119.

<sup>660</sup> Ken Bai, 'On the Chinese People's Attitude to the Death Penalty' (2012) 6 Issues on Juvenile Crimes and Delinquency 28.

Therefore, fickle and sometimes unreasonable public opinion cannot be used as the reason for delaying or hindering the progress of reform of the death penalty.<sup>661</sup>

Admittedly the right to life has many different interpretations, and some sovereignties do not recognise it as a human right to be protected. In China, although human rights as a general idea have been enshrined in the Chinese Constitution, there is neither a clear definition of 'human rights' in the Constitution, nor in other lower hierarchy laws.

This study reveals several important findings. Firstly, the majority of Chinese students and recent graduates reject the immediate abolition from now on up to 20 years in China. These people are from all over China and received their university education in different areas of China, and some are or have been overseas students in the UK, Germany and other death penalty free areas. The research shows that the educational background does not make those respondents favour abolition more. As This result confirms those of former studies that some individual factors, such as gender, the area an individual grows up in, and the background of education (in China or abroad), do not have a significant impact on attitudes to retention or abolition. It implies that the inherent common culture has an entrenched influence on shaping people's thinking.

Secondly, religious beliefs seem to bring different results with Christians having the lowest support for retention and Buddhists the highest. This is interesting given that the death penalty is contrary to the doctrine of Buddhism: 'non-killing of every living creature'. This finding may have been influenced by the small size of the Buddhist and other religious group. However, since the survey has covered a relatively large area in China, the total number involved is relatively large compared to other previous studies, so the outcome still has significant implications for future study and practical work. It also is coincident with former social studies that in China; the majority of Chinese people are atheist and among the rest, Buddhism occupies the largest proportion. This result reflects the true socio-culture structure in China's society. It also reflects Japanese studies

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<sup>661</sup> Fan Wen, 'The Reform of the death penalty in China: the Present Situation, Problems and the Future' (*aisixiang*, 18 December 2014) < [www.aisixiang.com/data/81523.html](http://www.aisixiang.com/data/81523.html) > accessed on 28 June 2015.

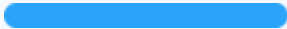


in that the majority of Japanese are Buddhists, and yet Japanese people overwhelmingly support the use of the death penalty (see Chapter 4).

Thirdly, the university students and recent graduates have a dynamic and an open attitude by actively answering questions in this questionnaire and giving their own viewpoints to these questions. In contrast to the previous investigations in which the general population expressed ignorance and indifference to the abolition or retention of the death penalty, the majority of these well-educated individuals were concerned with this problem. They showed critical thinking by querying some of the questions, although some were still confined to the long-term political viewpoints. These dynamic answers also showed that numerous factors influenced these respondents' opinions. Concerns for the loss of public order and self-security, the hatred of crime, patriotism and the call for independent development without interference by the outside world were all entwined with the issue of the abolition of the death penalty. This research provided a sample for future study that when a revised policy is developed, the younger generation with good education should be consulted and their views should be considered seriously.




**Table 1**



**Question:** *‘are you interested in the issue of abolition/retention of the death penalty in China?’*

options	Numbers of Respondents	percentage
No	177	 22.41%
Yes	582	 73.67%
Other answers	31	 3.92%
<b>Valid questionnaires</b>	<b>790</b>	

**Table 2**

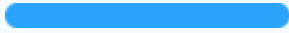




**Question:** *‘since 158 countries have abolished the death penalty in law or in fact amongst all 197 countries in the world, whether you think that China should follow this trend to abolish the death penalty’*

options	Numbers of Respondents	percentage
No	532	 67.34%

Yes	209	 26.46%
<u>The other answers</u>	49	 6.2%
<b>Valid questionnaires</b>	<b>790</b>	

**Table 3**

**Question:** *How long time do you think China should take to abolish the death penalty?*

Options	Numbers of Respondents	Percentage
now	34	 4.3%
5 to 10 years	115	 14.56%
10 to 20 years	127	 16.08%
20 to 50 years	189	 23.92%
After 50 years	236	 29.87%

never	89	11.27%
<b>Valid questionnaires</b>	<b>790</b>	

**Table 4**

**Question:** *The reason you support the use of the death penalty, (this question should be only answered by people who support to retain the death penalty in China)?*

Options	Number of respondents	Percentage
As a deterrent, the application of the death penalty can lower crime rates	195	24.68%
Retribution, who killed somebody else, should be killed	48	6.08%
Both of the above.	261	33.04%
None of the above.	45	5.7%
Empty	241	30.51%
<b>Valid questionnaires</b>	<b>790</b>	

**Table 5**

**Question:** *In the consideration of the abolition of the death penalty in China, which of the following factors you feel arguing for this? (Note: this question should be only answered by people who support to abolish the death penalty in China)*

Options	Numbers of Respondents	Percentage
The death penalty is an inhuman punishment	96	12.15%
It is using a violent method to try to prohibit another	130	16.46%
It breaches the international law	36	4.56%
The country does not have right to deprive people of life	155	19.62%
Other answers	40	5.06%
Empty	517	65.44%
<b>Valid questionnaires</b>	<b>790</b>	

Table 6

**Question:** Which capital crimes in the current criminal law do you support to retain (Note: this question should be only answered by people who support to retain the death penalty in China)?

Options	Numbers of Respondents	Percentage
All	119	15.06%
Only murder	221	27.97%
Intentionally inflicting injury upon another person which leads to his/her death	253	32.03%
Rape	291	36.84%
Robbery	101	12.78%
Kidnap	139	17.59%
Abducting and trafficking in a woman or child	320	40.51%
Arson; explosion; spreading poisons; and other using dangerous techniques resulting in jeopardising public security	335	42.41%

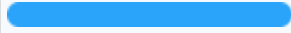

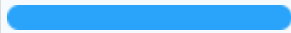
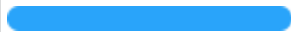



Drug related crimes	310	 39.24%
treason	299	 37.85%
all other military crimes	272	 34.43%
espionage	240	 30.38%
others	33	 4.18%
Embezzlement and Bribery	6	 0.76%
Empty	186	 23.54%
Valid questionnaires	790	

Table 7

The percentages of male and female answering the Question: *The reason you support the use of the death penalty*

X\Y	As a deterrent, the application of the death penalty can lower crime rates	Retribution, who killed somebody else, should be killed	Both of the above.	None of the above.	Empty	In total
Male	56(23.73%)	22(9.32%)	75(31.78%)	11(4.66%)	72(30.51%)	236

Female	139(25.09%)	26(4.69%)	186(33.57%)	34(6.14%)	169(30.51%)	554
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**Table 8**

The percentages of male and female answering the Question: *In the consideration of the abolition of the death penalty in China, which of the following factors you feel arguing for this?* (Note: this question should be only answered by people who support to abolish the death penalty in China)

X\Y	The death penalty is an inhuman punishment	It is using a violent method to try to prohibit another	It breaches the international law	The country does not have right to deprive people of life	Other answers	Empty	In total
male	39(16.53%)	38(16.1%)	15(6.36%)	48(20.34%)	12(5.08%)	151(63.98%)	236
female	57(10.29%)	92(16.61%)	21(3.79%)	107(19.31%)	28(5.05%)	366(66.06%)	554

**Table 9**

The percentages of people with different beliefs answering the Question: *In the consideration of the abolition of the death penalty in China, which of the following factors you feel arguing for this?* (Note: this question should be only answered by people who support to abolish the death penalty in China)

X\Y	The death penalty is an inhuman punishment	It is using a violent method to try to prohibit another	It breaches the international law	The country does not have right to deprive people of life	Other answers	empty	In total
Atheists	67(10.89%)	98(15.93%)	27(4.39%)	112(18.21%)	22(3.58%)	419(68.13%)	615
Christians	6(21.43%)	7(25%)	4(14.29%)	11(39.29%)	3(10.71%)	12(42.86%)	28

Muslims	2(14.29%)	2(14.29%)	0(0%)	7(50%)	2(14.29%)	6(42.86%)	14
Buddhists	10(14.29%)	13(18.57%)	5(7.14%)	12(17.14%)	5(7.14%)	42(60%)	70
Others (some self-considered as non-atheists but also as having no clear religious belief)	11(17.46%)	10(15.87%)	0(0%)	13(20.63%)	8(12.7%)	38(60.32%)	63

Table 10

The percentages of people with different beliefs answering the Question: *The reason you support the use of the death penalty?*

X\Y	As a deterrent, the application of the death penalty can lower crime rates	Retribution, who killed somebody else, should be killed	Both of the above	None of the above.	Empty	In total
Atheists	155(25.2%)	34(5.53%)	205(33.33%)	35(5.69%)	186(30.24%)	615
Christians	5(17.86%)	1(3.57%)	8(28.57%)	1(3.57%)	13(46.43%)	28
Muslims	0(0%)	0(0%)	6(42.86%)	1(7.14%)	7(50%)	14
Buddhists	19(27.14%)	9(12.86%)	21(30%)	6(8.57%)	15(21.43%)	70
Others (some self-considered as non-atheists but also as having no clear religious belief)	16(25.4%)	4(6.35%)	21(33.33%)	2(3.17%)	20(31.75%)	63



Table 11

The percentages of people with different beliefs answering the Question: *How long time do you think China should take to abolish the death penalty?*

X\Y	Now	5 to 10 years	10 to 20 years	20 to 50 years	More than 50 years	never	In total
Atheists	27(4.39%)	86(13.98%)	93(15.12%)	155(25.2%)	186(30.24%)	68(11.06%)	615
Christians	2(7.14%)	8(28.57%)	7(25%)	2(7.14%)	5(17.86%)	4(14.29%)	28
Muslims	0(0%)	5(35.71%)	2(14.29%)	1(7.14%)	6(42.86%)	0(0%)	14
Buddhists	1(1.43%)	11(15.71%)	9(12.86%)	12(17.14%)	27(38.57%)	10(14.29%)	70
Others (some self-considered as non-atheists but also as having no clear religious belief)	4(6.35%)	5(7.94%)	16(25.4%)	19(30.16%)	12(19.05%)	7(11.11%)	63

Table 12

The percentages of male and female answering the Question: *How long time do you think China should take to abolish the death penalty?*

X\Y	Now	5 to 10 years	10 to 20 years	20 to 50 years	More than 50 years	never	In total
male	18(7.63%)	29(12.29%)	37(15.68%)	46(19.49%)	73(30.93%)	33(13.98%)	236
female	16(2.89%)	86(15.52%)	90(16.25%)	143(25.81%)	163(29.42%)	56(10.11%)	554

## APPENDIX 7 TABLE OF CIRCUMSTANCES OF MEASURE OF PENALTY

Circumstances of measurement of penalty	Adjusting the proportion of measurement of penalty according to a criterion of penalty
14- 16 years old defendants	Reducing 30%-60%
16-18 years old defendants	Reducing 10%-50%
Defendants of an attempted crime	Reducing 50%
Defendants assisting a crime	Reducing 20-50% or above
Voluntary surrender	Reducing 40% or under, or exempting from the penalty
Meritorious performance	Reducing 20 %
Major meritorious performance	Reducing 20-50%
Confession	Reducing 20% or under
Repenting the crime in the court	Reducing 10% or under
Refunding the crime-related properties or compensating	Reducing 30% or under
Obtaining the victim's forgiveness	Reducing 20%
recidivism	Increasing 10-40%
Bad behavioural record	Increasing 10% or under
Victims are juveniles, old people, the disabled or pregnant women.	Increasing 20% or under
During the outbreak of an epidemic or a disaster	Increasing 20% or under

## APPENDIX 8 THE ABOLISHED CAPITAL CRIMES IN AMENDMENT 8 AND 9

	Capital Crimes Abolished in Amendment 8	Capital Crimes Abolished in Amendment 9
Chapter III Crimes of Disrupting the Order of the Socialist Market Economy	<ol style="list-style-type: none"> <li>1. Smuggling cultural relics ;</li> <li>2. Smuggling precious metals</li> <li>3. Smuggling precious and rare species of wildlife</li> <li>4. Smuggling goods</li> <li>5. Committing fraud by means of financial bills</li> <li>6. Using forged or altered settlement certificates of a bank</li> <li>7. Committing fraud by means of a letter of credit</li> <li>8. Falsely making out special invoices for value-added tax or any other invoices to defraud a tax refund for exports or to offset tax money</li> <li>9. Forging or selling forged special invoices for value-added tax</li> </ol>	<ol style="list-style-type: none"> <li>1. Smuggling weapons, ammunition</li> <li>2. Smuggling nuclear materials</li> <li>3. Smuggling counterfeit currency.</li> <li>4. Counterfeiting currency</li> <li>5. Raising funds by means of fraud</li> </ol>
Chapter V Crimes of Property Violation	<ol style="list-style-type: none"> <li>10. Theft</li> </ol>	
Chapter VI Crimes of Obstructing the Administration of Public Order	<ol style="list-style-type: none"> <li>11. Teaching another person how to commit a crime</li> <li>12. Excavating and robbing a site of ancient culture or ancient tomb of historical, artistic or scientific value</li> <li>13. Excavating and robbing fossils of paleo anthropoids or paleo vertebrates of scientific value</li> </ol>	<ol style="list-style-type: none"> <li>6. Arranging for another person to engage in prostitution</li> <li>7. Forcing another person to engage in prostitution</li> </ol>
Chapter X Crimes of Servicemen's Transgression of Duties		<ol style="list-style-type: none"> <li>8. Obstructing a commander or a person on duty from performing his duties.</li> <li>9. During wartime fabricating rumours to mislead others</li> </ol>

Source: The Amendment 8 and The Amendment 9 to the Criminal Law.

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