

Confronting Capital Punishment in Asia

*Human Rights, Politics,
and Public Opinion*

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Recent Reforms and Prospects in China

Liu Renwen

1. Introduction

The death penalty in China has attracted international attention because of the large but still secret number of executions that take place annually and the wide variety of crimes that remain subject to capital punishment. This chapter reviews the reforms that have been made in the death penalty system in China since the amendment of the Criminal Law of the People's Republic of China (Criminal Law) in 1997. It introduces the general principle to be followed in judicial practice of 'killing less and cautious executions', and analyses two major changes that have resulted from the adoption of this policy. First, on 1 January 2007, the Supreme People's Court (SPC) of the People's Republic of China (PRC) took back from the Provincial High Courts (to which it had been devolved for most types of crime during the 1980s) the power of reviewing and approving, or not approving, death sentences with immediate execution imposed by the People's Intermediate Courts and upheld by the Provincial High Courts. As will be explained below, this was intended to strictly limit the use of the death penalty by the Chinese lower courts. Secondly, on 25 February 2011, the Chinese legislature adopted 'Amendment VIII to the Criminal Law' which abolished the death penalty for 13 non-violent crimes.¹ This was the first time that China had reduced the number of statutory death penalty offences and therefore was of great significance as an indicator of further possible reductions in the number of capital offences. It is fair to say that China has made significant progress in a short period. This chapter will review this

¹ The 13 types of offences include the crimes of smuggling cultural relics, crimes of smuggling precious metals, crimes of smuggling precious wildlife or the product thereof, crimes of smuggling common goods and articles, crimes of conducting swindling activities by means of financial bills, crimes of conducting swindling activities by means of financial receipts, crimes of conducting swindling activities by means of credit cards, crimes of filing falsely made out value-added tax invoices or other kinds of invoices used for obtaining fraudulently tax refunds on exported items or tax deduction, crimes of counterfeiting or selling counterfeited special invoices for value-added tax, crimes of stealing, crimes of passing on means of crime, crimes of excavating and robbing a site of ancient culture or ancient tomb, crimes of excavating and robbing fossils of ancient human beings or ancient vertebrate animals.



recent progress and analyse the methods of reducing and restricting the application of the death penalty in judicial practice and through legislative efforts. In addition, it also puts forward some suggestions for further reforms of the death penalty system in China.

2. Cautious Application of the Death Penalty by the Courts

When China promulgated its amended Criminal Law in 1997, academic researchers generally argued that there were too many types of offences that were still subject to capital punishment, and therefore called for the number to be reduced. Although agreeing that such a viewpoint was worthy of their attention, the Chinese legislature insisted that 'the severe current situation of social safety and economic crimes implies that conditions for the abolition of capital punishment are absent'.² Therefore, it made a decision 'neither to increase nor to reduce the death penalty in principle'. Directed by this decision, the new Criminal Law absorbed all existing capital offences laid down in separate criminal laws: the total number amounted to 68. However, the new Criminal Law did make some progress in restricting the application of the death penalty. For example, the maximum sentence that could be applied to a juvenile who had committed a capital offence when under the age of 18 was reduced from the death penalty with a two-year suspension to life imprisonment,³ and the death penalty for theft was limited to two types of dishonest crimes: stealing from banking institutions when the amount involved was especially huge, and stealing precious cultural relics when the circumstances were serious. That is to say, the Criminal Law (1997) abolished the death penalty for ordinary theft, even though it was quite prevalent at that time.

In 1998, the Chinese government signed the International Covenant on Civil and Political Rights (ICCPR),⁴ Article 6(2) of which clearly stipulates that, 'in countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes'. According to the interpretation of the United Nations Human Rights bodies, the 'most serious crimes' here should be strictly limited, and the death penalty should be a very exceptional punishment. Now that China is preparing for the ratification of the ICCPR, it needs to meet the requirement to further limit the scope of the death penalty through legislative and judicial channels.⁵

² 'Introduction to "Draft Amendment to Criminal Law"', made at the annual session of the National People's Congress NPC by Wang Hanbin, the then Vice-Chairman of Standing Committee of the NPC.

³ According to the Criminal Law, the death penalty with two years suspension is a kind of death sentence. If no further intentional crimes are committed during the suspension period, the sentence in principle will be commuted to life imprisonment.

⁴ International Covenant on Civil and Political Rights, GA Res 2200A (XXI), UN DocA/6316 (1966) 999 UNTS 171, adopted on 16 December 1966 and entered into force on 23 March 1976.

⁵ At first, the attitude of Chinese researchers towards provisions on the death penalty in the ICCPR was not completely positive. For example, most researchers thought that it would satisfy ICCPR's requirement by changing the formula in the Criminal Law adopted in 1979 ('the death penalty shall

The trend to strictly restrict the use of capital punishment was clearly evident when on 1 January 2007 the SPC, with the support of the central government, withdrew from the Higher People's Courts (HPC) in the Provinces the power of reviewing and approving, or disapproving, capital sentences.⁶ The Criminal Law adopted in 1979 had clearly provided that the SPC shall exercise this power, but since the 1980s in response to the perceived severity of crime in China, the SPC had delegated its authority for most types of crime⁷ to the HPCs so that cases could be concluded more speedily.⁸ This caused a significantly negative impact on the quality of decisions in capital cases in the Intermediate People's Courts (which have power to impose death sentence at the trial of first instance), and in the HPCs (in which appeals are dealt with at the trial of second instance). After advocacy over a considerable period from the academic community, which called for restriction of the use of the death penalty and uniform application of sentences in capital cases, the SPC eventually withdrew the power to approve capital sentences from the HPCs in early January 2007, and accordingly set up three new criminal divisions to exercise the power of review.⁹

When making preparations for withdrawing the power of approving death sentences, the SPC issued the 'Notification on Further Regulation of the Second Trial of Death Penalty' in December 2005, which ordered HPCs to open all court hearings to the public from 1 January 2006 in cases where appeals had been filed which raised important issues of fact and evidence. Six months later it went further and required that all appeals should be heard in public from 1 July 2006 in order to improve the quality of second instance hearings and the decisions made and thereby laid down a good foundation for the SPC to conduct unified review and approval of decisions in capital cases.¹⁰

The return of the power to review and approve or reject capital sentences to the SPC, directly or indirectly, led to a decline in the number of persons

only be applied to criminals who have committed a heinous crime with the worst evil mind') to 'the death penalty shall be only applied to criminals who have committed extremely serious crimes' when the new Criminal Law was introduced in 1997. When looking back now, I cannot agree that the idea is scientific. The fact that there were 68 capital offences, including a large number of non-violent ones, shows clearly the big gap between Chinese Criminal Law and the requirement of the ICCPR.

⁶ In order to withdraw the power to review and approve death sentences, the SPC recruited hundreds of new judges, and thereby made the SPC the largest Supreme Court in the world.

⁷ It is worth noting that the Supreme People's Court only decentralized some of the review and approval power of death penalty to the Provincial High Courts, such as the cases of murder, rape, robbery, explosion and other types of crimes seriously endangering the public security and social order, but not such crimes as embezzlement and bribery. According to the information released by the Supreme People's Court in 1997, the percentage of death penalty cases reviewed and approved by the Provincial High Courts occupied 63.2 per cent of the total death penalty cases. See also Liu Renwen, *Structure and Vision of the Criminal Law (Xingfa De Jiegou Yu Shiye)* (Beijing, Peking University Press 2010) 196–8.

⁸ According to the Criminal Procedure Law of the People's Republic of China, the jurisdiction of death penalty cases at first instance is the Intermediate People's Court or above.

⁹ Liao Weihua, 'The Supreme People's Court Will Take Back the Power of Reviewing and Approving Cases of Death Penalty and Set up Three Special Tribunals', 7 September 2005, <<http://legal.people.com.cn/GB/42735/3673797.html>> (accessed 27 January 2013).

¹⁰ Until then, the appeal at the trial of second instance was mainly based on written documents.

executed. In 2008, Xiao Yang, the then president of the SPC, in his report to the annual session of the National People's Congress (NPC), disclosed to representatives that the number of death sentences with a two-year suspension now exceeded for the first time in China the number sentenced to be executed immediately. Furthermore, the number of executions had decreased. Meanwhile, the number of serious reported crimes, such as causing an explosion, homicide, and arson was even lower in 2007 than the year before. Besides, when interpreting the SPC's annual report, Ni Shouming, the then spokesman of the SPC, pointed out that the quality of decisions made at first and second instance trials had also been improved. Even so, the proportion of cases where the SPC disapproved capital sentences in 2007 was still about 15 per cent, due to facts in the original trials being unclear, evidence insufficient, the punishment excessive, or specific proceedings illegal. In fact, the decline in the overall use of the death penalty was far more than 15 per cent. The message conveyed by the SPC to courts at all levels was that the death penalty shall be strictly restricted, and should not be used at the trial of first or second instances if at all possible. In the past, some judges said that the first choice of penalty would be death when serious crimes had been committed, but now they would first consider whether or not there were mitigating factors to avoid the imposition of the death penalty. In addition, information released from the procuratorial organ showed that the number of protests from that body requesting immediate execution has been clearly lower in recent years. This is in sharp contrast with the past when the procuratorate often protested if it thought that a death sentence with two years' suspension was too lenient punishment. All these changes have been due in large part to the cooperation of the prosecution service and the government in implementing the criminal policy of reducing the application of death penalty. It is estimated that the number of executions have been reduced by at least a half, even two-thirds, since the withdrawal of the approval power from the Provincial High Courts and its return to the SPC.¹¹

Judicial control on the use of the death penalty is still in progress, including further improvement in the transparency and fairness of reviewing procedures and in regulating the examination and determination of the evidence relating to the criteria to be satisfied before a death sentence can be imposed. For example, in June 2010 the SPC, the Supreme People's Procuratorate (SPP), and other Ministries jointly issued the Regulations on Review and Judgment of Evidence of Death Penalty Cases and Regulations on Elimination of Illegal Evidence in Criminal Cases, and thereby established higher standards for judicial organs in handling criminal cases and especially death penalty cases, because improper practices in collecting evidence, examining, judging, and excluding illegal evidence were still to be found. In addition, regulations have also been handed down on issues such as how defence lawyers and prosecutors should intervene in cases during the approval

¹¹ Secrecy about the execution toll in China has been strongly criticized by scholars, including Chinese researchers. See Chen Guangzhong, 'Discussing the Pros and Cons of Releasing Capital Punishment Figures', *Southern Weekend*, 16 December 2009.

process for capital sentences in order to guarantee fairness and prevent corruption in the process of handling cases.¹²

3. Reducing Use of the Death Penalty Through Legislation

It is a qualitative jump from strict restriction on the use of the death penalty in practice to decreasing the number of capital offences in law. The ‘Amendment VIII to the Criminal Law (Eighth Amendment)’, adopted in early 2011, abolished cautiously the death penalty for 13 types of non-violent crimes, including four types of crimes of smuggling, five types of financial crimes, and two types of crimes against control of cultural relics, in addition to theft and the crime of imparting criminal methods. Furthermore, a new provision was added, stating that ‘the Death Penalty shall not be applied to a person who has reached the age of 75 at the time of trial, except cases where death consequence is caused by especially cruel means’.¹³

The reasons why the Chinese legislature made substantial progress in abolishing the death penalty might be summarized as follows:

The first reason, in the background, is that abolition of the death penalty has become an international trend. As Roger Hood has put it:¹⁴

At the end of 1988, only 52 (29%) of the then 180 member states of the United Nations had abolished the death penalty for murder and other common crimes, but only 35 of them—less than one fifth of all nations—had eliminated capital punishment altogether from their penal and military codes. But since then [by the end of 2011] the number of abolitionist nations has doubled to 104 of the 196 UN member states and the vast majority, 96 of them, have abolished it for all crimes in all circumstances. . . . Among the 92 countries that retain the death penalty in law only 43 have executed *anyone* within the past 10 years and not yet announced a moratorium—less than a quarter of all nations and Amnesty International regards 34 of the remaining 49 as truly ‘abolitionist in practice’: the other 15 although not having executed anyone for at least 10 years might still be liable to do so. Thus 70 per cent (138/196) of states no longer inflict or intend to inflict the ultimate penalty.

For example, Russia, which retains the death penalty in law, has not executed anyone since 1966 and in November 2009 its Constitutional Court effectively abolished the death penalty by declaring that the moratorium on executions will

¹² The SPP set up an internal working office responsible for reviewing the death sentences in 2007, and now the office has been officially approved. It is expected that more prosecutors will be recruited in the office in order to regulate review and approval of death sentences. Many scholars, including the author, advocate that review of death sentences should be converted from a kind of inside examination to a public hearing with lawyers and prosecutors present.

¹³ In the past, there were no such ‘preferential’ measures for older offenders.

¹⁴ Roger Hood, ‘Towards Global Abolition of the Death Penalty: Progress and Prospects’, speech delivered at the Jindal Global Law School, Delhi 14 November 2011 (unpublished manuscript). See also Roger Hood, ‘Towards Global Abolition of the Death Penalty: Progress and Prospects’, in Luis Arroyo, Paloma Bigling, and William A Schabas (eds), *Towards Universal Abolition of the Death Penalty* (Valencia, Tirant lo Blanch 2010) 419–41.

continue until the Russian Parliament ratifies an international treaty abolishing capital punishment.¹⁵

In those countries without executions or even with few executions, there is no evidence to show that the situation of public safety deteriorated or there was a necessary correlation between abolition of the death penalty and an increase or decrease in the crime rate. This has been acknowledged by more and more state leaders and citizens. Such information has had a marked impact on thinking in China.

The second reason lies in the economic development and enriched experience in the area of economic management and regulation. Economic development will naturally promote the respect for human life. When material conditions are no longer impoverished, human life will be treated as invaluable and matchless. What is more important is that China has established and improved administrative supervision measures in the economic sphere, which were absent at the beginning of 'Reforming and Opening to the World' (Chinese economic reform) in the early 1980s, and these measures are key to the prevention of economic crimes and more effective than retrospective punishment. In fact, the majority of the 13 types of capital offences which were abolished recently had been gradually added to the Criminal Law in the 1980s as a harsh response to the rapid increase in economic crimes due to inefficiency of the old management system and incompleteness of new systems during the period of economic development. At present, effective regulation in these fields and the gradual quenching of the people's great outcry against economic crimes has correspondingly contributed to creating a favourable atmosphere for reducing the scope of the death penalty. According to a survey conducted by the legislative body, the death penalty had seldom or never been applied to these 13 types of crimes in recent years. Therefore, the abolition of the death penalty for these crimes has not only done no harm to society, but also generated no opposition from the public in China.

Thirdly, China's empirical experiences at the legislative and judicial levels have provided support for further reduction of executions. When China abolished the death penalty for ordinary theft in 1997, the public were concerned that ordinary theft, an offence closely related to the masses, would increase in China. However, in recent decades there has been no increase in the occurrence of recorded thefts. This fact shows that crimes and the death penalty are not simply correlated as often imagined due to the complex factors that contribute to the crime rate. In the four years that have passed since the withdrawal of approval power of death sentences from the Provincial High Courts and the resulting considerable decrease in the number of executions, crime rates of some offences have decreased due to improvements in social management. This firmly proves that the state can reduce capital offences with strong confidence that by improving management, social stability can be maintained.

¹⁵ Haley Wojdowski, 'Russia Constitutional Court Extends Moratorium on Death Penalty', *Jurist*, 19 November 2009, <<http://jurist.org/paperchase/2009/11/russia-constitutional-court-extends.php>> (accessed 27 January 2013).

Fourthly, the state has relieved anxiety among the masses by adjusting the punishment structure. There was a fear that if some serious violent criminals were not sentenced to death, they might take advantage of the loopholes in the law which would enable them to be released and threaten society again. Keeping this concern in mind and in order to create conditions for reduction in the use of the death penalty, Amendment VIII to the Criminal Law, responding to the criminal policy of combining severity with lenience, adjusted the system of long-term imprisonment. For instance, it imposed strict limits on mitigating the term of imprisonment of those not sentenced to death and extended the proportion of the sentence they would actually serve.¹⁶ For example, it provided that, for a recidivist or a person convicted of murder, rape, robbery, abduction, arson, explosion, dissemination of hazardous substances or organized violence who is sentenced to death with a reprieve, the people's court may, in sentencing, decide to put restrictions on the commutation of his sentence in light of the circumstances of the crime committed.

Fifthly, public opinion has been appropriately guided in China. China has already written into the Constitution the line that 'the State has respect for and protects human rights'.¹⁷ The principle of 'people-oriented' being actively advocated in criminal legislation and criminal justice has undoubtedly played an active role in constructing a tolerant and humane social psychology. Under the circumstance of incomplete abolition of the death penalty, reforms of the capital punishment system such as use of lethal injection, the gradual removal of shooting as the execution method, and allowing death sentenced criminals to meet their relatives before the execution, have also helped to reinforce the social psychology of respect for life. In addition, detailed reports and analysis in the mass-media with regard to unjust, false, or wrong charges in the cases of She Xianglin,¹⁸ Zhao Zuohai,¹⁹ and Nie Shubin²⁰ have robustly confirmed the public understanding of, and support for, the series of measures intended to ensure cautious and less use of the death penalty.

Finally, public concerns have been fully taken into account in deciding what types of capital offences should be the first ones to be abolished. Although there were 13 types of capital offences abolished at one time, there are still 55 capital crimes in the Criminal Law of China. Obviously, this is contrary to Article 6(2) of the ICCPR that 'in countries that have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes...'.²¹

¹⁶ According to Amendment VIII, if a convict has any major meritorious performance, the sentence shall be commuted to imprisonment of 25 years. In contrast, the original article provided that the sentence shall be commuted to imprisonment of more than 15 years but less than 20 years.

¹⁷ Article 33(3) of the Constitution of the People's Republic of China (2004).

¹⁸ For the detailed story, see Liu Li, 'Wrongly Jailed Man Freed after 11 Years', *China Daily*, 14 April 2005, <http://www.chinadaily.com.cn/english/doc/2005-04/14/content_434020.htm> (accessed 30 December 2011).

¹⁹ For the detailed story, see Clifford Coonan, 'Zhao Zuohai: Beaten, Framed and Jailed for a Murder that Never Happened', *The Independent*, 14 May 2010, <<http://www.independent.co.uk/news/world/asia/zhao-zuohai-beaten-framed-and-jailed-for-a-murder-that-never-happened-1973042.html>> (accessed 23 June 2013).

²⁰ For the detailed story, see Amnesty International, 'Nie Shubin: Wrongly Executed', 23 March 2008, <<http://www.amnesty.org.au/china/comments/11243/>> (accessed 30 December 2011).

4. Further Reduced Use of the Death Penalty

China is planning to ratify the ICCPR that it signed in 1998 and this will no doubt be an issue that is discussed when it is required (like all UN member states) to undergo a Periodic Review by the UN Human Rights Council. Judging from the precious work of the Human Rights Council, the fact that 55 offences are still punishable by capital punishment is certainly unacceptable and it is difficult for China to provide a convincing justification. More than half of the 55 offences are non-violent crimes. For instance, corruption and bribery which attract strong public resentment at present and are considered to endanger the foundation of the ruling party have not been put on the abolition agenda in China, despite the fact that they are non-violent in nature and scholars have been insisting that such crimes should also be on the abolition list because there is international consensus that such offences are not to be regarded as among 'the most serious crimes'. The 'Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty' adopted in 1984 by the United Nations Economic and Social Council laid down that 'their scope should not go beyond intentional crimes with lethal or other extremely grave consequences'.²¹ Although 'intentional crimes with other extremely grave consequences' might leave some space for justification in a broader sense, the Secretary-General of the United Nations in his 2010 Report concerning 'Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty' further pointed out that intentional crimes with lethal or other extremely grave consequences should be those endangering life, that is, that privation of life is very likely to happen.²² Furthermore, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Professor Philip Alston, called in 2007 for revision of Safeguard 1 so that it would read: 'The death penalty can only be imposed where it can be shown that there was an intention to kill which resulted in the loss of life.'²³

Therefore, China should continue to make efforts to reduce the scope of the death penalty at the legislative level and this will require the government to create conditions capable of decreasing the occurrence of several types of capital offences. In order to abolish the death penalty for such crimes as corruption and bribery, it is crucial to promote system construction such as strengthening the supervision of news media on public power and introducing a law on property declaration of public officers. Only

²¹ United Nations Economic and Social Council, 'Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty', ESC Res 1984/50, UN Doc E/1984/84, adopted on 25 May 1984, Safeguard 1.

²² United Nations Economic and Social Council, 'Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty', UN Doc E/2010/10, Substantive Session of 2010, New York, 28 June to 23 July 2010, adopted on 18 December 2009, para 63.

²³ Human Rights Council, 'Civil and Political Rights, Including the Questions of Disappearances and Summary Executions: Report of the Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, Philip Alston', UN Doc A/HRC/4/20, Fifth Session, adopted 29 January 2007, para 65. And in general on the interpretation of the concept of 'most serious crimes', see Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* 4th edn (Oxford, Oxford University Press 2008) 130–2.

when a type of crime rarely happens and its harm to the state and society is not so widespread will the public outcry decrease. Under such circumstances, abolition of the death penalty would probably not confront strong public opposition.²⁴ In this sense, it requires effort beyond the criminal law to address the death penalty issue in corruption and bribery cases.

In the immediate future, as long as the domestic and international situations stay stable, China will continue to move in the direction of limiting and decreasing the use of the death penalty. As for the death penalty for non-violent crimes, economic crimes such as ‘fund-raising scams’ can be removed from the death list in the first place, followed by such crimes as corruption and bribery. It would be realistic to put crimes such as ‘serious premeditated murder’ at the end of the abolition agenda due to the deeply-rooted ideology of ‘compensating a life with a life’ in Chinese culture.

5. Specific Systems for Reforming the Death Penalty

Prosecutorial supervision in reviewing capital sentences

According to the Chinese Constitution, the prosecutorial organ in China is not only a public prosecution organization but also a supervisory one for law enforcement.²⁵ Therefore, after the SPC took back the power of reviewing and approving capital sentences in 2007, the SPP set up a special office responsible for supervising cases where the death sentence has been either upheld or not upheld by the SPC. Then, how can the review of capital sentences be supervised in practice? The following are some preliminary suggestions.

First, the major purpose of returning the power of reviewing and approving, or disapproving, capital sentences to the SPC was to implement the policy of killing less and cautiously. Therefore, the legal supervision of the review of death penalty by the prosecutorial organ should contribute to achieving this goal. In cases where a defendant who should not have been sentenced to death was sentenced to death or his death sentence had been approved after appeal to an HPC, the prosecutorial organ should submit a legal supervision advice or file an appeal to the HPC

²⁴ Although whether to abolish the death penalty is more a matter of principle than one of public opinion, no politician will ignore public opinion when making a decision. According to the *Fight for the Abolition of the Death Penalty* by Robert Badinter, as early as in President D’Estaing’s presidency, the President himself had agreed that the death penalty should be abolished. However, he never publicly expressed his support for abolition due to the fact that the majority of voters in France were then against it. When Mitterrand was elected President, although supporters of the death penalty still accounted for more than a half, the support rate had dropped. It is under such a condition that it was possible for him to successfully facilitate the abolition of the death penalty in France according to his belief. It should also be noted that when capital punishment for murder was abolished in Britain in 1965, a large majority of the public were in favour of retaining it. See Hood and Hoyle (n 23) 352–3.

²⁵ Articles 129 and 131 of the Constitution of the People’s Republic of China (2004).

or SPC in a timely manner, so as to facilitate the SPC to revoke an inappropriate death sentence.

Secondly, as the supervisor in the review procedure, the SPP bears the responsibility of safeguarding justice and the common interest of society. Where judges disapprove death sentences in cases of taking bribes, abusing the law for private interest, or failing to handle the cases strictly in accordance with legal requirements, or the disapproval is not based on legal facts and objective circumstances or is obviously unfair, the SPP should protest against court decisions, and place judges involved on file for investigation and prosecution, so as to guarantee fairness in reviewing death sentences.

Thirdly, while reviewing death sentences, whether or not the hearing is open, the SPC should not only listen to the views of the defendant and his or her attorney, but also to those of the prosecutorial organ. This is necessary to ensure that the final decision is based on all related facts and prevent it from being partial. The best choice might be to make the procedure of reviewing the death sentence a trial procedure of third instance, or at least as a public hearing with three parties being present. It would be best if this could be put into the draft amendment of the Criminal Procedure Law.

Making the method of execution uniform

Safeguard 9 of the ‘Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty’ states that ‘where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering’.²⁶ In the recent past, shooting was the only means of execution in China.²⁷ The Criminal Procedure Law amended in 1996 added lethal injection as an execution means based on such considerations as injection could reduce suffering and preserve the corpse better than shooting and avoid cruel scenes. Since the first injection execution was carried out in Kunming, the capital city of Yunnan Province, in 1997, it has now become a common method in some provinces. This reflects a humanistic advancement in the means of execution in China. However, shooting was still retained, especially in rural areas as it takes time to develop drugs, build execution sites, and train personnel.

After a ten-year trial period, I think it is time to completely replace shooting with lethal injection. Currently the reasons why some persons are executed by

²⁶ United Nations Economic and Social Council, ‘Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty’, Safeguard 9.

²⁷ Execution methods in history might generally be divided into two categories, one intended to deprive persons of life, and the other to cause great sufferings while depriving persons of life. In China, the latter category included cutting in bits (*lingchi*), decapitation (*xiaoshou*), posthumous execution (*lushi*), etc. When Shen Jiaben (1840–1913) was in charge of amending laws in the late Qing dynasty, he firmly insisted that execution means should be uniform and the above means intended to causing pain to those to be executed should be abolished, and his advice was approved by the Qing government. Needless to say, the current means of execution in China should not be compared with those in feudalism in terms of cruelty. However, Shen Jiaben’s proposal for a uniform method of execution is still a valuable reference point for contemporary China.

lethal injection and others by shooting is poorly understood by the general public. They ask why so many corrupt officials have been executed by injection, and this has harmed people's faith that all citizens are equal before the law. Some courts determine execution means according to public anxiety about a case. This is also not in accord with the original intention of legislation to make the execution means more humane. Shooting should be just a transitional measure until the conditions for completely adopting injection are mature. Even if current conditions make it impossible to completely abolish the death penalty in China, it does not mean that China should choose an execution method that may cause unnecessary pain to those put to death.

This problem should be resolved strategically by the state. Furthermore, judicial policemen and full-time forensic doctors responsible for carrying out injection execution should be allocated uniformly throughout the national court system and receive the necessary training. I suggest that the SPC issue documents specifying the practical requirements and medical procedures to be followed in carrying out lethal injections as soon as possible, so as to ensure that this more humane method of execution can be used in every case. Meanwhile, it is necessary to monitor all lethal injections so as to ensure that the kind of mistakes that have led to 'ugly performance' and probably great suffering by some offenders executed by lethal injection in the United States do not occur in China.

Separating the decision makers

To separate the organization responsible for ordering and carrying out the execution from the one responsible for making the decision to sentence the person to death is of great significance in the current context of strictly controlling the death penalty. In fact, the decision to sentence to death and the decision to enforce the punishment are inherently different, as the former should belong to the judicial authority while the latter belongs to an administrative body. Thus, fixed-term imprisonment and life imprisonment sentences imposed by the judicial organ are carried out specifically by the executive organ—the prison administration—after the judgments are pronounced. However, as regards the death penalty, the Chinese have been used to the system under which the death penalty is both pronounced and executed by order of the court itself. According to Articles 210–213 of the Criminal Procedure Law, when the death penalty with immediate execution is pronounced or approved by the SPC, the President of the court shall issue an order for the execution to take place. After receiving this order from the SPC to execute a death sentence, the People's Court at the lower level shall cause the person to be executed within seven days.

Such practice is significantly different from that in other countries that retain the death penalty where a death sentence is declared by a court but would not be carried out until the Minister of Justice signs and issues an execution order. This is the reason that we often read reports showing how many people have been sentenced to death and how many people were actually executed in a country, and the number of the latter is far less than that of the former.

For example, although the death penalty has not been abolished in Japan, the fact that there have been often only one or two executions in a year has made the most serious penalty almost a symbolic punishment there. An important reason is that the authority to approve execution in Japan belongs to the Minister of Justice. Now, there are about 130 inmates who were sentenced to death but have still not been executed. There are a number of reasons for this that can be summarized as follows.

First, according to the Japanese law, any convict sentenced to death is entitled to use remedial measures such as filing an appeal and a special appeal and applying for a pardon. Once he/she appeals, the Minister of Justice must postpone signing the execution order. Moreover, the Minister of Justice will not sign the order until the internal review procedure has reached the conclusion that the death sentence is appropriate after a special panel has examined all aspects of the case and a superior panel has re-examined it and submitted its decision to the Minister. Furthermore, in cases of joint crime or where a defendant was involved in other cases, the Minister of Justice should not sign the execution order before other defendants have been tried and their conviction and sentence declared. The decision to issue an execution warrant is entirely at the discretion of the Minister as advised, and several have refused to sign them because of their Buddhist beliefs.²⁸

In particular, according to Article 475 of the Criminal Procedure Law of Japan, the Minister of Justice should sign the execution order within six months after the court hands out a valid judgment of the death penalty. However, along with the increased attention to human rights protection, the provision only exists in name now because it is impossible to complete the review procedure for signing the execution order in such a short time. Therefore, in a well-known case in 1998, when the condemned brought a lawsuit against the government claiming that he was not executed in six months, the court gave a subjective explanation that the death penalty shall be executed in six months when possible, but because it had been proved to be impossible, it dismissed the prisoner's appeal.

It is therefore very likely that if China were to give to a body other than the SPC the power to make the order to issue and carry out the execution, the number of persons executed might be further decreased by allowing more time for appeals for clemency or commutation of the sentence to be considered.

Establishing a special amnesty and clemency system

Article 6(4) of the ICCPR provides that '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'. Considering that China will not abolish the death penalty in the immediate future, a special

²⁸ Megumi Satoh, the Minister of Justice in Kaibe's cabinet from 1990 to 1996, and Sugiura Seiken, the Minister of Justice in Junichiro Komizu's cabinet from 2005 to 2006, both of them Buddhists, never signed an execution order. On Japan's practices, see Ch 9.

amnesty/clemency procedure should be provided for capital cases in order to meet the human rights standards in the ICCPR.²⁹

To add a procedure for special amnesty or clemency is also the requirement of perfecting the present death penalty system. As mentioned above, Article 211 of the Criminal Procedure Law of China provides that after receiving an order from the SPC to execute a death sentence, the People's Court responsible for execution at a lower level shall cause the sentence to be executed within seven days. However, the Court at a lower level shall suspend execution and immediately submit a report to the SPC for an order under one of the following conditions:³⁰

- (1) if it is discovered before the execution of the sentence that the judgment may contain an error;
- (2) if, before the execution of the sentence, the criminal exposes major criminal facts or renders other significantly meritorious service, thus the sentence may need to be revised; or
- (3) if the criminal is pregnant.

The SPC pointed out in the 'Reply on How to Apply Law in Cases Where Conditions Make it Necessary to Change the Original Sentence before Execution' issued in 1999 that, as far as cases mentioned in Article 211 are concerned, the court granted the power of reviewing and approving death sentences (now of course the SPC) shall either change the original sentence or order courts at the lower level to conduct a retrial. However, Articles 204 and 205 of Criminal Procedure Law provide that a case shall not be retried unless some definite error has been found in a legally effective judgment or order of the trial court as to the determination of facts or application of law. The reason for changing the original sentence under the second condition in Article 211 may not be an error in a legally effective judgment as to the determination of facts or application of law. The reason for changing the original sentence under the third condition in Article 211 may also not be an error in a legally effective judgment, because the criminal might not get pregnant 'during the trial', but after trial or even after the original verdict became effective.³¹ The policy of mitigating the punishment in cases where females under a death sentence get pregnant after trial is based on the humane consideration that another innocent life shall never be subject to the same punishment, and is also prohibited by Article 6(5) of the ICCPR, which provides that sentence of death shall not be

²⁹ It might be said that application for pardon or commutation of punishment has become an internationally recognized right. For example, Safeguard 7 of the *Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty* and Article 6(4) of the ICCPR provide that anyone sentenced to death shall have the right to seek pardon, or commutation of sentence, and Art 4 of American Convention on Human Rights also provides that every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence.

³⁰ Article 211 of the Criminal Procedure Law of China.

³¹ It might be argued that it is impossible for a criminal to get pregnant after trial or her sentence becoming valid as she would be in custody. However, it has been proven it is not totally impossible. For example, according to a report in *Jiangnan Times* published on 15 July 2000, a female death sentenced inmate got pregnant after being raped by the head of detention house and other policemen. And her death sentence accordingly was commuted to life imprisonment.

carried out on pregnant women. Therefore, I agree with the proposal that a new procedure for special amnesty be constructed for the two conditions—(2) and (3)—mentioned above.³²

It might be argued that the special review procedure provided by the SPC in capital cases but not to other criminal cases, has shown that it can function also as an amnesty or clemency tribunal. But I cannot agree with this opinion for a number of reasons. In the first place, the review procedure in capital cases is judicial in nature, and the special amnesty procedure is independent of the judicial organ. A death sentence is not valid before completion of the review procedure, while the special amnesty or clemency procedure will not be initiated until a death sentence becomes valid. Moreover, the review procedure cannot fully replace the function of the special amnesty or clemency procedure. For example, a criminal who begins to suffer from a mental or incurable disease after being sentenced to death might deserve to be pardoned even though it may be hard to find legal grounds to exempt him/her from the death sentence in the review procedure. Furthermore, it is not redundant to add a new special amnesty procedure on top of the trial procedure of first and second instance and the review procedure. Many lessons have proved that even in a three-tier system, miscarriages of justice still cannot be fully prevented in capital cases. Even in countries such as the United States where the capital procedure seems desperately long, news has still constantly burst out in recent years that innocent people have been convicted, and many have come close to execution.³³

The following questions should be borne in mind in designing the special amnesty or clemency procedure.

(1) It has been suggested that the SPC should be the agency,³⁴ but this opinion is debatable. Since the SPC has been given the authority to review and approve the death sentences, to give it also the power to grant special amnesty or clemency would mean that the decisions that should be separate would be exercised by the same organ. This may result in an uneasy mechanism and a negative effect. For example, if the SPC first approves a death sentence and then grants a special pardon or clemency, even if the decisions were made by different divisions within the institution, the SPC's authority would be surely doubted by the public. As far as special amnesty or clemency in individual cases are concerned, I suggest that the President of the State be authorized to decide and issue a special amnesty order directly, and as for the multiple cases, I suggest that the Standing Committee of the NPC make the decision and the President of PRC issue the order. In addition, China should also consider establishing a special Pardons or Clemency Board to advise the President or the Standing Committee on whether or not to grant

³² See Zhu Huaijun, 'On Construction of Amnesty System in Capital Case' (2004) 5 *Journal of Hunan Normal University (Social Sciences)* 86–90.

³³ It is impossible to know for sure, but there may also have been executions of innocent persons in the United States since 1977, information of which is available at <<http://www.deathpenaltyinfo.org/>> (accessed 30 December 2011).

³⁴ See Huaijun (n 32).

clemency or a pardon, as is the case in many other jurisdictions that retain capital punishment.³⁵

(2) As for the content of special amnesty, in cases of persons under immediate sentence of death, it might be better that their application is confined to mitigation of punishment rather than being filed for total pardon and resumption of rights. It would be psychologically difficult for the public to accept total exemption of death sentenced inmates from punishment. And because the precondition for resumption of rights is that a sentence has been served or pardoned, it is absolutely unnecessary in capital cases. Moreover, mitigation of punishment should also be limited. It would be proper to mitigate a death sentence to one with two years' suspension, because decisions made at previous trials of first and second instances and the review procedure would suggest that special amnesty should not present too much lenience.

(3) As regards to whom a special amnesty could be granted, in my opinion it should be at least applicable to four categories of persons. (a) Death sentenced inmates with circumstances provided for in Article 211 of the Criminal Procedure Law, such as before the execution of the sentence a criminal exposes major criminal facts or renders other significantly meritorious service, or is pregnant after trial. (b) Those whose cases involve diplomatic considerations: for example, Akmal Shaikh, a drug importer from Britain, who was sentenced to death and executed in China in 2009. His execution led to an 'earthquake' not only in the UK but also in the EU, since the EU countries including the UK have abolished the death penalty. However, given Chinese sentencing policy and practice with regard to cases involving the importation of a large amount of illicit drugs, no grounds were found to exempt him from the death penalty with immediate execution. If the special amnesty system had already been in place, he could have been sentenced to death and then granted a special pardon. (c) Those who suffer from insanity, mental illness, or incurable diseases after being sentenced to death.³⁶ (d) Those who are senior citizens or have just reached the age of 18,³⁷ the mentally disordered,³⁸ and new mothers. If such persons are sentenced to death, they should be considered for clemency and if granted a period of imprisonment should be substituted for execution.

³⁵ On this see Hood and Hoyle (n 23) 257–64.

³⁶ In most countries (eg the United States), such people cannot be executed anyway.

³⁷ Amendment VIII to the Criminal Law added that the death penalty shall not be applied in principle to persons that have reached the age of 75 at the time of trial. This is undoubtedly a great progress. However, it leaves an exception, that is, 'except in cases that death consequences are caused by exceptionally cruel means'. Moreover, the age of 75 years old is still too high. Therefore, special amnesty is still necessary in elderly defendants' cases.

³⁸ The Federal Supreme Court of the United States ruled that to execute the mentally retarded constitutes 'cruel and unusual punishment' in Art 8 of the Constitution of the United States, and thus prohibits execution of the mentally retarded. See Liu Renwen, 'Enlightenment of Non-execution of the Mentally Retarded', *Procuratorial Daily*, 17 January 2004. See also United Nations Economic and Social Council, 'Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty', ECOSOC Res 1989/64 (4), adopted 24 May 1989.

As for a time limit on waiting for execution, according to the Criminal Procedure Law, once a death sentence is approved, the execution must be carried out within seven days in China. This has been criticized in academic circles. The establishment of a special amnesty system will also make it necessary to extend this time limit. Otherwise, the death penalty would have to be carried out even before the procedure of special amnesty is initiated.

6. Conclusion

From the discussion above, it is obvious that China has made great progress in the reform of its death penalty system when seen in the Chinese context. First, the judiciary holds a cautious attitude towards the death penalty at the criminal trial. Secondly, 13 types of capital offences were removed through legislation in 2011. Despite these advancements, it is necessary for China to further reduce the number of offences subject to the death penalty, starting with abolition for non-violence crimes before proceeding in stages to notorious violent crimes. When carrying out further reform of the death penalty, China needs to pay attention to the improvement of several concrete systems, such as procuratorial supervision in the review and approval procedure in death penalty cases, unification of the means of execution, separation of the organ responsible for execution from the sentencing body, and establishment of a special amnesty procedure for those under a sentence of death. In the long run, China is likely to abolish the death penalty system as this is a developmental trend in the international community. But right now, it will be more practical for China to reduce and restrict the use of the death penalty and the number of people actually executed.