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SPECIAL ISSUE: EXAMINING THE DEATH PENALTY IN CHINA

On the "criterion" of proof in capital cases and the revision of the Criminal Procedure Law

Wang Minyuan

Institute of Law, Chinese Academy of Social Sciences

解决死刑案件质量问题，首先应保障死刑案件的实体公正，即案件的事实和证据不至于存在问题。而在保障死刑案件的事实和证据无质量问题中，首先需要考虑的是不会发生不可挽回的错误，同时，还需要防止发生不可饶恕的错误。为此，我们必须达到可以判处死刑的"证明标准"即证明要求。由于证明要求的实现应当以完善的程序作为保障，因此，中国的刑事诉讼法需要对死刑案件的相关程序予以进一步完善。

关键词：死刑　案件质量　实体公正　证明标准　程序

To guarantee quality in capital cases, the first essential is to ensure substantive justice, which means that there must be no problems with regard to the facts and evidence in the case. In ensuring that there is no qualitative problem with either the facts or the evidence in capital cases, the first consideration is that there should be no chance of an irretrievable error. At the same time, it is necessary to forestall any unforgivable miscarriages of justice. To do this, it is necessary to meet the "criterion of proof" for imposing a death sentence, that is, the requirements for proof. As the requirements for proof can only be guaranteed by adequate procedures, China's Criminal Procedure Law needs to improve its handling of procedures relating to capital cases.

Keywords: death penalty, case quality, substantive justice, criterion of proof, procedure

Introduction: a discussion of the background and significance of the "criterion" of proof in capital cases

The reversion to the Supreme Court of the exclusive right of review of the death penalty

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was instituted after long discussion. Great hopes have been placed on this reversion, in the belief that it would facilitate a return to China's traditional policy of extreme caution and strict control over imposition of the death sentence. However, we should not lose sight of the fact that while the positive significance of this move is widely accepted, it also involves a risk we need to recognize: it subjects the judiciary of this country to an unprecedented test. For, should such miscarriages of justice as "the dead person's return to life" or "discovery of the true murderer" come to pass after review of all death penalties has reverted to the Supreme Court, their implications would be far graver than if the errors had occurred when review of the death penalty rested with the Provincial High Court. Hence the quality of capital cases has become a much more prominent issue.

In light of the fact that the quality of capital cases has received so much attention,[1] we need to discuss how we can avoid problems that may arise in this connection. This involves exploring a great many issues; here, our discussion will center on the "criterion of proof," an issue closely related to the quality of capital cases. We believe that whether capital cases meet the most rigorous requirements of proof constitutes the basic criterion for measurement of case quality and the key to solving the issue of that quality. Thus this question calls for adequate attention, conscientious research and careful handling.

I. Explanations of some basic concepts

With a view to avoiding ambiguity in the interpretation of relevant concepts and facilitating in-depth investigation of the quality of capital cases and the criterion of proof, we must first elucidate a number of concepts fundamental to our discussion.

1. Quality of capital cases

Our discussion here of the criterion of proof in capital cases is aimed at resolving the problem of quality in such cases. For this reason, we must first provide an explanation of the implications of "the quality of capital cases." The concept is a complex one. The quality of these cases is influenced by such substantive factors as accuracy in determination of guilt and sentencing, whether the facts of the case are clear, the degree of reliability and sufficiency of evidence, as well as by procedural factors like effective safeguards for the right to defense and fairness in the procedures of investigating,

1 The point has been clearly appreciated by the various departments concerned. Accordingly, it is stipulated, in Article 2 by the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and the Ministry of Justice in their joint "Opinions on Further Strict Adherence to Procedures in Handling Legal Cases to Guarantee Quality in Capital Cases," that case-handling quality constitutes the lifeline of the people's court, the people's procuratorate, and public security and judicial organs; the quality of capital cases is especially important as these cases involve the lives of human beings....

prosecuting and trying a case. Generally speaking, it is these factors in substantive and procedural justice that decide the quality of a capital case. It follows that we have to look to these two aspects for the quality of such cases. It needs to be made clear, however, in light of the indisputable significance of substantive justice – since the criterion of proof in itself constitutes the key factor in solving the substantive problems of capital cases, the discussion in this paper tends to focus more on this issue.[2]

Many problems have to be tackled with regard to the quality of capital cases; for instance, studying how to deal with the many quality issues in different types of cases on the basis of the different categories into which they fall. If we analyze cases from the viewpoint of their substantive aspect, the ideal quality outcome in capital cases would be neither undue lenience nor undue severity. When quality problems arise in capital cases, they can be divided into wronging the innocent and letting the guilty go free. Distinguishing between the two is significant for the analysis of related problems.

There can be only one choice if our alternatives are "neither wronging the innocent nor letting the guilty go free" on the one hand and "either wronging the innocent or letting the guilty go free" on the other. When faced with a choice between wronging the innocent and letting the guilty go free, however, we find ourselves in a dilemma. What is needed from us at such a juncture is a firm stand to avoid the irretrievable error of wrongful execution of the innocent. If we do not take a sufficiently firm stand on this issue, we will encounter difficulties in later discussions. On this point we need to come to the clear conclusion that when the choice comes down to either wronging the innocent or letting the guilty go free, the most important thing is to make sure that irretrievable errors are absolutely ruled out.

Of course, we need to recognize that (apart from the legendary infallible divine judgments) it is wishful thinking to imagine that trials in our human world never go wrong. On the one hand, we must, on the basis of this recognition, exercise extreme caution in dealing with capital cases so as to avoid quality problems, especially such irretrievable ones as wrongful execution of the innocent. On the other, we must take extra care to avoid unforgivable mistakes. If it is but a myth that trials never go wrong in our human world, and if irretrievable errors may occur no matter how much care is taken, we should at least avoid unforgivable mistakes. What we mean by "unforgivable mistakes" are mistakes that end in the execution of the innocent, executions which the judicial organs failed to prevent even though they were already aware of the possibility of

2 My comments here do not of course imply any disregard for procedural justice. Rather, I wish to place on an indisputable basis the legitimacy of the ensuing discussion, including discussion of procedural issues in capital cases. Obviously, my purpose here is to make sure that there can be no dissent over solutions to issues of substantive justice so as to avoid the readily applied label of treating human life as valueless.

a miscarriage of justice.

We base our division of irretrievable errors in capital cases into categories including "unforgivable mistakes" on the existence of subjective reasons within the relevant entities when mistakes occur. As we see it, if an irretrievable error occurs and an innocent person is executed, but no one can identify problems with the reason for the execution, then that error is surely forgivable, since in our human world we cannot demand that trials be free of errors that nobody detects in advance. If, however, the execution was the result of an irretrievable miscarriage of justice that was brought to light but not effectively prevented, or if those conducting the trial realized the possibility of a fatal error even if it had not been drawn to their attention, then the mistake is an unforgivable one. This kind of quality problem we can and must prevent and avoid.

From the above discussion it follows that with regard to the quality of capital cases, we need to stress procedural as well as substantive issues. In guaranteeing quality, it is important not only to avoid errors by closely adhering to the principle of neither punishing the innocent nor letting the guilty go free, but also to avoid such irretrievable errors as wrongful executions. While it is not absolutely possible to avoid irretrievable errors even in capital cases, it is our duty to avoid unforgivable mistakes.

2. Criterion of proof in criminal cases

Before we take up the criterion of proof in capital cases, we need to clarify the question of the criterion of proof in criminal cases. This is a controversial topic that has been much discussed in academic circles in the last few years, and one on which this writer has also published. As I see it, there is hardly any real difference between the two opposing criteria of proof that have been discussed in academic circles, that is, the so-called objective criterion of proof and legal criterion of proof. The fact is, there is a basic commonality among the provisions in China's Criminal Procedure Law requiring that "the facts of the case are clear and the evidence reliable and sufficient," the "inner conviction" stipulated in the criminal procedure law of countries with the continental legal system, and the "absence of reasonable doubt" required in countries with the Anglo-American legal system. This commonality is reflected in two ways.

On the one hand, compared with the immediately evident subjectivity of "inner conviction" and "absence of reasonable doubt," the requirement that "the facts of the case are clear and the evidence reliable and sufficient" is usually regarded as a kind of objective standard.[3] However, since the facts of the case are not in themselves either

3 Although their points of view are opposed, virtually all advocates of "objective truth" and "legal truth" as criteria of proof are unanimous in regarding "the facts of the case are clear and the evidence reliable and complete" as an objective criterion and "inner conviction" and "absence of reasonable doubt" as legal (subjective) criterion.

"clear" or "unclear," and evidence is not in itself "reliable and sufficient" or the opposite, it would appear that there is no real difference among the three; whether something is "clear" or "reliable and sufficient" can only be a subjective issue. In this sense, there is hardly any essential difference between "the facts of the case are clear and the evidence reliable and sufficient" and "absence of reasonable doubt." Thus the former is merely a subjective criterion, and not an objective one as people imagine. This is why, in China's judicial practice, people continue to differ with regard to whether, in the same case, the facts were "clear," and the evidence was "reliable and sufficient," despite the use of "objective criteria."

On the other hand, while the "criterion of proof" that came into being following the age of trial by ordeal and legally prescribed evidence remains a valuable concept for weighing the facts and evidence in a case, its connotations have undergone a fundamental change; that is, it is no longer a concept with a definite meaning, so that people can no longer eliminate divergent views about the facts and evidence in a case by relying on a single criterion of proof as they used to do with trial by ordeal and legally prescribed evidence. In this sense it can be said that the three criteria of proof current today – that "the facts of the case are clear and the evidence reliable and sufficient," "inner conviction" and "absence of reasonable doubt" – are requirements of proof rather than criteria of proof, because these "criteria" are, in fact, requirements of people's level of subjective belief. They cannot fulfill the role of a criterion and have difficulty in resolving disagreements over facts and evidence, or even simple differences between individuals.[4]

As I see it, there is hardly any difference in degree of leniency or severity between "the facts of the case are clear and the evidence reliable and sufficient," "inner conviction" and "absence of reasonable doubt" as requirements of subjective belief for undertaking a prosecution. Many people believe that "inner conviction" and "absence of reasonable doubt" represent a lower requirement for proof than "the facts of the case are clear and the evidence reliable and sufficient." I believe this view to be lacking in rationality, since it is neither possible nor desirable to develop an "inner conviction" or "absence of reasonable doubt" about someone's guilt when the facts of the case are unclear or the

4 While the word "criterion" can mean a set of defined gradations or a yardstick (such as the medical standard for a high fever or the standard for a top sportsman), it can also be used to indicate requirements that can vary from one person to another (such as the criteria for falling in love). When people talk about the criterion of proof, they generally take it to be a defined gradation or yardstick, hoping thereby to eliminate disagreements over case facts and evidence. It is worth mentioning in passing that whether or not a criterion is definite is not necessarily related to its subjectivity or objectivity. Subjective does not necessarily mean arbitrary, and something considered objective may entail a host of disagreements. In the past people often evoked the "subjectivity" or "objectivity" of a criterion to indicate its degree of certainty. In so doing they were in fact seeking to solve the issue of point of view by substituting ontological studies for analysis based on epistemology; this is most unsound.

evidence is not reliable or complete. This view also lacks the requisite empirical basis, as it is rare for any convincing material to be put forward to support it. Consequently, any theory that attempts to grade the three criteria of proof currently employed in criminal cases, however prevalent, tends to have a highly dubious basis.[5]

3. The criterion of proof for capital punishment

On the basis of the position outlined above, and taking into account the clear stipulation for the "criterion of proof" in capital cases in the relevant international convention, that "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,"[6] I believe that while the so-called criterion of proof in verdicts of capital punishment can be held to require much greater strictness than in other criminal cases, it is nevertheless not a criterion of proof that has a defined meaning (because the basic implication of "criterion" is that of a standard for measuring things, and as such it should be able to handle the problem that understandings and conclusions differ from person to person).[7]

Obviously such expressions as "clear and convincing evidence" and "leaving no room for an alternative explanation of the facts" can easily lead to differences of opinion. They are suited to serving as requirements of proof in capital cases, rather than as criteria of proof with a defined meaning. Thus, while people usually cite these formulations as "criteria of proof" in capital cases, they should in fact be taken as requirements of proof. Since the "criterion of proof" used in imposing the death sentence is actually only a requirement of proof and so is inadequate for the resolution of divergent views in relation to the facts and evidence in capital cases, we should discard the notion that we can take a simple approach to the problem, that is, that we can solve the problem of divergent and even arbitrary understandings and conclusions in capital cases in our judicial practice by further regulating the criterion of proof for capital punishment. Rather, we need to consider adopting other procedures to solve this problem.

II. Clarifying two fundamental concepts

Two basic concepts have to be clarified before we continue with our discussion of the

5 The above-mentioned views are expressed in two main articles of mine: "One Mistake, Two Pieces of Nonsense and Three Doctrines – a philosophical and historical analysis of case facts and evidence," and "Re-thinking theories on the criterion of proof in criminal cases."

6 Cf. the stipulations of Article 4 in *Safeguards guaranteeing protection of the rights of those facing the death penalty,* adopted by the UN Economic and Social Council in its 50th resolution of 1984.

7 Cf. Xinhua Dictionary Compilation Team, *Xinhua dictionary*, p. 54.

quality of capital cases[8] and the influence on it of the criterion of proof. It is my belief that these two basic concepts form the basis for dealing with related procedural problems. As they contain issues requiring further explanation, I have clarified them here.

1. The court's role in the trial of capital cases

Seen from the perspective of procedural law, the trial of capital cases, whether in the first or second instance or at the review stage, is a more decisive procedure than prosecution or investigation because it is the key procedure in which the facts and evidence of the case are finally brought to light and the decision is made to impose the death penalty. In this sense, one cannot overemphasize the importance of the trial in guaranteeing the quality of capital cases. However, we must on the other hand also acknowledge that owing to the limited functions of trials, their role in guaranteeing the quality of capital cases is quite limited.

While the fundamental role of the trial is to ascertain the facts and evidence of a case and accordingly reach a verdict in accordance with the law, we must recognize that the concept of "ascertaining the facts of the case" at the trial stage is quite different from that which applies at the stage of investigation and prosecution. If we say, from the epistemological point of view, that ascertaining the facts of the case at the stage of investigation and prosecution is a process in which we move gradually from ignorance of the facts and evidence to knowledge and from a little knowledge to greater knowledge, then "ascertaining the facts of the case" at the trial stage is a process of checking and verifying facts and evidence that are already known and understood. Again, if we say, from the point of view of procedural theory, that the organs of investigation and prosecution "ascertain the facts of the case" through the exercise of their official powers in a process of active investigation and collection of facts and evidence, then the court's "ascertaining the facts of the case" is a process of checking and verifying facts and evidence that are already known and understood, a process in which all parties involved in the case participate.

The two concepts of "ascertaining" the facts of the case – that applying to the trial stage and that applying to the stage of investigation and prosecution – are readily confused. On the one hand, the trial process would appear in the epistemological sense to be similar to that of an investigation because modern criminal proceedings, with a view to preventing judges from prejudging the case prior to the trial, do not allow them to learn about the circumstances and evidence of the case beforehand, so that they acquire their knowledge of these matters gradually as the trial unfolds and develops. On the other hand, the basic

8 To accord with established usage, the expression "criterion of proof" is also adopted in this paper, but is generally used in the sense of "requirement of proof."

task that the law assigns to the trial is exactly the same as that assigned to investigation and prosecution: to find out the true facts of the case. As a result, the duties of a judge presiding over a trial would appear to be the same as those of the officers undertaking investigation and prosecution. However, these similarities are but apparent; in fact, these are two qualitatively different ways of ascertaining the facts.

In the first place, one of the major features of modern criminal proceedings is the very strict limits set on prosecution, which must in general be based on clear facts and reliable and sufficient evidence. This makes them quite different from the criminal trials of the old days which could start when the facts of the case were still ambiguous; this made it imperative that the trial undertake the functions of investigation and prosecution, that is, that it ascertains the facts of the case. By contrast, a trial today should have nothing to do with investigation or prosecution, but merely perform the function of checking and reviewing. In the second place, this is also required by the image of fairness that modern law prescribes for the court in criminal proceedings, in which the court does not actively prosecute. It is because of this special requirement that the court exercise only passively its right to try a case that judges may not actively seek out facts and evidence as organs of investigation or prosecution do, even though Chinese law does empower the court to take measures such as inspection and examination which resemble investigation measures and even though judges have the capacity to conduct investigations. This is to avoid confusing the prosecution of a case with its trial.

Recognizing that the distinctive feature of the way the court "ascertains" facts and evidence at the trial stage is simply a matter of review and re-examination has a positive significance for our subsequent discussion, as it makes possible a clearer definition of the court's duties in the trial of capital cases and enables us to deal with the special issue of the effect of the criterion of proof on such trials. On this basis, we can transform the application of the criterion of proof in capital cases into requirements specially targeted on the prosecution. For a court to refuse to impose (or approve) the death penalty on the grounds that the evidence failed to meet the criterion of proof is to fulfill its function in accordance with the legitimate requirements of the law. However, should this lead to the court's exceeding its authority in relation to the conduct of the trial by assuming the roles of investigator and prosecutor and taking active steps to ascertain facts which the prosecution has failed to make clear, or by gathering proof of the accusation, that would be a serious case of "exceeding the court's authority" and would certainly create serious problems for the trial in terms of both substantive and procedural justice. It needs to be made clear here that if the facts are not clear or the evidence unreliable or insufficient in a capital case, and the judge sticks to his duties by not "exceeding his authority" and not trying to ascertain the facts or gather evidence, and for this reason refrains from imposing (or approving) the death sentence – if in such circumstances the guilty party is treated

leniently, the fault lies not with the court but with the prosecution and investigation.

Seen from this perspective, we need to change the existing trinity of the court, the procuratorate and the organs of public security in criminal proceedings, since the three do not have the same responsibilities in guaranteeing quality in capital cases. The court should not be made to shoulder the blame when the other two fail in their duties. Such a change has practical significance. It is obvious that if, when a case has proceeded through the stages of investigation and prosecution and reached the trial stage, the facts are still uncertain and the evidence is still unreliable and insufficient, to oblige the court to undertake the role of the investigative and prosecuting bodies would be neither realistic (since the best opportunities for investigation would normally be gone by this stage) nor reasonable (because this is not the court's responsibility). Of course, investigating and verifying facts and evidence that are favorable to the defendant should not be regarded as being contrary to the court's responsibilities, since with regard to the quality of capital cases, avoidance of irretrievable errors is the common responsibility of the courts, the procuratorate and the organs of public security. One can even say that of the three, the courts bear the heaviest share of responsibility.[9]

2. The test of history and of present-day reality in relation to the quality of capital cases

To guarantee the quality of capital cases and to prevent and avoid the occurrence of irretrievable errors, the leadership of the relevant bodies often stress that capital cases must be conducted in such a manner as to turn them all into "ironclad cases" that can withstand the test of history. The relevant regulations have accordingly clearly expressed this special requirement.[10] The basic idea behind this requirement, that is, there can be no error in the imposition of capital punishment and that utmost caution must be the order of the day, deserves our full support. However, we need to analyze further the special requirement that "withstanding the test of history" is a test of quality in capital cases.

It should be recognized that the so-called "test of history" has its limitations. In the first place, the "test of history" is usually used to refer to things like "the discovery of the true murderer (after the execution of the alleged murderer)" or "the dead person's return to life" that provide incontrovertible evidence of a miscarriage of justice in the case in

9 I have criticized this principle of the "trinity" of these three organizations in criminal proceedings in an article on the subject (cf. Wang Minyuan, "On the Revision of Some Principles in the Criminal Procedure Law"). What needs to be added here is that while the three organizations should not form a "trinity" in prosecuting crime, they do share the responsibility when it comes to avoiding wrongful, false and erroneous cases.

10 The second article of the "Opinion" stipulates: Ensure the facts, the evidence, the procedure, and applicability of the laws in capital cases, so that the handling of every capital case can withstand the test of history.

question.[11] However, such events tend to be the outcome of quite accidental factors. We therefore have reason to believe that while such situations are extremely rare, this does not means that errors in capital cases are equally rare. In view of the limitations of the "test of history," we cannot make the sole test of quality in every capital case "the discovery of the true murderer" or "the dead person's return to life."

In the second place, even in the case of death penalties about which there is some doubt, the "true murderer" will not necessarily be "discovered," nor will the victim "return to life" to attest to the quality of their case. In other words, these doubtful verdicts may well be able to withstand the test of history. Thus it follows that while we cannot say that the test of history is an illusory one with regard to the quality of capital punishment verdicts, it is at least not always realistic and effective. Doubtful verdicts of capital punishment are not so rare in the present day, but one cannot subject them to the "test of history." Rather, we need to consider subjecting the quality of capital cases to a more realistic test than the "test of history."

By a realistic test we mean that any doubts that are discovered or raised about problems that emerge during the process of investigation, prosecution and trial should be effectively resolved. For example, from the perspective of the criterion of proof, is the evidence for the sentence of death "clear and convincing"? Is there "no room for an alternative explanation" of facts that bear on guilt and sentencing? If any doubts remained on such subjects, have they been effectively resolved? This is the kind of realistic test to which the quality of capital cases needs to be subjected; this kind of testing should rank first in our consideration when the relevant procedures are being designed. As I see it, all verdicts of capital punishment should in the first place withstand the test of present-day reality; only after that can we talk about the "test of history." For this reason, when we go to improve the relevant procedures for guaranteeing the quality of all capital cases, we need to place the focus on the "test of reality." We should be clear that it is only when verdicts of capital punishment are able to withstand the "test of reality" in all its shapes and forms that they will be qualified to withstand the "test of history."

III. A few procedural problems

As mentioned above, "the facts of the case are clear and the evidence is reliable and sufficient" is just a demand for subjective recognition by a specific entity rather than an objective criterion of proof; and so-called "clear and convincing evidence leaving no room for an alternative explanation of the facts" is in fact a requirement for proof for the use of

11 In the absence of facts that fundamentally controvert a valid death sentence, if the emergence of evidence or new facts merely cast doubt on the correctness of the sentence it is rarely reversed.

the death penalty, rather than a criterion of proof with definite meaning. This being so, there is almost nothing we can do to perfect our legislation on the criterion of proof with a view to preventing the uncertainty of this criterion from leading to possible arbitrary decisions and the consequent rash imposition of the death penalty. We therefore need to change our approach and set up a strict system of proof and related procedures so as to help realize the strict requirement for proof demanded by capital cases and guarantee their quality.

As we know, in order for mere "requirements for degree of belief" such as "inner conviction" and "beyond reasonable doubt" to act as restraints on judges and prevent arbitrary and unfounded verdicts, other countries have set up corresponding control mechanisms in their respective laws. For example, in countries with the Anglo-American legal system, where guilt must be proved "beyond reasonable doubt," the law sets down strict rules of evidence (such as the rules on hearsay evidence, which provide the maximum guarantee against the admission of doubtful evidence, and the strict and meticulous rules on court examination and cross-examination, which casts light on the full extent of the reliability and credibility of the evidence). Also, institutions like the elite nature of the judiciary and the complex jury selection procedure aim to ensure to the maximum extent possible that those involved in judging cases exercise their ability to discriminate between true and false and right and wrong on the basis of justice, further guaranteeing that judges will avoid arbitrary, unfounded decisions. Further more, by putting strict limits on guilty verdicts (such as the premise that jury decisions must be virtually unanimous) they also seek to minimize wrongful, false and erroneous cases as much as possible.

Countries with the continental legal system, where "inner conviction" is required, seek to prevent their judges from making arbitrary, unfounded decisions by other means, such as strict restraints on the grounds and process by which judges form their convictions. For example, French criminal procedure law stipulates that a judge's inner conviction can be formed only on the basis of "materials that have been submitted to the court for debate, and have been argued about freely among the parties involved," rather than on facts known to the judge alone, or on documents unknown to or unread by the other party. ...The verdict of the court, though announced verbally by the chief judge, also has to be presented in written form listing the reasons for the verdict. These should include a statement on the judge's inner conviction, including the evidentiary material presented in the documents of the case and during the arguments in the court hearings that proved the correctness of the verdict. Judgments (verdicts) where no explanatory reasons are presented or where the explanatory reasons are insufficient or internally contradictory are all subject to investigation by the supreme court. The court's verdict cannot be limited to copying out the legal provisions that stipulate what constitutes a crime without a specific explanation of the facts of the crime that have been established and used in proof as they relate to the relevant

legal provisions. The verdict may not use pre-printed forms. The court's explanation of its reasons for the verdict should correspond to each of the items of the verdict and to the circumstances of each defendant. It must respond to all requests and statements from different parties in the case, and must not contain internal contradictions.[12]

We should not give up our endeavors to further improve relevant procedures just because the Criminal Procedure Law of China has already provided a criterion of proof in which we can take pride. In order to provide the maximum guarantee for the quality of capital cases, the death penalty must meet the highest requirements of proof. In order to prevent such irretrievable errors as wrongful executions and avoid unforgivable mistakes, we should perfect procedures in capital cases. A wide range of procedures covering numerous issues require legislation if they are to be improved; only the more important ones can be briefly reviewed here. As this writer sees it, our procedure for judgments in capital cases should seek, through the revision of the Criminal Procedure Law, improvements at least in the following three respects:

1. Improvement of regulations on evidence

While the need to improve our regulations on criminal evidence has long been the topic of heated discussion, opinions on how this should be done continue to differ. It is my view that the regulations on evidence in capital cases are crying out for improvement. This applies mainly in relation to the following two aspects.

On the one hand, we need to establish firm rules on the exclusion of illegal evidence in capital cases[13] for the simple reason that such evidence cannot be relied on. It should never become the basis for deciding whether "evidence is reliable and sufficient" and whether "the facts of the case are clear." Besides being directly damaging to procedural justice, it is highly unreliable. While setting up rules for the exclusion of illegal evidence may remain an issue under discussion in other types of case, when it comes to procedures for capital cases we must not hesitate in setting up such rules if we are to avoid irretrievable errors and unforgivable mistakes.

On the other hand, we should improve rules on cross-examination in court. As is well known, witnesses rarely appear in court in China, so courtroom cross-examination is extremely weak. Wide-ranging and in-depth discussions have taken place on the courtroom presence and testimony of witnesses and their cross-examination, and while there remain some differences in views, these should constitute no problem in the trial of capital cases. This is because there can be no doubt that procedural justice is severely compromised if the relevant evidence in a verdict of capital punishment cannot be tested

12 Gaston Stefani, Georges Levasseur et Bernard Bouloc, *Procédure pénale*, pp. 773, 780.
13 "Illegal evidence" here refers mainly to evidence that is illegally obtained.

by court investigation or cross-examination. This is also a hidden danger for substantive justice. For this reason, improving the rules for cross-examination in court so that witnesses (including expert witnesses) have to be present to testify and submit to cross-examination in capital trials is a matter that brooks no delay.

2. Safeguards for effective defense

The fact that criminal defense in today's China faces severe trials is indisputable. It has long been no secret that the rate of defense is low, the results poor, and the whole process fraught with risk. Defense lawyers always complain of the difficulties they encounter in reading court documents, meeting the accused, and conducting investigations. In capital cases, the system of mandatory defense does afford some protection, but the many difficulties encountered in criminal defense and disregard for the views of the defense mean that they suffer from lack of an effective defense in the same way as other criminal cases. In view of this situation, an effective system for guaranteeing defense in capital cases should be established immediately.

Since the duty of the defense is to protect the legitimate rights of the accused in accordance with the law, providing the requisite safeguards for the right to read documents, interview the accused and carry out investigations would provide all necessary conditions for the defense to bring to light problems in the facts and evidence put forward by the prosecution. The role of the defense is especially significant and irreplaceable in capital cases, where it can prevent irretrievable errors and unforgivable mistakes. It is thus particularly important that we give full play to the role of the defense in capital cases (from investigation and prosecution to trial, and even at the stage of reviewing the death penalty) and accord full weight to defense views. We should not be afraid of the effectiveness of the defense, as it is precisely this effective defense that offers the true "test of reality." How can a death penalty withstand the "test of history" when it breaks down under the cross-examination of a defense lawyer?

3. Set up a special procedure for dealing with disagreements

In the course of the discussion of the criterion of proof in criminal cases, I have persistently condemned the so-called "criterion of proof with operability." However, while the idea is unrealistic, operative norms can be set up to meet the requirement of proof. For example, in terms of a capital trial, a special procedure for dealing with different views can be set up on the basis of the norm of "unanimity." This would mean meeting the requirement of proof in verdicts of capital punishment, that is, the verdict should be founded on "clear and convincing evidence," "leaving no room for an alternative explanation of the facts."

Obviously, if the proposition stands that those who judge capital cases are reasonable

beings, it follows that so long as there is disagreement on whether the facts of a case are clear or the evidence is reliable and sufficient, then "clear and convincing evidence" is lacking and room is left for "an alternative explanation of the facts," that is, the requirements for a verdict of capital punishment have not yet been met. If the death penalty is allowed in these circumstances, it is highly likely that an irretrievable error will take place. In order to prevent the occurrence of irretrievable errors and avoid unforgivable mistakes, we must set up regulations for the collegial judgment of capital cases that differ from the "majority rules" principle of other criminal proceedings in requiring a special provision for "unanimity" with regard to facts and evidence.

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Notes on contributor

Wang Minyuan is Research Fellow at the Institute of Law, Chinese Academy of Social Sciences. His main area of research is criminal procedural law. His representative works include *A Review of Theory and Practice in the Administration of Criminal Justice* (刑事司法理论与实践检讨, Beijing: China University of Political Science and Law Press, 1999), "One Mistake, Two Pieces of Nonsense and Three Doctrines – A Philosophical and Historical Analysis of Case Facts and Evidence" (一个谬误、两句废话、三种学说——对案件事实、证据的哲学、历史学分析, in Wang Minyuan, ed., *Public Law*［公法］, vol. 4, Beijing: Law Press, 2003). E-mail: minyuanwang@sohu.com.

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—*Translated by* Chen Si
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