

# The Death Penalty in China: Reforms and Its Future

Zhenjie ZHOU

## Abstract

China has seen several constructive reforms on death penalty system since 2005. The latest one is the abolition of the death penalty for 13 crimes in Amendment VIII to the Criminal Law of PRC, which is therefore thought of as the starting point of China's long march toward complete abolition of the death penalty. Meanwhile, China stated that it carried out all these reforms with the final aim to completely abolish the death penalty. This article argues that although reforms in recent years deserve positive comments and to abolish the death penalty in law has gained strong academic support and recognition even in judicial and political circles to some degree, it is obviously unrealistic in foreseeable future. By analyzing such elements as symbolic and political meaning of the death penalty, public opinion and increase in crime rate, this article concludes that the most realistic choice for China may be not to abolish the death penalty in law or in practice, but to strictly limit its application within the scope of crimes potential to result in death and serious corruption crimes with such circumstances as causing massive social damage and the amount involved being exceptionally large.

## 1. Introduction

Amendment VIII of the Criminal Law of PRC (hereinafter, the Amendment VIII) adopted by the Standing Committee of National People's Congress (NPC) came into force on May 1, 2011. It has received highly positive comments in both academic circle and among average citizens for its main purpose to strength protection of civic rights pronounced by the legislature<sup>(1)</sup>. What surprised most Chinese researchers is that it abolished the death penalty for 13 crimes in substantive criminal law for the first time since the promulgation of first Criminal Law in 1979. Therefore, the Amendment VIII is believed to be helpful in limiting application of the death penalty in practice, pushing forward changes in public opinion and ensuring the implementation of international documents that China has ratified<sup>(2)</sup>. It has also been pointed out that "the Amendment is the starting point of China's long march toward total abolition of the death penalty. It implies that the proposal to restrict and abolish the death penalty for which academic circle has been making efforts for such a long time was finally recognized by legislature and now is being dealt with at the level of legislation"<sup>(3)</sup>.

Theoretically, whether to abolish the death penalty in law might be a matter of principle, and political leaders might be expected to take positive steps to turn a world without the death penalty into reality depending on such reasons as protection of human rights, equality and prevention of justice miscarriage<sup>(4)</sup>. However, realistically, whether to abolish the death penalty or not is mainly a political issue, and it wouldn't be so easy for a political leader to make such a decision if he/she couldn't obtain enough public support, unless the issue won't undermine his/her political prospect. China has been taking measures intending to ensure a fair and accurate application of the death penalty and improve transparency and openness of capital proceedings since the year of 2005 when the Supreme People's Court of China (SPC) issued the Notice on Improving Work on Open Trial for Second Instance Cases with Capital Sentences, just as professor Roger Hood with the University of Oxford commented: "the last few years have witnessed a distinct change in the discourse, evidenced by open exchange of views in meetings .....; the opening up of the subject to research; ..... the return of the review of all death penalty verdicts to the NPC, to ensure more consistency, less variability, and greater parsimony in the

types of crime and number of persons who are in practice executed—in fact to replace former practices with a policy aimed to impose the death penalty ‘strictly, cautiously and fairly ..... on a tiny number of serious criminal offences<sup>(5)</sup>.’” Then, could we be so optimistic about the future of the death penalty as to say that China will eventually abolish the system for all crimes or that requirements in international documents would be fully and faithfully satisfied in China?

In order to find a realistic answer to this question, this article begins with a general introduction to history of the death penalty and execution in recent years in China according to data compiled by Amnesty International (AI), an international organization well known for its contribution in the area of human rights protection worldwide. Then, it reviews reforms in capital proceedings since 2005. Moreover, it comments on the abolition of capital punishment for 13 crimes in the Amendment VIII and explains why this amendment was called the starting point of China’s long march toward abolition of the death penalty. Furthermore, it conducts an overall analysis on elements potential to influence political decision, including public opinion, deteriorating public security situation, difficulties in political reform and the symbolic meaning of the death penalty, and points out that we shouldn’t be too optimistic about the future of the death penalty in China. Finally, it draws a realistic conclusion on the basis of the analysis above.

## 2. Capital Offences in Chinese Criminal Law

### 2.1 A Brief History of the Death Penalty and Scope of Capital Offences

In the beginning of 1950s when the PRC was just founded, only few special criminal laws provided capital punishment such as *Ordinance of Punishing Anti-revolution Activities (1951)*, *Provisional Ordinance of Impairing Regulation of Currency (1951)* and *Ordinance of Punishing Corruption (1952)*. However, a document issued by the SPC in 1956 shows that more than 10 crimes including murder, assault resulting in death, rape, hardened thief, hardened cheat, maltreatment resulting in death and damaging communication equipment in addition to those in the above ordinances were frequently punished by the death penalty in practice according to the criminal policy of combining punishment with lenience due to absence of criminal

laws and need to fight anti-revolutionists and strike crimes endangering social stability<sup>(6)</sup>.

The first Criminal Law of PRC promulgated in 1979 (hereinafter, 1979 Criminal Law) established a death penalty system with unique Chinese characters. According to article 43 of 1979 Criminal Law, the death penalty shall only be applied to criminals who have committed extremely serious crimes. If the immediate execution is not deemed necessary, a two-year suspension of execution may be pronounced simultaneously with the imposition of the death sentence. In other words, there are two types of death penalty sentence, death sentence (immediate execution) and death sentence (two years suspension). In latter case, the death penalty would in principle be mitigated to life imprisonment as long as no intention crimes are committed during suspension period.

There were 27 capital offences in the Special Part of 1979 Criminal Law, 14 of which were anti-revolution offences and 13 were common ones. It should be noted that offences of violating duties of military servicemen then weren’t provided in the 1979 Criminal Law, but in *Provisional Ordinance of Punishing Violating Duties of Military Servicemen (1981)*, which provided 11 capital offences too. Considering the fact that the Provisional Ordinance was in fact a part of 1979 Criminal Law, it might be better to say that the total number of capital offences in 1979 Criminal Law wasn’t 27 but 38.

The rapid turn from a planned economy to a market one since the implementation of opening-up and reform policy in the beginning of the 1980s brought China not only economic prosperity, but also surprisingly quick increase in crimes, especially in fields of economic activities and social management. Correspondingly, China launched campaigns intended to strike severely economic crimes and those endangering social management. In order to lay down legal foundation for these strike hard campaigns, legislature adopted more than 10 special criminal laws and more supplementary criminal provisions in economic and administrative laws between 1982 and 1995, and thereby added 33 capital offences. That is to say, the total number of capital offences had reached 71 by the year of 1997, when the 1979 Criminal Law was thoroughly amended.

The task to promulgate an integral and complete criminal code entered the timetable of Chinese deci-

sion makers in 1995, and two years later, Amendment to 1979 Criminal law (hereinafter, 1997 Criminal Law), which is virtually a collection of provisions in 1979 Criminal Law and all special criminal laws and supplementary criminal provisions, was passed by the Fifth Session of the Eighth National People’s Congress and became effective from October 1, 1997. As for death penalty system, 1997 Criminal Law made several important changes in its General Part, e.g. it abolished the article providing that minor criminals between 16 and 18 could be punished with death sentence with two-year suspension. In the Special Part, although two capital offences were abolished and the number of capital offences was reduced to 68, no substantial change happened because the acts in question were absorbed by other capital offences.

As can be seen in figure 1, capital offences could be found in 9 of 10 chapters in Special Part of 1997 Criminal law with the exception of Chapter 9, crimes of dereliction of duty. The fact that capital offences in chapter 3 (crimes undermining the socialist economic order) and chapter 2 (crimes endangering public security) account for nearly 43% of the total number indicates a shift in the Chinese government’s concerns from political interests in the past to economic and social issues in the present. Meanwhile, that most capital offenses don’t involve deadly consequence implies that what is stressed in legislators and judicial practitioners’ mind is still the tool value of criminal law. In other words, the death penalty is considered no more than a tool to strike resistance, control society and punish criminals. This is also a common character and image of criminal laws at all dynasties in Chinese his-

tory<sup>(7)</sup>.

## 2.2 Execution Number

Article 210 of Criminal Procedure Law of PRC amended in 1995 provides that when a verdict of the death penalty with immediate execution is pronounced or approved by the Supreme People’s Court, the President of the Supreme People’s Court shall sign and issue an order to execute the death sentence, and it shall be executed by such means as shooting or injection. Different from those countries that regularly compile and publish statistics of execution such as Japan and American, China deems annual execution toll a state secret. Therefore, we have no access to the number of death inmates, their professions, ages, names and crimes committed. This practice has been strongly criticized. E.g. Professor CHEN Zexian, director of the Institute for International Law Studies of Chinese Academy of Social Sciences, comments ironically in following way: “How many death sentences are there in China each year? For a long time this question pose as an embarrassment for government officials, perplexing for scholars, and surprising for outsiders. It is said that the statistics on imposition of death penalty is a judicial secret. But who can tell me the legal basis and necessity to treat the number of sentenced cases including death sentences as a national secret? The actual reason is very simple, no more than that there are too many death sentences and making the number available to the public would undermine the international image of China. But who is unaware that China’s Criminal Law defines the highest number of crimes for which the death penalty

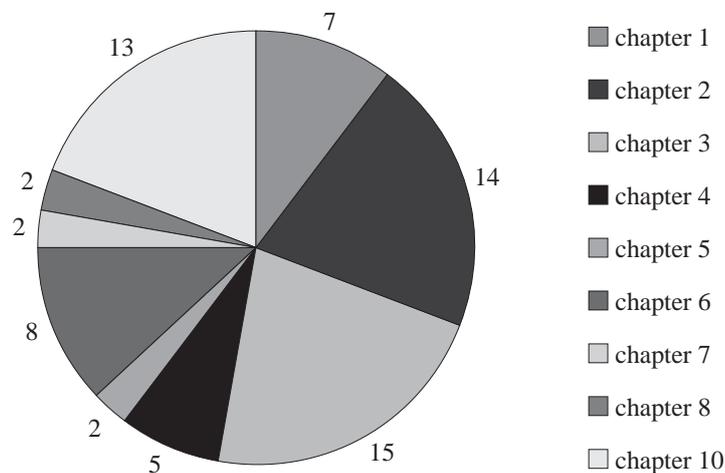


Figure 1: Distribution of Capital Offences in Special Part of 1997 Criminal Law

may be imposed and China has the highest number of death sentences?<sup>(8)</sup>,”

Inaccessibility to official statistics leaves academic researchers no choice but turn to data compiled by NGOs, among which that compiled by AI is the most cited because every case reported can be traced to its original source. Meanwhile, “it also represents the most conservative estimate of death sentences and executions in China due to the following accounting rules: 1) when there is doubt of accuracy, figures were excluded; 2) where two conflicting reports existed, the lower figure was used; 3) when a combined figure of death sentences and prison sentences was given, only one death sentence was recorded; and 4) when a group was sentenced to death, only one sentence was entered<sup>(9)</sup>.”

According to the AI, as Figure 2 shows, the annual toll in China might be higher than that of the rest of the world combined. While the lowest recorded number of executions in China was 470 in 2007, the highest was 1770 in 2005 and in recent 6 years. The number of executions in China has consistently accounted for a large proportion of that in the world. It should be noted that the numbers of execution in 2009 and 2010 are both 1000 because the AI decided not to publish figures for the use of the death penalty in China due to the fact that China’s keeping the number of execution a state secret renders its estimate costly and meaningless. Meanwhile, because “unofficial estimates place the figure at anywhere between 1,700 and 8,000 executions annually<sup>(10)</sup>,” it took a relatively safe stance by setting the minimum figures in both year at 1000. Even so, executions in China respectively account for more than 58% in 2009 and 65% in 2010 of that worldwide.

### 3. Reforms on Capital Punishment System in Recent Years

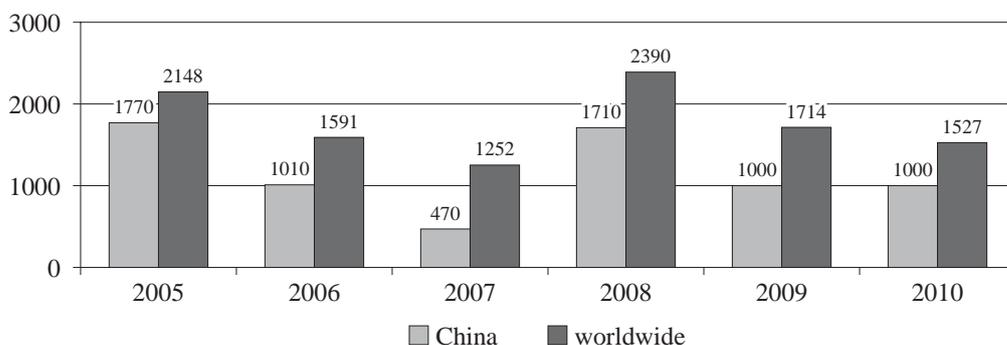
#### 3.1 Criticism against Death Penalty System

Due to the wide scope of capital offences in criminal law, substantial use of the death penalty and secrecy of execution toll, Chinese death penalty system has been criticized from various perspectives such as the right to life, presumption of innocence and proportionality, just as a foreign reporter said, “China’s enthusiasm for capital punishment has long been a target for international criticism of its human rights record<sup>(11)</sup>.” As far as substantive criminal law is concerned, the criticism is mainly focused on the scope of capital offences and amnesty system.

##### 3.1.1 The Scope of Capital Offences

As mentioned above, Majority of 68 crimes eligible for the death penalty in 1997 Criminal Law aren’t potential to cause deadly consequence. More than one Chinese scholar has pointed out that this isn’t in accordance with *International Covenant on Civil and Political Rights (ICCPR)*, article 6 (2) of which provides that in countries which have not abolished the death penalty, sentence of death may be imposed only for “*the most serious crimes*” in accordance with the law in force at the time of the commission of the crime. According to the provisions of the ECOSOC Safeguards guaranteeing protection of the rights of those facing the death penalty, the notion of “the most serious crimes” here refers to intentional crimes with lethal or extremely grave consequences.

Chinese government has formally signed the *ICCPR* on 5 October 1998. Although the Standing



Source: Death Penalty Information Center (<http://www.deathpenaltyinfo.org/>)

Figure 2: Number of Confirmed Executions in China and Worldwide (2005-2010)

Committee of People's Congress hasn't ratified it, from the perspective of the provision in *Vienna Convention on the Law of Treaties* that a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty, China has promised to take the moral responsibility to abide by the ICCPR even since the day on which it signed the Convention<sup>(12)</sup>. Article 48 of 1997 Criminal Law requires that the death penalty shall only be applied to criminals who have committed "extremely serious crimes". From the perspective of wording, "extremely serious crimes" might be unlimitedly close to "the most serious crimes". However, the fact that offences such as theft, smuggling, tax fraud and bribery are punishable by the death penalty according to 1997 Criminal Law shows that the scope of "extremely serious crimes" is apparently broader than the explanation given by Article 1 of the ECOSOC Safeguards guaranteeing the protection of those facing the death penalty in respect of "the most serious crimes".

Application of the death penalty to non-deadly crimes such as property and economic crimes incapable of resulting in death consequence has also been criticized according to article 5 of 1997 Criminal Law by Chinese researchers. According to the article, the degree of punishment shall be commensurate with the crime committed and the criminal responsibility to be borne by the offender. However, the punishment of non-deadly crimes could never be said to be equal to that of the death penalty, just as Professor QIU Xinlong with Hunan University acutely questioned the death penalty for smuggling rare cultural relics and products of rare animals in article 151 of 1997 Criminal Law, "which one is more valuable between a human head and a piece of stone? Which one is more worthy between human skin and that of panda?"<sup>(13)</sup> Therefore, abolition of the death penalty for non-violent and non-deadly crimes such as theft has been proposed ever since 1990s<sup>(14)</sup>.

### 3.1.2 Amnesty System

Article 6 (4) of 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." Amnesty system could be found in the Constitution of PRC amended in 1982. Article 67(17) of the Constitution provides that the Standing Com-

mittee of the NPC exercises the power to decide on the granting of special pardons. Correspondingly, its article 80 provides that the President of PRC issues orders of special pardons in pursuance of the decisions of the Standing Committee. However, the amnesty system hasn't been used for more than 30 years in China. On one hand, "these provisions are so simple that the application and the execution of special pardon couldn't be counted on"<sup>(15)</sup>. On the other hand, special pardons granted to war criminals before 1975 shows that "in China special pardon was initiated by either the Party Central Committee or the State Council while criminals or prosecutors had no right to seek it"<sup>(16)</sup>.

Therefore, it has been suggested by researchers that procedure of special pardon of the death penalty should be established as soon as possible in order to make effective use of amnesty system in Chinese Constitution. E.g. Professor YIN Jianfeng with Beijing Normal University suggested the procedure be established by granting criminals and prosecutors the right to apply for special pardon, setting up a committee entitled to receive and deal with the applications in capital cases under the direction of the Standing Committee of NPC and delegating to the SPC the power to execute special pardon according to the decision of the direction of the Standing Committee<sup>(17)</sup>.

## 3.2 Key Procedural Reforms

Chinese judicial organs and legislature have been trying to facilitate reforms in proceedings intending to ensure accuracy and fairness and thereby to create conditions for restricting the use and abolishing the death penalty since 2006 when the SPC issued its Second Five-Year Reform Plan (2006-2010), and several legal documents governing procedural aspects of death penalty cases have been issued. Table 1 highlights contents of major documents. Moreover, it is worth noting that the SPC made reform of use of the death penalty as a key part of its third Five-year Plan outlined in March 2009 and this has seen important work taking place on sentencing guidelines and review procedures. And this approach has also been endorsed by the first National Human Rights Action Plan issued by the State Council in April 2009.

These procedural reforms have brought considerable changes, and table 2 provides a comparison of policy, principle and procedure before and after the

Table 1: Key Reforms to Capital System since 2006 in China

Documents Issued	Issuing Date	Issuing Body	Subject Matter
Notice Improving Work on Open Trial for Second Instance Case with Death Sentences	December 7, 2005	SPC and Supreme People's Procurator (SPP)	Open Trials for second instance in cases that may result in the death penalty and for which importance facts and evidence were in dispute
Provisions on Some Issues Concerning the Court Trial Procedures for the Second Instance of Cases Involving the Death Penalty (for Trial Implementation)	September 21, 2006	SPC and SPP	Open trials in second instance courts in all death penalty (immediate execution) cases
Amendment to the Organic Law of the People's Court	October 31, 2006	Standing Committee of the NPC	SPC to review all lower court decisions ordering a death sentence (immediate execution)
Provision of the SPC on Several Issues Concerning the Review of Death Penalty Cases	February 27, 2007	SPC	Details of circumstances in which the SPC would uphold a death sentence and when it would order a retrial in lower courts
Opinions on Strengthening Handling Cases in Strict Accordance with Law and Guaranteeing the Quality of Handling Death Penalty Cases	March 9, 2007	SPC, SPP, Ministry of Public Security (MPS) and Ministry of Justice (MJ)	Elaboration of procedure to reduce wrongful death verdicts, including the presence of witness at trial, and reaffirms that confessions extracted under torture cannot be used as the basis of conviction
Provisions Concerning Issues in Examination of Evidence in Handling Death Penalty Cases	June 13, 2010	SPC, SPP, MPS, Ministry of National Security (MNS) M J	Principles and detailed rules for scrutinizing and gauging evidence used in cases involving the death penalty
Regulation on Issues Concerning Exclusion of Illegal Evidence in Handling Criminal Cases	June 13, 2010	SPC, SPP, MPS, MNS and M J	Detailed procedures for examining evidence and for excluding evidence obtained in an illegal way like torture

death penalty reforms began in 2006. Although problems and deficiencies could still be found in capital proceedings in such aspects as judicial independence, absence of transparency, presumption of innocence and intimidation of criminal defense lawyers<sup>(18)</sup>, it would be fair to say that proceedings in capital cases are advancing in the direction toward democracy, fairness and transparency. Especially, the two sets of legal rules jointly issued by five Chinese ministries and judiciary organs in June 2010 not only adjusted the criminal evidence system, but also introduced new principles. E.g. article 2 of Provisions Concerning Issues in Examination of Evidence in Handling Death Penalty Cases specifies that the facts in capital cases must be determined according to *evidence*. This is a big step forward compared with the previous general principle of “be based on *facts* and be judged according to law” in article 6 of Criminal Procedure Law of

PRC in that “evidence” must satisfy all formal and substantive requirements specified in Criminal Procedure Law while “facts” may be based on illegal evidence such as confessions obtained through torture.

What is more important, these reforms created atmosphere favorable for limiting use of the death penalty and decreased execution in practice. According to 2008 annual report of the SPC, the number of death sentence (two years suspension) exceeded that of death sentence (immediate execution) for the first time ever since 1979. Meanwhile, statistics shows that majority of death sentences are used in the most serious violent crime cases such as murder, robbery, kidnap and intentional attack resulting in death<sup>(19)</sup>. All these changes laid down sound foundation for reforms in the Amendment VIII.

Table 2: Key Changes Promulgated by Death Penalty Reforms since 2006

	Subject Matter	Before Reforms	After Reforms
1.	Exercise of the death penalty in general	No official on the frequency of imposing the death penalty	Officially stated the principle of killing fewer and cautiously
2.	Death Penalty (immediate execution) cases review body	Higher People's Court at provincial level reviewed certain kinds of death penalty (immediate execution) cases	SPC reassumes power to review all death penalty (immediate execution) cases
3.	Decisions on a wrongful conviction/sentence	Review court empowered to replace death sentence (immediate execution) with more lenient sentence when ruling that application of law was wrong or sentence inappropriate	SPC will order a lower court to retry a case in most cases, except in very limited scenarios
4.	Questioning of convicted person during review	Review judges not required to question convicted person	SPC judges should question the convicted person "in principle".
5.	Open trial in second instance court	Open trial not required when certain procedures carried out and when facts are clear	Open trial for all cases that may result in death penalty (immediate execution)
6.	Exclusion of illegal evidence	Exclusion of illegal evidence not required	Illegal evidence such as confessions obtained through torture should be excluded

### 3.3 A Breakthrough: the Amendment VIII

Chinese decision-makers took a substantial and historic step forward in 2011. The Amendment VIII, the most massive and important one ever since 1997<sup>(20)</sup>, abolished the death penalty for following 13 crimes, 19% of the total number: smuggling of cultural relics; smuggling of precious metals; smuggling of precious animals or their products; smuggling of ordinary freight and goods; fraud connected with negotiable instruments; fraud connected with financial instruments; fraud connected with letters of credit; false invoicing for tax purposes; forging and selling value-added tax invoices; larceny; instructing in criminal methods; excavating and robbing ancient cultural sites or ancient tombs, and excavating and robbing fossil hominids and fossil vertebrate animals. Although it is argued that the Amendment VIII won't necessarily lead to a significant fall in the numbers of criminals executed because all the crimes for which the death penalty was abolished are all non-violent crimes, and what is more important, for which the death penalty was rarely if ever applied<sup>(21)</sup>, the fact that 19% of capital offences were abolished makes it fair to call it a breakthrough in the way of reforming capital punishment. What is more meaningful, the Amendment VIII indicates a change in value choice of Chinese legislature.

Traditionally, criminal law is taken as a tool to strike crimes and maintain social order, and punish-

ment as weapon to protect state and people in China, just as article 1 of 1997 Criminal Law provides: "The aim of the Criminal Law of the People's Republic of China is to use criminal punishments to fight against all criminal acts in order to safeguard security of the State, to defend the State power of the people's democratic dictatorship and the socialist system, to protect property owned by the State, and property collectively owned by the working people and property privately owned by citizens, to protect citizens' rights of the person, their democratic and other rights, to maintain public and economic order, and to ensure the smooth progress of socialist construction". Therefore, it isn't surprising to see that Chinese legislature kept extending the list of capital offences after 1980s, when China were confronted with rapid increase in economic crimes, expecting to make full use of deterrent of the death penalty, the severest punishment. The comparison between the importance traditionally placed on the tool value of criminal law and the abolition of capital punishment for 13 non-violent crimes implies that Chinese legislature has begun to rethink its value choice in promulgating criminal law and shift its focus from maintaining social order by using severe punishment to achieving a balance between social order and human rights.

In addition to reducing the number of capital offences, the Amendment VIII provides in article 3 that seniors who are 75 years or older at the time of

trial shouldn't be sentenced to death, except in cases where the senior causes another person's death by especially cruel means. In other words, death sentence for seniors beyond 75 is in principle banned. Meanwhile, article 1 of the Amendment VIII provides that seniors beyond 75 who committed intention crimes may be given a lighter or mitigated punishment, and in case of negligence crimes, they should be given a lighter or mitigated punishment. Moreover, article 19 of the Amendment VIII provides that criminals who were less than 18 at the time of commission of a crime and sentenced to less than 5-year imprisonment don't have to fulfill the duty to report to the unit concerned about the fact that he/she had been subjected to criminal punishment before being recruited in the army or employed provided in article 100 of 1997 Criminal Law. Judging from provisions with regard to death penalty and liability for seniors and minors, it might be said that the Constitutional promise that "the State respects and protects human rights"<sup>(22)</sup>, is being gradually turned into reality in the realm of criminal law at macro level. In a word, as far as death penalty issue is concerned, the Amendment VIII is a historic breakthrough not only because it reduced the number of capital offences in substantive criminal law but also because it implies a change in value choice of Chinese legislature.

Meanwhile, Chinese government has stated its stance on the death penalty issue. In March 2007, Mr. LA Yifan, China's representative in the UN Human Rights Council, made a firm commitment that "the death penalty's scope of application was to be reviewed shortly, and it was expected that this scope would be reduced, with the final aim to abolish it"<sup>(23)</sup>. Inspired by all these changes, the majority of Chinese criminal law researchers are being optimistic on future of the death penalty in China and believe that these reforms will eventually lead to total abolition. Is it really safe to say so now?

## 4. Future of the Death Penalty in China

### 4.1 Arguments on the Future of the Death Penalty

Public argument regarding the death penalty issue, such as its future, transparency, accuracy and fairness in capital procedure, could barely be seen until mid-1990s due to political atmosphere. Arguments on the future of the death penalty brought

forward by Chinese scholars by so far could be generally divided into three categories. The first one suggests that China abolish the death penalty immediately. E.g. Professor QIU Xinglong with Hunan University insists that China should take steps to restrict use of the death penalty immediately and abolish it in law in near future because the universal nature of human rights indicates that basic human rights of criminals are supreme and couldn't be deprived of, and to abolish the death penalty is the direct requirement of protection of human rights. Moreover, international standards with regard to limiting use of the death penalty don't conflict with Chinese reality, so Chinese death penalty system must comply with international standards. This is not only necessary but also feasible<sup>(24)</sup>.

On the contrary to above proposal, majority of average citizens insist that the death penalty be retained, and they are also backed by academic support. E.g. professor ZHANG Xiaohu with Renmin University of China, while admitting that the death penalty should be abolished at utmost sense, holds that whether to abolish or retain the death penalty is specifically affected or even decided by particular social background. In present China, the notion of "blood for blood, life for life" is still deeply rooted, and although general deterrent of the death penalty could no way be accurately calculated, it is still believed to be an element potential to prevent serious crimes. Therefore, presently China shall surely retain the death penalty, or it is safe to say that China won't totally abolish it in at least 50 years<sup>(25)</sup>.

Most Chinese researchers are for the opinion that although it isn't feasible for China to abolish immediately, active measures should be taken to restrict its use and thereby gradually abolish it<sup>(26)</sup>. E.g. professor ZHAO Bingzhi with Beijing Normal University, while questioning the opinion that China should abolish the death penalty in immediate future, holds that it isn't feasible for the mainland to totally abolish the death penalty in short term because of absence of cultural condition and social foundation. However, in regions where required conditions are mature, we can establish pilot zone, in another word, Special Zone of Criminal Justice, in order to collect judicial experience for future gradual abolition of the death penalty<sup>(27)</sup>. Furthermore, professor ZHAO suggests that China should abolish the death penalty in three steps: in the first

one, the death penalty for non-violent offenses should be abolished before 2020 when China enters well-off society; in the second one, the death penalty for non-fatal common violent crimes should be abolished when conditions are mature after development of further ten or twenty years; in the final one, the death penalty for all crimes should be abolished when China becomes a relatively developed state. And this goal should be achieved at the latest, before the year of 2050<sup>(28)</sup>. Some Foreign scholars also agreed that this opinion was in accordance with Chinese tradition<sup>(29)</sup>.

Obviously, above arguments are mainly based on public opinion, social safety and international influence. As mentioned above, whether to abolish the death penalty or not is more a political than a principle decision. Therefore, another important element that we should never neglect is political meaning of the death penalty, especially in China where stability is considered the most important political task.

## 4.2 Influential Elements

### 4.2.1 Political Meaning

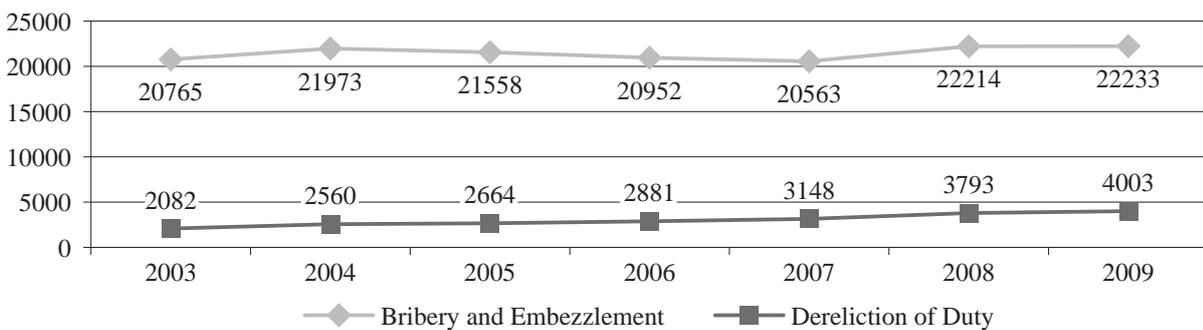
The death penalty, as a system created by political organ, can naturally be used to achieve political ends, such as to gain public support or restore public confidence. E.g. in the federal election in Canada held in November 2000, in order to win out, the right-wing party adopted the phrase ‘putting the justice back into the justice system,’ and ‘all opposition parties, even the left-wing New Democratic Party promised to make sentencing tougher and to champion changes that respect victims’ rights. And this trend, it should be recalled that, this occurred in the country that has experienced the most protracted period of declining crime rates<sup>(30)</sup>. This might be also true in China.

As can be seen in Figure 3, criminal cases of

bribery, embezzlement and dereliction of duty that can only be committed by state functionary have been increasing since 2003. As a consequence, Chinese government is losing people’s trust. In the area of justice called the last line of defense for social conscience, even a deputy president of the SPC have admitted that ‘‘presently, some citizens’ distrust in justice system has gradually evolved into a kind of universal social psychology. This is an extremely terrible phenomenon<sup>(31)</sup>’.

It has long been pointed out that the corruption in China is a kind of ‘‘system corruption<sup>(32)</sup>’’, which means that because the overall political system is of corrupt nature, persons within it naturally become corrupt. Moreover, ‘‘along with gradual development of market economy, its conflict with present political system is becoming more and more obvious<sup>(33)</sup>.’’ Therefore, to reform present political system might be the best way to overcome corruption problem. However, as the following statement in People’s Daily shows, it might be impossible to see positive and effective political reform, at least in near future: ‘‘the historic changes in China after the foundation of new China, especially after 30 years since the opening up policy, sufficiently prove that the political system we are implementing is in accordance with Chinese reality and full of vitality<sup>(34)</sup>.’’ Then, how can we respond to public anger at corruption and restore public trust in government?

Chinese government chose to avert public anger from the overall political system by directing it to individual corrupt officials and has been trying to calm citizens down by applying severe punishment in cases where the amount involved is extremely large or consequence caused is exceptionally serious. E.g. XU Maiyong, former deputy mayor of Hangzhou and Jiang Renjie, former deputy major of Suzhou, were



Source: China Annual Statistics (2004-2010)

Figure 3: Total Number of Criminal Cases of Bribery, Embezzlement and Dereliction of Duty (2003-2009)

executed on the same day in July, 2011 for taking bribery of more than 100 million<sup>35)</sup>. This is a choice based on penal populism, a political response that favors popularity over other policy considerations, and as has been shown in Western countries, it can be politically useful, but has nothing to do with penal effectiveness, because populist penal policies in some cases “can be a consequence of an intentional attempt to exploit public anxiety about crime and public resentment toward offenders. In other contexts they have emerged out of a desire by policy makers to respond to public opinion without having undertaken an adequate examination of the true value of public views. Public expressions for punitive are taken at face value<sup>36)</sup>.”

#### 4.2.2 Crime Rate and Strike Hard Campaign

When overall crime rate is on increase or heinous crimes such as murder, rape and robbery happen so frequently as to cause public anger, Chinese supreme organ of legal and political affair will usually launch a strike hard campaign (strike hard at serious crime with severe punishments), during which police usually take tough measures against crimes and judicial authorities hand down swifter and harsher penalties. The death penalty is undoubtedly a sharp sword in the strike hard campaign, and this is right the reason that NPC delegated the power to review and approve death sentence decisions to provincial courts, for cases of homicide, rape, robbery, bombing, and other crimes that seriously endanger public security and damage social order, and the strike hard policy is thought of as a leading reason for the continually high number of exe-

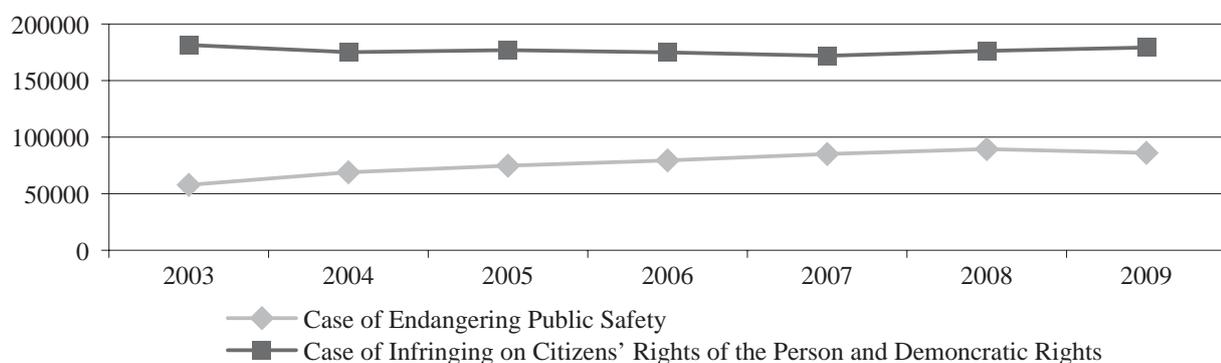
cutions in China<sup>37)</sup>.

As Figure 4 shows, criminal case of endangering public safety and of infringing on citizens' rights of the person and democratic rights have been on increase ever since 2004. Moreover, China witnessed a string of violence against primary school children in 2010, making public security authorities realize the urgency of the situation. Therefore, following previous three rounds in 1983, 1996 and 2001, the Ministry of Public Security announced the fourth round strike hard campaign targeting extreme violent crime, gun and gang crime, telecom fraud, human trafficking, robbery, prostitution, gambling and drugs in June 2010<sup>38)</sup>.

Reforms on capital punishment in recent years have reduced the use of the death penalty, but deteriorating crime situation and the fourth round strike hard campaign makes it impossible for China to stop using it, at least in cases of “extreme violent crime”, although it might be argued that “In China, the popularity of the harsh anti-crime campaigns have been used as a means for the regime to gain support in an insecure environment of transition. Harsh punishment proves the point to the public that the government' is doing something' about the negative consequences of economic reforms. The alleged positive net effect on the crime rate, however, is of a more dubious character, and it is less than likely that the campaigns managed to reduce crime<sup>39)</sup>.”

#### 4.2.3 Public Opinion

“Public opinion is quietly frequently cited as a major factor in the decision whether to abolish, retain, or reinstate the death penalty. For example, government officials in Japan, several countries of the former



Source: China Annual Statistics (2004-2010)

Figure 4: Total Number of Criminal Case of Endangering Public Safety and That of Infringing on Citizens' Rights of the Person and Democratic Rights (2003-2009)

USSR, China, Thailand, and elsewhere have stated the strength of public opinion in favor of capital punishment militates against its abolition<sup>(40)</sup>. It was said that general public support for the death penalty was a misunderstanding in China and therefore “it is obvious that the state would not listen to them unilaterally, on the contrary, the state shall even take the responsibility of leading them to rational considerations<sup>(41)</sup>.” However, in a state under the people’s democratic dictatorship led by the working class and based on the alliance of workers and peasants where all power belongs to the people<sup>(42)</sup>, public opinion will naturally not be neglected, just like what has been repeatedly stressed by the SPC: judges should try to realize both legal and social effect when sentencing<sup>(43)</sup>. Researchers also admit that political leader should fully take into account specific social background, crime situation, public opinion and collective consciousness in deciding the future of capital punishment, and public opinion and capability of controlling society should be given special attention in China<sup>(44)</sup>. “Abolition of the death penalty would be no more than a dream if the problem of public opinion couldn’t be overcome<sup>(45)</sup>.”

“Although Asia is the most important region of the world when it comes to capital punishment, it is also one of the most understudied<sup>(46)</sup>.” This fully applies to China. Very few surveys have tried to measure public attitudes toward the death penalty in China, and all these surveys show that majority of Chinese strongly support the death penalty. E.g. the Law Institute of Chinese Academy of Social Science (CASS) and the National Bureau of Statistics of China conducted a population survey in 1995 in three Chinese provinces in 1995. They found that over 95% of the respondents supported the death penalty<sup>(47)</sup>. In another survey among 2000 persons in 2005, the respondents were asked if they supported the death penalty or if they wanted it to be abolished: 82.1% supported it, while 13.7% said they wanted it abolished. Even when the question was changed, and rephrased on the assumption that the death penalty had already been abolished by the state, 60.6% still wanted to retain the death penalty, although the number of abolitionists increased to 33%<sup>(48)</sup>.

The latest survey was the one conducted in Beijing, Hubei and Guangdong provinces by the Research Center for Contemporary China (RCCC) at Peking University in 2007-2008. The survey was administered

as face-to-face interviews. Among 4472 samples that were eligible and responded, when confronted with the standard general question, without any qualifications as to the type and circumstances of the crime or the characteristics of the offender, 57.8% support the death penalty, 14% oppose it and 28% are undecided. Even if when asked from the opposite about their attitudes toward abolition, still a moderate majority support the death penalty (55% in the question “Should China follow the practice of many countries abolishing the death penalty” and 53% in the question “Should China speed up to abolish the death penalty”). But if asked more concretely about their support level of the death penalty for specific crimes, 78% of the respondents support the death penalty for murder which is much higher than for the death penalty generally<sup>(49)</sup>.

It was argued that public opinion is just the embodiment of the social public’s values of the region or sector in which a case take place. Meanwhile, public opinion is vague, sometimes based on misunderstanding and therefore irrational, what is more important, it is quite easy to change<sup>(50)</sup>, “public opinion could be guided and it should be guided<sup>(51)</sup>”. Surveys have also proved that it is possible. E.g. a survey in 2006 shows that among 897 respondents, as for application of the death penalty to crime of taking bribery, when told “the death penalty would not be used wrongfully”, more than 20% answered I support. However, when told “the death penalty might be used wrongfully”, the support rate dropped dramatically to around 5%<sup>(52)</sup>.

Then, how can the public opinion be guided? As far as I am concerned, the best way would be to tell citizens the facts, such as whom and for what crime is executed, what executions bring us and whether there are wrongful death sentences and executions? However, as has been noted, execution toll is kept state secret in China. Therefore, although it might be true that public opinion could be guided, there is a possibility that it is guided into wrong direction if citizens could never have access to truth.

#### 4.2.4 International Pressure

The last element that Chinese policy makers will never neglect when deciding the future of capital punishment is international pressure. According to AI, among 197 nations and regions worldwide, up to

2010, 96 nations had abolished the death penalty wholly, 9 had abolished for ordinary crimes, and 34 were abolitionist in practice, not having executed anyone for at least ten years and having a settled policy not to carry out executions. Thus, when the latter two are added to the nations that are abolitionist in law, 71 percent (139) of states no longer inflicts or intends to inflict the ultimate penalty<sup>53</sup>. And at the United Nations in December 2008, 106 states voted in favor of a resolution calling for a world-wide moratorium on death sentences and executions, with only 46 countries voting against<sup>54</sup>. In retentionist countries such as Japan and USA, death sentences are only given in cases where death consequence was caused. And even in countries that use the death penalty to punish crimes other than those resulting in death such as Singapore, it is very rare to see that such crimes as smuggling common goods and theft are punished by death. In a word, to limit use of the death penalty, if not to abolish it wholly, has become an irreversible international trend.

“There can be no doubt that the latest wave of abolition has been influenced greatly by the process of democratization in Europe ...and freedom from colonialism and post-colonial repression in Africa ..... Foremost among these influences has been the development of international human rights law and international covenants to put them into effect (notably Protocol No.2 to the ICCPR (1989) and Protocols No.6 (1982) and 13 (2002) to the ECHR), as well as new democratically inspired Constitutions in many countries that embody the right to life<sup>55</sup>.” China has ratified more than 200 international covenants in these 20 years, and thus is supposed to take international responsibilities, including that to respect the right to life by limiting use of the death penalty. Meanwhile, Chinese government is devoting itself to establishing at international stage an image that stresses protection of human rights, facilitates rule of law and development of civil society. Therefore, active measures to limit use of the death penalty are necessary for Chinese decision-makers’ macro strategy. From this perspective, reforms in recent years might also be regarded as China’s responses to outside pressure to a degree, just as a foreign reporter commented when draft of the Amendment was published for public scrutiny in 2010, “it is believed that the proposed amendment is one of several recent moves by the Chi-

nese government to soften its image as the world’s biggest executioner<sup>56</sup>.”

### 4.3 The Future of the Death Penalty: A Realistic Analysis

In China, “the question of whether to retain or abolish the death penalty is not so much about culture and psychology as it is about power, politics, and political will<sup>57</sup>.” “Even if China today is exceptional in the use of harsh punishments and executes more people than the rest of the world combined, there is no need to see this fact in terms of Chinese culture. China can use its own traditions to end this situation effectively in a fairly short period of time if there is the political will to do so. Given such political will, public opinion will follow suit<sup>58</sup>.” Then, will Chinese political leaders make such a will under present political system? It is very unlikely.

On one hand, when making a decision on future of the death penalty, the first thing that appears in political leaders’ minds might not be principle consideration such as humanitarianism or protection of human rights, but what consequence the abolition will cause. As noted above, China is being confronted with increasing crime rate, serious corruption problem and universal distrust in government. The relatively rational choice to resolve these problems is undoubtedly, while maintaining moderate deterrent of criminal law, to push forward reforms in economic area such as to redistribute social wealth reasonably and narrow income gap, and in political area such as to promote supervision outside the Communist Party of China. However, what such reforms may cause to political stability and authority of the ruling party? No political leader can and wants to answer this question, not to say to take the historical responsibility. Therefore, severe punishment has become the easiest and least costly means to respond to public dissatisfaction and show that the authority is working hard to cope with crime problem in China. On the other hand, because the ruling party is trying to restore public trust, penal populism will continue to prevail, although public opinion in favor of the death penalty is somewhat irrational because it isn’t based on enough information in China. Therefore, the death penalty will be used in cases where universal public indignation was caused or image of ruling party gravely damaged, as executions of XU Maiyong and JIANG Renjie have proved.

Meanwhile, apart from international criticism against the scope of capital offenses and execution record, bungled cases reported in recent years involving the death penalty have also prompted a more cautious approach in China. E.g. a work report by the SPC in March 2004 revealed that the Court “adjudicated 300 cases for both review of death sentence and trial supervision in the previous year. Among those cases, original judgments of sentences of 182 cases were maintained, 94 changed and 24 conducted retrials by courts at lower levels. It can be seen that the rate of error correction is rather high in those cases for review of death sentences<sup>59</sup>.” According to China Daily on 31 May, 2010, the SPC announced that about 15 percent of death sentence verdicts by lower courts in 2007 were found to have faults. The latest instance would be the ZHAO Zuohai case, in which a 57-year-old resident of Zhaolou village in Zhecheng County was wrongfully convicted of the murder of a fellow villager in 1999, and declared innocent and released after languishing for about 10 years in jail because his alleged victim returned home in May 2010<sup>60</sup>. Miscarriages continuously disclosed have attracted an enormous amount of public comment and, at times, strong disagreement with the court’s decision.

The competing forces mentioned above imply that the most realistic and feasible choice for Chinese government might not be, given that no substantial and constructive change happens to the present political system, to abolish the death penalty in law or in practice, but to retain it while limiting its use to violent crimes that caused death and corruption, also, ones that led to grave consequences such as severe damage on Party’s reputation. And this is just what Chinese government is doing.

## 5. Conclusion

In order to improve its records in the area of human rights and realize the constitutional promise that the state respects and protects human rights, Chinese government has taken effective measures to limit use of the death penalty and proclaimed that it is doing all this with the final aim to completely abolish it. Meanwhile, confronted with strong public support for the death penalty resulting from increasing crime rate and spreading distrust in governments because of corruption problem deeply rooted in existing systems, Chinese government has no choice but to utilize the

death penalty as a signal showing angry citizens that it is tough on crime and criminals and is doing something.

Therefore, although China has been taking procedural actions to promote transparency, ensure fairness and accuracy in capital cases since 2005 and the Amendment VIII abolished the death penalty for 13 crimes in substantive criminal law, China will retain the death penalty under existing political system, while limiting its use to violent crimes potential to cause death consequence and corruption ones with such circumstances as massive social damage and the amount involved being exceptionally large in foreseeable future. This might be the most realistic and feasible choice for Chinese government.

### Note

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- (3) GAO Mingxuan and CHEN Lu, *Reading and Rethinking Amendment VIII to Criminal Law (2011)*, Beijing: Press of Remin University of China, p3.
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- (7) See CHEN Xiaofeng (eds.), *A Study on Chinese Legal Culture (1993)*, Zhongzhou: Henan People’s Publishing House, p315.
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