

Death Penalty in People's Republic of China: Quo Vadis?

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Introduction

According to Amnesty International's most recent death penalty report, "The Death Penalty Worldwide: Developments in 2005," four nations accounted for 94% of the 2,148 recorded executions carried out around the world in 2005. Those four nations are China¹(1,770), Iran (94), Saudi Arabia (86), and the United States (60). That is to say, China executes more people every year than the rest of the world combined. Of the only 22 countries with actual executions in 2005, China stands for the worst image with overwhelmingly biggest number of executions². As an ancient civilized nation, China is notorious for the rampant execution of capital punishment. The issue of death penalty has become an Achilles' heel in the construction of rule of law in China. With the enlightenment of human right thoughts and influence of the global tide of death penalty reform, more and more Chinese elites realized the irrationality of death penalty and rounds of debates on restriction and abolition of capital punishment are initiated in recent years. Although the justifications for preserving death penalty have been challenged and criticized, the cry of abolishing is still very weak in the whole society of China and the overwhelming majority of citizens place overdue expectations on the death penalty in coping with the social problems. As far as the abolition of death penalty is concerned, the cornerstone of social culture in current China is not in favor of abolition of death penalty and it will not be eliminated completely in a short time because of the absence of favorable social conditions. The consensus reached at present time is that the death penalty will be preserved but strictly restricted currently although it should be completely abolished in the future in China. This paper is to review the status quo of death penalty in China and analyze the missions China should undertake in the purpose of reducing and complete eliminating death penalty in China.

1. The status quo of death penalty in PRC

1.1. *Death penalty policy*

Chinese people, as a nation with an especially long ruling history of feudal monarch, resort to death penalty distortedly in facing with social problems. Death penalty is deeply rooted in Chinese social culture, which has always been the principal punishment in Chinese criminal law system for several thousand years. Although the legal reform in the end of late Qing

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¹ China means the People's Republic of China, which covers the Mainland China, the Special Administrative Regions of Hong Kong and Macao (SAR, where the death penalty has been already abolished respectively in 1993 and in 1996 by the Criminal Law of Macao entered in force since January 1 1996) and the Province of Taiwan where the death penalty is still maintained. In this paper China equals the Mainland China if not specified.

² <http://www.deathpenaltyinfo.org/newsanddev.php?scid=30>

dynasty at the early decade of 20th century had introduced advanced penal doctrines and greatly reduced the brutality of executions, no hiatus of execution of death penalty has occurred in this ancient country, which is partly due to too many upheavals in the past. The evil nature of death penalty, however, has been realized by the intuition of social elite even though it is not until the recent two decades that the irrationality of death penalty has aroused profound and comprehensive blames. In the early 1950s, Chinese government promulgated the death penalty policy----“to kill less and cautiously, the criminal who are not necessarily to be killed should not be sentenced to death”-----in accordance with the criminal policy of “punishment combined with leniency”, which, despite the interruption by social upheavals and temporary *severe-punishment* campaigns, has been serving as the applicable guideline and standard for Chinese legislation and judicial practice concerning death penalty from then on.

1.2. Legislation concerning death penalty

The criminal law of PRC enacted in 1979, the first one after founding of the People's Republic of China, with an obvious feature of strong political color, was fully in accordance with the above mentioned policy of death penalty. As Mr. PENG Zhen, late then vice chairman of the Standing Committee of the National People's Congress, put it in *“Illustration on the Criminal Law (Draft) of PRC”* on June 7th 1979, “China could not completely abolish death penalty, but the execution of this punishment should be reduced as far as possible”³, the applicable conditions, object and due procedure of death penalty was prescribed and restricted in the general provision of this law with the peculiar reprieve system of death penalty. Furthermore, in the specific provision, only 28 crimes----15 for counterrevolution,8 for endangering public security, 3 for infringing personal rights and 2 for property embezzlement ----- are stipulated with capital punishment in 15 articles, of which the 15 capital offences of counterrevolution were seldom invoked in judicial practice.

However, the consequent judicial practice, for example, the three rounds of *severe-punishment* campaign, seriously deviated from this criminal code shortly after its enactment because of the high rate of crimes and simultaneous tumultuous social and economical transformation resulted from the famous reform and opening-up policy. Additionally, the number of capital offences is soaring up in the affiliated criminal laws such as *Decision Regarding the Severe Punishment of Criminals Who Seriously Sabotage the Economy* enacted by the Standing Committee of NPC in 1982, *Decision Regarding the Severe Punishment of Criminals Who Seriously Endanger the Public Order* by the Standing Committee of NPC in 1982 and so on. Up to 1997 when the criminal law was revised, 49 more capital offences were supplemented in the over 20 affiliated criminal laws, the number of capital crimes amounted to 74 in a total, and the death penalty was expanded to economic crimes, nonviolent crimes and ordinary criminal offences.

The swelling of capital punishment aroused alert among academic field of criminal law and quite a lot of Chinese penalists proposed to reduce and restrict the applications of death penalty. However, these proposals were not adopted by the legislators in revising the criminal law in 1997 due to the rampant crimes, serious situation of public security and strongly clinging mentality of the public. Finally a compromise was reached in revising the law that the number of capital offences would neither increase nor reduce. The revised criminal law of 1997 retains almost all the capital offences and still stipulates 68 crimes with death penalty with a slight

³ See ZHAO Bingzhi, “Gradual Abrogation of Death penalty Regarding to the Non-violent Crimes from the Perspective of Chinese Death Policy”, *Review of Criminal Law*(III):43, Law Press, China.

reduction.

Based on the provisions of the criminal law of 1979, some restrictions on death penalty have been made and perfected in the general provisions of the revised criminal law of 1997. The applicable objects were more explicitly stipulated as "criminals who have committed extremely serious crimes," and the death penalty shall not be imposed on persons who have not reached the age of 18 at the time the crime is committed or on women who are pregnant at the time of trial; The improper provision of reprieve of death penalty in the criminal law of 1979 --- the suspension of death penalty is applicable to those young criminals between 16 and 18 years old---was deleted off; The lethal injection was supplemented as a new method of execution; The system of death penalty reprieve was perfected in its consequence; A more strict control of death penalty from the criminal procedural perspective were also stipulated in the revised criminal law although the right of approving death penalty has improperly been entitled to the Higher People's Court in reality. However, except for more strict and explicit provision on the constituent elements of a few crimes, the rampant trend of death penalty legislation is still very obvious. Among the 10 chapters (i.e. 10 categories of criminal offences) of the current criminal law, 9 chapters (except for the Chapter 9 of crimes of dereliction of duty), are stipulated with capital punishment. There are 7 capital crimes in Chapter 1 of crimes endangering national security (Treason; Undermining unity of country; armed riot; traitor; espionage; unlawfully providing foreign agent with State secrets and intelligence; aiding enemy in wartime), 14 in Chapter 2 of crimes endangering public security (arson; breaking dike; explosion; placing dangerous materials; endangering public security by dangerous methods; damaging public transportation vehicles; damaging traffic facilities; damaging power equipments; damaging flammable and explosive facilities; hijacking; illegally making, buying and selling , transporting ,mailing and storing guns, ammunition, explosives and dangerous materials; illegally making, buying, selling, transporting and storing dangerous material; stealing and seizing guns, ammunition, explosives and dangerous materials; and seizing by force guns, ammunition, explosives and dangerous materials), 16 in Chapter 3 of crimes disrupting the order of the socialist market economy (producing and selling bogus medicine; producing and selling poisonous and harmful foods; smuggling weapons and ammunition; smuggling nuclear materials; smuggling forged money; smuggling cultural relics; smuggling precious material; smuggling rare animals and articles made from them; smuggling ordinary goods and articles; forging money; swindling by fund raising; swindling by bills and notes; swindling by financial documents; swindling by L/C; swindling by false value added tax invoice for tax reimbursement for export and write-off tax; forging and selling forged value added tax invoice), 5 in Chapter 4 of crimes infringing upon citizen's personal rights and democratic rights (intentional murder; intentional injury; rape; kidnapping and abducting women and children), 2 in Chapter 5 of crimes of property violation (robbery and theft), 8 in Chapter 6 of crimes obstructing the administration of public order (teaching criminal methods; insurrection and prison breaking; armed prison raiding; robbing ancient cultural relics and tombs; stealing fossil of ancient people and vertebrates; smuggling, trafficking, transporting and making narcotics; organizing prostitution and compelling to prostitute), 2 in Chapter 8 of crimes of embezzlement and bribery (embezzlement and bribery), 12 in Chapter 10 of crimes of servicemen's transgression of duties (disobeying order in wartime; intentional concealing or reporting false military intelligence; refusing to convey or convey a false military order; surrender; deserting from the battlefield;

obstructing performing a serviceman's duties; defecting from China; stealing, spying into or buying or illegally offering military secrets to foreign agents; fabricating rumors to mislead or shake the morale of troops in wartime; stealing or forcibly seizing weapons, equipment or military supplies; illegally selling or transferring military weapons or equipment; and cruelly injuring innocent residents or plundering their property in wartime)⁴.

1.3. Judicial practice of death penalty

The breakthrough of death penalty in legislation has directly led to the flooding of capital punishment in judicial practice. The idea of omnipotence of death penalty was fostered and become popular among the judicial officials and even the public. They blindly worship the severe punishment and death penalty. Some judicial personnel wrongly put forward that it was necessary to increase the number of capital crimes in law and to resort to severe punishment (even death penalty) to crack down the frequent occurrence of crimes. It was also erroneously claimed that the policy "to heavily and quickly strike the grievous criminal offences" should become a long run task. Some local leaders of judicial functionary even incorrectly required to sentence those to death without extreme circumstance, and to take the number of capital criminals as an indicator of the achievement of judicial organs.

Such aberrant practice deteriorated the overabundant executions in China and has invoked profound rethinking as well. More and more people (especially those who are engaged in the judicial practice and academic study of criminal law) realized the cruelty and abuse of death penalty. Along with the spread of human right movement and frequent expositions of wrong verdicts of capital punishment, Chinese government has begun taking decisive actions to correct and divert this trend of deterioration. Although it is realized that death as a punishment is irreversible and final with lasting doubts on its justice and justification, the claims for abolishing capital punishment in China is still within the circle of academic exploration. In the light of the realities of present China, because of the popular and lasting retributive psychology of the public, it is impossible for the Chinese legislators to take radical actions to abolish capital punishment in face of the high rate of crime occurrence and stern situation of public order. They would preserve capital punishment as a deterrent with rigorous restriction of executions rather than abolishing it, just as Premier WEN Jiabao put it in the press conference after the session of the NPC on March 14, 2005, "China is reforming its judicial system, including taking the right of reviewing death penalty to the Supreme People's Court. However, given our national condition, we will not abolish the death penalty. However, what we are doing is to institute an effective system in China to ensure prudence and justice when the death penalty is given."⁵ There is still a bumpy and long way to go in abolishing death penalty in China.

2. Missions China should take for abolishing death penalty

Since the official attitude toward death penalty is definitely positive in current China, it is commonly believed that China now has not the conditions for abolishing death penalty. As for the conditions for abolishing death penalty, it is even more controversial than the abolishment itself. Different people have different viewpoints on these conditions. According to some scholars, the low education level, ineffective social control, and high crime rate caused by

⁴ See GAO Mingxuan, "Chinese Legislation on Death Penalty and its Developing Trend," *Law Science Magazine* (25) p6-7:2004

⁵ <http://news.xinhuanet.com/newscenter/2005-03/14>.

poverty can form strong resistance to the abolishment of death penalty⁶; a certain level of material and spiritual civilization is a necessary condition for abolishing death penalty⁷; Death penalty can only be abolished when blessed with both objective feasibility and subjective willingness⁸ and so on. Whereas the status quo of China is like that, China is an undeveloped country with several thousand years of feudal tradition and a population of 1.3 billion, and it is in a process of social transformation with high crime rate. If we don't compare the status quo of death penalty in China with other countries and just confine our sight within this country, we may be persuaded by such theoretical and philosophical analysis. We, here, don't intend to challenge with such justifications for preserving capital punishment, and would like to make a discuss on such issues as the obligation of scholars, the features of public opinion and the responsibility of statesman as following:

2.1. *The obligation of scholars*

Scholars are teachers of the whole human being and their mission is to pass down knowledge, to edify the wisdom of the people, and to change mentality. Just as a western saying says "It is for statesman to talk about progress, whereas for scholars to talk about problems." Although it sounds reasonable for China to preserve death penalty, as long as we view beyond our territory, we may doubt our justifications for it. So it is time for scholars (especially criminologists), with their comprehensive and profound knowledge, to instruct and guide the civilian so as to correct their blind faith in capital punishment and impel the further efforts on restricting and abolishing death penalty in China.

Firstly, scholars should steer the public opinions on capital punishment, and make it a dominant ideology to abolish this cruel penalty, since the opposition of public opinion is usually regarded, home and abroad, as one of the biggest obstacles in the way to abolish death penalty. In fact, over 200 years ago, Cesare Beccaria, a great Italian criminologist, initially advocated abolishing death penalty in his writing as "A philosopher's voice is so weak by contrast with the noises uttered by those majorities who abide by fatuous erroneous customs." A recent poll conducted by Sina.com on the attitudes towards death penalty also shows that about 75.8 percent of the 4600 sample targets are for preserving death penalty in China and surprisingly 13.6 percent are for abolishment and 10.6 percent with a compromising stand depending upon the development of the country.⁹ It isn't beyond our expectation that the majorities support the maintain of death penalty. However, the 13.6 percent for abolishment is really beyond our expectation, which is just the hope for the cause of abolition of death penalty. Scholars are both members of the public and social elite and it is their duty to pilot the public opinion towards death penalty. As a creature with emotions such as love, hatred and impulsion, human being is different from other creatures in its rational logos. There may be various reasons for those in support of death penalty, but most of them are out of irrational logos that should definitely be given up. Under whatever circumstances, it should be criticized to instigate certain kind of hatred, which is an error, even a crime in light of our rational sense. As for debates concerning

⁶ See CHEN Linghai, "The Preservation or Abolishment of Death Penalty: Democracy or Philosophy", *Jurisprudence*(III)p65.

⁷ See CHEN Xingliang, *The Philosophy of Criminal Law*(III)p391, Beijing: China University of Political Science and Law Press.

⁸ See Roger Hood(Britain), "*The Death Penalty: a World Perspective*" 2005:p475, Tran. By LIU Renwen and ZHOU Renjie, China People's Policy Study University Press.

⁹ <http://news.xinhuanet.com/comments/2005-01-20>.

preserving or abolishing death penalty, they should be prudently held within rationality in stead of agitating hatred towards criminals. In China, it is those instigations of hatred to criminals, both intentional and unintentional, that further impel the extension of application of death penalty. Among those for abolishing death penalty, they express their feelings out of rational logos by such inspiring words full of wisdom and humanism as "The nature of every person is virtuous and every one of us is made of blood and flesh, so law should be a tool for reeducating and saving criminals rather than a knife to kill them." "The aim of abolishing death penalty is to let us value our lives." "Our lives are bestowed by the God, even those criminals." and "How criminals are treated is just the expression of the way we are treated by our society and our country". Law workers, especially law scholars, have the obligation to spread and instruct such social consciousness and make them become dominant logos, so as to guide the public to the belief that nothing else is more valuable than one's life and that none punishment is more disgusting than death penalty.

Secondly, scholars should enlighten the statesmen and exert some influence upon the politics since the major reasons for preserving death penalty, in our view, are of politics. On one hand, democracy requires the agreement of the majority in making decisions on such important issues as death penalty, and it should be decided by the majority, at least representatives, on what kind of crimes capital punishment should be imposed upon. Whereas the public opinion, just as we have discussed above, should be instructed and guided by scholars, in this way, it is at the hands of scholars whether to abolish death penalty or not in China. It is the scholars' duty, especially criminologists' duty, to discuss the irrationality of death penalty again and again so as to reach the agreement that death penalty should be abolished in China. On the other hand, the public, even the scholars, are not directly in charge of the political power and the final policy-making power of abolishing death penalty is in statesmen's hands. So law workers should enlighten statesmen through various channels and tell them that the western experience and researches have proved there are more scientific justifications for abolishing death penalty. Criminologists should let statesmen understand that the abolition of capital punishment in China would not spur thousands of people to madly commit such crimes as intentional homicide, intentional injury and rape just because that death penalty cannot be imposed upon these crimes since it is abolished and that they would regard it a real bargain. Criminologists should make statesmen understand that the abolition of capital punishment in China would not drive the country into collapse. The preservation of death penalty is just for political reasons rather than because of public opinion. Statesmen wisely preserve death penalty as a weapon for combating crimes in virtue of public opinion.

Thirdly, scholars should reconstruct the social culture since a national culture with humanism as its cornerstone is a decisive force for abolishing death penalty. Chinese people are full of humanism passions since we have an ancient tradition clinging to feelings. However, in Chinese culture, such spirits as tolerance and humanism have never surpassed the natural retributive impulsion since the latter is usually with the mask of justice. It is a healthy and upright social feeling for the public to hate those murderers, however the murderers' lives also deserves our respect all along. Although everyone is liable for his or her conduct and any crime should be punished, criminal mirrors us since every one is living in certain social-cultural circumstances. How we treat others is the way they treat us, which is a truth we have to believe despite of most criminals' desecration. No matter how difficult it is to eliminate capital

punishment in China, Chinese criminologists must try their best to advocate abolishing it. Death penalty must be abolished as sooner as possible and it is scholars' obligation to push forward the abolition of this cruel penalty.

2.2. The correlation of Public opinion and death penalty¹⁰

As we have discussed, public opinion is usually cited as one of the justifications for preserving death penalty, so we would like to make an exploration into the features of public opinion and its correlation with death penalty.

In our viewpoint, the correlations of death penalty and public opinion should be explored respectively from two different perspectives: one is from macro-perspective and legislative angle, which focuses on the relations of preserving or abolishing death penalty and public opinion; the other is from micro-perspective and judicial angle, focusing upon the influence of public opinion on specific application of capital punishment. If we compare the findings from these two perspectives, something interesting happens: On one hand, popular public opinion, from the micro-perspective, is against abolition of death penalty which makes a dramatic contrast with views of social elite (such as law scholars), who strongly appeal to eliminate capital punishment; whereas from the micro-perspective, except for adhering to capital punishment for a few heinous specific crimes, most of public opinions toward individual cases are against imposing execution upon capital criminals. On the other hand, although the public, along with the exposing of wrong convictions and executions of innocent people, are becoming more and more doubtful about individual justice, they still support preserving death penalty.

In the traditional rural society, the scope of personal interaction and social relation are confined due to the poor material conditions then. People were living in a small world where they expressed their viewpoint and attitudes from their own moral and natural psychology. Public opinion is the gist of judicial sentence. At that time, public opinion is natural, direct, personal, local, interest-oriented and usually pointing to specific offences and criminals. By contrast, in modern society, with the development of social civilization and science and technology, great changes have taken place in public opinion's forms, contents, transmitting channels, and its approaches and consequences. The forms of public opinion become various such as petitions of criminal suspects or victims, professional viewpoints and advices submitted by judicial organ or parties concerned, and reports (especially comments) of the media etc. Thus some public opinions are natural without processing, and some are processed or even manipulated; Some are for execution with no pardon at all, whereas some against executions; Some are based upon personal sympathy or indignation, while some upon expectations and worries for public security. The complication of influence that public opinions exert upon justice in approaches, times, objects and consequences deserves furthering studies.

Firstly, public opinions are not homogeneous. This heterogeneity is based on the following justifications: The conclusion that public opinions are for or against death penalty is dubious since the public's agreement with the macro-policy and legislation about death penalty coexists with their opposition to imposing execution upon specific criminals; The public learn less information about the macro-policy and legislations about capital punishment than that of a specific capital offence reported through media or specially related with their interests; On the micro-level, public opinions on death penalty are indirect and mainly processed by some

¹⁰ See LU Jianping, "The Application of Death Penalty and Public Opinion" *Journal of Zhengzhou University*(38)5p107-109:2005

agencies such as media, academic institutions and nongovernmental bodies since no vote by the whole nation on death penalty has been held, while to those specific capital cases, public opinions are direct but confined, most of which are expressed by the parties' acquaintances such as family, friends, neighbors, town-fellows, classmates and colleagues etc. So different groups representing different parties hold different attitudes towards the specific execution; Furthermore, there are 56 ethnic groups in our country and different ethnic groups have different legal culture (including attitudes towards death), thus how to cope with these different public opinions really becomes a knotty problem.

Secondly, public opinions don't stand for justice and is not criminal law itself. In fact, public opinions are a kind of integrated reflection of such elements as crime consequences, defendant's subjective malignance and crime circumstances but not the simple accumulation of these elements since they simultaneously express the public's viewpoints of value, moral, ethic and law. So when such social viewpoints of value accord to the process of social civilization and promote human rationality, public opinions will exert a positive influence upon the criminal sentence and justice; whereas if such social viewpoints of value don't accord to human reason and is just out of furor, retribution, prejudice and egoism, public opinions may exert a negative influence upon the criminal sentence and distort judicial justice. Actually, public opinions are usually irrational, capricious and ambiguous, and no matter what kind of public opinions, it aims to exert some influence upon legislation and justice, even to take place of judicial justice, which has been proved by more and more judicial practices. Although virtual justice depends upon people's good wills, if not regulated by law, these good wills may lead to contrary consequence, thus public indignation should be excluded in judging the imposition of capital punishment.

Thirdly, public opinions should only exert influence upon national macro-policy and legislation about death penalty through turning individual and regional public opinions into a national opinion, rather than upon sentencing of a specific case. Of course, to a specific case, public opinions' function is mainly to supervise, neither to intervene into nor to take place of trial of it since trial itself should be independent. Furthermore, the way in which public opinions exert influences should be regulated and reformed instead of current prevalent mode---- certain public opinion or professional advice by experts on a specific case is propagated by media and turned into an influential public voice to attract attentions from some leaders and authorities so as to initiate proceedings for judicial supervision. That is to say, there should be a boundary for public opinions and media to exert their influences and they should be in accordance with certain rules under the framework of constitutionality.

Fourthly, public opinions can be piloted and should be guided. Public opinions are not definitely lagging behind since some of them are quite advanced, so we should let the advanced steer those lagging behind. A communication platform should be set up for constructive interactions between scholars and the ordinaries. Since only resorting to social elite, constitutionality and rule of law can't be carried out, the viewpoints of social elite should be frequently exchanged with those of public and turn public opinion into a dominant force in restricting and even abolishing executions. Execution related information should be publicized so as to let the public learn about the actual legislative and judicial situations of death penalty in China and international trend of restricting and abolishing death penalty. Let the ordinaries completely understand the advantages and disadvantages of capital executions, and help them out of the blind worship for omnipotence of death penalty, and help them form a scientific attitude toward

death penalty, thus paving foundations for adjusting national macro-policy and legislation about death penalty. Although there are much critique about public opinions nowadays in China, generally speaking, the public opinions about death penalty are not yet fully expressed and not comprehensive since the information about executions is, to a extent, beyond the public's reach. As far as the strategy for gradually restricting and abolishing death penalty in China is concerned, what the scholars should do is, besides their own theory preparation and strategic choice, to mobilize the public for expression instead of regarding their viewpoints as confrontations. We should try our best to turn the issue of death penalty into a public topic and a virtually political topic.

Finally, we would illustrate the attitude that process of justice should adopt towards public opinion. Although "strong public opinion is not a terrible thing and multiple voices are originally part of human livings in a modern democracy -we learn this world through expressions of media, meanwhile, we express our attitudes towards one and another specific events and exchange and share our value views, just because that to express is an essential part of human social activities and has certain social value by itself and should be protected by law"¹¹-, judges should avoid the intervention of public opinions as much as possible and strictly accord to law. In nowadays China, it is not a piece of cake to keep process of justice independent since it may encounter not only influences from public opinions but intervention from superior authorities that petitions of the public have resorted to. By the way, the intervention into process of justice from superior power is more forceful than that of public voice, so the ordinaries, including many senior intellectuals, are accustomed to settling their disputes through resorting petitions to superior authorities. In order to keep independent, the process of justice, wedging between public opinion and superior power, has to resort to the principle of legality, a principle that the ordinaries support and the authorities respect. How does proceeding of justice achieve justice? The only answer is to mete out cases strictly according to law, since law is the most essential and rational public opinion. Public opinion shall never be another justification for imposing capital punishment since there have already been too many justifications for it in China.

2.3. The responsibility of statesmen

The abolition of death penalty has never been a sheer issue of law, it is also an issue of criminal policy and politics. Without policy-maker's resolution and action, death penalty would never be abolished. Although scholars have challenged preserving death penalty and initiated rounds of debates, the process of restricting executions has made little development without statesmen's virtual involvement. On one hand, the change of public opinion needs statesmen's intervention, support and help so as to exert authorities' role of steering; on the other hand, the legislation of death penalty, as the major legal approach, need approval of national policy-makers. In a word, it is beyond doubt that the drive of leaders in national policy-making level is a crucial factor for abolition of death penalty. Statesmen have to boldly undertake, even at the cost of their political career and historical reputation, such political responsibilities to impel civilization of criminal penalty and construction of rule of law.

As far as death penalty-related responsibility is concerned, to undertake such responsibility is both complex and simple. It is complex in that death penalty, as a measure of control the whole

¹¹ XU Yongzhi, "Does Public Opinion Intervene into Process of Justice?" *New Era of China*(6):2004

society, has been regarded highly for a long history and an improper control of death penalty may theoretically lead to the public disorder and impose a risk upon the statesmen's political career; it is meanwhile rather simple since to control death penalty is just one item (even unimportant one) in the national agenda, a political leader's brilliance may not be neglected even with improper handling the issue of death penalty, which indicates that national leaders not only should but can do a lot in the drive for abolishing death penalty.

French counterparts provided an excellent example in abolishing death penalty.¹² Execution for murder had continued until 1977. But when Francois Mitterand campaigned for the presidency in 1981 he declared the abolition of capital punishment even though opinion polls showed that nearly two-third of the public favored its retention. Mitterand was elected, he appointed a strong opponent of the death penalty, Robert Badinter, as his Minister of Justice and within the year the French parliament decisively abolished capital punishment in all circumstances. Since then France has been a leading advocate of abolition on the international stage. Mitterand and Badinter thus become famous would be remembered in the history. Then President of Russia, Boris Nikolayeich Yeltsin set another good example in announcing a stop of executing in 1996 when the domestic situation is not very good and completely abolishing the death penalty later.

Why should Chinese statesmen undertake the political responsibility of restricting death penalty in China? Firstly, the development of democracy drives our country to establish a responsible government, whereas political responsibility is just one of the core contents of the theory of responsible government. To be in accordance with the principle of a responsible government, those senior statesmen should not only carry out their missions but also make excellent achievements. In other word, the principle of a responsible government inevitably requires statesmen to undertake political responsibilities. As for the issue of restricting death penalty, statesmen (especially those senior policy-making leaders) have the responsibility to restrict application of death penalty so as to accord with this trend of civilization development. Secondly, statesmen's mission is to protect the people's interests. Whereas life is the base for interests of the people and it is the most important part of protecting interests of the people to protect the lives of citizen (including the lives of those in execution row). The wide scope of and low threshold for death penalty is obviously contrary to the protection of citizen's right of life. So it is statesmen's responsibility to restrict application of death penalty. Finally, although public opinion is a hard obstacle in abolishing death penalty, as we have discussed above, public opinion can be steered and changed. Moreover, the critiques from the public may not directly point to an individual statesman since the legislation is passed through the congress which is the public's representative institution¹³.

In a word, the policy-making leaders should boldly get rid of clinging to so-called deterrent function of capital punishment and wisely make a decision to restrict and finally eliminate death penalty in our country.

3. Our prospects for abolition of death penalty

It has become an international trend to abolish death penalty. The recent statistics by Amnesty

¹² See Roger Hood, "From Restriction to Abolition of the Death Penalty: an Historical and Comparative Note" *The Road of Abolition of Death Penalty in China* (Edited by ZHAO Bingzhi), 2004, Press of CPPSU.

¹³ See WU Dahua, "A Rational Consideration Over Restriction of Death Penalty", *Politics and Law*(3)2005:p92.

International shows that 95 countries have abolished death penalty by the end of 2004, of which there are 85 countries that abolished death penalty for all crimes under whatever conditions and about 39 countries haven't executed any criminals for at least 10 years (abolished death penalty de facto). In China, the defects of capital punishment have been fully discussed in academic circle and most scholars hold a negative attitude towards death penalty, agree to adopt a progressive strategy to restrict and finally abolishing the executions. Many explorations have been made on how to restrict and abolish capital punishment. Based upon other scholars' studies, we here tentatively propose our prospects for abolishing death penalty in China.

3.1. An integrated route of abolishing death penalty

3.1.1 The foreign routes that we may take as reference

There are about three routes that foreign counterparts have adopted in abolishing death penalty and we may take as reference¹⁴:

The first route is called constitutional route. Foreign experiences have shown that many countries attain their policy goal of restricting and abolishing death penalty through constitution amendments, constitution interpretations and constitution application. Constitution route emphasizes the role of constitutionality in abolishing death penalty and it is simple and convenient way since it may steer clear of complicated process and technologies of criminal legislation and justice. However, it needs the safeguard of constitutional tradition as well as constitutional application mechanism which are not possessed by every country. In this regard, China faces two major problems: one is absence of related provisions in the institution, so it is suggested that "every one has a right of life" and "prohibition of torture" should be prescribed in Chinese constitution when making constitution amendment so as to be cited as legal source for restricting and abolishing death penalty. The other problem is absence of constitution application mechanism. That China has no constitution court leads to ineffective and inefficient control over the legislative and judicial violations, for instance, delegation of authority by the Supreme People's Court to Higher People's Courts to approve death penalty should have been declared invalid through constitution violation review system after promulgation of the revised criminal law of 1997. Therefore, it is not realistic for China to abolish death penalty through sheer constitutional route.

The second route is named criminal law route. It is through revising the related provisions of criminal law to restrict and abolish death penalty for capital crimes. This way resorts to taking advantage of the legislative resources and is legitimate and thorough route for reducing and annulling death penalty since the modern principle of legality requires separation and balance of criminal legislative power and criminal judicial power. However there are also some disadvantages for criminal law route: first, it costs a rather long period because of the complication of legislative procedures; second, it is easily reversed under special conditions for lack of experience and recognition; finally, there is no realistic foundation for restricting and abolishing death penalty through criminal law route in our country with such a strong retributive psychology and unenlightened legal consciousness. So it is also unviable for China to restrict and abolish death penalty through sheer criminal law route, otherwise we may miss many opportunities for actual reduction of capital executions.

¹⁴ See LIU Renwen, "Strict restriction on Death Penalty and Its Path in China" *The Road of the Abolition of Death Penalty in China* (Edited by ZHAO Bingzhi), 2004, Press of CPPSU.

The third one is judicial route. It is to narrow down the execution scope and raise the threshold of application of death penalty without any change of the existing laws and regulations. It is to stop the application of execution in judicial practice so as to make the capital provisions of criminal law dead provisions. It is through judicial route that the above-mentioned 39 countries virtually abolished death penalty. We have previously proposed to broaden the scope of two-year suspension of execution, a peculiar capital system in our current criminal law, so that all prompt executions may be changed to death penalty with a two-year suspension and thus virtually abolish capital punishment in China¹⁵, which also belongs to judicial route. There are quite a few advantages for this path in China: it may retain the deterrent function of death penalty without executions; it may reach the effect of virtual abolition of capital punishment in the fastest speed and steer clear of the endless arguments of the public and the complication of legislative process; it may cultivate the public's recognition of the brutality of death penalty and make them adapt to the criminal justice without executions so as to pave a foundation for abolishing capital punishment completely. However, this route is always criticized for the judicial power's violation of legislative power. In addition, this route is not a thorough path since the death penalty is not eliminated from criminal law and the application of death penalty may be reversed and expanded in certain situation. So the judicial route is not accessible for China to restrict and abolish executions either.

3.1.2. The integrated route we suggested

After analyzing the advantages and disadvantages of constitutional route, legislative route and judicial route respectively, we realize that it is not feasible in China to adopt sheer one route to abolishing death penalty. So we should try to make full use of the advantages of those routes and avoid their disadvantages to innovate a new path for China to abolish capital punishment. We call such new route "an integrated route"-----reducing and abolishing death penalty from legislation goes together with restricting and ceasing of it in judicial practice, the judicial restriction and ceasing are antecedent and followed by legislative reduction and abolition, the final destination is to completely eliminate death penalty from criminal law and criminal proceeding of justice. We propose such an integrated route for China to restrict and abolish death penalty basing upon the following considerations:

First, it is in accordance with our legal system and tradition. As constitutional law prescribed, the legislative organ in our country is in charge of making, revising and abolishing laws, meanwhile the judicial organ is responsible for applying these laws. Criminal law and criminal procedure law, as basic laws, are both enacted by the National People's Congress and executed by the judicial organs. The Article 3 of existing criminal law provided, "For acts that are explicitly defined as criminal acts in law, the offenders shall be convicted and punished in accordance with law; otherwise, they shall not be convicted or punished." Therefore, judicial organs must obey the provisions of related Articles of capital crimes in criminal law and have no power to make any change. Thus, from the perspective of legality, the final abolition of death penalty means to completely eliminate death penalty from legislation and the sheer judicial route without the confirm of legislation is vulnerable for its violating of legislative power. So we propose an integrated route which relying on the safeguard of legislation besides that of judicial practice.

¹⁵ See LU Jianping, "Criminal Policy Significance of Suspended Death Penalty System and its expending" *Journal of Jurists*(5)2004

Second, it is based upon our domestic situation and adapts to international trend of death penalty. Respect for right of life and rising of human right concept have become global tide and it is international trend to abolish death penalty. By contrast, the number of capital crimes in criminal law and that of executions in judicial practice is amazingly big in China¹⁶. The rigorous reality of death penalty forces us to take efficient actions immediately to restrict and abolish capital punishment instead of waiting for the final legislative abolition. However, the public, from the ordinaries to political leaders, are infatuated with this ancient penalty. Under such situation, it is not realistic for the legislators to completely abolish death penalty immediately. In conclusion, it is our domestic situation and the international trend of death penalty that decide the inevitability of antecedence of judicial ceasing of capital punishment.

3.1.3. Feasibility of the integrated route

On the issue of death penalty application, China has consistently adopted a restrictive policy that "to kill less and cautiously, the criminals who are not necessarily to be killed should not be sentenced to death." So if we reduce and restrict the application of capital punishment in criminal justice, it is in accordance with the death penalty policy. In other word, the policy of restricting the death penalty provides us with supports of criminal policy in the effort of abolishing death penalty via integrated route.

In our view, the system of two-year reprieve of execution provided in the existing criminal law is a legitimate source for restricting and abolishing death penalty through integrated route. Even up to now, the invaluable significance of this system for restricting and abolishing death penalty hasn't been fully exploited. As what is prescribed in Article 48 of current criminal law, "The death penalty shall only be applied to criminals who have committed extremely serious crimes. If the immediate execution of a criminal punishable by death is not deemed necessary, a two-year suspension of execution may be pronounced simultaneously with the imposition of the death sentence." There are two requirements for the application of reprieve of execution: The premise for reprieve of execution is that criminals have committed extremely serious crimes and should be sentenced to death; the virtual condition is that immediate execution is not deemed necessary. We here reiterate that reprieve of death penalty is one way of implementing sentence of death penalty instead of an independent category of penalty that it is a variation of death penalty, which are always misunderstood by some people. We must correct this mistake and regard both reprieve of execution and immediate execution as one category of penalty---death penalty, and they share the same premise that criminals have committed extremely serious crimes and should be sentenced to death. In logic, this premise makes no difference for reprieve of execution and immediate execution, however, some judges wrongly attempt to differentiate more serious crimes from extremely serious crimes so as to make a sentence of two-year reprieve of execution or immediate execution, which confuses the premise and virtual condition of reprieve of execution.

The key difference between reprieve of execution and immediate execution lie in their virtual condition----whether an immediate execution is necessary or not? However, there are different viewpoints in explaining this virtual condition. As for judging the situations included in "an immediate execution is deemed unnecessary", some scholars wrongly insist a criteria based

¹⁶ Different from the other countries in the world, Chinese criminal law prescribes capital punishment for many economic crimes, which makes it especially difficult to extradite those economic criminals fled to other countries and thus prevents us from punishing these criminals.

upon the degree of harm done to society¹⁷; whereas other scholars think two exceptions should be taken into consideration in judging whether an immediate execution is unnecessary: first, if an immediate execution is not implemented, it is impossible to prevent this atrocious criminal from recommitting crimes and imposing new harm upon the society; second, if an immediate execution is not implemented, a social upheaval may be resulted. As long as one of the above two exceptions occurs, the criminal should be executed immediately, otherwise, a two-year reprieve of execution should be sentenced¹⁸. We agree to the latter argument because it masters the gist of reprieve of execution. Thus many capital criminals can be regarded as unnecessary for immediate execution and be sentenced with a two-year suspension of execution. If so, the judicial reduction and ceasing of capital execution is just in accordance with the provision and spirit of current criminal law and is utterly legitimate.

On all accounts, there are enough existing sources for our integrated route of abolishing death penalty to resort to, according to the current criminal policy and criminal law, death penalty for all kinds of capital crimes can be restricted and reduced by a large extent and death penalty for some kinds of capital crimes can be virtually stopped.

3.2. Schedule for abolishing death penalty

Although it may be criticized to propose to set a timetable for restricting and abolishing death penalty, we still follow such a modus operandi. Since the social development is impossibly as precise as mathematics formula and no researchers of social phenomena are like fortunetellers, any digital expectation for abrogation of death penalty, in a sense, will never be precise. However, such long and concrete expectation exerts a positive influence upon the abrogation of death penalty. Such influence is a kind of conception encouragement more than an objective arrangement, after all, the schedule may do help in fixing the starting point of counting down.

The integrated route we proposed is also not a royal road for restriction and abolition of death penalty in a day. Taking all factors into consideration and taking the schedules designed by other domestic scholars as reference¹⁹, we tentatively propose a schedule for our integrated route in reducing and eliminating capital punishment:

The first phase is to restrict application of capital punishment (especially immediate executions) in criminal justice as a whole, and the number of virtual executions per year will be controlled

¹⁷ See HU Yunteng, *Death Penalty*, Press of CUPLS1995, p236.

¹⁸ See MA Kechang, *Criminal Punishments*, Press of Wuhan University1999, p122

¹⁹ As for the schedules designed by other domestic scholars, see ZHAO Bingzhi, "The Design for Abrogation Death Penalty Gradually in China" *Legal Science*(1)2005. Professor Zhao proposed his design for gradual abolition of capital punishment in China in three steps: first, the death penalty for most non-violent crimes can be abolished in 2020 when China has entered into a comfortable society; second, after another one or two decades of development, capital punishments for nonfatal violent crimes can be further abolished when the conditions become mature; third, all death penalties shall be annulled no later than 2050 when our social civilization and rule of law will be quite developed. Dr. Zhao designs his schedule from the perspective of a legislative route. Also see HU Yunteng, *Death Penalty*, Press of CUPLS1995, P301-302, Dr HU propose his "century dream" for restricting and abolishing death penalty in three phases: the first phase is from the present to the year of 2010 more or less when the death penalties shall be greatly reduced, and the goals of this phase are to reduce capital crimes in the criminal law to about 15(except for crimes of servicemen's transgression of duties) and to take back the right of approving death penalty by the Supreme Court and to reduce the number of actual executions to about ten percent of that of the present; the second phase is from 2010 to 2050 more or less when all death penalties are primarily annulled, the objects of this period are that capital punishments are mainly retained for two to three crimes such as intentional homicide, treason and terrorism and that the actual number of executions further reduced to about ten percent of that of 2010; the third phase is from 2050 to 2100 when all capital punishments will be abolished completely, the destination for this stage is that no death penalties in law and justice at all.

less than 1000 by the year of 2010. Since the present number of executions of death penalty is too big, it may be greatly reduced by a large scope. From 2006 on, our country will steps into the phase of "the 11th five-year plan" when the politics, economy, culture and legality of our country will be further developed and the Olympic Games Beijing in 2008 will further open our country to the outside world. The comprehensive interactions with other countries will drive us to catch up with our counterparts in various systems, International Covenant on Civil and Political Rights (ICCPR) might be approved and the right of approving sentence of death penalty will be taken back by the Supreme Court. All of these changes will make it an available goal to reduce the number of capital punishments to less than 1000 through judicial control.

The second phase is to further restrict application of capital punishment through criminal justice and all executions for non-violent crimes will be ceased in criminal justice by 2015 and be completely abolished in legislation by 2018. After the phase of "the 12th five-year plan", our social civilization are expected to be further developed, and the people may get a more rational and comprehensive understanding of death penalty, an entire ceasing and hiatus of death penalty for nonviolent crimes can be realized in criminal justice in the last year of "the 12th five-year plan" period. By the year of 2018 when the 13th National People's Congress will be held, all legislative capital penalties for nonviolent crimes can be abolished through legislation proceeding.

The third phase is to further restrict application of capital punishment through criminal justice and all executions for non-fatal violent crimes will be ceased in criminal justice by 2025 and be completely abolished in legislation by 2028. After the phases of "the 13th five-year plan" and "the 14th five-year plan", all aspects of our country will be further developed, an comprehensive ceasing and hiatus of death penalty for non-fatal violent crimes can be realized in criminal justice in the last year of "the 14th five-year plan" period. By the year of 2028 when the 15th National People's Congress is held, all legislative capital penalties for non-fatal violent crimes can be abolished through legislation proceeding.

The fourth phase is to further restrict application of capital punishment in criminal justice and all capital executions will be ceased in criminal justice by 2040 and be completely abolished in legislation by 2048.

The third and fourth phases are the most crucial period for complete and comprehensive abrogation of death penalty in China. On one hand, it will cost a long time for the public to accept the abolition of capital punishment for non-fatal violent crimes due to their traditional retributive psychology for death penalty. On the other hand, the abolition of death penalty for non-fatal violent crimes indicates the coming of a new era without capital punishment and we can not take death penalty as deterrent tool any more, which also needs a long period for the public to accept. Due to the above reason, the fourth phase lasts for a longer time than any other phases. After three phases of "five-year plan", a complete and comprehensive ceasing and "freezing up" of death penalty for non-fatal violent crimes can be achieved in 2040, the last year of the phase of "the 17th five-year plan". And all capital punishments will be thoroughly abolished in legislation in 2048 when the 19th National People's Congress is opened.

We will not extravagantly wish that the timetable for restriction and abrogation of death penalty designed by us will be strictly followed, because the abolition of death penalty requires various conditions and favorable factors, moreover, the accidental factors occurred during the development of our society may exert an influence upon the reform of death penalty and make

the reform deviating from our schedule. Even so, the integrated route and schedule for abolition of death penalty proposed by us should not be denied since they impose a sense of pressure upon us and increase the maneuverability.

4. The perfection of substitutive measures

Along with the restriction and abolition of death penalty, some related systems must be established or perfected so as to consolidate our periodical achievements:

4.1. The perfection of substantive law on death penalty

4.1.1. Reform of the two-year reprieve of execution system²⁰

As for the reform of two-year suspension of death penalty system, we consistently admit its criminal policy significance in our country, meanwhile we advice to expand the scope of application of reprieve of execution in our daily judicial practice so as to bring the system into full play in restricting the virtual execution of death penalty. Furthermore, we suggest that the two-year reprieve of death penalty should be expanded as a compulsory execution process for all capital offences so as to prevent from and restrict the virtual executions of death penalty by reprieve of execution system, and that requirements for change from reprieve of execution to immediate execution should be more prescribed in a more detailed way, so as to make it an exception to virtually executing death penalty.²¹

4.1.2. The coordination and reform of related penalties

At present, substitutive measures for death penalty is not enough in China. According to the current criminal law, if a capital criminal is sentenced to reprieve of execution in stead of the original immediate execution of death penalty, after the two-year suspension of death penalty, his sentence usually may be commuted to life imprisonment or fixed term imprisonment. Besides, a sentence of life imprisonment will usually be commuted to a fixed term imprisonment in China. So there is no actual life imprisonment and no powerful force in current reprieve of execution and life imprisonment, the public have to resort to immediate execution of death penalty to meet their retributive psychology²². Therefore, our current penalty system should be further reformed. Some differentiations should be provided in the criminal law between reprieve of execution and life imprisonment, between the ordinary life imprisonment and the life imprisonment commuted from reprieve of execution, between the ordinary fixed term imprisonment and those commuted from reprieve of execution and life imprisonment, correspondingly, the related systems, such as commutation and probation, should be reformed so as to upgrade their deterrent force and to make them actual substitutive measures for death penalty.

²⁰ As for the reform of two-year suspension of execution of death penalty, also see LU Jianping, "Criminal Policy Significance of Suspended Death Penalty System and its expanding" *Journal of Jurists* (5)2004

²¹ Many scholars share the same stand with us in expanding the scope of reprieve of execution. For example, Prof. CHEN Xingliang also advices to expand the scope of two-year suspension of death penalty, see CHEN Xingliang, "*Philosophy of criminal law(Third edition)*", Press of CUPLS2004, p400-401; some scholars think that in order to reach the destination of complete abrogation of death penalty, reprieve of death penalty taking place of immediate execution may be an effective way. see YANG Zhongmin, "A feasible path for death penalty reform", *Journal of CPPSU*(3)2005

²² According to some polls, if the public can choose substitutive measures for death penalty, such as life imprisonment without release on probation and with compensation to the victims, the rate of supporting death penalty will fall. See Roger Hood "*The Death Penalty: A worldwide Perspective*" translated by LIU Renwen, PHCPPSU2005, p486-487

4.2. Perfection of due procedures for death penalty²³

4.2.1 To withdraw the right of approving sentence of death penalty.

The existing two-level system for right of death penalty review is full of defects, not only because the procedure for approving death penalty is terribly becoming administration-oriented in practical operation, but also because it becomes atrophy and even void after the delegation from the Supreme Court to the Higher Courts. Under such conditions, it is impossible for the Higher Courts to strictly restrict the use of death penalty and prevent from wrong executions in daily criminal justice. The delegation of the right of approving death penalty from the Supreme Court to the Higher Courts is not in accordance with criminal policy of prudent use of capital punishment, so it should be taken back.

4.2.2. To establish the related systems such as pardon and commutation.

The pardon for death penalty is a legal system designed to forgive and relieve the convicted criminals' original punishment at the order of administrative mugwump (chief of State) or the superior authority organ. China has formally signed ICCPR, Article 6, section 4 of which provides, "Anyone sentenced to death penalty 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". According to this provision, not only the capital criminals have the right to seek pardon or commutation, but the states have the duty to grant pardon and commutation to the capital criminals. This provision aims to prevent the abuse and misuse of death penalty and builds the last stop for the capital criminals before execution. Chinese government didn't put forward the reservation to this Article, so once ICCPR is approved by the Standing Committee of NPC, it may share the equal effectiveness with domestic criminal law. However, there are no provisions concerning pardon and commutation for capital criminals in our existing law, which does not accord to ICCPR²⁴. Therefore, we should establish and perfect the systems of pardon and commutation for death penalty, at the same time, the legal terms for sentence of death penalty and capital execution should be prolonged so as to provide the capital criminals with enough time for seeking for pardon or commutation²⁵.

4.3. Establishment of victim's compensation from the government.

In terms of social responsibilities, the occurrence of crimes is resulted from ineffective education and control of the government, so the government should, at least partly, be responsible for the loss of victims. Many criminals can't afford to compensate for the victims and their families, thus the victims and their families are violated by the criminal offences with no compensation at all and dramatically fall into poverty. Therefore, Chinese government should establish and perfect the victim's compensation system and undertake the responsibility

²³ Some scholars argue that there are mainly two paths for abolishing death penalty: substantive law and procedural law. The former is ultimate and efficient, however, it is not realistic for China for our criminal policy of retaining death penalty and the public's strong retributive psychology. Fortunately, the latter is rather realistic for China for it is compromised, concealed, gradual, acceptable and retrospective. See YANG Zhengwan, "The due procedure and restriction of death penalty", in *Journal of GUEM*(2)2005,P25-32

²⁴ Of course, the existing provisions concerning pardon in the constitutional law and criminal law are too ambiguous and have never been used in reality. Nowadays we should activate and perfect the system of pardon.

²⁵ As for the system of pardon and its construction, see CHEN Dongsheng, "Research on System of Amnesty" PHCPPSU, 2004. Also see ZHU Huaijun, "The construction of system of pardon for death penalty" *Journal of HNU*(5)2004 and YIN Jianfeng, "Study on the construction of amnesty for death penalty in China" *Report on the development of criminal law in China* (edited by ZHAO Bingzhi),PHCPPSU2005.

for compensation. In this way, the hurt hearts may be consoled and the tension relation between criminals and victims can be dispelled.

On all accounts, in order to reach the destination of abolishing death penalty, we should make a thorough investigation into and review on our existing laws and perfect the concerning systems so as to make the integrated way of abolishing death penalty more smooth.