

**CAPITAL PUNISHMENT IN CHINA:
TOWARDS EFFECTIVE PUBLIC POLICY AND LAW**

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Abstract

Based on an examination of the rationality and moral legitimacy of capital punishment in China, this research depicts the evolution of the Chinese death penalty law and policy from 1979 onwards; investigates the institutional and procedural shortcomings that lead to pre-trial torture, wrongful convictions, and executions of innocent or vulnerable people; and explores the prospects for restricting the application of the death penalty in retentionist China by focusing on feasible legal and policy changes to assure fair trials in capital cases.

The key research questions to be addressed are: why capital punishment persists in China in an age of abolition; and if the abolition cannot be achieved in the foreseeable future, what reforms should be introduced to prevent miscarriage of justice?

This research finds that the Confucian theory of punishment constitutes a compelling unified theoretical framework and establishes solid philosophical and ethical foundations for the introduction and persistence of capital punishment in China. Responding to the concerns expressed by and pressure from the international human rights community together with domestic calls for more caution in meting out capital punishment, China has launched a series of reforms in the death penalty regime since the middle of 2000's which has resulted in a significant reduction in the use of the death penalty. However, it is also observed that: capital offenders with mental illness are at a substantial disadvantage in receiving psychiatric assessment and thus are at a high risk of being sentenced to death; police ill-treatment and torture are rampant due to the deeply-rooted presumption of guilt and the confession-oriented approaches predominantly employed in police investigation practices; and the procedural

loophole that suspended death sentence, although being a form of capital punishment, is not subject to review and final approval by the highest judicial authority has in effect condoned arbitrary sentencing in capital cases and consequently exacerbated the miscarriages of justice.

It is concluded that the retention of capital punishment in China may be more impervious to abolitionists' claims than other jurisdictions; hence, to improve its state competence in securing criminal justice, China should promote institutional and procedural changes in line with international human rights standards for protecting the rights of offenders facing the death penalty.

Key Words: Capital Punishment, Confucianism, Torture, Wrongful Convictions, China

Capital Punishment in China: Towards Effective Public Policy and Law

“Justice without mercy is tyranny, and mercy without justice is weakness.”

The late Archbishop of Manila (Philippines) Jaime Cardinal Sin

speaking at a Prison Fellowship International conference in Nairobi, Kenya, 1986

Chapter 1. Introduction

This research aims to explore the rationality and moral legitimacy of capital punishment based on China's experience.

Despite the abundance of studies on capital punishment, existing discussions rely heavily on the policies and practices in the West, whereas China, as one of the most prominent death penalty jurisdictions, remains understudied.¹ Most attention has been cast on the number of China's annual executions and the impact of the current Government's political dictatorship in the death penalty realm. In the relevant literature to date, the longstanding death penalty in China is typically attributable to some historical, cultural and/or politico-legal factors. Prevailing arguments include: that China retains harsh criminal sanctions because of its lengthy history of using cruel execution methods;² that Chinese people support vengeance;³ and, that the Chinese authorities tactically use political rhetoric

¹ David T. Johnson & Franklin E. Zimring, "Taking Capital Punishment Seriously" (2006) 1 *Asian Criminology* 89 at 89, 92.

² See, e.g., Hong Lu & Terance D. Miethe, *China's Death Penalty: History, Law, and Contemporary Practices* (New York: Routledge, 2007) at 28-29; Mingxuan Gao, "On Chinese Legislation Concerning the Death Penalty" in Bingzhi Zhao, ed, *The Road of the Abolition of The Death Penalty in China* (Beijing: China Public Security University Press, 2004) at 15.

³ See, e.g., Bingzhi Zhao & Dongyang Wang, "中国古代死刑观念论要" [Public Perception of the Death Penalty in Traditional China] (2008) 28 *Academic Forum of Nandu* 91 at 91; Shenhui Qi & Dietrich Oberwittler, "On the Road to the Rule of Law: Crime, Crime control, and Public Opinion in China" (2009) 15:1 *European J of Criminal Policy & Research* 137 at 143-146; Børge Bakken, "The Norms of Death: On Attitudes to Capital Punishment in China" in Lill. Scherdin, ed, *Capital Punishment: A Hazard to a Sustainable Criminal Justice System?* (Surrey, England: Ashgate Publishing, 2014) at 196.

to manipulate the practice of the death penalty.⁴

Little scholarly work has contributed specifically to our understanding of the foundational basis for and the values embedded in this oldest institution in China. The oft-cited factors for its longevity only have a tenuous connection to how people perceive the death penalty and the real reasons behind their support. This offers us a grand area to explore: As a country historically nurtured by Confucianism, does China establish a peculiar value system in which the Confucian sense of justice is woven into the application of the death penalty, and consequently forms a deep and abiding bond between Confucian ethics and the persistence of capital punishment? Is it possible that the rationale behind China's position has been undervalued for more pedestrian political reasons? Can deeper analysis of capital punishment in China yield meaningful insights not only for its better understanding, including developments in its practice, but also for a progressive reduction in its use. And, beyond the death penalty in China, can this analysis yield meaningful insights for international debates on human rights more generally in the criminal justice field notably with a view to better implementation and effective respect and protection of the relevant substantive and procedural rights?

1.1 Literature Review

China has often been accused of human rights violations; within various human rights debates, the death penalty in China usually sparks criticisms about the character of the Chinese criminal justice system, notably its (in)humanity and its (in)effectiveness. Responding to the global abolition movement, some Chinese scholars, lawyers, and social

⁴ See, e.g., Bakken, "The Norms of Death," *id* at 209; Børge Bakken, "The Culture of Revenge and the Power of Politics: A Comparative Attempt to Explain the Punitive" (2008) 1:2 *J Power* 169 at 178; Susan Trevaskes, *The Death Penalty in Contemporary China* (New York, NY: Palgrave Macmillan, 2012) at 5.

activists started launching a series of advocacy, lobbying, and campaigning at the turn of 21st century.⁵ Most prevalent views held by the Chinese abolitionists are actually a transplant of the major arguments raised by their Western counterparts, including: a state is not authorized to deprive its people's right to live; the death penalty incites violence rather than deters crimes; innocent people might be executed; non-violent acts should not be subject to death sentence; the death penalty is often used for political purposes; the human dignity of both offenders and executioners would be destroyed in execution process.⁶

This anti-death penalty trend in China's context has been warmly received and privileged in international media.⁷ Western commentators were once very optimistic that Chinese people's hostile attitude toward abolition would soften, or at least no longer be the major resistance; Chinese intellectual elites were expected to push the government toward abandoning the death penalty.⁸ However, China's position on the death penalty has not developed as anticipated.⁹ The abolitionists' advocacy and engagement in capital litigations

⁵ See, e.g., Roger Hood, "Abolition of the Death Penalty: China in World Perspective" (2009) 1 *City University of Hong Kong Law Review* 1 at 1-2, 16; Chunyou Yan, "为什么要废除死刑" [Why Should We Abolish the Death Penalty] (1997) 4 *Young Thinker*, online: <http://blog.sina.com.cn/s/blog_40a715d40101hnws.html>; Yu Jia, "中国死刑必将走向废止" [The Death Penalty in China Shall End Eventually] (2003) 4 *Legal Science* 45 at 48-49.

⁶ Weifang He, *In the Name of Justice: Striving for the Rule of Law in China* (Washington, D.C.: Brookings Press, 2012) at 196-213. These arguments are shared amongst Chinese abolitionist scholars and practitioners. Some representatives are Professor Zhao Bingzhi, the Dean of College for Criminal Law Science and School of Law, Beijing Normal University; Professor Mo Hongxian, Law School of Wuhan University; Professor Zhou Xiang of Zhongnan University of Economics and Law; Professor He Jiahong, Law School of Renmin University of China, History professor Qin Hui of Qinghua University, and quite a few Chinese human rights lawyers including Teng Biao, Chen Youxi, and Cheng Hai. These names can also be found in some Western commentators' articles.

⁷ For example, Weifang He, a Law professor and a representative abolition lobbyist once was named as the FP Top 100 Global Thinkers 2011. Kedar Pavgi, "The FP Top 100 Global Thinkers," *Foreign Policy* (28 November, 2011) online: <<http://www.foreignpolicy.com>>. On November 28, 2012, the launching of He's book was hosted by John L. Thornton China Center at Brookings. Some well-known American scholars and Judges attended the launching. Videos and transcripts are available at <http://www.brookings.edu/events/2012/11/28-china-law>. However, I argue that seminars and panels alike were polarized as, while the death penalty is an arguable topic, Chinese proponents had not been invited to participate in the debate.

⁸ Hood, "Abolition of the Death Penalty", *supra* note 5 at 17, 19-21.

⁹ Franklin E Zimring, "State Execution: Is Asia Different and Why" in Roger Hood & Surya Deva, eds, *Confronting Capital Punishment in Asia: Human Rights, Politics and Public Opinion* (Oxford: Oxford

have indeed provoked heated debates across Chinese society, but also generated some backlash against the elite phenomenon among the populace.¹⁰

I argue that the typified strategies adopted by the Chinese abolitionists were not accurate or informative, and therefore eventually ineffective. For instance, Italian jurist Cesare Beccaria's views on the abolition of capital punishment are quoted as a key supportive argument practically in all Chinese abolitionists' debates, however, for some reason they never mention that Beccaria also advised to put capital crime offenders to work as permanent jail slaves instead of being executed so that the offenders had to suffer the slavery pains through the rest of their life.¹¹ Beccaria believed that slavery was a more terrible punishment than the death penalty in that the continuous pains inflicted by the former could create the most powerful repeating effect on the mind of sensible spectators, whereas the intense shock caused by the executions only lasted for a moment.¹²

Neither have the Chinese abolitionists examined the applicability of Beccaria's 18th century Italian experience to contemporary China. Beccaria lived in the pre-modern continental Europe, where criminal liabilities and penalties were determined in large part by the offenders' social status, which he strongly disfavored, and so he developed his penal theories grounded in his belief in social equality, and he proposed sentencing principles should focus on offensive behaviors instead of the social status of offending individuals.¹³ In fact, Beccaria's opposition to capital punishment also stemmed from his pursuit of social

University Press, 2013) at 16.

¹⁰ Haiming Shang, "当代中国死刑存废论争夺话语解释" [Interpretation of the Debates on the Abolition of the Death Penalty in Today's China] (2019) 21:4 Journal of Southwest University of Political Science & Law 44 at 45.

¹¹ Cesare Beccaria, *An Essay on Crimes and Punishments* (Philadelphia, PA: Philip H. Nicklin, 1819) at 99-100.

¹² Beccaria, "An Essay on Crimes," *ibid.*

¹³ James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (New York, NY: Oxford University Press, 2013) at 51.

equality: the distinction between the execution modes in his time—beheading and hanging for high-status and low-born offenders, respectively—and the resulting degradation and humiliation would be eliminated if the death penalty were discarded.¹⁴

While adopting Beccaria's views as their flagship argument, the Chinese abolitionists have failed to update themselves of the development in the critical studies of the Beccarian philosophy. It is noteworthy that Beccaria's act-egalitarianism theory in punishment has already been proven implausible by mainstream Western punishment theory specialists, particularly in the following aspects.¹⁵

Beccaria held a firm attitude toward formal equality in criminal law—all forbidden behaviors should be listed and the penalties for the violation thereof should be clearly prescribed.¹⁶ His ideas are criticized as having set up a penal tariff, in that potential offenders would be aware of what “price”, rather than “fine”, they would pay for any specific misconduct, whereupon they could act according to their “budget”; as such, crime and punishment becomes market-oriented.¹⁷

Beccaria and his followers disapproved of all kinds of systematic mitigation: they proposed that punishment should be determined by the criminal acts without taking moral depravity into consideration.¹⁸ According to the Beccarian school of thought, penalties should be imposed in exactly the same way and with exactly the same intensity upon offenders who had committed the same wrongful deed, regardless of any mitigating factors of

¹⁴ Whitman, “Harsh Justice,” *ibid.*

¹⁵ Whitman, “Harsh Justice,” *id* at 73.

¹⁶ Whitman, “Harsh Justice,” *id* at 42

¹⁷ Whitman, “Harsh Justice,” *id* at 73-74.

¹⁸ Whitman, “Harsh Justice,” *ibid.*

the offences, the offenders, or the circumstances.¹⁹

While strongly opposing harshness, Beccaria did not acknowledge the value of rehabilitation or resocialization, and he insisted on the unvarying implementation of punishment and allowed for no pardoning.²⁰ These ideas undoubtedly violate the commonly acknowledged conception of justice today; Beccarianism would eventually be replaced by the more scientific individualization philosophy in the doctrines of liability and sentencing practices in the modern Western world.²¹ In terms of its resistance to leniency, Beccarianism resonates with the core views of a penal philosophy of Legalism (法家) that governed the traditional Chinese criminal system over 2000 years ago but was soon replaced by Confucianism (儒家), which I shall extensively discuss in Chapter 2 of my dissertation.

Reminding the public that capital punishment is barbaric, bloodthirsty, and inhumane is another strategy repeatedly used by the Chinese abolitionists to challenge the implementation of the death penalty.²² However, the emotional sources with respect to the death penalty in their debates are polarized, in that all emotions, explicit or implicit, in favour of the death penalty are excluded. Their vivid descriptions of the pain inflicted on offenders by the death penalty often arouse the public's compassion and sympathy but hardly can shake the proponents' position.²³ The reason this emotion recognition strategy has not functioned

¹⁹ Whitman, "Harsh Justice," *id* at 50.

²⁰ Whitman, "Harsh Justice," *id* at 42, 50-51.

²¹ Whitman, "Harsh Justice," *id* at 51.

²² He, "In the Name of Justice," *supra* note 6 at 204-205.

²³ Under the pressure of the air of moral superiority, proponents in China choose their words cautiously: it is reminded that supporting the death penalty is not equal to accepting brutality, and capital punishment should not be denounced and barred hastily without considering China's particularities. See, e.g., Suli Zhu, "俯下身, 倾听沉默的大多数" [Please Listen to the Silent Public], *Legal Daily* (13 September, 2011), online: <<http://epaper.legaldaily.com.cn>>; Yuanzhao Shu, "康德和黑格尔死刑正义论的当代审视" [Examining Kant and Hegel's Justification of the Death Penalty in Contemporary Era] (2011) 27:12 *Tribune of Study* 56 at 59; Xuehui Xiao, "支持死刑不等于选择野蛮" [Supporting the Death Penalty Does Not Mean Choosing Brutality], *Southern Metropolis Weekly* (12 July, 2011), online: <<http://www.nbweekly.com>>.

successfully in practice as expected is that the abolitionists have confused people's sense of justice with their moral feelings.

The sense of justice is a capacity we have that leads us to evaluate fairness and motivates us to respond in emotions and/or behavior justly.²⁴ In other words, a sense of justice allows us to develop an ability to feel certain ways toward other people's situations, determine our attitude, and take actions accordingly. Anyone who has a developed mature sense of morality would feel sympathetic to the suffering pain of others and want to seek all possible opportunities to act benevolently and humanely. However, our assessment of the cause of such the pain is not determined by our sentiment but by our sense of justice.²⁵ Only when our sense of justice is aroused and makes us think the cause is wrong shall we have the motivation to change or remove the cause (i.e. the death penalty institution in my research). Moral feelings stem from our sense of justice, yet cannot replace the latter to help us perceive what is fair or unfair. Consequently, the abolitionists' sentimental approach does not necessarily lead proponents to feel contempt for the death penalty or start questioning the fairness of the institution; rather, it only scratches the surface in most cases.

Despite the success of the top-down reforms in moving most European countries toward abolition,²⁶ the Western abolitionist groups also struggle with challenges. Commentators indicate that they have failed to communicate with proponents of capital punishment about what constitutes just punishment: while simply raising a STOP sign to executions, they have not found alternatives that effectively meet primary stakeholders' needs,

²⁴ Erin M. Cline, *Confucius, Rawls, and the Sense of Justice* (New York, NY: Fordham University Press, 2013) at 170.

²⁵ Cline, "Confucius, Rawls," *id* at 171.

²⁶ Franklin E Zimring, *The Contradictions of American Capital Punishment* (New York, NY: Oxford University Press, 2003) at 127.

such as the public's moral outrage over crimes and fear of recidivism, and victims and their survivors' desire for closure, healing, and peace.²⁷ For example, they have been unable to persuade people on a crucial issue: how to deal with the worst offenders—like Charles Manson, Robert Pickton, or Peter Scully—who remain recalcitrant and express no remorse for their crimes after getting away from the death penalty, continue to diffuse their controversial beliefs by captivating fanatics and followers, and possibly earn profits from selling their stories? In such cases, how are these offenders to be neutralized?

The abolitionists in China don't have a convincing answer either. Since the mid-2000's, China's death penalty regime has made noticeable efforts in downsizing the scope of offenses subject to the death penalty as well as in reducing executions in practice, which will be examined in Chapter 3. However, the social influence of the previously active abolitionist groups has been fading; their objection to the use of the death penalty is extremely weak when confronting high-profile cases. The activist movement has slowed down whereas support for conservatism is growing in this context.²⁸ In fact, calls for *de jure* abolition receive less exposure and public responses in today's China.²⁹

My research on capital punishment in China is not only driven by a normative imperative; it is also proposed in an attempt to make good practical sense. Perhaps one of the biggest challenges that China confronts when integrating itself into the global economy is the deep concern held by the international community over its human rights record.

²⁷ Kerry Ann Akers & Peter Hodgkinson, "A Critique of Litigation and Abolition Strategies: A Glass Half Empty" in Peter Hodgkinson, ed, *Capital Punishment: New Perspectives* (Burlington, VT: Ashgate Publishing, 2013) at 1.

²⁸ Shang, "Interpretation of the Debates," *supra* note 10 at 44, 49; Wei Lin, "中国死刑七十年:性质,政策及追问" [China's Death Penalty in the Past 70 Years: Nature, Various Stages of Policy, and Discussions] (2019) 5 *China Law Review* 124 at 135-136.

²⁹ Shang, "Interpretation of the Debates," *id* at 45.

Notwithstanding a continuous reduction in capital crimes and executions in recent years, the persistence of death penalty in China still faces excoriations of its harshness in the context. This has damaged China's public image and jeopardized China's efforts to enhance international cooperation: trade and investments are affected by human rights advocates' protests, and some jurisdictions hesitate or refuse to extradite criminals accused of certain offenses which may carry the death penalty in China.

1.2 Objectives

The main purpose of my doctoral research is to examine the rationales behind the persistence of capital punishment in China; whether capital punishment in China can be abolished in the near future or not, and why: if not, what reforms should be introduced to prevent the miscarriage of justice.

I shall not only describe the change with China's position regarding the death penalty and the legal and practical development in the context, but also examine the philosophical and ethical foundation for the application and retention (thus far) of capital punishment in China. This study shall provide an interdisciplinary perspective that might prompt scholars, activists, and policymakers to expand on the following aspects of the issue: to understand why capital punishment is perceived as morally obligatory in China; to assess the multiple meanings and varied intentions that underlie the evolution of the Chinese death penalty law and policy; to identify and sort the stakeholder conflicts within China's capital justice system that are likely to lead to wrongful convictions and executions; to propose a set of pathways combating police torture and improving the fairness, accountability, and transparency in capital sentencing, and last but not the least, to foster more effective and equal human rights

dialogues with China so that it can be more open to the international human rights scrutiny.

1.3 Research Questions

1. Is capital punishment morally justified in China; if yes, how?
2. What changes have occurred in China's attitude and death penalty policy towards the international abolitionist movement?
3. What are the harsh or merciful aspects of the Chinese capital punishment system, and the impact thereof on justifying the institution?
4. Can capital punishment be abolished or reformed in the foreseeable; and if the latter, who should be executed?
5. What are the prospects and feasibilities for reducing wrongful and otherwise problematical impositions of the death penalty in retentionist China?

1.4 Theoretical Context & Methodology

The fundamental theoretical analysis of this research is grounded in a comparative study of the Confucian concept of punishment and well-established Western punishment theories. But first and foremost, I will justify the continued relevance of classical Confucianism as the mainstream philosophy in modern Chinese society.

The traditional Chinese criminal justice system is rooted in the philosophical theories of Confucianism—the school of thought founded by Confucius and developed and expanded by his followers.³⁰ Confucianism had become one of the main streams of Chinese thought by the third century BCE.³¹ Around 136 BCE, the Chinese Emperor adopted Confucianism as

³⁰ Confucius was China's first private teacher and also the most influential teacher in Chinese history. Most of his ideas are known through *Analects* (《论语》), which is a collection of his sayings and teachings compiled and edited by some of his disciples. See Yu-Lan, Fung & Derk Bodde, eds, *A Short History of Chinese Philosophy* (New York, NY: The Free Press, 1948) at 30, 39.

³¹ Fung & Bodde, "A Short History," *id* at 30, 205-206.

the primary official teaching to unify intellectual thought across the country, and the exclusive philosophy guiding legal thinking and practices.³² This marks the beginning of the Confucianization process of the legal system in Imperial China. When trying and deciding cases, judges were required to apply the Confucian concepts and theories to legal reasoning, and compare fact patterns analogically.³³ The feudal Chinese legal system (the criminal justice system, in effect) completed its Confucianization in 653 CE,³⁴ and remained the same toward the end of the dynastic era.³⁵

Confucianism continued to be the basis for ethical discipline and school curricula until the Republican government was overturned by the Chinese Communist Party (CCP) in 1949.³⁶ Surprisingly, the CCP implicitly allowed the (continued) spread of Confucianism soon after its governance had stabilized.³⁷ A nation-wide propaganda campaign against Confucianism was launched in 1973-1976 to meet the political purposes of the Cultural Revolution when people were encouraged to turn against their parents, friends and neighbours, or to challenge academic and legal authorities through betrayal and violence, which is in stark contrast to Confucian ethics and values.

³² Jianhong Liu et al, "Chinese Legal Traditions: Punitiveness versus Mercy" (2012) 9:1 Asia Pac J Police & Crim Just 17 at 22-23; Ying-qin Chen, "On the Confucian Plots in the Thirteen Criminal Annals" (2009) 21:1 J of Chongqing University of Posts and Telecommunications (Social Science) 67 at 67.

³³ Norman P. Ho, "Confucian Jurisprudence in Practice: Pre-tang Dynasty Panwen (Written Legal Judgements)" (2013) 22 Pac Rim L & Pol'y J 49 at 83; Liu, "Chinese Legal Traditions," *supra* note 32 at 22.

³⁴ It was clearly stipulated in the Tang Penal Code that "everything has to follow Confucian morality and propriety (一准乎礼)". See, Liu, *id* at 24; Geoffrey MacCormack, *Traditional Chinese Penal Law* (Athens, GA: The University of Georgia Press, 2009) at 13-15.

³⁵ Starting from the Han dynasty, the imperial examination system recruited government officials mainly based on their knowledge of the Confucian theories. Some of these Confucian scholars then became magistrates dealing with criminal cases, or officials overseeing the judicial departments in their prefectures. See, e.g., Liu, "Chinese Legal Traditions," *supra* note 32 at 24; Norman P. Ho, "The Legal Philosophy of Zhu Xi (朱熹) (1130-1200) and Neo-Confucianism's Possible Contributions to Modern Chinese Legal Reform" (2010-2011) 3 Tsinghua China L. Rev. 167 at 176.

³⁶ Fung & Bodde, "A Short History," *supra* note 30 at 325; Sébastien Billioud, "Confucianism, "Cultural Tradition" and Official Discourses in China at the Start of the New Century" (2007) 3 China Perspectives 6 at 56.

³⁷ Joseph R. Levenson, "The Place of Confucius in Communist China" (1962) 12 The China Quarterly 1 at 2.

Nonetheless, right after the end of the devastating period, the Chinese policymakers determined to restore the status of Confucianism in order to gain ideological support from scholars and the populace who still held strong faith in Confucian ideals despite previous political denunciations, as described in the next chapter. The subsequent generations of Chinese leadership have continued engaging in the promotion of Confucian civilization. Moreover, the political legitimization of Confucianism began in the early 2000's and reached its peak in 2014: Confucianism is recognized as the ethical foundation for China's legal reform towards the rule of law in official discourse.³⁸

It is not controversial that Confucianism is still the mainstream philosophy that influences the legal thinking and legal practices in modern Chinese society. A common misconception in the West is that Confucianism always advocates benevolence and forgiveness and opposes the application of punishment. In fact, the concept of punishment developed simultaneously with the formation of the widely honored virtue concepts in Confucian philosophy: a ruling framework appropriately combining three ways of governance, namely "rule by moral integrity", "rule by propriety", and "rule by penalty", was recommended for the ultimate purpose of justice.³⁹

The Confucian concept of punishment constitutes the most relevant resource for us to investigate the introduction and continued use of the death penalty in China. A comparative

³⁸ See, e.g., Daniel A Bell, *China's New Confucianism Politics and Everyday Life in A Changing Society* (Princeton, NJ: Princeton University Press, 2008) at 12, 153; Xi Jinping's speech at International Conference Commemorating the 2565th Anniversary of Confucius' Birth on 24 September 2014; Kai Jin, "The Chinese Communist Party's Confucian Revival", *The Diplomat* (30 September 2014), online: <<http://thediplomat.com>>; Andrew Browne, "Xi Jinping Sends Mixed Signals on Rule of Law", *The Wall Street Journal* (21 October 2014), online: <<http://online.wsj.com>>.

³⁹ "论语•为正" [Analects of Confucius: Wei Zheng]; "荀子•成相" [Xunzi: Cheng Xiang], cited in Liu, "Chinese Legal Traditions," *supra* note 32 at 22. Mencius said that the feeling of shame is the basis for righteousness. See "孟子•公孙丑上" [Mencius: Gongsunchou Shang], cited in Fung & Bodde, "A Short History," *supra* note 30 at 70.

study of the Confucian punishment theories with their Western counterparts, including Retribution, Deterrence, Rehabilitation, Expressivism, and Purgative rationale, shall lead to a more accurate and profound understanding of the nature of the Confucian sense of justice, which lays the cornerstone for our exploration of the theoretical grounds for the use of capital punishment in China.

My approach is to focus on a set of Confucian notions and themes, and to examine how they work independently, affect each other mutually, and eventually establish a unified theoretical framework serving multiple penal goals. Originating from a society with distinct historical and cultural influences, the Confucian theory of punishment shares considerable similarities with those of the Western in their intention to achieve certain instrumental purposes of punishment, whereas the distinctive features they hold manifest a Confucian path in how the discourse surrounding capital punishment proceeds, instruct the way for legal changes in China's criminal justice regime, and also form a deep rooted mindset disregarding offenders' dignity and procedural justice in the context. These distinctions shed light upon the centre issue of my research—namely, whether capital punishment is morally permissible—and provide insights for us to diagnose the insufficiency in the current work evaluating the death penalty in China.

The evolution of the related law and policies of China's death penalty is to be introduced from the legal history perspective. One cannot holistically understand the complex history of the death penalty in modern China if he is unfamiliar with the social, economic, and ethical implications in the time period in question. Take the harsh anti-crime campaigns in the 1980s—"Strike Hard" (严打) —as an example, I shall explore the following questions

from a historicist perspective:⁴⁰ What were the salient features of the social relationships and economic conditions in China when the crime combating movements were launched? Why did some currently-deemed irrational policies receive wide support from the public at the time?

The historical approach deepens our knowledge of the death penalty reforms in China with respect to the underlying values and theories, the consequences of the changes, and the failures. I shall explore, besides the influence of the revival of the Confucianism, whether there are any changes accompanying socio-economic development in Chinese society, such as contact with Western values, including human rights and human dignity, with Chinese moral consciousness, that have aided in softening the “hard” death penalty policy of the time.

I then shall turn to an issue that we definitely can not and should not circumvent: how to interpret the harsh label associated to China’s death penalty. Scholarly work has confirmed that the practice of capital punishment in Imperial China was not particularly harsh; in fact, it was milder than its European counterparts at the same time.⁴¹ The fact that China’s death penalty was depicted as barbarous and ruthless perhaps could trace back to 1908 when a German photographer published some photos he took at an execution site in China at the end of 1904; the European people were shocked by the punishment method—slicing(凌迟, *Ling Chi*, the lingering death).⁴² *Ling Chi* is a method of execution with torture applied to the very

⁴⁰ Without any exceptions, the Strike Hard campaigns have been fiercely criticized for serious human rights violations and depicted as a dark time in China’s death penalty history. See, e.g., Nicola Macbean, “The Death Penalty in China: Towards the Rule of Law” in Jon Yorke, ed, *Against the Death Penalty: International Initiatives and Implications* (Burlington, VT: Ashgate Publishing, 2008) at 210-211; Trevaskes, “The Death Penalty,” *supra* note 4 at 2-5, 19.

⁴¹ Unlike that in China, extreme tortures and tormented executions were religiously justified and regularly applied in European criminal systems. See, e.g., Chin Kim & Theodore R. LeBlang, “The Death Penalty in Traditional China” (1975) 5 *Ga. J. Int'l & Comp. L.* 77 at 88; Børge Bakken, “China, A punitive Society?” (2011) 6:33-50 *Asian Criminology* 33 at 36.

⁴² Jérôme Bourgon, “Chinese Executions Visualising Their Differences with European Supplices” (2003) 2:1

worst offenders in Imperial China: during the execution, a knife was used to methodically remove portions of the body over an extended process, eventually resulting in death. Slicing sounds scary, but normally the offender would be dead by the third cut; thus it was “not so painful as the half-hanging, disembowelling, and final quartering practiced in England not so very long ago.”⁴³ Nevertheless, the negative impression of China’s death penalty in the Western people’s mind has been gradually turned into stereotype due to the sensationalisation and terror presented in various Western media, including movies, newspapers, and television documentaries,⁴⁴ and has also been strengthened by the disclosure of the killings in the Maoist era (mostly happened in the political persecutions during the Culture Revolution decade), and in the Strike Hard campaigns thereafter.

I shall argue that reaching the conclusion that China’s death penalty is harsh based on its historical execution numbers is facile and somewhat abrupt. Even some leading abolitionist scholars point out that today the application of the death penalty is infrequent in terms of its proportion of the prison population, either in the United States (U.S.) or in China.⁴⁵ We are also reminded that we should be more cautious and careful to criticize a punishment as “harsh” in that we probably do not completely apprehend the substantial content of “harshness” or “mercy”.⁴⁶

With reference to the harshness measuring kit set up by James Whitman, I am going

European Journal of East Asian Studies 153 at 160, 175.

⁴³ FN 28, Kim & LeBlang, “The Death Penalty,” *supra* note 41 at 86.

⁴⁴ Such as the movie *Red Corner* made in 1997, as introduced in Klaus Mühlhahn, *Criminal Justice in China: A History* (Cambridge, MA: Harvard University Press, 2009) at 1.

⁴⁵ A total of 41 death sentences were issued in 2017 in the U.S. which has a population of 3.257 billion and an annual average of 15,000 homicide cases, whereas in China, the portion of population is about 2000 vs. 13.79 billion. David Garland, “Capital Punishment and American Culture” (2005) 7:4 *Punishment and Society* 347 at 361; Akers & Hodgkinson, “A Critique of Litigation,” *supra* note 29 at 3.

⁴⁶ Whitman, “Harsh Justice,” *supra* note 13 at 32.

to examine the harsh and mild aspects of the death penalty context in China. Specifically, I shall investigate the harshness and leniency in criminalization, namely the range and types of conduct that are categorized as capital crimes; in the law and application of capital punishment; in offender treatment; and in the issuance of commutations.⁴⁷ An in-depth measuring and assessment can secure a clearer and firmer sense of how the Chinese criminal justice system operates leading to various forms of harshness and mercy in the concrete death penalty practice.

A stakeholder perspective analysis is adopted to organize my investigation of legal and institutional reforms and implementation activities in China's death penalty regime. The participation-centered approach suggests that the performance and effects of a law or an institution rely heavily on the participation of key actors; hence, identification of the actions of and interplay among the majority of stakeholders in the context is a critical factor to examine whether and how a law or an institution functions. This approach enables me to identify and map the web of primary stakeholders within the Chinese capital justice system, explore how conflicts arise amongst the actors involved in the decision-making process, examine the background considerations leading to their choices, and highlight what unintended consequences have produced in practice.

1.5 Chapter Structure

Chapter 2 shall conduct a philosophically grounded discussion about the legitimacy of the death penalty within Chinese society. After an examination of the profound influence of Confucian philosophy on the legal system in China and its continued impact today, I shall

⁴⁷ The detailed descriptions of the various forms of harshness can be found in Whitman's book. *Id.*, at 32-36.

investigate the similarities and distinctions between the Confucian concept of punishment and the predominant concepts in the West. The similarities shall demonstrate a broad consensus between this classical Chinese philosophy and the modern theories of punishment developed by Western philosophy. The distinctions, on the other hand, shall bring us an instructive perspective from which to comprehend the Confucian sense of justice and to explore how it constitutes a general justification for capital punishment. The Confucian notion leading to the ignorance of procedural justice and individual rights in the Chinese legal culture—the end justifies the means—shall be stressed.

Although I was greatly inspired by Matthew Kramer's purgative theory, my research shall contend that, contrary to his assertions,⁴⁸ the Confucian justification of capital punishment is compatible with the purgative rationale which originated in liberal-democratic governance. Confucianism asserts that capital punishment should be imposed on offenders who unrepentantly commit evil and prove to be incorrigible and irreformable, whose misconduct would preach heterodox doctrines, distort righteousness, and mislead the populace were they to escape the death penalty.⁴⁹ Therefore, the practice of capital punishment is justified as a manifestation of collective anger, disapproval, and denunciation toward atrocious crimes and as a form of spiritual cleansing for society.

A specific comparison of the Chinese concept of punishment with Western restorative justice theory is absent in this chapter, however, the restorative elements of Confucian punishment theory shall be presented not under one heading but separately. In particular, I

⁴⁸ Matthew H. Kramer, *The Ethics of Capital Punishment: A Philosophical Investigation of Evil and Its Consequences* (Oxford: Oxford University Press, 2011) at 16.

⁴⁹ “孔子家语”, [The School Sayings of Confucius], cited in Ho, “Confucian Jurisprudence in Practice,” *supra* note 33 at 72.

shall indicate that seeking and maintaining harmony within and order of society is the ultimate objective of Confucian moral philosophy; the principle adopted in the past as well as in today's criminal justice system holds that education is the major approach in the administration of law, while punishment is used as a supplemental measure to recover damaged human relationships and restore social stability; shame punishment—a form of restorative justice—is aimed at expressing the community's condemnation towards wrongdoers; the ideal social status in Confucian philosophy is 'no lawsuit' which has explained the historical disregard for lawyers in Chinese society (and the relatively lower importance given to procedural elements). As such, I shall not address restorative justice specifically in this chapter because the strength of the restorative approach is limited when dealing with the most serious offenses; the use of restorative justice is too soft to be considered in handling capital offenses.

While I stress the significance of Confucianism in shaping the Chinese people's view on morality and law, I do not deny the influence of other traditional Chinese philosophies, such as Legalism and Taoism. Although they were not main stream, they had their impact on forming moral judgments and ethical decision making; some of their concepts were integrated into Confucian philosophy.

A long-standing view in the literature on the Chinese public's favorable attitude toward capital punishment shall be discussed at the end of this chapter. I shall examine, from the Chinese public's perspective, what moral values the death penalty expresses (such as human equality), and the connection and bond between these values and the Confucian sense of justice.

Chapter 3 shall provide an overview of the reforms, in particular those launched in the 21st century, in the death penalty realm of China. In order to fully understand and assess those reforms, I shall outline the major time periods since 1949, and examine how the evolution of the Chinese criminal law and policies on the death penalty has been rationalized, the reasons for the changes, and the outcomes.

Placing the reforms in a historical context, I shall address the changing domestic political and socio-economic situations and the impact of the global movement against capital punishment that have, since the mid-2000's, contributed to: the ongoing trend in the reduction of capital crimes, namely removal of most economic/financial offenses and some violent offenses from the capital crime list; improved procedural safeguards; lowering the threshold for suspending death sentences and subsequent commutations; and shifts in the overall society's attitude toward a softer stance on certain types of misconduct, and indicate how the changes in the criminal justice policy reconciles the Confucian philosophical ideas.

Chapter 4 shall examine the diverse forms of harshness presented in the Chinese criminal justice system, and identify their interrelationships and the main forces leading to the complexities. Specifically, this chapter shall address: what obstacles have posed to impede capital offenders with mental illness from getting access to qualified psychiatric assessment in practice; why the Chinese police are obsessed with confessions which are often obtained through torture and ill-treatment and why other actors, such as the procuratorates and courts, disregard the defendants' allegations of police torture; how the use of the supposedly lenient punishment—a death sentence with a two-year reprieve—has been steered following the populist justice and resulted in increasing the risks of wrongful convictions.

I shall argue that the harsh aspects discussed, due to the huge discrepancy between the law in books and the law in practice, have indeed encouraged the abuse of powers at local police and judicial authorities (influenced by local protectionism or political intervention), and consequently increased the chances of miscarriage of justice in practice, and undermined the legislature's intention to reduce the application of the death penalty.

Chapter 5 shall firstly explore China's attitude on the retention of capital punishment under the global pressures overwhelmingly leaning in the abolitionist direction. I shall argue that the focuses of the ongoing death penalty debates in China are different with that in the U.S. or in European countries prior to abolition because of the unique Confucian moral basis of capital punishment institution as well as because there is no concern for non-criminal factors in China's context relating to such as religion, race or vigilante traditions, which have served as persuasive abolitionist arguments elsewhere.

The death penalty reforms in China bears some similarities to its Western counterparts in terms of setting up leniency-oriented policy, narrowing the range of capital offenses in law, reducing the imposition of death sentences, and improving procedural safeguards. However, the crucial differences presented in its historical trajectory also imply that China might be persistent in maintaining its Chinese way of employing death penalty. The possibility of the emergence of a normative discourse in China challenging the institution is extremely low; a sharp division in the Chinese public's perception of the justifiability of the death penalty seems very unlikely to appear in the near future. The two stimuli for abolition—domestic triggering events and international pressure through economic aid and extradition

policies⁵⁰—have not functioned as incentives to any significant extent.

I shall argue that, at this stage, China is facing not just a debate of whether or when it will abolish the death penalty, but, more importantly, China needs to consider how to improve its state competence in securing criminal justice. Specifically, China should raise the police and judiciary's awareness of international human rights norms and standards; explore theories, tools, and good practices for effective police investigation and combating pre-trial ill-treatment and torture; create a statutory sentencing guideline to unify the standards for capital sentencing and enhance judges' resistance to extra-judicial interventions; and overcome the procedural flaws pertaining to the imposition of suspended death sentences.

1.6 Originality and Contribution

My research shall scrutinize the mainstream position and correct some longstanding misinterpretations of capital punishment in China: it shall analyze the intrinsic values of capital punishment policies, identify the complex relationship between the institution and the society that sustains it, and explain why a full legal abolition is difficult to achieve in China.

China has been actively participated in the international counter-terrorism cooperation and has launched its “One Belt, One Road” initiative to foster its economic connectivity with the world. Thus its image as a “responsible stakeholder”⁵¹ is likely to be subject to ever increasing international scrutiny. In this evolving context of increased Chinese global engagement and relations, China should pursue a development strategy to engage in

⁵⁰ David T. Johnson & Michael McCann, “Rocked but Still Rolling: The Enduring Institution of Capital Punishment in Historical and Comparative Perspective” in Austin Sarat & Charles Ogletree, eds, *Where Are We on the Road to Abolition?* (New York, NY: New York University Press, 2009) at 165.

⁵¹ Yuni Park, “U.S.-China Counter-Terrorism Co-Operation and Its Perspective on Human Rights” (2017) The French Institute for International and Strategic Affairs (IRIS) Working Paper, online: <<https://www.iris-france.org/wp-content/uploads/2017/12/Asia-focus-56.pdf>>.

meaningful and effective dialogues and cooperation on human rights. This study provides some insights into the contribution that China can make to the global death penalty debates.

Chapter 2. A Unified Theory of Punishment: Confucian Sense of Justice

“Confucius ...was like Socrates. Socrates thought that he had been appointed by a divine order to awaken the Greeks, and Confucius had a similar consciousness of a divine mission.”

A Short History of Chinese Philosophy, Fun Yu-Lan

This chapter is to explore the prominent theoretical role that Confucian legal philosophy has played in regards to capital punishment in China. Confucianism has remained the predominant ideology in Chinese society and significantly shaped the Chinese view on morality and law from the past through to the present.⁵² The impact of Confucianism on the development of Chinese law has attracted scholars’ interest in recent years; however, such interest has focused mainly on how Confucian ethics, virtues and legal thoughts interact with social norms to influence governance and social justice outcomes.⁵³ The conception of punishment in Confucianism, on the other hand, has been neglected.

In this chapter I shall discuss the similarities and distinctions between the Confucian theory of punishment and its counterparts predominant in the West, and explore whether the Confucian conception of punishment is able to morally justify the imposition of the death penalty and, if so, how. I shall begin with an explanation of the dominance of Confucian philosophy in Chinese society, as well as its cornerstone role in establishing and shaping the Chinese criminal legal system. Then I shall describe the principal features of the Confucian conception of punishment in comparison with Western theories of punishment, namely, retribution, deterrence, rehabilitation, expressivism, and the purgative rationale. Specifically,

⁵² See, e.g., Fung & Bodde, “A Short History,” *supra* note 30 at 38; Derk Bodde, “Dominant Ideas in the Formation of Chinese Culture” (1942) 62 *JAOS* 293 at 293.

⁵³ See, e.g., John W. Head, *Great Legal Traditions: Civil Law, Common Law, and Chinese Law in Historical and Operational Perspective* (Durham, NC: Carolina Academic Press, 2011); Cline, “Confucius, Rawls,” *supra* note 24.

in my examination of whether and how Confucian punishment theory justifies the use of the death penalty, I shall chiefly address the following questions: how Confucianism defines extremely evil misconduct; what penalty Confucianism asserts is best to punish offenses at the highest end in the spectrum of evilness; and why the imposition of the death penalty is justified as morally appropriate. I shall conclude this chapter, from the Chinese popular perspective, with an exploration of what moral values the death penalty expresses, and the bond between these values and the Confucian sense of justice.

2.1 The Place of Confucianism in Historical and Today's China

The Confucianist school was founded by Confucius (孔子, 551 - 479 BCE), and developed and expanded by his followers.⁵⁴ The fundamental ethical concepts of Confucianism, namely *Ren* (仁, benevolence), *Yi* (义, righteousness), *Li* (礼, rituals, rules of proper conduct), *De* (德, moral integrity), and *Xin* (信, good faith), are deemed to be the chief virtues of a healthy society.⁵⁵

Confucianism had become one of the main streams of Chinese thought by the third century BCE.⁵⁶ Around 136 BCE, the emperor of the Han dynasty (汉朝) took the advice of Dong Zhongshu (董仲舒)—a leading Confucian scholar and a senior government official at the time—in adopting Confucianism as the primary official teaching to unify intellectual thought across the country.⁵⁷ From then on, Confucian ethical values started permeating the thinking of Chinese intellectuals.

⁵⁴ Confucius was China's first private teacher and also the most influential teacher in Chinese history. Most of his ideas are known through *Analects* (论语), which is a collection of his sayings and teachings compiled and edited by some of his disciples. See, Fung & Bodde, "A Short History," *supra* note 30 at 30, 39.

⁵⁵ See, e.g., Daniel K. Gardner, *Confucianism: A Very Short Introduction* (New York: Oxford University Press, 2014) at 22.

⁵⁶ Fung & Bodde, "A Short History," *supra* note 30 at 30, 205-206.

⁵⁷ Liu, "Chinese Legal Traditions," *supra* note 32 at 22-23; Chen, "On the Confucian Plots," *supra* note 32 at 67.

China experienced a long and intensified warring period after the Han dynasty, until the Sui dynasty (隋朝) finally ended the centuries-long division.⁵⁸ The Sui dynasty, however, only existed for about 27 years and was replaced by the Tang dynasty (唐朝), which further stabilized the unification of the empire, and ushered China into a golden age of its cultural and political peak.⁵⁹ As early as in Dong Zhongshu's era, the government had already integrated Confucian texts into public service recruitment tests.⁶⁰ The imperial examination system (科举, *Ke Ju*) was formally set up in the Tang dynasty (622 CE) to select government officials based mainly on their knowledge of Confucian theories. Imperial examinations were in effect civil service examinations open to the general public for them to qualify as accredited scholars and/or members of the state bureaucracy.⁶¹ Confucian thinkers and scholars after the Tang dynasty continued contributing to the evolution of Confucianism; the imperial examination system was firmly retained, developed, and utilized for the remainder of China's dynastic history. Hence, Confucianism gradually drew and shaped Chinese civilization.⁶²

The last feudal throne of China was overturned in 1912; however, the new republican government affirmed that Confucianism would continue to be the basis for ethical discipline, and remained in school curricula until the republic's governance was ended by the CCP in 1949.⁶³

In defiance of the general trend for drastic reform as expected by the public, the CCP

⁵⁸ Fung & Bodde, "A Short History," *supra* note 30 at 266.

⁵⁹ Fung & Bodde, "A Short History," *ibid.*

⁶⁰ Fung & Bodde, "A Short History," *id* at 206.

⁶¹ Fung & Bodde, "A Short History," *id* at 266, 295.

⁶² Luo Lu, Robin Gilmour & S.F. Kao, "Cultural values and happiness: an East-West dialogue" (2001) 141: 4 *The Journal of Society Psychology* 477 at 493.

⁶³ Fung & Bodde, "A Short History," *supra* note 30 at 325; Billioud, "Confucianism," *supra* note 36 at 56.

did not abandon Confucianism after it had seized power.⁶⁴ On the contrary, it engaged in the promotion of Confucianism soon after its governance had stabilized, until the Cultural Revolution of 1966 wrought destruction through the country.⁶⁵ The contemporary government invested noticeably in annotating and translating the Confucian literature works into modern Chinese,⁶⁶ restoring and maintaining Confucian temples across the country,⁶⁷ and supporting annual worshipping festivals.⁶⁸ Mao Zedong (毛泽东), the leader of the country and the CCP at the time, reassured that Confucianism was a precious legacy that even Marxist believers should not ignore.⁶⁹

It is true that there are certain Confucian perceptions that are contrary to the communist beliefs—a villain in a Confucian's eyes might be hailed as a hero by communists.⁷⁰ It was suggested, however, that the continuity of Confucianism should be kept up in a way to “broaden the modern, narrow the old.”⁷¹ Regardless of the divergences in what or who should be praised or blamed, most of the concepts in Confucianism were accepted and used by the contemporary Chinese government in constructing a moral structure accommodating socialist doctrines.⁷² For instance, the principle that Confucius and his

⁶⁴ Levenson, “The Place of Confucius,” *supra* note 37 at 2.

⁶⁵ See, e.g., Joseph Needham, “An Archaeological Study-tour in China, 1958” (1959) 33 *Archive* 113 at 116-17; *People's Daily* (16 April 1962) p2 cited in Levenson, “The Place of Confucius,” *id* at 16.

⁶⁶ Wang, Yuemei. “Confucian Political Philosophy in the 20th Century”, (12 December 2014) *China Confucianism* online: <<http://www.confuchina.com>>.

⁶⁷ Needham, “An Archaeological Study-tour,” *supra* note 65 at 116-17.

⁶⁸ *People's Daily* (16 April 16 1962) p2 cited in Levenson, “The Place of Confucius,” *supra* note 37 at 16.

⁶⁹ Mao's remarks first time occurred in his speech in Communiqué of the Sixty Plenary Session of the 6th Central Committee of the CPC in October 1938. Zedong Mao, “马克思主义在中国具体化” [The Implementation of Marxism in China], in Zedong Mao, *毛泽东选集第二卷* [*Selected Works of Mao Zedong Volume II*] (Beijing: People's Publishing, 1991) at 534.

⁷⁰ For example, Confucians and the communist give opposite appraisals to historical peasants risings. See Levenson, “The Place of Confucius,” *supra* note 37 at 5.

⁷¹ Boda Chen, “批评地继承和新的探索” [A Critical Inquiry into Heritage and Novel Exploration] (1959) 3 *Red Flag* 1, 37, cited in Joseph R. Levenson, *Confucian China and Its Modern Fate: The Problems of Historical Significance* (Oxford, UK: Routledge, 2005) at 78.

⁷² For example, there were lasting nationwide propaganda campaigns that encouraged the masses to become a

followers insisted on giving teachings to pupils in spite of their age, social, or economic background is in conformity with the communist proclaim to non-discrimination in education. The publication of Confucian classics continued until a national shortage of resources, including paper, occurred in the early 1960's.⁷³ Nevertheless, the traditional Confucian philosophy found its place and applicability in Maoist China.

Confucianism experienced a resurgence after the end of the notorious Cultural Revolution. Government-funded research institutions of Confucian philosophy were established at the beginning of the 1980s.⁷⁴ While the world was discussing the contribution of Confucianism to the economy growth of the four "Asian Tigers", the Chinese policy makers were exploring how the economic value of this traditional philosophy school could serve the modernization of the national economy.⁷⁵ A top-notch research team including scholars from mainland China, Hong Kong, Taiwan, and the US was set up pursuant to the central government's instructions,⁷⁶ initiating a prominent new Confucian movement.

At the popular level, Chinese people's enthusiasm for traditional culture, especially Confucian philosophy, received support from contemporary political authorities. Major leaders gave speeches on various occasions, highly praising Confucianism as a precious cultural heritage.⁷⁷ The tryouts of introducing simplified Confucian classics to

selfless person devoted to the party and the country. The Confucian concept *Zhong* (忠, loyalty), which requires people to be loyal to the country and their government, matched the communist propaganda goal.

⁷³ Levenson, "The Place of Confucius," *supra* note 37 at 4.

⁷⁴ Umberto Bresciani, *Reinventing Confucianism, The New Confucian Movement* (Taipei: Taipei Ricci Institute, 2001) at 419.

⁷⁵ Billioud, "Confucianism," *supra* note 36 at 52.

⁷⁶ That was written in the 7th Five-year Plan for the National Economic and Social Development in China (1986-1990) (第七个中华人民共和国国民经济和社会发展五年规划).

⁷⁷ Xianlin Song, "Reconstructing the Confucian Ideal in 1980s China: The 'Culture Craze' and New Confucianism" in John Makeham, ed, *New Confucianism: A Critical Examination* (New York: Palgrave Macmillan, 2003) at 86-87.

young students in some cities were widely reported on television and newspaper, and soon led to a nationwide popularization for Confucianism studies in the 1990s.⁷⁸

There was a great leap in the political legitimization of Confucianism after the fourth-generation leaders assumed power in the early 2000's. In the official discourse, Confucianism was noted as the foundation for the development of civic morality and culture.⁷⁹ Consequently, some classic Confucian ethical concepts were integrated into government propaganda slogans,⁸⁰ which are often used for moral indoctrination in China. Public school curricula were revised wherein traditional literature and culture were given more weight.⁸¹

Despite the critiques from conservative communist scholars fearing that Confucianism may replace Marxism,⁸² the newest generation leaders have endorsed the renewed prominence of this orthodoxy and rejuvenated the study of Confucian classics since 2012. On multiple occasions, President Xi Jinping (习近平) voiced his respect for Confucian philosophy and stressed the modern importance of Chinese traditional culture in his speeches to high-rank communist party leaders, cadre students in the Central Party school, young

⁷⁸ That phenomenon was named “national studies” in the media. Zuo Xu, “Media Dissemination of National Studies in an Era of Mass Media” (2012) 1 *Journalism Lover* 37 at 37.

⁷⁹ That was written in the 2001 Action Plan for the Development of Civic Morality and the 2006 Plan for Cultural Development in the 11th Five-year Plan for the National Economic and Social Development in China (2006-2010) (the 11th Five-year Plan, 第十一个中华人民共和国国民经济和社会发展五年规划). It was the first time that the Chinese government used considerable space to talk about the significance of Confucianism and traditional culture in the highest-level official documents.

⁸⁰ For instance, a slogan of eight virtues and eight disgraces (八荣、八耻) based on the president Hu Jintao's speech in 2006 borrowed some Confucian elements directly. The eight virtues are patriotism, public service, scientific knowledge, hard work, unity, honesty, civil obedience and plain living; the eight disgraces include harm to the country, betraying the people, ignorance, being indolent, selling ethic for profit, pursuing profit at the expense of others, embracing chaos and lawlessness, pursuing luxury.

⁸¹ The re-edition work was an implementation of Sections 28 & 30 of the 2006 Plan for Cultural Development in the 11th Five-year Plan (2006-2010).

⁸² Professor Jie Wang presented his disputes against the “fever” of national studies in an interview dated 13 February 2007. However, that report has been removed online.

leader representatives, and elementary school principals and teachers.⁸³ The entire society, including the official propaganda agencies, is encouraged to participate in the spreading of Confucian values and traditional culture, which is deemed to be a significant resource to strengthen the nation's soft power.⁸⁴

It is worth noting that the Chinese government's evolving attitude and explicit support is not the sole factor that has contributed to the deep and wide influence of Confucianism in modern Chinese society. The government has merely responded and adapted to Chinese people's desires. There was a moment where the whole nation was undergoing a craze for traditional culture after a long-time repression.⁸⁵ But if the study of Confucian philosophy was a "fever" as some commentators hypothesized,⁸⁶ it could not have been carried forward to the present.⁸⁷ The Chinese political leaders have recognized that Confucianism has exerted tremendous cohesive force on the minds of Chinese people, and concluded that Marxism could not subsist without combining with Chinese cultural elements.⁸⁸ While confirming that Marxism is still the CCP's political ideology, President Xi asserts that the legitimacy of the Party will be strengthened because its efforts in promoting the country's historical inheritance

⁸³ Pengfei Zhang, ed, "China commemorates Confucius with high-profile ceremony", (25 September 2014) *Xinhua* online: <<http://english.cntv.cn>>.

⁸⁴ "习近平传统文化重要论述 2012-2014" [Xi Jinping's Speeches on Traditional Culture], Online: Baoji City Traditional Culture Promotion Committee <<http://m.bjctwh.org>>.

⁸⁵ See, e.g., Billioud, "Confucianism," *supra* note 36 at 56; Jin, "The Chinese Communist Party's Confucian Revival," *supra* note 38.

⁸⁶ Billioud, "Confucianism," *id* at 52.

⁸⁷ Over 50 million Children have engaged in the national studies. "Conversations between Mainland and Taiwan Scholars about National Studies", (24 April 2013) *China News Online*: <<http://www.chinanews.com>>. Books and speeches about Confucian philosophy and philosophers have been extolled and followed. For example, an interpretation of the *Analects of Confucius* was sold over five million copies in two years. Hong Zhang, "Analects of Confucius Was Sold 5 million Copies in Two Years", (28 November 2008) *Beijing News Online*: <<http://www.chinanews.com>>. More and more businessmen have enrolled in classic culture courses and strived to become a Confucian entrepreneur.

⁸⁸ Zhang, "China commemorates Confucius," *supra* note 83.

shall gain more support from the Chinese people.⁸⁹ The rehabilitation and prevalence of traditional literature and culture represented by Confucian philosophy should be understood as a bottom-up aspiration. Confucian perspectives on ethics and values have permeated every facet of life of the Chinese people in the past and today. And Confucianism is believed to have established a moral basis underpinning the theory and practice of legislation in China.⁹⁰

2.2. A Confucianized Criminal Justice System in China

Before Confucianism became the dominant philosophy in the Chinese society, the criminal laws and punishments in ancient China were indeed harsh and cruel. The first recorded penal code was created in the slavery dynasty of Shang (商朝, 1700 – 1027 BCE), which included Five Punishments (五刑) for misconduct: *Mo* (墨, permanent branding on the offender's face), *Yi* (劓, amputation of the offender's nose), *Fei* (刖, feet amputation), *Gong* (宫, amputation of a male's reproductive organ or locking a woman up for life), and *Da Pi* (大辟, the death penalty).⁹¹ The Five Punishments had been constantly used for nearly 1000 years thereafter.⁹² During the Warring States (战国, 475 – 221 BCE), there were approximately 200 crimes punishable by the death penalty.⁹³

The first feudal dynasty which unified Imperial China, Qin (秦朝, 221 – 207 BCE), also relied on stern punishments, because its official philosophy objected to pardons claiming that people do not have any inherent goodness, therefore should be governed by strong power

⁸⁹ See Xi Jinping's speech at International Conference Commemorating the 2565th Anniversary of Confucius' Birth on 24 September 2014. Jin, "The Chinese Communist Party's Confucian Revival", *supra* note 38. Also see Xi Jinping's speech at the Politburo's 18th collective study session on governance on 13 October 2014; Didi Kirsten Tatlow, "Xi Jinping on Exceptionalism with Chinese Characteristics", (14 October 2014) *The New York Times* online: <<http://sinosphere.blogs.nytimes.com>>.

⁹⁰ Browne, "Xi Jinping," *supra* note 38.

⁹¹ "五刑和肉刑", [Five Punishments and Corporal Punishment], online: <<http://www.chinaculture.org>>, translated in Lu & Miethe, "China's Death Penalty," *supra* note 2 at 32.

⁹² Lu & Miethe, "China's Death Penalty," *ibid*.

⁹³ Lu & Miethe, "China's Death Penalty," *ibid*.

and harsh laws.⁹⁴ Heavy penalties were imposed on minor crimes; people were required to spy on their neighbors or relatives and report a known or suspected violation or any questionable behavior, otherwise they themselves would be punished due to ‘linked liability’ (连坐, guilt by social association, *Lianzuo*).⁹⁵ The *Lianzuo* system was set up in 359 BCE according to which every five families were linked into one unit and they were mutually responsible for each other’s behaviours and required to timely report any misconduct of their unit members. Otherwise, the entire unit would be punished as equally guilty with the wrongdoer(s).⁹⁶

The growing influence of Confucian ethics in the subsequent Han dynasty established the grounds for practicing and expanding leniency in law.⁹⁷ After years of wars and rebel fights, the country entered a comparatively peaceful period; the conflicts between the historical harsh punitive institutions and the dominant Confucian thought were becoming evident. For example, the ‘linked liability’ policy that compelled people to betray their family or friends stands in stark contrast with the Confucian virtue *Ren*. *Ren* contains two senses: affection and virtue.⁹⁸ As human beings, we should have a feeling of liking or love, commiseration and caring for other people; meanwhile we should have some moral qualities to survive in our community and play our social roles. According to Confucianism, a human being’s humanity is verified and signified by his social relations and responsibilities.⁹⁹ We

⁹⁴ Lu & Miethe, “China’s Death Penalty,” *id* at 30-31.

⁹⁵ Lu & Miethe, “China’s Death Penalty,” *id* at 31.

⁹⁶ Robin Yates, “Cosmos and Central Authority in the Early Chinese Empire” in Susan E. Alcock et al, eds, *Empires: Perspectives from Archaeology and History* (Cambridge, UK: Cambridge University Press, 2001) at 363.

⁹⁷ Liu, “Chinese Legal Traditions,” *supra* note 32 at 20.

⁹⁸ Chenyang Li, “Confucian Concept of *Ren* and the Feminist Ethics of Care: A Comparative Study” in Daniel A. Bell, ed, *Confucian Political Ethics* (Princeton: Princeton University Press, 2007) at 177.

⁹⁹ Mee-Yin Mary Yuen, “Human Rights in China: Examining the Human Rights Values in Chinese Confucian Ethics and Roman Catholic Social Teachings” (2013) 8 *Intercultural Hum Rts L Rev* 281 at 292.

are able to sustain our virtue of *Ren* when we have sympathy and empathy, and are developing positive relationships with other community members.¹⁰⁰ The most important social relationships in Confucianism are *Wulun* (五伦, five cardinal relationships), namely, ruler-subjects (君臣); parents-offspring (父子); husband-wife (夫妇); siblings (兄弟); and friends (朋友).¹⁰¹ A person of *Ren* is supposed to manage his *Wulun* appropriately based on his virtues and render his *Ren* in his *Li*.¹⁰² That is to say, people should show their human-heartedness in their behaviors which are deemed to be appropriate and acceptable in their temporal social context. The ‘linked responsibility’ policy, however, requires people to repress their natural human feelings, abandon their moral obligations, and further to destroy all their social relationships, which eventually would impair their human dignity. In this way, the foundation for building an orderly and virtuous society as Confucianism expects would be damaged.

The traditional Chinese criminal justice system is deeply rooted in the philosophical theories of Confucianism. The reform in the Han dynasty advocated and led by Dong Zhongshu that adopted Confucianism as the exclusive philosophy guiding legal thinking and practices marks the beginning of the Confucianization process of the legal system in Imperial China.¹⁰³ By 104 BCE, Dong Zhongshu had written a book known as *Chun Qiu Jue Yu* (《春秋决狱》), Adjudicating Criminal Cases in accordance with a Confucian Statecraft *Chun Qiu* based on his experience in hearing 232 cases.¹⁰⁴ Dong intended to set up a textual foundation

¹⁰⁰ Li, “Confucian Concept of *Ren*,” *supra* note 98 at 177.

¹⁰¹ “孟子•滕文公上” [Mencius: Tengwengong Shang], cited in Fung & Bodde, “A Short History,” *supra* note 30 at 197.

¹⁰² Yuen, “Human Rights in China,” *supra* note 99 at 293.

¹⁰³ Liu, “Chinese Legal Traditions,” *supra* note 32 at 22-23; Chen, “On the Confucian Plots,” *supra* note 32 at 67.

¹⁰⁴ *Chun Qiu* (春秋, The Spring and Autumn Annals) is a Confucian classic, the authorship of which is in

of law on the basis of Confucian principles, and the completion of the *Chun Qiu Jue Yu* demonstrated his efforts in promoting the systemization of law and the consistency in the application of law.¹⁰⁵

In this book, Dong provided detailed judicial decisions exemplifying the application of Confucian concepts and theories (with references with events recorded in the *Chun Qiu*) to legal reasoning, and analogically comparing fact patterns to decide cases impartially.¹⁰⁶ He wanted to guide his peer officials and successors how to put forward legal rules applicable to future cases with similar fact patterns to ensure objective decision-making and fair punishment fitting the crimes.¹⁰⁷ In addition, he showed in the case descriptions how to integrate Confucian moral instructions into trials and judgements. The *Chun Qiu Jue Yu* was deemed to be a legacy of Dong's Confucian thought and soon became an important resource of the penal code in the Han dynasty.¹⁰⁸

Along with the broad application and extensive influence of the *Chun Qiu Jue Yu*, two fundamental tenets for a Confucianized legal system were solidly established accordingly: (i) legislation should be based on the Confucian concepts and principles (ii) the final goal of law enforcement is Confucian moral education. The *Chun Qiu Jue Yu* is acknowledged as a masterpiece of Confucian jurisprudence; the concepts and methods recommended in this book were highly referenced in subsequent dynasties and reached its peak in the pre-Tang

question. Some people believed that it was written by Confucius though.

¹⁰⁵ Norman P. Ho, "Stare Decisis in Han China? Dong Zhongshu, the *ChunQiu*, and the Systematization of Law" (2010) 3:1 Tufts Historical Rev. 153 at 153; Paul R. Goldin, "Han Law and the Regulation of Interpersonal Relations: "The Confucianization of the Law" (2012) 25:1 Asia Major 1at 4.

¹⁰⁶ Ho, "Confucian Jurisprudence in Practice," *supra* note 33 at 83; Liu, "Chinese Legal Traditions," *supra* note 32 at 22.

¹⁰⁷ Ho, "Stare Decisis," *supra* note 105 at 153-154.

¹⁰⁸ Ho, "Stare Decisis," *ibid.*

period.¹⁰⁹ It is noteworthy that the constant immersion of Chinese intellectuals in the Confucian moral and philosophical ideology ensured that the deductive and analogical reasoning approaches recommended in the *Chun Qiu Jue Yu* were interpreted and utilized in a consistent way despite changes in the political sphere.¹¹⁰

The feudal Chinese legal system (the criminal justice system, in effect) completed its Confucianization in the Tang dynasty: it was clearly stipulated in the Tang Penal Code (唐律, 653 CE) that “everything has to follow Confucian morality and propriety (一准乎礼, *Yi Zhun Hu Li*)”.¹¹¹ The dominant status of Confucianism within the Chinese legal system did not change after the Tang dynasty was replaced; the Confucian system of ethics remained as the guiding principles for all subsequent laws including the two most comprehensive codes enforced in the Ming dynasty and Qing dynasty respectively—the Ming Code (大明律, 1397-1644 CE) and the Qing Code (大清律, 1646-1912 CE) which was elaborated based on the former—until the end of the dynastic era.¹¹²

Corresponding to the political legitimization of Confucianism since the early 2000’s, Confucianism is recognized as the ethical foundation for China’s legal reforms toward the rule of law in official discourse, and the Confucian restorative notion that “moral education is central while punishment supplements” (德主刑辅, *De Zhu Xing Fu*) has been adopted in the

¹⁰⁹ Ho, “Stare Decisis,” *ibid*; Liu, “Chinese Legal Traditions,” *supra* note 32 at 22.

¹¹⁰ Ho, “Stare Decisis,” *id* at 165.

¹¹¹ Liu, “Chinese Legal Traditions,” *supra* note 32 at 24; MacCormack, “Traditional Chinese Penal Law,” *supra* note 34 at 13-15.

¹¹² Jianhong Liu & George B. Palermo, “Restorative Justice and Chinese Traditional Legal Culture in the Context of Contemporary Chinese Criminal Justice Reform” (2009) 7:1 *Asia Pacific J of Police & Criminal Justice* 49 at 53.

criminal justice system,¹¹³ to the extent that some commentators refer to the CCP as the “Chinese Confucian Party.”¹¹⁴

While constantly stressing that the government should rule its people with virtue, Confucianism never opposes the application of punishment. Confucian philosophy holds that people are born with basic virtuous qualities but need self-discipline and exterior guidance to be good.¹¹⁵ Under circumstances when wrongdoers cannot be affected merely by moral education, punishment should be inflicted. Institutions are set up to foster the goodness in people’s human nature: beneficence, rewards, punishments, and executions are four ways of governance.¹¹⁶

2.3 Confucianism Punishment: A Framework Accommodating Multi-principles

The important concept of *Xing* (刑, punishment) developed alongside of the formation of Confucian virtue values. Confucian masters suggested that *Li* play a leading role and *Xing* improve the implementation of *Li* or make *Li* complete.¹¹⁷ Confucius recommended a framework that combined three ways of ruling, namely “rule by moral integrity (*De*)”, “rule by propriety (*Li*)”, and “rule by penalty (*Xing*)” for the purpose of justice.¹¹⁸ Accordingly, Confucianism provides a unique approach to addressing multiple penal goals.¹¹⁹

¹¹³ See, e.g., Browne, “Xi Jinping,” *supra* note 38; “习近平:我国古代主张礼法合治德主刑辅” [Xi Jinping’s Speech: The Principle of Moral Education is Central while Punishment Supplements in Ancient China], Xinhuanet (13 October 2014), online: <<http://news.sina.com.cn>>.

¹¹⁴ Bell, “China’s New Confucianism,” *supra* note 38 at 12, 153.

¹¹⁵ Fung & Bodde, “A Short History,” *supra* note 30 at 197.

¹¹⁶ Fung & Bodde, “A Short History,” *id* at 198.

¹¹⁷ “论语·堯曰” [Analects of Confucius: Rao Ri], cited in Fung & Bodde, “A Short History,” *ibid*.

¹¹⁸ “论语·为正” [Analects of Confucius: Wei Zheng], cited in Fung & Bodde, “A Short History,” *ibid*.

¹¹⁹ I’ve been inspired by the discussions of unified punishment theories in Thom Brooks’ book. See, Thom Brooks, *Punishment* (Abingdon, Oxon: Routledge, 2012) at 123-148.

2.3.1 Solid Retribution—Desert & Proportionality

Similar to most Western retributivist theories, desert and proportionality are at the core of the conception of Confucian punishment. Confucianism looks to the past and claims that criminals deserve to be punished for the illegal behaviors they have committed. Regarding how to respond to offenses, Confucius himself declared a basic principle: a disciple once asked Confucius what he thought if one returned injustice with kindness. “Then what can we return kindness with?” Confucius asked in turn, before offering his answer: “We repay kindness with kindness, and return injustice with justice (以德报德, 以直报怨).”¹²⁰

In addition, Confucianism asserts that the punishment should fit the crime, which is analogous to the concept of proportionality at the core of Western retributivism.¹²¹ A Confucian idea of *Zhong* (中, just right) can be applied to the magnitude and anchoring of the penalty scale in Confucian punishment. The literal translation of *Zhong* is being ‘neither too much, nor too little’ or ‘in the middle’.¹²² When explaining *Zhong* to Western readers, Professor Yu-Lan Fung used a vivid example: “*Zhong* is like the Aristotelian idea of the ‘golden mean’. [.....] Suppose that one is going from Washington to New York. It will then be just right to stop at New York, but to go right through to Boston, will be to do too much, and to stop at Philadelphia, will be to do too little.”¹²³

Confucianism recommends a system based on the standard of *Zhong*, in which the degree of a penalty matches the seriousness of a given crime, else it would cause discordance in the community: only when we have found a penalty balanced in proportion to the

¹²⁰ “论语·宪问” [Analects of Confucius: Xian Wen].

¹²¹ “荀子·君子” [Xunzi: Junzi].

¹²² “中庸” [Doctrine of the Mean].

¹²³ Fung & Bodde, “A Short History,” *supra* note 30 at 172.

wickedness of a crime, can the substantial and/or spiritual requirements of the community members be satisfied; consequently, society can remain orderly and harmonious in alignment with Confucian goals.¹²⁴ Seeking proportional justice is the basic sentencing principle that Confucian punishment endorses. Starting with the penal code of the Tang dynasty, complex formulas for determining mitigating and aggravating factors were included in imperial penal codes to prohibit disproportional or arbitrary punishment.¹²⁵

It is important that Confucian punishment not be misunderstood as driven by vengeance. Confucianism explicitly disapproves of punishment for the sake of mere revenge, which lends itself to overly harsh measures (torture, for instance) in defiance of the principle of *Zhong*.¹²⁶ In 1747, a man was killed in an affray. The victim's son wished to avenge him, but the killer was a feared combatant, so the son killed the killer's own son instead. The victim's son was arrested and sentenced to death. The supreme judicial court reviewed this case and recommended a stay of execution since the victim's son had acted out of filial piety. However, the Emperor, Qian-long, disagreed, asserting that filial piety was no excuse for premeditated murder. In an imperial edict, he decried the jurists for overstating the filial element in the misconduct of the victim's son. The Emperor rejected the court's recommendation and approved the death sentence of the filial son.¹²⁷

A traditional Chinese saying "an eye for an eye" (以眼还眼) or "a life for a life" (一命抵一命) is often cited to infer that Chinese culture is punitive. However, this is a misinterpretation. In 1802, when a review panel member opposed the suspension of a death

¹²⁴ Fung & Bodde, "A Short History," *id* at 173.

¹²⁵ Stephen B. Davis, *The Death Penalty and Legal Reform in the PRC*, (1987) 1:2 *J. Chinese L.* 303 at 306.

¹²⁶ "孟子·公孙丑上" [Mencius: Gongsunchou Shang].

¹²⁷ M. J. Meijer, *The Autumn Assizes in Ch'ing Law* (1984) 70: 2 *T'oung Pao* 1 at 16.

sentence in a case of homicide in an affray—claiming that the principle of “a life for a life” should be followed—Emperor Jia-qing, citing the legal reasoning of a precedent case, pointed out that “the rule that a person who took another person’s life must pay with his own originally referred to fighting in war. In ordinary affray cases we should take circumstances into consideration to make the evaluation of life and death. [.....] If we rigidly adhere to the principle of “a life for a life”, we should sentence all offenders of homicide in affray cases to death with immediate execution, and then we don’t need to adopt extended death sentences as a punishment whatsoever. Would that be regarded as in accordance with basic principles?”¹²⁸ Emperor Jia-qing’s words suggest that those old sayings should be read metaphorically, rather than literally. The principle of “a life for a life” might have been created with retaliation in mind, but it had gradually transformed into retribution following the idea of *Zhong* over the course of the evolution of the Confucian legal system.¹²⁹

Confucian punishment should not be read as being retributive only. More principles can be found within the framework.

2.3.2 Community-centric Rehabilitation & Mercy

Confucianism stresses that punishment is intended to reform offenders, which resonates with Western rehabilitation ideals. Rehabilitation theories of punishment attempt to provide solutions to reduce recidivism, holding that punishment should aim to assist offenders in re-integrating into society so that they will choose to reject crime upon release.¹³⁰ Likewise, offender reform is a primary goal of Confucian punishment, in that Confucianism considers the pedagogical function of punishment to outweigh its punitive role.

¹²⁸ Meijer, “The Autumn Assizes,” *ibid.*

¹²⁹ Meijer, “The Autumn Assizes,” *id.* at 14-15.

¹³⁰ Brooks, “Punishment,” *supra* note 119 at 51.

Confucian philosophers point out that legal punitive measures are set up not solely to punish people, but more importantly, to educate them about Confucian ethics and morality.¹³¹ These philosophers believe leading offenders by moral education and role-modeling can help them learn propriety, acknowledge their wrongfulness, and exhibit repentance; thus reforming the offenders. Law and punishment themselves are deemed to be expressions of the Confucian virtue *Li* which is aimed at promoting morality; the implementation of punishment is expected to complement education in encouraging offenders to move away from evil, ultimately contributing to peace and order in society.¹³²

The abolition of the corporal punishments demonstrates the profound impact of the rehabilitative principle of Confucian punishment theory on the contemporary criminal justice practices. The banning process was initiated by a case recorded as *Ti Ying Jiu Fu* (缙萦救父, Ti Ying Saving Her Father): In 167 BCE, a well-known physician was wronged for corruption and was being transferred to the capital city Chang An (长安) for a corporal punishment. The physician's youngest daughter, Ti Ying, accompanied him to Chang An. She wrote a letter to the Emperor Wen (汉文帝) stating that her father was a man of integrity and honesty; but if he were convicted guilty, she would be willing to become a government slave in exchange for her father being exempted from the corporal punishment. In her letter she stressed that corporal punishments took away wrongdoers' chances to correct their behavior and become a normal person, as once a body part was removed, that part would not grow back. The Emperor Wen was very touched by Ti Ying's filial piety (孝心) and also was persuaded. He ordered a reinvestigation of the physician's case; it turned out that he was

¹³¹ Ho, "The Legal Philosophy of Zhu Xi," *supra* note 35 at 187-189.

¹³² Ho, "The Legal Philosophy of Zhu Xi," *ibid.*

innocent. Not only Ti Ying's father was exonerated, but all existing corporal punishments were abolished following the Emperor's order.¹³³

Filial piety is regarded as a fundamental and central Confucian virtue for keeping an orderly and harmonious society, because if one does not love one's lineal ascendants, one cannot be expected to love other people, or be loyal to the sovereign.¹³⁴ According to Confucianism, the basic sense of filial piety is that our body comes from our parents, therefore, we should not harm any part of our body including skin and hair.¹³⁵ People who are corporally punished cannot completely fulfill their filial obligations, or build positive social relationships; eventually, their *Ren* and *Li* would be jeopardized, and that may become disharmonious factors to the entire society. The traditionally popular inhumane punishments therefore lost their ethical grounds to be utilized.

However, the successful abrogation of corporal punishments was not, or at least not mostly because the Emperor was touched by Ti Ying's filial behavior; otherwise, he could just have saved her father. When discussing with his ministers, the Emperor Wen pointed out that offenders, while being punished, should also be given chances to turn over a new leaf entirely (重新做人) whereas the corporal punishments prevented them from social reintegration. Later on in his edict abolishing the corporal punishments, he stated that the growing crimes are due to his failure as a ruler in promoting moral values; offenders should be allowed to get access to moral education, therefore to the possibility of turning away from

¹³³ “史記•孝文本紀第十” [Records of the Historian: Xiao Wen Ben Ji the Tenth]), cited in Liu, “Chinese Legal Traditions,” *supra* note 32 at 23.

¹³⁴ Fung & Bodde, “A Short History,” *supra* note 30 at 309.

¹³⁵ “孝经” [The Classic of Filial Piety] cited in Guang Xing, “Buddhist - Confucian Controversy on Filial Piet” (2010) 37:2 J. of Chinese Philosophy 248 at 250.

evil and flowing virtue (改过为善).¹³⁶ In fact the Chinese idiom for rehabilitation (改过自新, reform and start afresh) originates from Ti Ying's story.

Amnesty, a notable institution adopted in China's imperial penal system, also upheld the idea in Confucian theory of punishment that most offenders can be reformed. *She* (赦, ordinary amnesty) and *Da She* (大赦, extensive amnesty) often occurred under special circumstances; for example, when the country was celebrating the emperor's wedding, the empress' birthday, or the birth of a prince, accompanied with ritual ceremonies, i.e. *Li*.¹³⁷ Both *She* and *Da She* were applied to all offenders across the country: *She* alleviated sentences whereas *Da She* completely exempted offenders, including those on death row, in order to show the great grace and mercy of the Confucian judicial system.¹³⁸ Offenders were deemed innocent after *Da She* so that they could resume their responsibilities as members of the community.

The legal use of leniency that came about with the rise of Confucianism in Chinese society was no rarity in Imperial China: for example, from the Jin dynasty (晋朝, 280 CE) to the Tang dynasty (907 CE), a *Da She* took place approximately every 18 months.¹³⁹ *She* and *Da She* did not disappear when the imperial era was over; *Da She* was granted by both the republican and the communist governments.¹⁴⁰ This institution of amnesty was assessed to

¹³⁶ That was written in the edict as: "...今人有过，教未施而刑已加焉，或欲改过为善，而道无繇至，朕甚怜之!"

¹³⁷ Bakken, "The Norms of Death," *supra* note 3 at 200; Geoffrey MacCormack, *Traditional Chinese Penal Law* (London, UK: Wildy, Simmonds & Hill Publishing, 2013) at 44, 125.

¹³⁸ Bakken, "The Norms of Death," *ibid.*

¹³⁹ Bakken, "The Norms of Death," *ibid.*

¹⁴⁰ "特赦、大赦、宽大释放" [Special Amnesty, Extensive Amnesty, and Acquittal with Leniency], (2016) Shanghai Local Chronicles Office, online: <<http://www.shtong.gov.cn>>.

have “demonstrated the redemptive power of the Confucian morality and humanitarianism”.¹⁴¹

A perceived similarity between the Confucian conception of punishment and Western rehabilitation theories lies in the contention that punishment should and can assist offenders to reform, thereby reducing recidivism. Western rehabilitative therapies and correctional programs are designed to be implemented with professionals’ guidance in a secure facility—in prison in most cases—with little interaction with the community.¹⁴² Confucianism emphasizes the significance of self-cultivation and self-perfection, and offers offenders, via amnesties for instance, the opportunity to return to the community in order to have access to role models and ethical education and to mend or rebuild the relationships with community members affected by their misconduct. Despite their overlapping goals, the Confucian principle of rehabilitation is different from its Western counterpart in that Confucian punishment is community-centric whereas the latter is offender-centric.¹⁴³

In terms of being community-centric, deterrence theories share some similarities to the Confucian conception of punishment in that they both seek to establish a deterrent for community members, where punishment is justified as a device to deter future criminality. However, the grounds for the success of crime prohibition in Confucian punishment and the Western deterrence are utterly different: Confucianism honours people’s good-orientated continence, whereas the latter claims the opposite as explained below.

¹⁴¹ Jessica J. Shen, “Killing a Chicken to Scare the Monkey: The Unequal Administration of Death in China” (2014) 23:3 Pac Rim L & Pol’y J 869 at 878.

¹⁴² Brooks, “Punishment,” *supra* note 119 at 69.

¹⁴³ Brooks, “Punishment,” *ibid.*

2.3.3 Stake-pursuing Deterrence

Deterrence theories look forward and argue that punishment may be morally justified by the resulting positive outcomes, namely the possible reduction of future crimes.¹⁴⁴ In other words, when potential criminal offenders' desire to offend is deterred by the fear of the pain inflicted by a punishment, deterrence constitutes the justification for said punishment.

Confucian philosophers would argue that Western deterrence does not work. According to Confucius, punishment without guidance only teaches people to hide their evil thoughts to avoid being penalized without feeling shame; this jeopardizes their individual qualities and eventually the righteous values of society.¹⁴⁵

Instead, Confucianism indicates that punishment may have a deterrent effect upon people because they want to keep their *Ming* (名, principle of identity) as members of the community. The Confucian concept of *Ming* is roughly equivalent to “stake” in Western stakeholder theories—people who have a suitable *Ming* can be deemed as stakeholders in their political community. *Ming*, the Confucian version of stake, is believed to be essentially determined by its holder's humanity. In a Confucian community, each member's *Ming* is verified and signified by his social relations and responsibilities; community members are expected to manage their social relationships in a way that best sustains their *Ming*, based on their virtues and through behaviors which are deemed appropriate and acceptable in their temporal social context.¹⁴⁶ Confucianism stresses that *Ming* is the cornerstone of a stable,

¹⁴⁴ Brooks, “Punishment,” *id* at 35.

¹⁴⁵ “论语•为” [Analects of Confucius: Wei Zheng]; “荀子•成相” [Xunzi: Cheng Xiang]. Mencius said that the feeling of shame is the basis for righteousness. See, “孟子•公孙丑上” [Mencius: Gongsunchou Shang].

¹⁴⁶ Yuen, “Human Rights in China,” *supra* note 99 at 292-293.

orderly and integrated (stakeholder) society, thus requiring people to sustain their *Ming* with proper conduct (*Li*).¹⁴⁷

People who assume their *Ming* with gratitude are people who identify themselves as stakeholders. Undoubtedly, they would choose to refrain from crime, but not because they are afraid of the pain caused by punishment as Western deterrence theories have argued. In the Confucian view, people do not commit crime simply for fear of losing their stake in the society. Punishment might create considerable damage to their supportive networks; they might become disassociated with their community while imprisoned, or even after they are released. Social calculus will lead a rational actor to choose not to break the law, so that his stake is not to be compromised. Here we can see some coherence between the rehabilitation and deterrence features of Confucian punishment: only offenders who want to restore their stake (*Ming*) will be motivated to reform; and only people who value their self-identity (*Ming*) will seek to avoid evil.

Proponents of Western deterrence theories tend to run cost-benefit analyses in sentencing, and are inclined to impose severe punishments out of all proportion to the gravity of the offense, as long as they believe the final effects outweigh the consequent suffering.¹⁴⁸ This contrasts core Confucian values, but coincides somewhat with those advocated by another ancient Chinese legal school—Legalism. Legalism was the official philosophy of the penal legislation in the Qin dynasty, which deviated from Confucian virtues but advocated harsh punishment and little leniency.¹⁴⁹ The cruel and brutal punitive institutions of the Qin

¹⁴⁷ Chung-Ying Cheng, "Critical Reflections on Rawlsian Justice versus Confucian Justice" (1997) 24 *J of Chinese Philosophy* 417 at 420; Fung & Bodde, "A Short History," *supra* note 30 at 33, 309.

¹⁴⁸ See, e.g., Beccaria, "An Essay on Crimes," *supra* note 11 at 51; Brooks, "Punishment," *supra* note 119 at 40.

¹⁴⁹ Lu & Miethe, "China's Death Penalty," *supra* note 2 at 30-31.

dynasty led to its swift downfall; the legal institutions of leniency practiced in Imperial China are greatly attributed to the ensuing penetration of Confucian ethics in Chinese society.

The Confucian conception of punishment states that it is the qualities of our good human nature, namely our sense of shame and pursuit of *Ming*, that contribute to the success in preventing the recurrence of crimes; not the selfishness in human nature as assumed in the Western deterrence theories.¹⁵⁰ Moreover, the community's expectation of repentance from the wrongdoers induced by their sense of shame stresses punishment should manifest strong condemnation of misbehaviors, which resembles the Western expressive theory of punishment.

2.3.4 The Expressive Function & Shame Culture

Confucian conception of justice holds the same rationale behind the Western expressivist theories that punishment is justified as it should be interpreted as “a statement of public denunciation”, and a manifestation of “public anger, fear, or disgust” of crimes.¹⁵¹ But Western expressivism argues that the condemnation is aimed at the misconducts alone,¹⁵² whereas according to Confucianism, punishment expresses public censure against offenses as well as offenders. This difference ends up arousing different emotions in the same situation as embodied in cultures of guilt and shame which dominate the Western countries and their counterparts in East Asia influenced by Confucianism respectively.¹⁵³ As Lewis explained, the fundamental distinction between shame and guilt lies in the role of oneself in

¹⁵⁰ Brooks, “Punishment,” *supra* note 119 at 36.

¹⁵¹ Brooks, “Punishment,” *id* at 101-102, 107

¹⁵² Brooks, “Punishment,” *id* at 101-102.

¹⁵³ Eastern culture, influenced by Confucianism, has generally been regarded as a shame culture, while Western culture has been perceived as a guilt culture. Cited in Xiaoyu Yuan, *Restorative Justice in China: Comparing Theory and Practice* (Cham, Switzerland: Springer, 2017) at 17.

experiencing the two emotions in that shame focuses on oneself whereas guilt is directly about the behavior done (or undone).¹⁵⁴ Take bullying as an example: in shame, the bully would be ashamed for himself “being a bully” whereas, in guilt, he would feel guilty for “having bullied someone”.

Although shame is an emotion that exists in all societies, the Chinese bestow on it some profound cultural meanings.¹⁵⁵ Shame, although undesirable in the West, is viewed as a moral and virtuous sensibility more than just being an emotion in China.¹⁵⁶ As early as in the Spring and Autumn period of ancient China (645 BCE), *Chi* (耻, sense of shame), along with *Li*, *Yi*, and *Lian* (廉, honesty, uprightness) was accredited to be the fundamental pillars upholding the moral integrity of a good society and an ideal State: the State would become unstable if one of the four pillars is damaged.¹⁵⁷ Shame was further advocated in Confucianism as one of the basic virtues regulating human values and conduct.¹⁵⁸ A human being’s sense of shame is perceived as an essential aspect of the Confucian conception of self-consciousness, and functions as a powerful motive for self-exploration and self-improvement toward heightened moral standard.¹⁵⁹ Shame is adopted as a precept of the code of social behaviours in a Confucianized community; a person without sense of shame

¹⁵⁴ Cited in J. P. Tangney, R. S. Miller, L. Flicker, & D. H. Barlow, “Are Shame, Guilt, and Embarrassment Distinct Emotions?” (1996) 70:6 *J of Personality & Social Psychology* 1256 at 1257.

¹⁵⁵ Jin Li, Lianqin Wang & Kurt W. Fischer, “The Organisation of Chinese Shame Concepts?” (2004) 18:6 *Cognition and Emotion* 767 at 769.

¹⁵⁶ Li, Wang & Fischer, “The Organisation,” *id* at 789.

¹⁵⁷ During the Spring and Autumn Period, Guan Zhong (管仲, 720-645 BCE), the prime minister of the State of Qi, argued, in his work of an ancient Chinese encyclopedia—*GuanZi*—that the four senses *Li*, *Yi*, *Lian*, and *Chi* are fundamental social guidelines for running a State. “国有四维，一维绝则倾，二维绝则危，三维绝则覆，四维绝则灭。倾可正也，危可安也，覆可起也，灭不可复错也。何谓四维？一曰礼，二曰义，三曰廉，四曰耻。礼不逾节，义不自进，廉不蔽恶，耻不从枉。”《管子·牧民第一》。

¹⁵⁸ The eight important human values advocated by Confucius and his disciples include Filial Piety(孝), Fraternity(悌), Loyalty(忠), Credibility(信), Courteousness(礼), Justice(义), Honesty(廉), and Shame(耻). 《八德：“孝悌忠信礼义廉耻”》《论语·学而》. The above values still can be seen in school mottos today to encourage students to be courteous, honest, respectful, and well-behaved.

¹⁵⁹ Li, Wang & Fischer, “The Organisation,” *supra* note 155 at 767, 769, 792, 794.

would not be deemed to be a qualified member of Chinese culture.

Mencius contends that shame is the ‘germination’ of justice.¹⁶⁰ In the Confucianized penal system, the purpose of the shame induced by punishment is twofold: first, it explicitly expresses the community’s anger, rage and condemnation towards moral wrongdoings, and second, it serves as an important means of calling for a moral sensibility in the wrongdoers, further inducing their desire to review their conduct, to regret the past wrongs, and to amend themselves. The strength of the shame should match the gravity of the offenses, as well as be determined by the moral state of the offenders and the (un)willingness of the offenders to proceed down the path toward morally desirable change.

Accordingly, punishment in Confucianism is administered by employing shame as a behaviour control strategy to engage moral communication with offenders,¹⁶¹ to persuade them to look back repenting their misconduct, and to motivate them to look ahead seeking reform and further reintegration back into the community. The idea behind this is that the effectiveness of the ethical persuasion is determined by the offenders’ sense of shame. While punishment is justified in the West as “a path towards reform and rehabilitation,”¹⁶² the Confucian theory of punishment stresses the moral education role of the shame attached to the punishment. In the Confucianized criminal justice system, the value of moral education and the societal significance of the judicial process carried the same weight; judges were required to combine education and instructions in ethics with reasoned and righteous

¹⁶⁰羞恶之心,义之端也,“孟子·公孙丑上” [Mencius· Gongsun Chou Shang 11.6] cited in Delia Lin, “High Justice versus Low Justice: Legacy of Confucian and Legalist Notions of Justice” in Flora Sapio et al, eds, *Justice: The China Experience* (Cambridge, UK: Cambridge University Press, 2017) at 72.

¹⁶¹ I borrowed the term “moral communication” from Robin Duff. See, Robin Antony Duff, *Punishment, Communication, and Community* (New York: Oxford University Press, 2001) at 122.

¹⁶² Duff, “Punishment, Communication,” *id* at 115–116; Robin Antony Duff, *Trials and Punishments* (New York: Cambridge University Press, 1986) at 70.

jurisprudence when deciding cases.¹⁶³

Confucianism believes that it is the shame rather than the remorse induced by the punishment that appeals to offenders' conscience, motivates them to make changes to enhance their human worth and dignity. In other words, repentance and reform could be expected only when offenders have acknowledged the moral wrongfulness in their previous misbehaviours, and felt ashamed of their lacking sound moral judgement. Western expressivism highlights its crime reductive element by declaring crimes are publicly condemned.¹⁶⁴ The expressive character of Confucian punishment, specifically of the shame attached, prevents recidivism in the long run as well through morally persuading offenders of their past wrongfulness, and encouraging them to pursue improvement in their sense of moral values.

Although constantly extolling the moral virtues of human beings, Confucianism also recognizes the great diversity in human nature, and admits that there exists a special population of the worst moral state, namely determined defiant offenders who are committed to values condemned by law, morals or social ethics¹⁶⁵ and are not to be sensitized to even the strongest censures. This leads to the end of the penalty spectrum within Confucian punishment framework—the death penalty.

2.3.5 Confucian Justification of the Death Penalty

Zhu Xi (朱熹, 1130 – 1200 CE), one of the greatest Confucian philosophers in Imperial China, employed the metaphor of water to explain how human nature could

¹⁶³ Ho, "Stare Decisis," *supra* note 105 at 156.

¹⁶⁴ Brooks, "Punishment," *supra* note 119 at 116.

¹⁶⁵ Duff, "Punishment, Communication," *supra* note 161 at 121.

degenerate.¹⁶⁶ Natural water is pure and clean at its source. It is likely to become muddy and turbid as it flows on its way toward the ocean. Some water gets dirty and smelly when bacteria grow, whereas some water becomes noxious if it is contaminated with toxins. Similarly, human nature is originally good, but it changes as people grow, and turns out remarkably different. When water just starts getting dirty, it can still be easily cleaned by filtering or boiling. Even it is not suitable for making tea, the water can be used to wash one's hands. Purifying dirtier and smelly water is more troublesome but still manageable: we can add some cleaning substance and use the water to wash mops. But poisonous water is absolutely not reusable, and should be disposed immediately and scrupulously to avoid further contamination. The human nature of most offenders is like the dirty water in the analogy: as long as these offenders are amendable, we can help them with their "purification", even though the task can occasionally be daunting and requires significant efforts. Unfortunately, there exist some offenders whose human nature is completely deteriorated; they are fully aware of what is criminalized but are determined to hurt innocent people in a severe and irrevocable way by following their evil desires.

This analogical interpretation of human nature underlies the severest penalty within the Confucian punishment framework: "those who transgressed presumptuously and repeatedly were to be punished with death."¹⁶⁷ Confucianism asserts that capital punishment should be imposed on malefactors who unrepentantly commit evil and prove to be

¹⁶⁶ Ho, "The Legal Philosophy of Zhu Xi," *supra* note 35 at 199-200. Zhu Xi was believed to be the most outstanding philosopher and scholar at his time; his commentaries on the Confucian classic works were adopted by his government as official interpretation for the imperial examinations. The classics include the Confucian Analects (论语), the Mencius (孟子), Great Learning (大学), and Doctrine of the Mean (中庸), collectively called the Four Books (四书). They were the primary texts used in the imperial examinations. See, Fung & Bodde, "A Short History," *supra* note 30 at 295.

¹⁶⁷ "舜典·尚书" [Book of Document: Shun Dian], cited in Ho, "The Legal Philosophy of Zhu Xi," *supra* note 35 at 193.

incorrigible and irreformable, whose misconduct would preach heterodox doctrines, distort righteousness, and mislead the populace if they were to escape the death penalty.

The penal goal of Confucian punishment to remove the moral taint created by extremely evil conduct by means of terminating the lives of vile offenders is comparable to the Western purgative rationale raised by Matthew Kramer: a community may apply capital punishment to extravagantly evil offenders to remove the defilement and maintain the community's moral integrity.¹⁶⁸

Confucius himself gave his standard for distinguishing extravagantly evil conduct from culpable misbehaviour. He listed five types of evil offenders (excluding theft and plundering) who he believed should be sentenced to death after he had approved and supervised an execution in 496 BCE: the first is those who are well educated and intelligent, but insist on using their intellects to do evil; the second is those who commit evil yet resist moral education and changes; the third is those who tell evil lies meanwhile can be very persuasive and tempting; the fourth is those who already have had a fortune but still are greedy and grab more by sinister means; the fifth are those who cover up, embellish and support evils. He suggested that, under extraordinary circumstances, namely when one of the five types of evil misconduct occurred, capital punishment should be applied to the evildoers who would not listen or be persuaded through moral education.¹⁶⁹ The three evils' case below can be used to interpret the standard recommended by Confucius.

In State of Jin, the Prince of Xing (邢侯) and the Chief of Yong (雍子) had a dispute

¹⁶⁸ Pursuant to the purgative rationale, capital punishment is justified only if it is applied to extravagantly evil actions. See, Kramer, "The Ethics of Capital Punishment," *supra* note 48 at 187-188.

¹⁶⁹ Xue Yang, "The Confucianization of Law and the Lenient Punishments in China" (2015) 10:1 Int'l J. of Criminal Jus. Sciences 32 at 37.

over some lands. Considering both parties were nobility, the magistrate did not want to displease either of them, therefore postponed the viewing of their case for years. The magistrate took a leave in 531 BCE; Shuyu (叔鱼) took his vacancy and wanted to reduce the backlog of cases. The dispute between the Prince and the Chief was not complicated; Shuyu soon found out that the Chief was in fault. Actually the Chief knew that himself. So he bribed Shuyu and even let one of his daughters marry him. Now that the Chief had become Shuyu's father-in-law, Shuyu made a decision against the Prince. The Prince was enraged, killed Shuyu and the Chief at the site when the decision was announced, and fled. The Prime Minister then entrusted Shuxiang (叔向), Shuyu's half-brother, to be the judge to try this criminal case. In his judgment, Shuxiang determined that the three men involved were all guilty for sins deemed to be the same in terms of severity. The Chief knew he was at fault in the original dispute, and bribing the judge was a crime, yet he chose to continue trying to buy a favorable result. Shuyu sold the law in exchange for his personal interest. The Prince was not a judge but made a decision against the two persons and executed them in court, which made him a murderer. The three men were convicted of three capital crimes according to the contemporary criminal code respectively—Deceptive and Disorderly Behavior (昏, *Hun*), Corruption (墨, *Mo*), and Evil (贼, *Zei*), and were sentenced to death. The Prime Minister then issued an order to pursue the Prince, and executed him after he had been arrested. Moreover, their corpses were exposed to the public in the local market.¹⁷⁰

With reference to the five evil types described by Confucius, we can find in this case, the Chief was dishonest and greedy in essence, but tried to disguise and deceive people using

¹⁷⁰ Three Crimes, Same Evil in “左传” [Zuo Zhuan], cited in Ho, “Confucian Jurisprudence in Practice,” *supra* note 33 at 68-69.

illegal means, which makes him Type IV. Shuyu matches Type I as he had intelligence and capabilities and was assigned to be a magistrate, however, he perverted justice for a bribe. The Prince killed the person who had a civil dispute with him and the judge in court without any sympathy and guilt; he belongs to Type II.

Mencius is well-known for his advocacy and pursuance of kindness and benevolence. He, however, provided a moral justification theory for killings under certain circumstances: if a ruler is tyrannical, a revolution is a morally correct choice, and the killing of the ruler should not be deemed to be a crime of regicide.¹⁷¹ Mencius further gave his reasons: the tyrannical ruler does not behave as he ideally ought to do; neither does he have the required ethical virtues for being a (good) leader. He morally chooses not to be a sovereign, and therefore would lose his *Ming* (identity) as a ruler and become nobody; terminating his life should not be seen as killing a ruler.¹⁷² Analogously, those who have committed heinous crimes do not have ethical qualities for being an eligible community member; they are determined to morally abandon the *Ming* for being a qualified member to reside in the community. Chinese people usually reprimand serious and aggravated offenders as non-human,¹⁷³ who should not be considered and treated as ordinary human beings; consequently, they don't see discontinuing the lives of whom as 'killing'.¹⁷⁴

It is noteworthy that the secular definition of extravagant evilness varies along with the evolving standards of decency and moral depravity; the views of Confucius and Mencius

¹⁷¹ “孟子•梁惠王下” [Mencius: Lianghuiwang Xia], cited in Fung & Bodde, “A Short History,” *supra* note 30 at 74.

¹⁷² Mencius: Lianghuiwang Xia, *ibid.*

¹⁷³ “不是人”[not a human being]; “禽兽不如”[beneath birds and beasts].

¹⁷⁴ The Chinese idiom “死有余辜” means even death cannot expiate one's sin. See, Virgil K. Y. Ho, “What Is Wrong with Capital Punishment? Official and Unofficial Attitude toward Capital Punishment in Modern and Contemporary China” in Sarat Austin & Christian Boulanger, eds, *The Cultural Lives of Capital Punishment: Comparative Perspectives* (Stanford: Stanford University Press, 2005) at 284.

should be understood in connection with the social context they lived in over 2000 years ago. The ethical foundations for the use of the death penalty interpreted in the traditional Chinese penal codes give their answers to the question “when is misconduct so evil as to imbue the life of its perpetrator with defilingness”, which was raised by Kramer to determine whether the purgative rationale is morally respectable.¹⁷⁵ It was stipulated in the Tang Penal Code that the eradication of wickedness defiling the community must reach to the roots.¹⁷⁶ Ming Tai-Zu (明太祖), the first emperor of the Ming dynasty who ordered the enactment of the Ming code, declared that the penal code should prevent or eradicate the defilement caused by the villainous conduct to reinforce the Confucian virtue *Li* so that the moral order of the society could be nourished and maintained by *Li*.¹⁷⁷ According to the Qing code, exceptionally grave evilness would necessitate the execution of perpetrator(s).¹⁷⁸ The code also classified the most abhorrent offenses into ‘ten abominations’, and stated that those offenses destruct the human bond (伦, *Lun*), rebel against heaven, destroy *Li*, and violate justice, therefore greatly jeopardize the overall well-being of the community.¹⁷⁹ The offenders of the ‘ten abominations’ were not eligible for leniency but deserved the severest punishment with immediate implementation. This is similar to what the purgative rationale suggests—when a crime taints the relationship between a community and the rest of humanity, capital punishment shall apply.¹⁸⁰ A special rule applied to the most atrocious offenders in the Qing code is, even if they died before the death sentence was implemented,

¹⁷⁵ Kramer, “The Ethics of Capital Punishment,” *supra* note 48 at 187.

¹⁷⁶ MacCormack, “Traditional Chinese Penal Law,” *supra* note 34 at 199.

¹⁷⁷ Geoffrey MacCormack, *The Spirit of Traditional Chinese Law* (Athens, GA: The University of Georgia Press, 1996) at 54.

¹⁷⁸ MacCormack, “The Spirit,” *id* at 200.

¹⁷⁹ MacCormack, “The Spirit,” *id* at 55.

¹⁸⁰ Kramer, “The Ethics of Capital Punishment,” *supra* note 48 at 230.

their dead bodies (corpses) would still be subject to the execution. The belief behind this rule is that their natural death implies the justice of heaven, however, those evil offenders should not escape “the full execution of human justice” due to the defilingness of their misconduct.¹⁸¹ No doubt this practice is deemed inhumane and brutal today. But it was understood and supported by the public in traditional China because the final goal of punishment in Confucianism was to restore the social relationships damaged by the crimes and to get rid of any potential threats to the moral order and harmony in the community.¹⁸²

Moreover, Confucianism stresses that the offenders subject to the death penalty are morally unrepentant and irreformable. The evildoers described by Confucius in his five-type standard, or in the traditional Chinese penal codes, share a common feature in that they contempt the legal rights of others and the general moral values and the legal system upheld in their community. This corresponds to what Kramer argued that the determinately extravagant conduct triggering the purgative rationale demonstrated the wrongdoers’ thoroughgoing contempt for humankind as a whole.¹⁸³ The effectiveness of moral communication via punishment depends on whether the recipient offender accepts the interpretation of his conduct as a public wrong.¹⁸⁴ Moral persuasion and education will be bound to fail when attempting to make extravagant evildoers repent because the moral values upheld by the community are what they have rejected, threatened, and infringed. Not only will they disregard or despise the moral message that the punishment seeks to convey, their continuing existence will become a moral blot which keeps impacting the *Lun* between them

¹⁸¹ MacCormack, “The Spirit,” *supra* note 177 at 200.

¹⁸² Yuan, “Restorative Justice in China,” *supra* note 153 at 16.

¹⁸³ Kramer, “The Ethics of Capital Punishment,” *supra* note 48 at 231.

¹⁸⁴ Duff, “Punishment, Communication,” *supra* note 161 at 122.

and other community members and poisoning the moral health of the society. This resonates with the moral obligation of the community justified by the purgative rationale to terminate the lives of the evildoers.¹⁸⁵ In addition, it was not uncommon in traditional China that the descendants of the executed perpetrators got punished as well—banished or became government slaves—fearing that they had inherited or been significantly influenced by the wicked spirit or air (戾气) of the perpetrators.¹⁸⁶

Despite its persistent belief in the effectiveness of leniency, Confucianism is committed to expressing public outrage to wrongdoers who contaminate and threaten the purity of the moral principles upheld by the community and asserts the enforcement of capital punishment can best achieve the goal. Capital crime defies the values and ethics embraced and reinforced by a healthy society, strips victims of their human dignity, and undermines the community's sense of *Li*. The expressive character of Confucian punishment shows its clear position for the death penalty by justifying the community's significant denunciation for the evildoers in the form of execution while signs of repentance or reformation do not exist. An execution sends the message that the moral stain created by the most repulsive and evil behaviors against society should and shall be eliminated firmly. The practice of capital punishment is justified as a manifestation of collective anger, disapproval, and denunciation toward atrocious crimes and as a form of spiritual cleansing for society.

Confucianism declares that letting these evildoers escape the death penalty is nothing but an abuse of leniency; any lighter punishment would impair public confidence in the

¹⁸⁵ Kramer, "The Ethics of Capital Punishment," *supra* note 48 at 233.

¹⁸⁶ MacCormack, "The Spirit," *supra* note 177 at 206-207.

credibility and reliability of the judiciary.¹⁸⁷ This philosophy, however, tends to centre on or even overstate the efficiency at trial and ignore some basic rights of defendants.

2.3.6 Ignorance of Defendants' Individual Rights

Since the Confucianization of the Chinese legal system in the Han Dynasty, formal penal codes had been enacted by integrating Confucian ethical and moral principles. Although Confucius acknowledged the social function of law and punishment, he in essence discouraged the use thereof.¹⁸⁸ Rather, he insisted the superior status of *Li* and trusted its effectiveness in moral guidance and preventing misconduct, which constitutes the restorative elements of the Confucian theory of punishment: punishment was recommended as a supplemental approach to ensure the reinforcement of moral persuasion and moral education in the administration of law.¹⁸⁹ Scholar officials handled criminal cases or supervised prefectural judicial departments based on their knowledge of the Confucian theories; moral reasoning was usually combined with legal reasoning and played a primary role in trials.¹⁹⁰ In most cases, the magistrate was the chief administrator of the prefecture himself, hence the judgements showed no difference with administrative decisions.¹⁹¹

Seeking and maintaining harmony and order of a society is the ultimate objective of Confucian moral philosophy. Trials and punishment were used in order to recover damaged human relationships and restore social stability.¹⁹² In Confucius' opinion, the most significant feature of an ideal society is "*Wu Song*" (无讼, no lawsuit). The goal of achieving

¹⁸⁷ “朱子文集” [The Collected Writings of Zhu Xi], cited in Ho, “The Legal Philosophy of Zhu Xi,” *supra* note 35 at 199-200.

¹⁸⁸ Liu & Palermo, “Restorative Justice,” *supra* note 112 at 53.

¹⁸⁹ Liu & Palermo, “Restorative Justice,” *ibid.*

¹⁹⁰ Liu & Palermo, “Restorative Justice,” *ibid.*

¹⁹¹ Liu & Palermo, “Restorative Justice,” *ibid.*

¹⁹² Liu & Palermo, “Restorative Justice,” *id* at 54.

harmony and peace within the community as soon as possible was placed above legitimating decisions in legal process.¹⁹³

As *Wu Song* was the most desirable social status, it is understandable that there were no independent lawyers or private businesses serving lawsuits in traditional China. In Chinese culture, a morally upright person would never be suspected of any misconduct. In other words, suspects involved in criminal cases were considered to be shameful and morally defected. In practice, criminal defendants generally had no independent representatives or defenders, or neither were they encouraged to find one; only state authorities (the prefectural government in most cases therefore making the police, the prosecutor and the judge are the same person—the magistrate) participated in the adjudication process.¹⁹⁴ In court, defendants were reminded of the values and standards of behaviors for all community members and expected to be honest and cooperate, therefore to confess on the site.¹⁹⁵ Although the severity of the punishment was required to be proportionate to the seriousness of the offense, a swift confession was usually accepted as showing the offender's shame and repentance and treated as a mitigating factor in sentencing. Defendants resorting to a third party to defend themselves would be denounced as being insubordinate to authorities, and assumed to be guilty and trying to lie and escape punishment; their defenders were biased to be cunning, dishonest, and challenging the widely accepted social rules.

Catching and punishing offenders is paramount in the Confucian criminal justice system, thus efficiency in truth finding merits attention whereas methods or procedures

¹⁹³ Liu & Palermo, "Restorative Justice," *ibid.*

¹⁹⁴ Timothy A. Gelatt, "The People's Republic of China and the Presumption of Innocence" (1982) 73:1 J. of Criminal Law and Criminology 259 at 264.

¹⁹⁵ Liu & Palermo, "Restorative Justice," *supra* note 112 at 54-55.

applied in the process do not matter.¹⁹⁶ Common senses of doubt (or doubtlessness), reasonableness, and moral assessment were significantly relied on and played a leading role over legal rules in practice for seeking a result of justice.¹⁹⁷ The dominant legal principle was a presumption of guilt; the manner of handling cases was inquisitorial—questioning the accused for confession: rebutted defendants were often beaten for the purpose of extracting a confession.¹⁹⁸ It is noteworthy that this principle had little to do with harshness; rather, it was backed by the belief that a truly good man would never become involved with the law.¹⁹⁹ Little sympathy or empathy was allocated to defendants and their individual rights were barely concerned; defendants were obliged to cooperate or even sacrifice their individual interest for the collective good or the imperial interest.²⁰⁰ It is criticized that Confucianism's pursuance of harmony, peace, and stability was achieved at the cost of infringement of individual interests and human rights.²⁰¹ This is the main reason that the traditional Chinese legal system was accused of being ruled by man.²⁰²

In addition, the dignity of defendants and executed offenders was of no concern, by today's standards. The main methods of execution in Imperial China included decapitation, strangulation, and slicing. The choice of execution method depended on whether it would create significant impact on the offender's soul as well as in the contemporary society.²⁰³ Strangulation, although it might cause more pain than decapitation, was often used for less

¹⁹⁶ Liu & Palermo, "Restorative Justice," *id* at 55-56.

¹⁹⁷ Liu & Palermo, "Restorative Justice," *id* at 56.

¹⁹⁸ Kim & LeBlang, "The Death Penalty," *supra* note 41 at 96; Gelatt, "The People's," *supra* note 194 at 264.

¹⁹⁹ Kim & LeBlang, "The Death Penalty," *ibid*.

²⁰⁰ Liu & Palermo, "Restorative Justice," *supra* note 112 at 56; Davis, "The Death Penalty," *supra* note 125 at 307.

²⁰¹ Liu & Palermo, "Restorative Justice," *id* at 55.

²⁰² Liu & Palermo, "Restorative Justice," *id* at 57.

²⁰³ Davis, "The Death Penalty," *supra* note 125 at 307.

severe crimes.²⁰⁴ An executed offender can longer perform his filial responsibilities, but keeping a full body for him would make him less unfilial as his body is deemed to be a bequest from his parents.²⁰⁵ Also, it was believed that the spirit of an offender would not be intact therefore could not create any further disruptive influence if his corpse was destroyed and unidentifiable.²⁰⁶ For example, intentional murders might be decapitated whereas traitors were to be sliced.

However, it should be noted that, the imperial penal codes in China carefully prescribed the procedures for the adjudication of capital offenses as the ruling class recognized the severity and irreversibility of execution, which had effectively limited the use of the death penalty and provided some safeguards for capital crime defendants.²⁰⁷

2.3.7 The Institution of the Autumn Assizes

The death penalty was implemented carefully in Imperial China, especially at the level of the central authorities, based on the notion that the natural order would be disturbed by the punishment of innocent people.²⁰⁸ The Emperor himself felt that, as a top ruler who had the power to enact, amend, and abolish laws, he was obliged to uphold the efficacy and impartiality of the overall judicial system because the administration of justice across the empire was in his name.²⁰⁹ The issuance of death sentences was perceived of the utmost importance; any errors leading to executions would cause imperial concern and immediate reactions.

²⁰⁴ FN 21, Davis, "The Death Penalty," *ibid.*

²⁰⁵ Davis, "The Death Penalty," *ibid.*

²⁰⁶ Davis, "The Death Penalty," *ibid.*

²⁰⁷ Davis, "The Death Penalty," *ibid.*

²⁰⁸ Gelatt, "The People's," *supra* note 194 at 265

²⁰⁹ Meijer, "The Autumn Assizes," *supra* note 127 at 2, 16.

For example, in the Han dynasty, offenders sentenced to death would be put on death row for a two-year reprieve when an unhesitant execution was not necessary. If the death row inmates were recognized for their meritorious actions and self-reform during the two-year period, their death sentences would be commuted.²¹⁰ In 592 BCE (the Sui dynasty), the authority of issuing final judgements on capital cases at the prefectural level was removed pursuant to the order of Emperor Wen, and all capital cases were required to be reviewed by the supreme judicial organ in the capital, and death sentences should be ratified by the Emperor.²¹¹ Emperor Tai-Zong of the Tang dynasty (唐太宗) ordered that all death sentences to be carried out should be presented to him for reconsideration two days prior to the executions, and again on the next day if he did not revise the sentences, and no less than three times on the day of executions.²¹²

Starting from the Sui dynasty, a multi-tier review mechanism—from district to prefecture to county to the highest judicial body of the State till the Emperor—which coincides partially with the modern death penalty review system, was set up for capital cases to prevent erroneous judgements and arbitrary executions, and ensure the consistency in the application of sentencing criteria in lower courts.²¹³ The higher-level reviewing authorities were required to investigate the circumstances triggering the misconduct and the conditions of the offender when committing the offense, and render their decisions pursuant to the penal code, common sense rules and Confucian theories. All death sentences should be forwarded

²¹⁰ Lu & Miethe, “China’s Death Penalty,” *supra* note 2 at 66; William P. Alford, “Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Late Imperial China” (1984) 72 California LR 1180 at 1183.

²¹¹ Derk Bodde & Clarence Morris, *Law in Imperial China: Exemplified By 190 Ch’ing Dynasty Cases, with Historical, Social, and Juridical Commentaries* (Cambridge, MA: Harvard University Press, 1967) at 131-132.

²¹² Bodde & Morris, “Law in Imperial China,” *ibid.*

²¹³ Davis, “The Death Penalty,” *supra* note 125 at 307-308; Kim & LeBlang, “The Death Penalty,” *supra* note 41 at 99.

to the Board of Punishments for review, and then be presented to the Emperor for his final approval.²¹⁴

The cautiousness toward the termination of human life throughout from the Han to the Tang Dynasty contributes to the formation of the Assizes system in the later imperial stage of China.²¹⁵ The Assizes system mandates a review of all death sentences by the Board of Punishments and the Emperor himself, therefore offers opportunities to offenders to be commuted as well as chances for the central authorities to correct the injustice issues in the preliminary trials and lower-level reviewing proceedings.²¹⁶

The institution of Autumn Assizes was developed and implemented in the Ming and Qing Dynasties. Death sentences were classified into two types: one is ‘execution without delay’ (立决), the other is ‘death sentence subject to the Autumn Assizes’ (秋后处决).²¹⁷ Convicts receiving the latter were to be held in jail (监候, *Jian Hou*) awaiting the review decisions on their punishment after the Autumn. This institution was applicable to all capital crimes in the Qing dynasty.²¹⁸

The provincial Adjudication Commissioner was also authorized to issue a ‘stay of execution’ (缓决) to a capital case in the second round of reviewing proceedings, which was still subject to the review and approval of the central authorities.²¹⁹ With reference to the opinions of the Board of Punishments, generally the Emperor would suspend the death sentences until “after the assize” for offenders who were deemed not to be extravagantly evil

²¹⁴ Davis, “The Death Penalty,” *id* at 307; Jinfan Zhang, *The Tradition and Modern Transition of Chinese Law* (Berlin: Springer, 2014) at 58-59.

²¹⁵ Kim & LeBlang, “The Death Penalty,” *supra* note 41 at 100.

²¹⁶ Kim & LeBlang, “The Death Penalty,” *ibid*.

²¹⁷ Meijer, “The Autumn Assizes,” *supra* note 127 at 2.

²¹⁸ Meijer, “The Autumn Assizes,” *ibid*.

²¹⁹ Meijer, “The Autumn Assizes,” *id* at 11.

and not suitable for immediate execution.²²⁰ Such cases included those with suspicious circumstances or special conditions deserved sympathy, for example, when the offender was a minor, an elderly, mentally retarded, or the only child of elderly or sick parents.²²¹

A special supreme court was set up to jointly review the suspended death sentences during the Autumn Assizes. The jurists consisted of around fifty high-rank officials from nine chief ministries, the six Boards, the Court of Revision, the Censorate, and the Office of Transmission.²²² Recommendations for a reduced sentence were made for most cases; it probably became a routine that capital crime convicts stayed in jail for one to three years and then the majority of them could be commuted to a lighter penalty such as banishment.²²³ If a *She* or a *Da She* occurred during the period of *Jian Hou*, their sentences would be alleviated or the offenders would be set free. The Emperor also issued edicts describing the reviewing methods and procedures for capital cases to establish precedents to guide lower courts.²²⁴

The Autumn Assizes was assessed as “a perfectly rational institution” and “an improvement and innovation of the Chinese legal system.”²²⁵ Commentators attribute the careful scrutiny of capital cases in Imperial China to the deep-rooted influence of Confucianism.²²⁶ It was stipulated in the penal codes that the formulas adopted in the Assizes for reducing punishments should follow Confucian humanitarian values and principles.²²⁷ The basic design and structure of the Assizes system persist in China’s criminal justice

²²⁰ Bodde & Morris, “Law in Imperial China,” *supra* note 211 at 138.

²²¹ Ning Zhang, “The Debate over the Death Penalty in Today’s China, (2005) 62 *China Perspectives* at 5.

²²² Kim & LeBlang, “The Death Penalty,” *supra* note 41 at 101; Meijer, “The Autumn Assizes,” *supra* note 127 at 10.

²²³ Bodde & Morris, “Law in Imperial China,” *supra* note 211 at 138.

²²⁴ Meijer, “The Autumn Assizes,” *supra* note 127 at 11.

²²⁵ Meijer, “The Autumn Assizes,” *id* at 13.

²²⁶ Kim & LeBlang, “The Death Penalty,” *supra* note 41 at 99.

²²⁷ Kim & LeBlang, “The Death Penalty,” *id* at 100.

system to this day, which will be discussed in Chapter 3.

Nonetheless, Capital punishment has been employed as an indispensable restraint upon evil forces in Confucian Jurisprudence. From ancient times to the present, a criminal justice system that is able to competently reconcile the Confucian principles of leniency and severity would gain the easiest approval of the Chinese populace. In the popular imagination, the death penalty is necessary and justifiable if it is applied to punish egregious misconduct. The use of the death penalty does not evoke people's negative emotion; on the contrary, it makes most people feel safe and protected.²²⁸

2.4 Public Perception of the Death Penalty

The popular view of capital crime offenders has varied little over time. Researchers find that the perception established 2000 years ago shows no significant difference with that prevailing in modern Chinese society. The vocabulary of the public media purposely conforms to this popular view, thereby further reinforcing it: death row is described as a collection of the most horrific and wicked criminals; what happened to the victims is always heartbreaking; cold-blooded offenders hurt innocent people atrociously without any sympathy or respect.²²⁹ Crimes are decried as a menace to orderly civilized society; the death penalty is promoted as a solution to the most serious threats to good people.²³⁰

The findings of Virgil Ho's fieldwork undertaken in some villages in southern China during the last 1980s and the early 1990s uphold the above. A television legal drama series named "Judge Bao" (包青天) about a legendary judge Bao Zheng (包拯) was broadcasted

²²⁸ See, e.g., Ho, "What Is Wrong," *supra* note 174 at 278-279, 282-284.

²²⁹ Ho, "What Is Wrong," *id* at 278-279.

²³⁰ Ho, "What Is Wrong," *id* at 282.

during his research, and Ho was deeply impressed by the popularity of that series.²³¹ He gave a vivid description of the scene as follows:

“Five nights a week during months when the program was broadcast, nearly all the villagers gathered in front of their TV sets to follow the latest developments in the judge’s investigation... Every time Judge Bao succeeded in clearing the name of a falsely accused character, or having the perpetrator of a sinister crime arrested and sent to execution, these ... audiences all spontaneously clapped and bellowed with joy, apparently celebrating the triumph of good over evil, not only in the fictional world, but also in real life.”²³²

Ho indicates that the respondents in his research overwhelmingly believe the use of the death penalty is to punish the most black-hearted and unforgivable evildoers, and they support the retention of the death penalty so that the society can get rid of more evils endangering common people’s safety and happiness.²³³ Ho also points out that the prevailing pro-death penalty attitude has no relation to ideological indoctrination—actually the government has done little propaganda in this regime; people do not hesitate to present their views for the death penalty, which they believe is to eliminate villains against the whole society.²³⁴

The death penalty also implies a sense of human equality to the populace. China has the oldest history with profound social status hierarchies. In the feudalistic Chinese society

²³¹ Ho, “What Is Wrong,” *id* at 282-283.

²³² Ho, “What Is Wrong,” *id* at 282.

²³³ Ho, “What Is Wrong,” *id* at 283.

²³⁴ Ho, “What Is Wrong,” *id* at 285.

that predated Confucianism (周朝, the Zhou dynasty), legal punishments were only applied to ordinary people.²³⁵ In other words, the upper class was exempt to penalties. This can be explained by the social structure of the contemporary society. The upper class consisted of the imperial family and feudal lords who were all relatives either by blood or by marriage.²³⁶ Most of the feudal lords inherited their rights and power from ancestors and ruled their land tenure—states semi-independently.²³⁷ The royals and the nobles communicated with each other following the rituals and unwritten rules of conduct: the upper class' conduct was regulated by *Li* instead of the penal code.²³⁸ All social classes were bound by law in the Confucianized legal system. At the same time, however, Confucianism also affirmed the difference in social status, and emphasized the significance of maintaining the social status hierarchies, i.e., the principle of *Ming* (identity), for a stable, orderly, and integrated society.²³⁹ People were required to take their identities with gratitude and sustain their identities using their *Li*.²⁴⁰ It is not hard to imagine that offenders were treated differently in trial or in prison because of their different social class and financial status. But people are equal when they are facing death.

Besides Bao Zheng, there are quite a few Judges who have a lasting fame in Chinese history, for example, Di Renjie (狄仁杰), Hai Rui (海瑞), Liu Yong (刘墉), and Shi Shilun (施世纶). They are Confucian scholar officials at different times, but what they have in common is that they were not afraid of power, treated offenders equally in their trials, and

²³⁵ Fung & Bodde, "A Short History," *supra* note 30 at 155.

²³⁶ Fung & Bodde, "A Short History," *ibid*.

²³⁷ Fung & Bodde, "A Short History," *ibid*.

²³⁸ Fung & Bodde, "A Short History," *id* at 156.

²³⁹ Fung & Bodde, "A Short History," *id* at 33.

²⁴⁰ Cheng, "Critical Reflections," *supra* note 147 at 420.

reviewed cases with intelligence, honesty and uprightness. Their legends have passed along for generations to this day. What makes people gratified is how they successfully convicted an extremely evil offender who was either wealthy or powerful, even nobility, and how they finally sentenced the offender to death and gave justice to the victims. This may partly explain why the death penalty is more popular among ordinary people comparing with the attitude of the elite class, as observed by Ho.²⁴¹

Punishment is viewed by the populace in traditional China as the State's reaction to putative misconduct and a tool to protect the community from criminal threats instead of a violation of the offenders' rights, which philosophers need to create theories to justify. Victims and the public strongly depended on the intervention of the government authorities for seeking justice.²⁴² The chief administrator of a prefecture was addressed as *Fu Mu Guan* (父母官, parent-official) for all residents in that prefecture, which demonstrates the residents' submission of the administrator's guidance.²⁴³ Whatever the administrator did to an offender in trials were accepted as parents disciplined their children or as doctors saved their patients. The administrator's decision to inflict a sanction upon an offender was deemed to be moral teaching. Even when innocent people were unjustly suspected and/or interrogated, they rarely held a grudge against their *Fu Mu Guan*. Their usual response would be to conduct self-examination to see if the unpleasant treatment could be attributable to their moral defects. A traditional Chinese saying 'flies only go for cracked eggs' (苍蝇不抱没缝儿的蛋) can explain this thinking.

²⁴¹ Ho, "What Is Wrong," *supra* note 174 at 281.

²⁴² Eva Pils, "Justice, Wrongs and Rights: Understanding Traditional and Liberal Conceptions of Justice through the Lens of Contemporary Chinese Advocacy Initiative" in Flora Sapio et al., eds, *Justice: The China Experience* (Cambridge: Cambridge University Press, 2017) at 229, 241.

²⁴³ Pils, "Justice, Wrongs," *id* 229, 242.

Chinese people are aware that wrongful conviction may happen. That is why people respect and admire Judge Bao and other legendary figures—they hope more morally upright and honest government officials would appear to safeguard against miscarriages of justice so that innocent people will not be framed.²⁴⁴ While accepting that there are shortcomings in the judicial system, however, they argue that occasional false charges or even executions cannot refute the efficacy and the ethical justification of capital punishment.²⁴⁵ Western researchers also find the same in their investigations that the public rarely change their position and attitude with respect to the death penalty even when what they used to believe is proved implausible.²⁴⁶ Samuel Gross indicates that most Americans believe their attitude favoring or rejecting capital punishment represents their self-identification: “We say, ‘I’m for the death penalty’, the same way we say, ‘I’m a Republican’, or ‘I’m a Red Sox fan’.”²⁴⁷ In China’s context, whenever the topic of the death penalty is raised, people would almost immediately take sides, the majority of which are supportive, and make judgement accordingly. Their views on whether the application of capital punishment is justified can hardly be shaken by some new punishment theories, empirical research data, or the exposure of high-profile cases. For most proponents of the death penalty, the fact that innocent people were executed calls for more cautiousness in the application of the death penalty but is not convincing enough to let them switch their side. The philosophy is that miscarriages of justice occurred in the context should not lead us to reject the death penalty *per se* just as we will not reject punishment because wrongful convictions existed; the current death penalty system needs to

²⁴⁴ Ho, “What Is Wrong,” *supra* note 174 at 283.

²⁴⁵ Ho, “What Is Wrong,” *id* at 282.

²⁴⁶ Brooks, “Punishment,” *supra* note 119 at 167.

²⁴⁷ Brooks, “Punishment,” *id* at 172.

be improved rather than be abandoned.

2.5 Summary

The official ideology in Imperial China—Confucianism—has resumed its historical role as the mainstream source of spiritual nourishment for Chinese people. Confucian philosophy has been adopted to guide legal thinking and legal practices from ancient China through to the present day. The Confucian theory of punishment constitutes a compelling unified theoretical framework which serves multiple penal goals: punishment is a concrete manifestation of public disapproval and is applied to recover damaged human relationships and restore social stability; offenders should be punished according to the seriousness of the offenses; the primary purpose of punishment is to conduct moral communication with offenders, and the shame attached to the punishment aims to incentivize the offenders to perform self-examination, acknowledge the wrongfulness of their misbehaviours, and be willing to morally amend themselves; punishment also creates a deterrent force because offenders who want to resume their stake and reintegrate into the society would decide to refrain from any further misconduct. Nevertheless, Confucianism states that there are some extremely heinous offenders who are proved to be morally unrepentant and irreformable therefore should never be condoned; the community is obligated to terminate the lives of the offenders' in order to remove the moral taint and prevent any further defilement of the morality and sanctity of the society.

In the next chapter, I will examine the evolution of modern Chinese Criminal Law and death penalty policies, and explore whether and how Confucian philosophical ideas impact the death penalty context in China.

Chapter 3. Sentencing Law and Policy: Death Penalty Reforms in China

This chapter shall depict the trajectory of the reforms in China's death penalty regime since 1979, and explore the origins of the reforms. I shall outline the major periods in the history of the Chinese criminal law, present the evolution of Chinese criminal law and policies on the death penalty, and discuss the political, economic, and cultural factors that have contributed to the critical changes in the context.

Below are some research questions that I will specifically address while framing a historical analysis in the examination of the law and practice of the death penalty in China. What are the external and internal forces motivating China to prioritize or reduce the application of the death penalty? Why did the Strike Hard campaigns—which are condemned by Western human rights advocates—receive extensive support from the Chinese people, especially at the earlier launching stage? What is the Chinese public's attitude towards the abolition of capital punishment for certain types of crimes? How does the popular consensus influence the sentencing decisions? Does our understanding of the Confucian theory of punishment help us to examine the legitimate grounds of the death penalty policy in contemporary China?

3.1 The Embryonic Stage Criminal Law in 1979

The establishment of a complete, modern framework for criminal law in China took nearly 30 years. The CCP defeated the Nationalist Party and founded the people's republic of China (PRC) in 1949, then repealed the Nationalist laws and judicial organs entirely—including the criminal system. Unfortunately, the Communist government was not

able to provide substitute criminal laws for a smooth transition.²⁴⁸

Over twenty drafts of a criminal code were produced between 1950 and 1957 in an attempt to establish a socialist criminal justice system, but they were all laid aside due to the continuous political movements eliminating class enemies.²⁴⁹ Up to 1488 laws, regulations, and decrees (many of which were in experimental or provisional form) were issued by different legislative and administrative agencies during 1949-1963.²⁵⁰ Without consistent formal criminal adjudication procedures, criminal sanctions were mostly determined and imposed by Party committees and the public security bureaus—heavy sentences including the death penalty were widely applied to political offenders in the name of revolutionary justice.²⁵¹

In the subsequent Cultural Revolution, formal aspects (either substantive or procedural) of the legal system were blatantly disregarded; fanatical crowd violence and arbitrary executions were incited and condoned in an attempt to intimidate political opponents and suppress dissent.²⁵² China experienced an era devoid of criminal legislation from 1949 until the end of the chaotic Cultural Revolution in 1976; the criminal justice context at that time was featured by a lack of stability, predictability, and the rule of law.²⁵³

Holding that a codified legal system was of the utmost importance in the maintenance of stability in society and reconstruction of the country's economic situation after decades of

²⁴⁸ Davis, "The Death Penalty," *supra* note 125 at 310.

²⁴⁹ Davis, "The Death Penalty," *id* at 311; Bingzhi Zhao, "Evolution of Chinese Criminal Law in the Last Hundred Years: For the Centennial of XinHai Revolution" (2012) 30 *Tribune of Political Science and Law* 117 at 122.

²⁵⁰ Shao-Chuan Leng & Hungdah Chiu, *Criminal Justice in Post-Mao China: Analysis and Documents* (Albany, NY: State University of New York Press, 1985) at 21.

²⁵¹ Shao-Chuan Leng, *Justice in Communist China: A Survey of the Judicial System of the Chinese People's Republic* (Dobbs Ferry, NY: Oceana Publications, 1967) at 122-123.

²⁵² Davis, "The Death Penalty," *supra* note 125 at 311.

²⁵³ Davis, "The Death Penalty," *ibid*.

social and political turmoil, the contemporary Chinese government initiated the drafting work for major laws and regulations in 1978. Both the Chinese criminal law and criminal procedure law were among the first pieces of legislations enacted in 1979.

The criminal justice policy established in the 1979 criminal law sought to “combine punishment with leniency” (惩办与宽大相结合), and restricted the death penalty only to the most heinous criminal offenders.²⁵⁴ Compared to the discretionary death sentencing throughout the previous three decades; the scope of the capital crimes in this law is considerably reduced. Nevertheless, the law still presents distinct politically-oriented characteristics of the era by placing Marxism-Leninism-Mao Zedong Thought as its supreme ideological foundation, and overstressing the class nature of crimes and offenders in death penalty decision making.²⁵⁵

Fourteen of the twenty-seven capital crimes are political offenses, including: colluding with a foreign state in plotting to jeopardize the sovereignty, territorial integrity, and security of the nation; plotting to subvert or dismember the government; bribing the police or armed forces; treason; gathering a mob to storm prisons or organize jailbreaks; and espionage.²⁵⁶ All of these offenses are described as counter-revolutionary and characterized as seriously jeopardizing the interests of the State and the people; the death penalty is justified for such offenders based on the possibility of causing severe result “in an odious manner.”²⁵⁷ The other capital crimes include offenses either seriously endangering public

²⁵⁴ 中华人民共和国刑法 [Criminal Law of the People’s Republic of China] (6 July 1979, effective 1 January 1980), arts 1, 43. (China). Margaret Lewis, “Leniency and Severity in China’s Death Penalty Debate” (2011) 24 Colum J Asian L 303 at 317.

²⁵⁵ Trevaskes, “The Death Penalty,” *supra* note 4 at 28-29; Zhao, “Evolution of Chinese Criminal Law,” *supra* note 249 at 123.

²⁵⁶ “Criminal Law 1979,” *supra* note 254, arts 91-94, 96-97.

²⁵⁷ “Criminal Law 1979,” *id.*, art 103.

security and social order²⁵⁸ or those which result in death or serious injury.²⁵⁹ The common characteristics of these capital crimes reflect the overarching objectives of the 1979 criminal law—“to use punishments to fight against all counterrevolutionary acts; to protect socialist property collectively owned by the people; to protect the citizens; to maintain public order; [...] and to safeguard the smooth progress of [...] socialist construction.”²⁶⁰

The 1979 criminal law is assessed to be the first comprehensive law that improved the predictability and fairness of the Chinese criminal justice system.²⁶¹ It gives the public a systematic understanding of the legislator’s cautious attitude towards the application of the death penalty: the majority of the capital crimes display so-called “class struggle particularities” and reflect the specificities of the period, which were barely used in practice and therefore had little impact on the life of ordinary citizens.²⁶² Moreover, the death penalty is not to be imposed on persons under the age of 18 years or mentally impaired at the time the offense was committed, nor on women who are pregnant at the time of trial.²⁶³ All death sentences given in lower courts shall be submitted to the Supreme People’s Court (the SPC) for review and final approval.²⁶⁴ The standards and proceedings set up in the law clearly demonstrate the influence of Mao Zedong’s views with respect to capital punishment: that it should be used cautiously in a limited number of cases, and that the scope of capital crimes

²⁵⁸ E.g. Arson in art 106; Robbery and corruption in arts 150 and 155. “Criminal Law 1979,” *id.*

²⁵⁹ Such as murder and rape in arts 132 and 139. “Criminal Law 1979,” *id.*

²⁶⁰ “Criminal Law 1979,” *id.* art. 2.

²⁶¹ Davis, “The Death Penalty,” *supra* note 125 at 312-313; Meaghan Sunderland, “Criminal Law Reform in the People’s Republic of China: Any Hope for Those Facing the Death Penalty?” (2002) 8 *Appeal* 18 at 22.

²⁶² Michelle Miao, “Capital punishment in China: A Populist Instrument of Social Governance” (2013) 17:2 *Theoretical Criminology* 233 at 238.

²⁶³ “Criminal Law 1979,” *supra* note 254, arts 15, 44.

²⁶⁴ “Criminal Law 1979,” *id.* art 43.

should be reduced gradually in the process towards abolition.²⁶⁵

In terms of limiting the use of the death penalty, a widely acknowledged significant contribution of the 1979 criminal law was the adoption of the *Sihuan* (死缓) institution as an alternative form of death sentence with immediate execution: if an immediate implementation of the death sentence is not deemed necessary, a two-year suspension of execution may be granted simultaneously. The capital crime offender shall undergo reform through labour; if he demonstrates repentance and willingness to amend within the two years, his punishment shall be commuted to life or fixed-term imprisonment.²⁶⁶

3.1.1 *Sihuan*: Death Sentence with Reprieve

The *Sihuan* institution had already been employed in some capital cases prior to the enforcement of the 1979 criminal law. It was a special lenient treatment granted to foreigner war offenders in communist-controlled area (苏区, the Soviet Zone) in the 1930s,²⁶⁷ and was proposed by Mao Zedong in 1951 as a policy to be used for the counter-revolutionaries “whose crimes deserve capital punishment but who owe no blood debts and are not bitterly hated by the people or who have caused serious but not extremely severe harm to the interest of the State.”²⁶⁸

This institution is believed to stem from the humanitarian aspects in the administration of capital punishment in Imperial China. Its precursor is the suspended death sentence practice in the Han Dynasty—inmates on death row could be commuted after a

²⁶⁵ Andrew Scobell, “The Death Penalty in Post-Mao China” (1990) 123 *The China Quarterly* 503 at 505.

²⁶⁶ Davis, “The Death Penalty,” *supra* note 122 at 314; Trevaskes, “The Death Penalty,” *supra* note 4 at 27.

²⁶⁷ Michelle Miao, “Two Years between Life and Death: A Critical Analysis of the Suspended Death Penalty in China” (2016) 45 *International Journal of Law, Crime and Justice* 26 at 28.

²⁶⁸ The 1951 Notice of the Standard for Meting Out Sentences, issued by the Public Ministry and the 1951 Interpretation on How to Carry out the Suspended Death Sentence for Counterrevolutionary Offenses, issued by the Adjudication Committee. See Lu & Miethe, “China’s Death Penalty,” *supra* note 2 at 66, 215.

two-year reprieve for their meritorious behaviours, and the institution of Autumn Assizes—if a death sentence was finally approved but not immediately executable, it would be held until the annual Autumn Assizes for a collective review, which often resulted in commutation (see Section 2.3.7 in Chapter 2).²⁶⁹ Both the traditional Autumn Assizes and the modern *Sihuan* institution embody and sustain a Confucian faith in the potential capacities of wrongdoers for repentance, reform, and reconciliation.

Unlike other retentionist jurisdictions, in which the seriousness of offense is the sole factor that may result in capital punishment, there are two conditions necessary for the death penalty calculus in the Chinese criminal system: only when offenders commit extremely heinous crimes and an execution is deemed to be imperative would a government-sanctioned punishment by death be dictated. However, if either of the two conditions—usually the latter—is not met, the court is to hand down a more lenient sanction, and the death sentence shall be suspended.

Consistent with the Confucian belief in moral self-cultivation and self-perfection, the *Sihuan* institution grants the most serious crime convicts a choice of life or death based upon their attitude and deeds. If a probability, however remote, is observed that an offender still values his *Ming*—his identity as a community member, an imminent termination of his life would be inappropriate. Instead, he is eligible for an opportunity to introspect his criminal actions. If he is able to convince his community, within a reasonable time limit, that he has the desire to repent, or further to amend the human bond (*Lun*) destroyed by his infraction, the original ultimate penalty could be commuted to a lighter punishment. Depending on his

²⁶⁹ Kim & LeBlang, “The Death Penalty,” *supra* note 41 at 98.

performance during the suspension period, the commutation shall focus on either the effect of incapacitation by sentencing the offender to life imprisonment, or facilitating the offender to reform via pursuance of *Li* and reintegrate back into society after serving a fixed term. If there is proof during the reprieve that the offender failed to appreciate the message the punishment conveys or even threatened or infringed upon the moral values upheld by his community, said community will be obligated to prevent the offender's continuing existence from sullyng society; an execution of the original death penalty is then justified.

There are no guidelines or judicial interpretations enumerating the circumstances that justify a stay of execution; that is, which circumstances meet the conditions of *Sihuan*. In practice, the evaluation is based on the court's discretion after taking account of the nature, consequences, and social harm of the offense, mitigating factors of the case, the continuing dangerousness of the offender, and whether the offender has shown remorse.²⁷⁰

The stipulation that all offenders granted a suspended death sentence should "undergo reform through labour" originates in the 1950s from Mao Zedong's instruction to "hold on the execution, grant a two-year reprieve and subject them (counterrevolutionary offenders) to forced labor to see how they behave."²⁷¹ The chief purpose of the labour reform is to retrieve the criminals' humanity and to morally transform them ideologically.²⁷² In the Maoist era, the Chinese government strongly imitated the Soviet Union in establishing its own model of criminal system²⁷³, exemplified by the institution of *Sihuan* in choosing labour reform as a

²⁷⁰ Genlin Liang, "The Fate of the Death Penalty in Modern China" (2014) 2:2 Peking University Law J. 257 at 263.

²⁷¹ *Supra* note 268.

²⁷² Matthew Seet, "Finding Reprieve: Should the Global Movement against Capital Punishment Embrace China's Suspended Death Sentence as a Model for Other Retentionist States to Emulate?" (2017)16 Chinese JIL 453 at 455.

²⁷³ Leng, "Criminal Justice," *supra* note 254 at 7-9; Davis, "The Death Penalty," *supra* note 125 at 399

special tool to punish and reform convicts. Convicts were to be confined in prison camps—modeling on the Soviet Union’s Gulag system—which normally are located in the remotest undeveloped regions, and worked on government projects producing a wide range of commodities.²⁷⁴

If a convict serving a *Sihuan* sentence shows repentance over the course of the two year reprieve, his punishment shall be commuted to life imprisonment upon the expiration of the suspension period; if he shows repentance and has meritorious performance, his punishment shall be reduced to fixed-term imprisonment of no less than 15 years but no more than 20 years.²⁷⁵ The convict is not allowed to request a pardon or commutation; the criminal justice system would evaluate and determine whether to initiate the commutation procedures or renew the suspension at the end of the two years.²⁷⁶

However, the 1979 criminal law offers no legislated standards for assessing the attitude and behavior of a prisoner and identifying whether he has already genuinely repented and morally changed. The evaluation is left up to the discretion of prison administrators; the administration of the prison makes recommendations to the intermediate level court or the SPC for their final decision.²⁷⁷ In reality, the majority of the suspended death sentences were commuted to lighter forms of punishment at the expiration of the reprieve.²⁷⁸ If there is solid proof that a convict has resisted moral education and reform in a flagrant manner during the two years, the death penalty shall be implemented upon the approval of the SPC.²⁷⁹

²⁷⁴ Michael Dillon, *Contemporary China—An Introduction* (New York, NY: Routledge, 2009) at 94-95.

²⁷⁵ “Criminal Law 1979,” *supra* note 254, art 46.

²⁷⁶ Seet, “Finding Reprieve,” *supra* note 272 at 455.

²⁷⁷ Davis, “The Death Penalty,” *supra* note 125 at 314

²⁷⁸ Davis, “The Death Penalty,” *ibid*; Seet, “Finding Reprieve,” *supra* note 272 at 455.

²⁷⁹ “Criminal Law 1979,” *supra* note 254, art46. 中华人民共和国刑事诉讼法 [Criminal Procedure Law of the People’s Republic of China] (7 July 1979, effective 1January 1980), art 153. (China).

The Chinese government is very proud of this “original creation” and states that the adoption of *Sihuan* conforms to the objectives of communist legal codes in re-educating and reforming criminals.²⁸⁰ Commentators have assessed the institution as a “uniquely Chinese contribution to the global panoply of penalties”²⁸¹ and recommended it to other retentionist States as the “best alternative penal mechanism to execution.”²⁸² Indeed, both Taiwan and Japan—the two jurisdictions greatly influenced by Confucianism throughout history—have considered drawing upon China’s experience while facing the pressure from the international human rights community to abolish capital punishment.²⁸³

Nonetheless, the broad discretionary freedom of judges in imposing *Sihuan* sentences is prone to errors, aggravating the risk of miscarriage of justice; this will be further explored in the next chapter.

3.1.2 Criminal Procedures for the Application of the Death Penalty

Procedural safeguards for defendants are legislated in the criminal procedure law enacted in 1979, although insufficient. A defendant is allowed to entrust a lawyer or a layman to defend him, or the court would designate a defense lawyer for him when necessary.²⁸⁴ The defense lawyer, however, is not permitted to meet the defendant until the case entered the trial phase, and is given a maximum of seven days to prepare for the trial.²⁸⁵ In practice, defense lawyers played a very passive role in criminal proceedings and rarely offered a defense for innocence, because all lawyers at that time were hired by the government and were thus

²⁸⁰ Seet, “Finding Reprieve,” *supra* note 272 at 455; Scobell, “The Death Penalty,” *supra* note 265 at 505.

²⁸¹ Michael Palmer, “The People’s Republic of China” in Peter Hodgkinson & Andrew Rutherford, eds, *Capital Punishment: Global Issues and Prospects* (Winchester, UK: Waterside Press, 1996) at 120.

²⁸² David Johnson & Franklin Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (Oxford, NY: Oxford University Press, 2009) at 283.

²⁸³ Seet, “Finding Reprieve,” *supra* note 272 at 456-457

²⁸⁴ “Criminal Procedure Law 1979,” *supra* note 279, arts 26-27.

²⁸⁵ “Criminal Procedure Law 1979,” *id* art 110.

required to be “loyal to the interest of the socialist cause and the people” instead of fulfilling their duties as agents of the defendant.²⁸⁶ In other words, defense lawyers were expected to persuade their clients to ‘cooperate’, namely to confess.

The intermediate-level people’s courts or higher are authorized to have first-instance jurisdiction over capital cases.²⁸⁷ Cases are tried by a panel of one judge and two “people’s assessors”.²⁸⁸ Convicted defendants may appeal to a higher-level court within ten days of the conviction; the appeals are to be heard by three to five judges.²⁸⁹ The second-instance court is suggested not to increase the penalty for appeals raised by the defendants.²⁹⁰ In order to prevent erroneous or unfair judgments, all death sentences, even if the defendant does not want to appeal, should be reviewed and approved by the SPC.²⁹¹

Another provision designed to assure defendants’ equality before the law is that the class background of a convict is no longer to be required to be considered by the court and the law mandates that “no privilege whatsoever is permissible before the law.”²⁹² However, although a death sentence should be determined in terms of the seriousness and the nature of the offense, commentators criticized that high rank government and party officials and their offspring were sanctioned more leniently than common offenders.²⁹³

The dignity of capital convicts, which used to be belittled, is acknowledged in the 1979 criminal procedure law, to some extent, by stating “executions shall be publicly

²⁸⁶ Leng, “Justice in Communist China,” *supra* note 251 at 272; Sida Liu & Terence Halliday, *Criminal Defense in China: The Politics of Lawyers at Work* (Cambridge, U.K.: Cambridge University Press, 2017) at 23.

²⁸⁷ “Criminal Procedure Law 1979,” *supra* note 279, art 15.

²⁸⁸ “Criminal Procedure Law 1979,” *id* art 105.

²⁸⁹ “Criminal Procedure Law 1979,” *id* art 129

²⁹⁰ “Criminal Procedure Law 1979,” *id* art. 137.

²⁹¹ “Criminal Procedure Law 1979,” *id* arts. 144-145; Leng, “Justice in Communist China,” *supra* note 251 at 108.

²⁹² “Criminal Procedure Law 1979,” *supra* note 279, art. 4.

²⁹³ Andrew Scobell, “Strung Up or Shot Down: The Death Penalty in Hong Kong and China and Implications for Post-1997” (1988) 20:1 Case W. Res. J. Int’l L. 147 at 160.

announced but shall not take place in public view.”²⁹⁴

Regardless of the improved predictability and equality in treatment brought about by the 1979 criminal law and criminal procedure law, the contemporary criminal justice system was still in its very early phase of development. At the beginning of the 1980s, China was experiencing swift economic and social changes due to the massive growth in rural–urban migration and rapid but uneven economic development.²⁹⁵ Consequently, Chinese people saw an arrival of an avalanche of crimes across the country; the incompatibility of the criminal justice system with the transition to an increasingly heterogeneous society began to appear.

3.1.3 Strike Hard Campaigns from 1983 onwards

According to the statistics of the Ministry of Public Security (MPS), more than 750,000 cases were filed for investigation nationwide in 1980, including more than 50,000 major cases. In 1981, more than 890,000 cases were filed including more than 67,000 major cases. In 1982, 740,000 cases were filed including 64,000 major cases.²⁹⁶ Youths and juvenile delinquency accounted for 60 to 70 percent of total crimes in the early 1980s, among which juvenile offenders under the age of 18 ascended to more than 20 percent from a mere 1.4 percent in 1977.²⁹⁷ This was mainly due to the high rates of unemployment, expanding inequality in acquisition of personal wealth, and lack of sustainable skill-training or job placement programmes.

In 1979, the unemployed urban population reached 20 million—the highest record

²⁹⁴ “Criminal Procedure Law 1979,” *supra* note 279, art 155.

²⁹⁵ Miao, “Capital punishment in China,” *supra* note 262 at 237.

²⁹⁶ “Encyclopedia of Strike Hard Campaigns in 1983”, *Baidu*. online: <<https://baike.baidu.com>>.

²⁹⁷ Bing Liang, “Severe Strike Campaign in Transitional China” (2005) 33:4 *Journal of Criminal Justice* 387 at 389.

since the founding of the PRC.²⁹⁸ Taking China's capital city Beijing as an example, one out of every 2.7 urban residents was jobless; the majority of the unemployed population (total 400,000) were youths.²⁹⁹ These young people, who had missed opportunities of education during the Cultural Revolution and could hardly find an appropriate position in the swiftly changing society, spent their days on the streets venting their anger. Some of them even became rioters and gang members.

Crime rates in China in the 1980s were actually relatively low comparing with that of most countries in the world; however, the upsurge in the gravity and categories of crime was perceived to be a serious threat to moral integrity, social order, and the socialist justice system.³⁰⁰ The continuing upward trend of vicious crimes at the beginning of 1983 motivated the authorities to take effective crime-control measures.

The June 16th massacre was one of the cases that triggered subsequent massive anti-crime activities in China. On the day of June 16th, 1983, eight teenagers—six of them below the age of 18—slaughtered the occupants of a farm factory in Inner Mongolian. They brutally raped and murdered 27 innocent people, including a 75-year-old man and a 2-year-old child. Three of the offenders were in fact recidivists that had been previously convicted of several robberies and explosions. Their atrocious behaviour shocked the whole country and aroused mass panic and outrage among the populace, which still had fresh memory of the destructive force of Mao Zedong's teenage Red Guards during the Cultural Revolution.³⁰¹ Public concern was inflamed and petitions called for swift and tough

²⁹⁸ "Encyclopedia of Strike Hard," *supra* note 296.

²⁹⁹ "Encyclopedia of Strike Hard," *ibid*.

³⁰⁰ Leng, "Justice in Communist China," *supra* note 251 at 132; Liang, "Severe Strike," *supra* note 297 at 388.

³⁰¹ Yuanhao Wu, "邓小平 1983 年因何痛下决心要全国“严打”?" [Why Deng Xiaoping Firmly Determined to Initiate a Nationwide "Strike Hard" Campaign in 1983?], reproduced from *People's Daily*, (1 January 2014),

punishment: even though the golden days of the 1950s-1960s—when doors were safely left unlocked at night—were gone, at least one should not condone that “good people fear bad people.”³⁰²

The State policymakers were determined to use harsh penalties, capital punishment in particular, to curb the soaring crime rates. In July 1983, following the dictate of China’s chief leader, Deng Xiaoping, the first round of the Strike Hard campaigns was launched across the country and lasted four years—at least one general anti-crime campaign, or a campaign targeting one or multiple specific categories of crimes, per year.³⁰³ This top-down movement received enthusiastic support and cooperation from the general public: two months into the campaign, political and legal agencies had received more than 440,000 letters reporting suspected offenses enclosed with evidence materials, and more than 31,000 offenders turned themselves into the police, resulting in a drop of 60% in the national crime rate.³⁰⁴ The instant and positive response of the masses justified Deng Xiaoping’s concerns that the CCP’s governance might lose the support of the people if no actions were taken to deal with the crime wave.³⁰⁵ He re-confirmed the harsh tone of the national crime-control strategy to reassure the public that no leniency would be granted for deterrence of crimes.³⁰⁶

Legal procedures were streamlined in order to combat crime efficiently and effectively: procedural safeguards codified in the 1979 criminal procedure law were

online: <<https://www.boxun.com>>.

³⁰² Wu, “Why Deng Xiaoping,” *ibid.*

³⁰³ Miao, “Capital punishment in China,” *supra* note 262 at 238.

³⁰⁴ Wu, “Why Deng Xiaoping,” *supra* note 301; Ryan Florio, “The [Capital] Punishment Fits the Crime: A Comparative Analysis of the Death Penalty and Proportionality in the United States of America and the People’s Republic of China” (2008) 16:43 U. Miami Int’l & Comp. L. 44 at 80.

³⁰⁵ Fuzhi Liu, “Strike Hard is Dictatorship: Comrade Deng Xiaoping’s Strategic Decisions over Strike Hard” (1992) 1: 3 Criminal Science 1 at 4.

³⁰⁶ Liu, “Strike Hard,” *id.* at 5-7.

repealed.³⁰⁷ Following the guideline of “being severe and swift” (从重从快), the Standing Committee of the National People’s Congress (NPC) decided: the trial notification period for capital cases was abolished, therefore removing defendants’ chances to seek legal advice; the time limit for appeals was reduced from ten to three days; the mandatory review of death sentences at the SPC was suspended to expedite the trials of capital cases; provincial higher courts were authorized to approve the implementation of executions.³⁰⁸ The SPC’s review function was delegated due to the SPC’s lack of sufficient manpower and resources to ratify the outpouring death sentences across the country. This procedural relaxation, however, becomes senseless when a provincial higher court is the first instance court of a capital case: a death sentence of the first trial and the approval of the execution may occur concurrently.³⁰⁹ It is criticized to be the main factor leading to a surge of wrongful convictions and inconsistent imposition of the death penalty.³¹⁰

Pursuant to the campaign policy of rapid adjudication, the time span for handling criminal cases became one of the most important performance metrics during the crackdown process.³¹¹ When “the main criminal facts are clear, the evidence is irrefutable, and the people’s indignation is very great,”³¹² the interrogation, prosecution, and trial of a case were often amalgamated for a speedy judgement: after a suspect had been arrested, staff designated by the police, the procuratorates, and the court would interrogate the suspect/defendant

³⁰⁷ Sunderland, “Criminal Law Reform,” *supra* note 261 at 22.

³⁰⁸ Leng, “Justice in Communist China,” *supra* note 251 at 134; Scobell, “Strung Up,” *supra* note 293 at 157; Ian Dobinson, “The Criminal Law of the People’s Republic of China (1997): Real Change or Rhetoric?” (2002) 11:1 *Pac Rim L & Pol’y J* 1 at 10; Jeremy T. Monthly, “Internal Perspectives on Chinese Human Rights Reform: The Death Penalty in the PRC” (1998) 33 *Tex. Int’l L.J.* 189 at 194; Sunderland, “Criminal Law Reform,” *supra* note 261 at 22; Liu & Halliday, “Criminal Defense,” *supra* note 286 at 23.

³⁰⁹ Stephen Minas, “Kill Fewer, Kill Carefully: An Analysis of the 2006 to 2007 Death Penalty Reforms in China” (2009) 27:1 *UCLA Pac Basin LJ* 36 at 39; Sunderland, “Criminal Law Reform,” *supra* note 261 at 24.

³¹⁰ Shen, “Killing a Chicken,” *supra* note 141 at 882.

³¹¹ Macbean, “The death penalty in China,” *supra* note 40 at 210.

³¹² Macbean, “The death penalty in China,” *ibid.*

together; then they would determine whether the defendant was guilty, then jointly issue a sentence.

The whole process was quite inquisitorial, following the principle of “leniency for confession, harshness for resistance” (坦白从宽, 抗拒从严). The cooperation of the three agencies exhibited an ‘iron triangle’ mode borrowed from Soviet Union, which made the criminal process controllable and predictable.³¹³ It was not uncommon that the execution was carried out on the same day that a death sentence was imposed for cases which “seriously endangered the public security.”³¹⁴ The efficiency of trial during the Strike Hard campaigns reached a record high at the cost of the infringement of the legal rights of suspects/defendants.

The prohibition of public humiliation of offenders stressed in the 1979 criminal procedure law was disregarded as well. Public trials and mass sentencing rallies were held at various locations in the purpose of shaming criminals and expressing public condemnation.³¹⁵ Although executions were no longer open to the public, it was still common that convicts sentenced to death were paraded through the streets or in public stadiums followed by immediate executions.³¹⁶ Then posters would be hung in public squares displaying the names and photos of the convicts and a summary of their misconduct, with red check-marks beside their names indicating that the death sentences had already been carried out.³¹⁷

The overuse of the death penalty during the Strike Hard campaigns, which was

³¹³ Liu & Halliday, “Criminal Defense,” *supra* note 286 at 19, 23.

³¹⁴ Macbean, “The death penalty in China,” *supra* note 40 at 210

³¹⁵ Susan Trevaskes, “Propaganda Work in Chinese Courts: Public Trials and Sentencing Rallies as Sites of Expressive Punishment and Public Education in the People’s Republic of China” (2004) 6:1 Punishment and Society 5 at 5; Trevaskes, “The Death Penalty,” *supra* note 4 at 164.

³¹⁶ Davis, “The Death Penalty,” *supra* note 125 at 316.

³¹⁷ Sunderland, “Criminal Law Reform,” *supra* note 261 at 23.

admitted by the current Chinese government and has been a constant topic fiercely criticized by the international human rights community, was due to the contemporary policymakers' excessive reliance, in penal affairs, on the deterrence function of capital punishment. Deng Xiaoping instructed that executions should be used as an "indispensable means" to educate the masses and to prevent future crimes.³¹⁸ His thinking, however, matches the Western deterrence theory rather than the deterrent effect suggested by the Confucian theory of punishment. A propaganda slogan extensively spread in the 1980s—the primary task of the criminal law is to suppress the enemies and protect the people³¹⁹—implies that (potential) offenders were labeled as enemies to the overall community; only harsh penalties could deter their intention to (re)offend because of the fear of the pain inflicted. Offenders were not deemed to be morally defected stakeholders as suggested by Confucianism; without a faith in their potential to refrain from crime, to assume their *Ming* (stake), the propensity in the anti-crime movements to impose severe punishments disproportionate to the gravity of offenses was reinforced.

A phenomenon deserving attention is that many of the offenders executed in the campaigns were sex offenders, particularly violent rapists. Although most sex offenses are no longer regarded as death punishable in today's China, tolerance for such crimes was extremely low in Chinese society in the 1980s when chastity was seen as a quality of women, whether married or not.

The Neo-Confucianism's view on chastity as a form of behavior incumbent upon women started from the Song dynasty (960—1279 BC); rape was proscribed as an extremely

³¹⁸ Scobell, "The Death Penalty," *supra* note 265 at 505-506.

³¹⁹ Miao, "Capital punishment in China," *supra* note 261 at 238.

serious crime in the subsequent imperial penal codes.³²⁰ The Confucian emphasis on the chastity of women has been passed on in Chinese society. Regardless of their education background or social status, most grooms in China in the 1980-1990s still sought virgin brides, and husbands barely tolerated their wives having had sex previously, even if it might be against her will. Chinese women, immersed in this culture, were brainwashed into believing that it was their essential moral duty and social obligation to be chaste: chastity was of prime importance in maintaining and developing the bonds between them and other community members; once it was lost, their *Ming* as a respectable female community member would be tremendously jeopardized. Surely, a woman who was raped would receive sympathy, but it was also very likely that people around her, including her own family, would look down upon her because she was no longer seen as pure and clean. The desperation due to this irreversible loss of chastity, and the humiliation brought upon her family and herself, would cast a shadow of stigma over her for a long time, possibly the rest of her life. Some rape victims even committed suicide, which was deemed to be a heroic act for restoring the reputation of the victims and their families in Imperial China.³²¹

There was a time prior to the 1983 Strike Hard campaigns when women dared not walk alone when it was getting dark, a fact which aroused massive anger and widespread protests.³²² Senior government officials and elderly intellectuals suggested that the government learn from Chinese traditions and punish certain offenses more harshly to appease the growing public outrage.³²³ Consequently, public indignation (民愤) became a

³²⁰ MacCormack, "The Spirit," *supra* note 177 at 63.

³²¹ Vivien W. Ng, "Ideology and Sexuality: Rape Laws in Qing China" (1987) 46:1 *J. of Asian Studies* 57 at 60.

³²² Wu, "Why Deng Xiaoping," *supra* note 301; Miao, "Capital punishment in China," *supra* note 262 at 238.

³²³ Scobell, "The Death Penalty," *supra* note 265 at 503.

license to sentence sex offenders to death regardless of the gravity of their offenses.³²⁴

Unsurprisingly, this over harsh practice barely received any domestic critics.³²⁵

Following a periodic toughening-up policy, a series of nationwide anti-crime movements were launched throughout Deng's leadership and into Jiang Zemin's as well.³²⁶ The continuous use of capital punishment as the primary means of crime control resulted in a rapid expansion in the scope of capital crimes.³²⁷ To overcome the vagueness and insufficiency of the 1979 criminal law, a total of 25 pieces of legislation were issued between 1981 and 1997, in the form of Standing Committee Decisions, Supplementary Provisions and Supreme Court interpretations, in order to crack down on the newly-presented violent and economic crimes.³²⁸ The ultimate penalty for most offenses included in these supplementary legislations was increased to the death penalty, making the total number of capital offenses jump to 71.³²⁹

Worldwide condemnation of China's violation of human rights reached peak after the Tiananmen Square protests in 1989, which significantly damaged the country's reputation on the world arena. The international relations setback turned into an impetus within China to conduct research on human rights and to facilitate discussions on the 'rights and interests' of citizens.³³⁰ Domestic scholars were encouraged by the government to undertake research of international human rights law, history, and universal norms, and to participate in

³²⁴ Miao, "Capital punishment in China," *supra* note 262 at 238.

³²⁵ Scobell, "The Death Penalty," *supra* note 265 at 503.

³²⁶ Miao, "Capital punishment in China," *supra* note 262 at 237.

³²⁷ Miao, "Capital punishment in China," *id* at 238.

³²⁸ Zhao, "Evolution of Chinese Criminal Law," *supra* note 249 at 124; Dobinson, "The Criminal Law," *supra* note 308 at 10.

³²⁹ Caixia Su, "The Present and Future: The Death Penalty in China's Penal Code" (2011) 36:2 Okla City UL Rev 427 at 435.

³³⁰ Macbean, "The death penalty in China," *supra* note 40 at 211

international academic exchange and collaboration programmes.³³¹ Meanwhile both the severity and frequency of vigilantism had been gradually dropping, especially in the later stages of the Strike Hard campaigns.³³²

China was also under the pressure to improve human rights and promote legal reforms in order to maintain its most favoured nation trading status with the United States, and to expedite the process of accession to the World Trade Organization (WTO).³³³ WTO accession required China to demonstrate that it has the resources and capabilities to offer “impartial,” “independent,” and “prompt” review of all administration relating to the implementation of laws, regulations, and judicial decisions.³³⁴ The Chinese policymakers were aware that reforms were imperative or else the then-weak Chinese legal system would definitely fail in this “toughest test”.³³⁵

The judicial reforms introduced by the beginning of the 20th century were attributable to the dual pressures that China was facing: to terminate the ongoing process of supplementation of the 1979 criminal law, and to exhibit to the world, particularly foreign investors, the WTO, and the international human right community, a more predictable and accountable legal environment in modern China.³³⁶ The criminal law and criminal procedure law were amended in 1997 to accommodate the new crimes which accompanied the fast changing legal, economic, and social conditions in Chinese society.

³³¹ Macbean, “The death penalty in China,” *ibid.*

³³² Macbean, “The death penalty in China,” *id* at 239.

³³³ Macbean, “The death penalty in China,” *id* at 211.

³³⁴ Art 2(D) of Part I, Protocol on the Accession of the People’s Republic of China, Nov. 10, 2001.

³³⁵ Bradley Milkwick, “Feeling the Rocks while Crossing the River: The Gradual Evolution of Chinese Law” (2005)14 J. Transnat’l L. & Pol’y 289 at 303.

³³⁶ Monthly, “Internal Perspectives,” *supra* note 308 at 211; John T. Boxer, “China’s Death Penalty: Undermining Legal Reform and Threatening National Economic Interest” (1999) 22 Suffolk Transnat’l L. Rev 593 at 607-608.

3.2 The Most Controversial Criminal Law in 1997

Compared with the 1979 criminal law, the 1997 version made significant improvements toward the rule of law in that the leading role of the Marxism-Leninism-Mao Zedong Thought was removed; the principles of legality and equality were set up so that the class status of offenders and victims was no longer considered in sentencing.³³⁷ The removal of the category of counterrevolutionary crimes, which had been punishable by death, demonstrated the legislature's determination to eliminate the superior status of the class struggle doctrine in the Chinese criminal justice system. But human rights advocates criticized that the addition of twelve crimes of "endangering state security", eight of which were capital crimes, still enabled the State to charge political dissidents.³³⁸

Three amendments were made aiming at restricting the use of capital punishment. To align with international treaties that forbade States from applying the death penalty to juveniles, the 1997 criminal law removed the provision that "offenders who had reached the age of 16 but not the age of 18 may be sentenced to death with a two-year suspension of execution," thereby exempting offenders under the age of 18 (at the time the crime was committed) from the death penalty.³³⁹

The conditions for the commutation of a suspended death sentence were relaxed: if an offender did not intentionally commit a crime during the period of the two-year retrieve, his punishment shall be reduced to life imprisonment. In other words, whether the offender has shown repentance is no longer to be evaluated. Even some petty misconduct or negligent offenses during the suspension period would not affect the eligibility of the offender for a

³³⁷ Zhao, "Evolution of Chinese Criminal Law," *supra* note 249 at 124.

³³⁸ Sunderland, "Criminal Law Reform," *supra* note 261 at 25-26.

³³⁹ Su, "The Present and Future," *supra* note 329 at 437.

reduction of his death sentence.³⁴⁰ The law, however, does not clearly define what types of crime might trigger the execution of a death sentence.

The threshold for the death sentence in cases of theft was raised: previously, any theft of an amount of over ¥30,000 RMB could result in a death sentence, regardless of the original ownership of the stolen property.³⁴¹ But according to the new criminal law, only stealing extraordinarily large amount of money and property from a financial institution, or serious thefts of precious cultural relics, may be subject to death sentence.³⁴²

The effectiveness of the 1997 criminal law, however, is controversial due to its extensive compilations of capital crimes. During the drafting stage, the legislature held several forums seeking opinions and recommendations from representatives of the academia and stakeholder agencies with respect to the scope of capital crimes.³⁴³ A few legal scholars suggested non-violent offences to be excluded.³⁴⁴ Considering the ascending trend of offenses in the economic realm, however, the majority of the participants affirmed that it was not the appropriate time to reduce the scope of capital crimes, nor was it necessary to broaden it.³⁴⁵ Accordingly, a total of 68 offenses was identified as publishable by death in the new criminal law, including all the capital crimes added ad hoc in the previous supplementary legislations for continuity and unity.³⁴⁶

³⁴⁰ 中华人民共和国刑法 [Criminal Law of the People's Republic of China] (amended 14 March 1997, effective 1 October 1997), art 50. (China).

³⁴¹ Decision of the Standing Committee of the National People's Congress Regarding the Severe Punishment of Criminals Who Seriously Sabotage the Economy (promulgated by the Standing Committee of the Fifth National People's Congress, effective 8 March 1982), art 345. (China).

³⁴² "Criminal Law 1997," *supra* note 340, art 264.

³⁴³ Taiyun Huang, "刑法修正案(八)解读(一)" [Interpretation of the Eighth Amendments to the Criminal Law (I)], (2011) 6 People's Procuratorial Semimonthly 5 at 5. The author is the deputy director of Criminal Law Division under the Legislative Affairs Commission of the National People's Congress in China.

³⁴⁴ Macbean, "The death penalty in China," *supra* note 40 at 213.

³⁴⁵ Huang, "Interpretation of," *supra* note 343 at 5.

³⁴⁶ Huang, "Interpretation of," *ibid.*

It is noted that twenty-four capital crimes pertained to non-violent offenses concentrating on areas of economic order and corruption.³⁴⁷ The anti-economic crime death penalty policy reflected the Chinese policymaker's concern for disorder in economic spheres and, more importantly, was set up to reinforce the central government's legitimate control over the undesirable social consequences accrued in the course of economic reforms since the 1980s. For example, anyone involved in the smuggling of counterfeit currency could be punished by death "if the circumstances [were] exceptionally serious."³⁴⁸

Official corruption-related offenses were another category of crime that the 1997 criminal law intended to address. Deng Xiaoping rebuked corrupt government officials and their family members for their abuse of political power and privilege for private interests, generating significant losses to the State, and posing a serious threat to the Party's legitimacy; he blamed the courts being "too soft" and recommended more use of the harshest punishment in corruption cases.³⁴⁹ Besides some scattered articles, the new criminal law uses one whole chapter (Chapter 9) to define corruption-themed crimes with detailed prescriptions of various modes of corruptive misconduct.³⁵⁰ Accordingly, corruption crackdowns became a primary task of the anti-crime campaigns in late 1990s, and bribery and embezzlement of public funds were set as their priority targets.³⁵¹ For instance, senior CCP cadres executed in 2000 included a former deputy governor of a province and a former vice-chairman of the NPC for

³⁴⁷ Hong Lu & Lening Zhang, "Death penalty in China: The Law and the Practice" (2005) 33 J. of Criminal Justice 367 at 369; Zhixiang Wang & Jia Jia, "New Thinking on the Problems Concerning Death Penalty: In the Perspective of Amendment IX to Criminal Law" (2015) 30:5 Legal Forum 13 at 14.

³⁴⁸ "Criminal Law 1997," *supra* note 340, art 151.

³⁴⁹ Scobell, "The Death Penalty," *supra* note 265 at 506; Sunderland, "Criminal Law Reform," *supra* note 261 at 28.

³⁵⁰ Sunderland, "Criminal Law Reform," *id* at 29.

³⁵¹ Sunderland, "Criminal Law Reform," *id* at 27.

taking millions of US Dollars worth of bribes.³⁵²

Although in practice the two-year reprieve was used considerably more often than the death sentence in capital cases of corruption, embezzlement and fraud,³⁵³ the possibility of imposing the death penalty to non-violent offenders has attracted wide criticisms from the scholar community for its inconformity to both international trends and the view of the United Nations.³⁵⁴ Meanwhile, corruption did not diminish as the central leadership had expected, despite the continuous crackdowns.³⁵⁵ Ironically, even a former director of the Anticorruption Bureau of the Supreme People's Procuratorate (SPP) was found guilty of corruption.³⁵⁶

The 1997 criminal law stresses the role of leniency and the importance of meting out harsh justice only to the most serious criminals in society.³⁵⁷ The SPC suggested that a death sentence be issued only when the defendant shows "extremely grave malicious intent or where the circumstances are particularly odious."³⁵⁸ The application of the death penalty to crimes of passion is reduced by means of the *Sihuan* institution. According to the sentencing guidance issued by the SPC in 1999, a *Sihuan* sentence is encouraged to be used in cases of neighborhood disputes where the victim was somewhat at fault or provoked the conflict leading to the fatal attack, or where statutory mitigating factors were present.³⁵⁹

³⁵² "Official Sentenced to Death", *China Daily* (16 February 2000); "The Fight Against Corruption", *China Daily* (21 September 2000).

³⁵³ Sunderland, "Criminal Law Reform," *supra* note 261 at 27.

³⁵⁴ Macbean, "The death penalty in China," *supra* note 40 at 213.

³⁵⁵ Sunderland, "Criminal Law Reform," *supra* note 261 at 28.

³⁵⁶ Sunderland, "Criminal Law Reform," *id* at 27.

³⁵⁷ Susan Trevaskes, "Suspending Death in Chinese Capital Cases: The Road to Reform" in Roger Hood & Surya Deva, eds, *Confronting Capital Punishment in Asia: Human Rights, Politics, and Public Opinion* (Oxford, UK: Oxford University Press, 2013) at 225, 227.

³⁵⁸ Minutes of the SPC National Meeting of Criminal Trial Work on Maintaining Stability in Rural Areas (effective 27 October 1999), see, Trevaskes, "Suspending Death," *id* at 227.

³⁵⁹ Minutes of the SPC National Meeting of Criminal Trial Work on Maintaining Stability in Rural Areas

In terms of procedural safeguards for defendants, the 1997 criminal procedure law adopted many conflicting measures in its attempts to balance the goals of curbing crime and protecting the rights of defendants.³⁶⁰ A pro bono lawyer shall be appointed in a capital case if the defendant does not retain a defender. Defendants convicted in the first-instance trials are given 10 days to appeal, and all death sentences are subject to the approval of the SPC.³⁶¹ But in practice, because the new procedural law was put into effect in the middle of a new round of national anti-crime movements and an order from the SCP in September 1997—that the decentralization of approval of death sentences should continue in order to “maintain the division of review tasks between the SPC and provincial courts”—the provincial higher courts still had the power to approve death sentences.³⁶² Lawyers are allowed to meet suspects during investigation, but they shall not be treated as defenders; lawyers can collect evidence but they need to seek the witness’ consent and, for testimony from the victim’s witnesses, the approval from the procuratorate or the court.³⁶³

Commentators started to express their disappointment with the outcomes of the 1997 criminal law not long after its enforcement. The politicization of the judicial process was effectively curbed; however, trying capital offenses without due process practically broadened the scope of the death penalty. Arbitrariness in capital-case decisions was gradually exposed since, without unified death penalty standards and sufficient judicial

(effective 27 October 1999), see, Moulin Xiong, Siyu Liu & Bin Liang, “Criminal Defense and Judicial Sentencing in China’s Death Penalty Cases” (2018) 24:4, *Psychology, Crime & Law* 414 at 415.

³⁶⁰ 中华人民共和国刑事诉讼法 [Criminal Procedure Law of the People’s Republic of China] (amended 17 March 1996, effective 1 January 1997), arts 1-2. (China).

³⁶¹ “Criminal Procedure Law 1997,” *id* arts 183, 199.

³⁶² In addition, no time limit for the delegation of the review power was set up in law. 中华人民共和国人民法院组织法 [The Organic Law of the People’s Courts] (amended 2 December 1986, effective 2 December 1986), art 13. (China).

³⁶³ “Criminal Procedure Law 1997,” *supra* note 360, arts 16-17.

supervision, the courts' discretion and authorization to impose the death penalty expanded considerably.³⁶⁴ Western critics attribute the fact that China's executions reached peak at the turn of the 21st century to the arbitrary administration of death sentences following the harsh death penalty policy embedded in the 1997 criminal law.³⁶⁵

The death penalty policy was labeled 'violent' and even was compared to the one implemented when the Qing dynasty was newly founded.³⁶⁶ The transition from the Ming dynasty to Qing in Imperial China was a decades-long period of armed conflicts, and eventually the latter conquered China after a series of bloody cruel wars. The founders of Qing employed harsh punishments to suppress the remnants of nationwide resistance and to consolidate their control over the judicature and governance of the country; there was a sharp increase of capital cases in the early Qing era.³⁶⁷

The oft-criticized high rate of capital punishment is attributable chiefly to the new round of Strike Hard campaigns launched in 1996 through to 1998, which specifically targeted crimes of drug trafficking, tax fraud, and corruption.³⁶⁸ Offenses committed during the process of the campaigns were perceived as a contempt of the anti-crime policy and the authority of the judicial system, therefore were punished more seriously than their pre-campaign counterparts.³⁶⁹

Decades of anti-crime campaigns, the rising rate of death sentences, and the cases of wrongful convictions revealed by the media provoked intense discussions in Chinese

³⁶⁴ Monthy, "Internal Perspectives," *supra* note 308 at 204.

³⁶⁵ Monthy, "Internal Perspectives," *id* at 194.

³⁶⁶ Florio, "The [Capital] Punishment," *supra* note 304 at 90.

³⁶⁷ Meijer, "The Autumn Assizes," *supra* note 127 at 2, 15.

³⁶⁸ Sunderland, "Criminal Law Reform," *supra* note 261 at 27.

³⁶⁹ Sunderland, "Criminal Law Reform," *ibid*.

academia and overseas. Commentators argued that the original goals of the 1997 reforms had failed, and urged the legislature to consider revising the criminal law again.³⁷⁰

3.3 Impetus for the Reforms in the Death Penalty Regime

Preserving a positive image and good relations with counterparts and international organizations is of significant importance to Chinese policymakers, who are conscious of international criticism against the extensive use of the death penalty in China.³⁷¹ With estimated data, the death penalty reports annually published by Amnesty International constantly reinforce the image of China as “the world’s top executioner.”³⁷² The international publicity of China’s mistaken convictions and executions of innocent people exposed a severe deficiency of procedural safeguards within the Chinese criminal justice system.³⁷³ Partnering with organizations such as the World Coalition against the Death Penalty and Anti-Death Penalty Asia Network, Amnesty International had launched a series of campaigns urging the abolition of the death penalty in China.³⁷⁴ China was, according to a judge of the SPC, “under excessive international pressure” to curb the overuse of the death penalty.³⁷⁵

The close and enduring attention of the international human rights community encouraged reforms in China’s death penalty regime. When meeting with a delegation of the United Nations Human Rights Commission, some senior officials of the Chinese central government admitted that the scope of capital crimes defined in the 1997 criminal law was

³⁷⁰ Florio, “The [Capital] Punishment,” *supra* note 304 at 213.

³⁷¹ Kandis Scott, “Why Did China Reform Its Death Penalty” (2010) 19 *Pac. Rim L. & Pol’y J.* 63 at 70.

³⁷² “The Death penalty in 2015: Facts and Figures” *Amnesty International*, (6 April 2016), online <<https://www.amnesty.org>>.

³⁷³ FN 49, Scott, “Why Did China Reform,” *supra* note 371 at 70.

³⁷⁴ Scott, “Why Did China Reform,” *ibid.*

³⁷⁵ Scott, “Why Did China Reform,” *id* at 71.

too broad.³⁷⁶ Luo Gan, one of the top Chinese leaders at the time, instructed in his speech to legal authorities in 2007 that the judiciary “should consider the possible international influence of and reaction to their decisions.”³⁷⁷ The NPC confirmed that international opinions had motivated it to improve the procedural safeguards for death penalty appeals.³⁷⁸ A judge of the SPC also told an American journalist in an interview that China had taken the international opinions into serious consideration and a reduction of capital crimes could be anticipated.³⁷⁹ Commentators predicted that, although China had not fully responded to the global abolition movement, it would revise its death penalty policy at the beginning of the 21st century in order to comply with the unrelenting international trend in restricting the use of the death penalty.³⁸⁰

China’s media play a crucial role in exposing wrongful convictions and executions. According to a report on legal reforms for limiting death sentences on China Daily—a daily newspaper run by the publicity department of the CCP, “China’s media have exposed a series of errors in capital cases and criticized courts for lack of caution in meting out capital punishment.”³⁸¹ It is noteworthy that the publicity of miscarriage of justice cases received explicit approval and support from the Chinese government since most of the Chinese media are state-owned businesses. Take China Central Television (CCTV) as an example: one of its

³⁷⁶ Scott, “Why Did China Reform,” *ibid.*

³⁷⁷ Joseph Kahn, “Chinese Official Warns against Independence of Courts”, *New York Times*, (3 February, 2007), cited in FN 54, Scott, “Why Did China Reform,” *ibid.*

³⁷⁸ Yu Tian et al., “中国最高法院收回死刑核准权 2007 年 1 月 1 日生效” [China’s Highest Court Takes Back Right to Review Death Penalty Effective on January 1, 2007], *Xinhua News Agency*, (31 October, 2006), cited in FN49, Scott, “Why Did China Reform,” *supra* note 371 at 70.

³⁷⁹ FN52, Scott, “Why Did China Reform,” *id* at 71.

³⁸⁰ Xingliang Chen, “An Examination of the Death Penalty in China” (2005) 36 *Contemp. Chinese Thought* 35 at 38.

³⁸¹ “China Changes Law to Limit Death Sentence”, *People’s Daily*, (31 October 2006), cited in FT61, Scott, “Why Did China Reform,” *supra* note 371 at 72.

most influential programmes, *Legal Report*, was launched in 1999 to provide documentaries of featured cases including high profile cases of wrongful conviction in an investigative reporting style. The programme was broadcast twice a day and had an average viewership of 900 million.³⁸² The outstanding success of the *Legal Report* created a multiplier effect with provincial Televisions replicating CCTV's experience and launching similar programmes across the country.

The media are more influential than the courts in China; it is hoped that the media could help supervise the fairness in the lower courts by disclosing regionally inconsistent and erroneous convictions.³⁸³ In effect, the media have successfully aroused sustained nationwide attention to the problematic administration of the death penalty, which resulted in reform efforts towards more uniformity, clarity, and due process in the context.³⁸⁴

The political influence of local governments in capital prosecutions in lower courts is another reason motivating the legislature to resume and strengthen the SPC's authority over capital cases. Local governments are responsible for the funding and staff appointments of the judiciaries in their administrative regions, and are therefore able to intervene and manipulate decisions of the judges.³⁸⁵ The central government, on the other hand, insisted on the centralization of judicial power and uniformity of judicature, and for that purpose was prone to adopting procedure changes to diminish the influence of the 'local protectionism'.³⁸⁶

As the chief justice of the SPC stressed in 2008, strengthening central supervision over death

³⁸² Yingchi Chu, "The Emergence of Polyphony in Chinese TV Documentaries" in Krishna Sen & Terence Lee, eds, *Political Regimes and the Media in Asia* (New York, NY: Routledge, 2008) at 53.

³⁸³ Benjamin L. Liebman, "China's Courts: Restricted Reform" (2007) 21:1 Colum. J. of Asian L. 3 at 21; Scott, "Why Did China Reform," *supra* note 371 at 72.

³⁸⁴ Scott, "Why Did China Reform," *id* at 73.

³⁸⁵ Scott, "Why Did China Reform," *id* at 76.

³⁸⁶ Some other strategies were exercised, for example, a program of national appointment of judges initiated in 2005, in order to disempower local courts. Scott, "Why Did China Reform," *ibid*.

penalty cases and unifying national standards relating to the death penalty are crucial to promoting consistency and stability in trials.³⁸⁷

Some other forces have contributed to the revision to the death penalty policy as well, such as the fact that Chinese people's consciousness of human rights has steadily grown, that the central leadership no longer invokes anti-crime campaigns as a primary national development strategy because of the decline in the crime rates, and that the Chinese policymakers have recognized both substantive justice and procedural justice are necessary to protect citizens' rights while the former can only be fully realized through the latter.³⁸⁸

Confronting calls from some elite legal scholars to end the death penalty, the Chinese government acknowledged that it was imperative to limit the use of the death penalty, but stated that the abolition of capital punishment would not work in China, given the country's specific social conditions.³⁸⁹ Nonetheless, judicial reforms in the death penalty context were widely anticipated.

3.4 Reforms Promoting Procedural Justice in 2006-2010

Proposals for re-establishing the SPC's authority to review death sentences had been intermittently raised since the early 2000's and gained expanding support from people's representatives in the NPC.³⁹⁰ Reforms on the death penalty system were prioritized in the second Five-Year Reform Plan of the People's Courts (2004–08).³⁹¹ In 2005, the Chinese Prime Minister, Wen Jiabao, announced that the recentralization of death sentence reviews

³⁸⁷ Chuanjiao Xie, "Review 'Not a Signal of Lenience'", *China Daily*, (8 January 2008) cited in FN95, Scott, "Why Did China Reform, *id* at 77.

³⁸⁸ Scott, "Why Did China Reform," *id* at 75; Minas, "Kill Fewer," *supra* note 309 at 49.

³⁸⁹ Lu & Miethe, "China's Death Penalty," *supra* note 2 at 124.

³⁹⁰ Minas, "Kill Fewer," *supra* note 309 at 42.

³⁹¹ Michelle Miao, "Examining China's Responses to the Global Campaign Against the Death Penalty" in Roger Hood & Surya Deva, eds, *Confronting Capital Punishment in Asia: Human Rights, Politics, and Public Opinion* (Oxford, UK: Oxford University Press, 2013) at 46.

should be the primary task of the upcoming judicial reforms.³⁹² In the same year, the SPC required provincial higher courts to hold open court hearings informing the public of the crucial facts and evidence for the reviewed capital cases, which was assessed as a step towards full-scale judicial reforms.³⁹³

The formal adoption of the criminal justice policy of “appropriately combining leniency and severity” (宽严相济) in the Decision of the Standing Committee of the NPC in October 2006 marked the beginning of the process of said full-scale judicial reforms.³⁹⁴ According to Chinese commentators, the policy implied a shift towards greater use of leniency in practice, whereas the previous criminal justice system emphasized the penal function of punishment.³⁹⁵ According to the SPC’s Opinions published two months later, the death penalty should be retained in China but with strict control of the application thereof.³⁹⁶ The SPC also announced that it was time to repeal the empowerment to the provincial higher courts to verify and approve death sentences.³⁹⁷

Consequently, the Supreme Court re-established its authority for the mandatory review and approval of all death penalty cases in 2007, in order to suppress a trend of harsh sentencing in local courts.³⁹⁸ In other words, all death penalties imposed by provincial higher

³⁹² Lu & Miethe, “China’s Death Penalty,” *supra* note 2 at 130. Minas, “Kill Fewer,” *supra* note 309 at 43.

³⁹³ Jianhua Feng, “Taking Back the Power”, *Beijing Review*, (8 February, 2007), online: <<http://www.bjreview.com.cn>>.

³⁹⁴ In fact, the principle was set up in 2004 in a lecture of Luo Gan. See, FN 62, Lewis, “Leniency and Severity,” *supra* note 254 at 318.

³⁹⁵ Lewis, “Leniency and Severity,” *ibid*.

³⁹⁶ “最高人民法院为构建社会主义和谐社会提供司法保障的若干意见” [Opinions of the Supreme People’s Court about Providing Judicial Protection for the Construction of Socialist Harmonious Society], (issued 15 January 2007), art 18.

³⁹⁷ “Decision of the Supreme People’s Court on the Issues Concerning Unification Exercise of Ratification Power on Death Penalty Cases” (promulgated 28 December 2006, effective 1 January 2007), cited in FN 35, Minas, “Kill Fewer,” *supra* note 309 at 43.

³⁹⁸ “中共中央关于构建社会主义和谐社会若干重大问题的决定” [Resolutions of the CPC Central Committee on Major Issues Regarding the Building of a Harmonious Socialist Society], *CPC News*, (11 October 2006),

courts and military courts shall be submitted to the SPC for ratification.³⁹⁹ During the review process, the SPC shall investigate the finding of fact, the application of law, and the legality of criminal procedures in the first instance, and may approve the death sentence, or may reverse the conviction and remand the case for retrial if the finding of fact was not supported by the evidence, or if the death sentence was inappropriately applied, or if the lower court(s) breached the criminal procedure law.⁴⁰⁰ Retrials of capital cases at lower courts should be open to the public. Generally, the SPC is not allowed to issue a new decision or declare a defendant not guilty even if it has discovered errors in the original judgment. Only when an offender was imposed multiple death sentences, or multiple offenders are facing the death penalty, shall the SPC revise the original death sentences.⁴⁰¹

In a Notice jointly issued afterwards by the SPC, the SPP, the MPS, and Ministry of Justice, it was stated that “at present, China may not abolish capital punishment” but will create a strict legal framework for controlling the application of the death penalty.⁴⁰² The centralization of review power for capital cases was evaluated as a major measure for “preventing the occurrence of miscarriage of justice” and “respecting and protecting human rights”, and “of great significance for building up a socialist harmonious society”.⁴⁰³

online: <<http://cpc.people.com.cn>>; “最高人民法院关于统一行使死刑案件核准权有关问题的决定” [Decision of the Supreme People’s Court on the Exclusive Exercise of the Power to Review Death Penalty Cases], *The Supreme People’s Court of the People’s Republic of China*, (28 December 2006), online: <<http://www.court.gov.cn>>; A panel consists of three judges is set up for each review. “Organic Law of the People’s Courts,” *supra* note 362, art 12. Also see, Lewis, “Leniency and Severity,” *supra* note 251 at 318.

³⁹⁹ Minas, “Kill Fewer,” *supra* note 309 at 43.

⁴⁰⁰ “最高人民法院于复核死刑案件若干问题的规定” [Provisions of the Supreme People’s Court on Several Issues Concerning Review of Death Penalty Cases] (adopted 22 January 2007, effective 28 February 2007), arts 2-5. (China).

⁴⁰¹ “China’s Supreme People’s Court Ordered Provinces to Retry Death Sentences”, *Xinhua Agency*, (28 February 2007), cited in FN 56, Minas, “Kill Fewer,” *supra* note 309 at 46.

⁴⁰² “Opinions on Further Strengthening the Strict Adherence to Law in Handling Cases and Ensuring the Quality in Handling Death Penalty Cases” (Joint Notice) (effective 9 March 2007). (China).

⁴⁰³ “Joint Notice,” *ibid.*

Although anti-crime movements continued, the guiding policy was revised from “fighting crimes severely and swiftly” to “fighting severe crimes according to the law,” and it was stressed to be subordinate to the national criminal justice policy.⁴⁰⁴

Since a staffing shortfall was one of the reasons why the SPC had delegated its review power,⁴⁰⁵ the SPC recruited hundreds of new judges and other court personnel to be well prepared for the sudden increase in work volume and complexity.⁴⁰⁶ Meanwhile, over 6000 judges across the country participated in special training programs on capital case trials organized by the SPC, with the goal of improving the quality of future death sentence decisions in lower courts.⁴⁰⁷ It is believed that enhanced professional qualification of judges has developed the resources and capacity of Chinese judicial system for capital prosecutions.⁴⁰⁸

Apart from the purpose of limiting the use of the death penalty, the 2006-2007 reforms also carry a commitment to procedural justice.⁴⁰⁹ According to the joint Notice, measures should be taken to ensure the legality of the means and manner of evidence gathering and processing at investigation and adjudication stages, and to prohibit torture and illegally obtained confessions.⁴¹⁰ A review panel of three judges is set up for each reviewed capital case. The panel may question the defendant personally or visit the crime scene to conduct “on-site investigations” if they have any doubts on the evidence.⁴¹¹ The application

⁴⁰⁴ Liang, “The Fate,” *supra* note 270 at 261.

⁴⁰⁵ Chen, “An Examination of,” *supra* note 380 at 50.

⁴⁰⁶ “最高法扩编备战死刑复核 重大案件复核可能听证” [The Supreme People's Court Recruited Personnel to Prepare for Death Sentence Reviews; Hearings May be Granted When Reviewing Important Cases], *Sina News* (3 November 2005), online: <<http://news.sina.com.cn>>.

⁴⁰⁷ “The Supreme People's Court Recruited Personnel,” *ibid*; Minas, “Kill Fewer,” *supra* note 309 at 53.

⁴⁰⁸ Scott, “Why Did China Reform,” *supra* note 371 at 74.

⁴⁰⁹ Minas, “Kill Fewer,” *supra* note 309 at 44.

⁴¹⁰ “Joint Notice,” *supra* note 406.

⁴¹¹ “Joint Notice,” *ibid*.

of litigation procedures in the first instance is required to be thoroughly scrutinized, and the opinions of the defense lawyer must, if requested, be heard, recorded, and attached to the case file, together with any other written defense opinions.⁴¹²

Also in 2007, the SPC's Opinions on further strictly enforcing the law to ensure the quality of death penalty cases was issued, to strengthen the protection for legal rights of suspects or defendants by adopting rules against torture, demanding witness testimony in appellate trials, guaranteeing defense lawyers' rights, and approving family members' visits prior to execution.⁴¹³

In his work report one year after the commencement of the mandatory review provision, the chief judge of the SPC confirmed that the death penalty had been applied strictly, cautiously, and only to the most egregious crime offenders.⁴¹⁴ The SPC rejected approximately fifteen percent of death sentences in the first year of review on the grounds of "unclear facts", "insufficient evidence", "excessive punishment", or "illegal proceedings" in the original trials.⁴¹⁵ The execution rate dropped 33% from 2006 to 2007; for the first time since 1979, the number of death sentences with a reprieve outnumbered immediate executions.⁴¹⁶

The SPC was quite explicit that uneven application of the death penalty would not be

⁴¹² "Joint Notice," *ibid.*

⁴¹³ Bin Liang, "China's Death Penalty Practice: Working Progress, Struggle, and Challenges within the Global Abolition Movement" in Bin Liang & Hong Lu, eds, *The Death Penalty in China: Policy, Practice, and Reform* (New York: Columbia University Press, 2015) at 5.

⁴¹⁴ "Top Judge: Death Sentences Meted out Only to "Tiny Number of Felons" in China", China Court (10 March 2008) online: <<http://en.chinacourt.org>> [translated by Ryan Florio], cited in Florio, "The [Capital] Punishment," *supra* note 304 at 85.

⁴¹⁵ Renwen Liu, "Recent Reforms and Prospects in China" in Roger Hood & Surya Deva, eds, *Confronting Capital Punishment in Asia: Human Rights, Politics, and Public Opinion* (Oxford, UK: Oxford University Press, 2013) at 110.

⁴¹⁶ Chuanjiao Xie & Chunzi Xu, "A Visionary's March toward the Rule of Law", *China Daily* (11 March 2008), online: <<http://www.chinadaily.com.cn>>; Susan Trevaskes, "The Death Penalty in China Today: Kill Fewer, Kill Cautiously" (2008) 48 *Asian Surv.* 393 at 413.

allowed. In the past, the death penalty had been their first choice when lower courts were trying serious crime cases; starting from 2007, however, they became more cautious when issuing or upholding a death sentence.⁴¹⁷ Judges began to seriously weigh the mitigating and aggravating factors of a case and tended to first consider more lenient penalties.⁴¹⁸

In the meantime the SPC started the national institutionalization of *Sihuan* as the default choice for sentencing in most capital cases, as exemplifying its efforts in harnessing the presidential rhetoric of ‘Building a Harmonious Society’ with the criminal policy.⁴¹⁹ In its judicial opinions and circulars, the SPC provided detailed advice and information on how to mete out less-severe punishments in sentencing.⁴²⁰ *Sihuan* was recommended to be applied to the majority of homicide offenses, when the offense was triggered by neighbourhood disputes, the offender had surrendered to the police, or the offender had offered financial compensation to the victim’s family.⁴²¹ A legal expert said in an interview that, from 2007-2009, “half of the defendants who would previously have been executed instead received a death sentence with a two-year reprieve, of which 99 per cent would never be executed.”⁴²²

In its Judicial Opinion issued in February 2010, the SPC reduced the scope of offenses eligible for the death penalty and further confirmed that lighter punishments are encouraged to be used for all but the most heinous crimes.⁴²³ It also discarded the one-fits-all style of sentencing during the Strike Hard campaigns that the same harsh punishment was

⁴¹⁷ Liu, “Recent Reforms,” *supra* note 415 at 110.

⁴¹⁸ Liu, “Recent Reforms,” *ibid.*

⁴¹⁹ Trevaskes, “Suspending Death,” *supra* note 357 at 226.

⁴²⁰ Trevaskes, “Suspending Death,” *supra* note 357 at 226.

⁴²¹ Trevaskes, “Suspending Death,” *id.* at 230.

⁴²² Miao, “Examining China’s Responses,” *supra* note 391 at 49-50.

⁴²³ “Opinions on Implementing the Criminal Justice Policy of Appropriately Combining Leniency and Severity”, (effective 8 February 2010) cited in Trevaskes, “Suspending Death,” *supra* note 357 at 226, 232.

imposed upon a whole category of serious offenses and stressed the importance of individuated sentencing with regard for the sui generis circumstances of the case.⁴²⁴ This is aimed to ensure: “only very isolated cases and therefore a small minority of offenders are to be ‘attacked’ [i.e. treated harshly], so the vast majority of offenders are dealt with through education, persuasion, and reform.”⁴²⁵

Similar changes of attitude occurred on the side of the procuratorates—their requests for immediate execution had noticeably decreased since 2007.⁴²⁶ Moreover, the procuratorates’ constitutional power to supervise law enforcement was emphasized; an internal working office was set up in the SPP specifically for supervising all death sentences reviewed by the SPC to ensure fairness and prevent corruption in the process of case handling.⁴²⁷

Two sets of rules regarding the examination and the adoption of evidence in capital cases entered into force in 2010, in the form of procedure reform measures embodying the spirit of the joint Notice. It was believed that the exposure of Zhao Zuohai Case—in which an innocent farmer was convicted of murder and sentenced to death with a two-year reprieve—prompted to the enactment of the two Rules.⁴²⁸ To improve the quality of death sentence decisions at each judicial level, it was stressed again that confessions obtained through illegal means such as torture should be disregarded, and procedures were specified for filtering and excluding illegally seized evidence.⁴²⁹ The new rules aimed to overcome lax

⁴²⁴ “Opinions on Implementing,” *ibid.*

⁴²⁵ “Opinions on Implementing,” *ibid.*

⁴²⁶ Liu, “Recent Reforms,” *supra* note 415 at 110.

⁴²⁷ Liu, “Recent Reforms,” *id.* at 111, 115.

⁴²⁸ Lewis, “Leniency and Severity,” *supra* note 254 at 312.

⁴²⁹ “关于办理死刑案件审判判断证据若干问题的规定” [Rules on the Examination and Evaluation of Evidence in Capital Cases] & “关于办理刑事案件排除非法证据若干问题的规定” [Rules on the exclusion of

scrutiny and improper collection and admission of evidence in capital cases, which was the main cause of wrongful convictions and, subsequently, wrongful executions.⁴³⁰

The procedural changes during 2006-2010, as a development in the process of judicial control on the use of the death penalty, displayed the legislature's efforts to ensure consistency and prudence in capital sentencing. However, commentators point out that the impact of these measures would be limited if essential reforms for restricting the operation of the death penalty do not follow up.⁴³¹ The focus of debates on China's death penalty context shifted to what types of criminal conduct should (not) be punished by death; this would result in the establishment of new goals in the next stage reforms. The subsequent transformation of the Chinese criminal law toward leniency and lighter sentencing further demonstrates China's commitment to reducing the application of the death penalty pursuant to the policy of "appropriately combining leniency and severity".

3.5 The First Move to Reduce Capital Crimes in 2011

The 8th Amendment to the 1997 criminal law came into effect in 2011, in which the number of capital crimes was decreased from 68 to 55. Seniors attaining the age of 75 years at the time of trial were conditionally included in the groups exempt from the application of the death penalty.⁴³² The *Sihuan* provision was revised to be more practicable: where a convict is sentenced to death with a reprieve, if he does not intentionally reoffend for two years, the sentence shall be commuted to life imprisonment or lighter sentences upon

Illegally Obtained Evidence in Criminal Cases], jointly promulgated by the SPC, the SPP, the MPC, Ministry of State Security & Ministry of Justice on 13 June, 2010. English translations of the texts are available at <https://www.duihua.org/hrjournal/evidence/evidence.htm>.

⁴³⁰ Lewis, "Leniency and Severity," *supra* note 254 at 306.

⁴³¹ Minas, "Kill Fewer," *supra* note 309 at 62.

⁴³² 中华人民共和国刑法 [Criminal Law of the People's Republic of China] (amended 25 February 2011, effective 1 May 2011), art 49. (China).

expiration of the reprieve.⁴³³

The thirteen offenses that dropped capital crime status were all non-violent in nature, including four types of offenses of smuggling, five types of financial offenses, two types of offenses against control of cultural relics, theft, and offense of imparting criminal methods.⁴³⁴ During the drafting stage, the majority of stakeholders endorsed the view that, while the abolition of capital punishment was not then warranted in China, it was necessary and practicable to reduce the scope of capital crimes in law.⁴³⁵ The deciding factor that the death penalty should not applied to offenses which did not endanger the lives of citizens or cause serious disabilities to victims, and the reduction should take the public's feelings and social acceptance into consideration therefore be implemented in a gradual manner.⁴³⁶

The shift to the system of long-term imprisonment is believed to be the result of appropriate leniency/severity calculus.⁴³⁷ Empirical studies indicated that, prior to the 8th Amendments, offenders sentenced to death with a 2-year reprieve spent an average of 15.75 – 16.17 years in prison, making a reprieved death sentence practically leap from the severest end of the penalty spectrum to the polar opposite (where it did not belong).⁴³⁸ In essence, a reprieved death sentence is still a death penalty imposed on offenders of most heinous crimes but in a comparatively lenient pattern. In other words, the severity scale of *Sihuan* should convey the information that it is only used for death-punishable offenses. Legal experts and judicial actors were concerned that the actual punishment serious crime offenders received

⁴³³“Criminal Law 2011,” *id* art 50.

⁴³⁴ Liu, “Recent Reforms,” *supra* note 415 at 111.

⁴³⁵ Huang, “Interpretation of,” *supra* note 343 at 6.

⁴³⁶ Huang, “Interpretation of,” *id* at 7.

⁴³⁷ Liu, “Recent Reforms,” *supra* note 415 at 113.

⁴³⁸ Huang, “Interpretation of,” *supra* note 343 at 8.

was disproportionate to the gravity of their offences, namely a phenomenon of “over severe on capital punishment, over lenient on non-capital punishment” in practice (死刑过重, 生刑过轻).⁴³⁹

In addition, the public was worried that some violent offenders might take advantage of the leniency policy to escape the imprisonment they deserved.⁴⁴⁰ To correct the unevenness in the punishment structure, fixed-term imprisonment was prescribed for commuted offenders with a *Sihuan* sentence: those whose punishment was reduced to life imprisonment must serve minimum 25 years and those who had significant meritorious performances during the two-year suspension must serve at least 20 years.⁴⁴¹ As to recidivists or offenders convicted of murder, rape, robbery, abduction, arson, explosion, dissemination of hazardous substances or organized violence, the court may, when sentencing them to death with a reprieve, add restrictions to the commutation of their sentences considering the circumstances of the offenses committed.⁴⁴² This approach intends to enhance the proportionality of punishment to certain serious offenders for whom an immediate execution might be unduly harsh but an ordinary *Sihuan* would be inappropriately lenient.⁴⁴³

The revisions of the criminal law did not enter into immediate effect in that the legislature wanted to give the public a “warming-up” period. A representative of the Legal Committee of the NPC explained this as a try-out to test the waters of society’s tolerance.⁴⁴⁴

⁴³⁹ Huang, “Interpretation of,” *ibid.*

⁴⁴⁰ Huang, “Interpretation of,” *ibid.*

⁴⁴¹ “Criminal Law 2011,” *supra* note 432, art 50. See, Huang, “Interpretation of,” *supra* note 343 at 8.

⁴⁴² Liu, “Recent Reforms,” *supra* note 415 at 113.

⁴⁴³ Miao, “Two Years,” *supra* note 267 at 33.

⁴⁴⁴ Lewis, “Leniency and Severity,” *supra* note 254 at 321.

Most of the abolished capital offences were added to the criminal law in the 1980-1990s—the early years of China’s opening-up and economic reforms—as a harsh response at the legislative level to the surge of economic offenses while the market could not self-regulate and the administration and supervision of the financial sector were weak.⁴⁴⁵ By the time the 8th Amendment was ratified, regulatory and institutional frameworks for the economic spheres had been significantly improved in China; the public was able to exercise an objective attitude towards economic offenses.⁴⁴⁶ As anticipated, the one-time removal of thirteen capital crimes did not create any public security crises or cause any panic or societal instability.⁴⁴⁷ Moreover, statistics even show a slight drop of serious crimes in the years since the revised law came into force because of improvements in social management.⁴⁴⁸

As a solid step illustrating the Chinese legislature’s attitude in restricting the use of the death penalty through legislation, the impact of the Amendment in 2011 is more significant symbolically than it is practically, in that offenders committing any of the removed capital crimes, for instance, fraudulent use of financial bills or letters of credit, falsifying invoices to obtain tax benefits, smuggling cultural relics, and tomb robbing, had barely been sentenced to death prior to the Amendment.⁴⁴⁹ Over half of the retained 55 capital crimes are non-violent in nature, such as ‘counterfeiting of currency’, ‘fundraising fraud’, and ‘bribery’, and putting these offenses on the removal agenda is apt to produce more meaningful effect on decreasing death sentences. Although such offenses are not classified into ‘the most serious crimes’ eligible for capital punishment according to the international

⁴⁴⁵ Liu, “Recent Reforms,” *supra* note 415 at 112.

⁴⁴⁶ Liu, “Recent Reforms,” *ibid.*

⁴⁴⁷ Wang & Jia, “New Thinking,” *supra* note 347 at 15.

⁴⁴⁸ Wang & Jia, “New Thinking,” *id* at 19.

⁴⁴⁹ Wang & Jia, “New Thinking,” *id* at 15; Huang, “Interpretation of,” *supra* note 343 at 7.

consensus, they engendered extensive resentment among Chinese people at the time the 8th Amendment was being made and were deemed to be constituting a threat to the foundation of the ruling party, therefore were kept on the list of capital crimes.⁴⁵⁰ However, this shows China the direction to continue its efforts to further narrow the scope of the death penalty so that to be more in line with international standards.

3.6 Completely Abolishing the Death Penalty for Economic Crimes in 2015

The decision approved by the third Plenary Session of the 18th CPC Central Committee in November 2013 confirmed that reforms would be deepened comprehensively in the Chinese criminal justice system and the number of capital crimes would be reduced “step by step.”⁴⁵¹

Again the legislature consulted with stakeholder agencies, scholars, legal practitioners, and public representatives while preparing for the revisions to the criminal law. With respect to the abolition of capital crimes, it was strongly recommended that priority be given to economic offenses because such misbehaviours cause relatively less social harm than violent offenses.⁴⁵² ‘Fundraising fraud’, for example, had been especially controversial but was retained as a capital crime when the criminal law was revised in 2011 fearing that private fundraising might undermine the monopolistic status of state-owned financial agencies and social stability considering the usually large scope of victims and people affected.⁴⁵³

Commentators argue, however, it is implausible that ‘fundraising fraud’ is singled out while

⁴⁵⁰ Liu, “Recent Reforms,” *supra* note 415 at 114.

⁴⁵¹ “中国共产党第十八届中央委员会第三次全体会议公报” [Communiqué of the Third Plenary Session of the 18th Central Committee of the CPC], *China Net*, (15 January 2014), <<http://www.china.org.cn>>; Kun Yan, “如何理解“逐步减少适用死刑罪名”” [How to Understand Reducing the Number of Crimes Punishable by Death Step by Step], *Southern Metropolis Daily*, (30 January 2014), online: <<https://chinadigitaltimes.net/china/southern-metropolis-daily>>.

⁴⁵² Yan, “How to Understand,” *ibid.*

⁴⁵³ Yan, “How to Understand,” *ibid.*

capital punishment was ended for all other fraud-related offenses.⁴⁵⁴ They insist that, severe punishment has not been effective in deterring economic misconduct, such as raising funds by means of fraud; rather, as economic growth is gradually maturing in China, the legislature should update economic and administrative laws to strengthen the regulation and supervision of financial markets rather than solely relying on harsh punishment.⁴⁵⁵ Commentators also draw an analogy between the two offenses of ‘smuggling of counterfeit currency’ and ‘counterfeiting of currency’ between ‘theft’, pointing out that if ‘theft’ is not subject to capital punishment regardless of the value of the stolen property, then the two former offenses should not be death punishable either because their purpose is, in essence, to steal money.⁴⁵⁶

The 9th Amendment to the criminal law took effect in November 2015. Nine capital crimes, including the three economic offenses strongly recommended above, were abolished, reducing the total number of capital crimes to 46. In terms of the nature of the removed capital offenses, a notable difference with the 8th Amendment is that three offenses involve a high risk that physical force may be used in the course of committing the offense.⁴⁵⁷

The *Sihuan* provision was again revised to further reduce executions: where a convict sentenced to death with a reprieve commits an intentional crime within two years, only when the circumstances are “flagrant” shall the original death sentence be carried out upon the approval of the SPC.⁴⁵⁸ A legal expert gives an example to help the public understand the thoughts behind this revision: if a retrieved inmate is a victim of prison bullying and he

⁴⁵⁴ Yan, “How to Understand,” *ibid.*

⁴⁵⁵ Yan, “How to Understand,” *ibid.*

⁴⁵⁶ Yan, “How to Understand,” *ibid.*

⁴⁵⁷ The three crimes are organizing another person to engage in prostitution, forcing another person into prostitution, and obstructing commanding officers or on-duty servicemen from carrying out their duties.

⁴⁵⁸ 中华人民共和国刑法 [Criminal Law of the People’s Republic of China] (amended 29 August 2015, effective 1 November 2015), art 50. (China).

slightly injured the bully on impulse, his death sentence should be carried out according to the previous version criminal law but apparently that is not fair. Pursuant to the revised provision, what he did to the bully would not be deemed flagrant therefore he is still eligible for a commutation.⁴⁵⁹ However, commentators are worried that the vague term “flagrant” may cause disparity in the decision making of whether to commute or to proceed to the execution.⁴⁶⁰ They called for sentencing guidelines or judicial interpretations to further define the nature and scope of “flagrant” circumstances so that the *Sihuan* institution can best contribute to restricting application of the death penalty.⁴⁶¹

Similar to its predecessor, a warming-up period was instituted for the public before the 9th Amendment took effect. Despite popular support for the retention of capital punishment for violent crimes, the enforcement of the 9th Amendment has not encountered any resistance or obstacles in practice. This is seen as a significant step forward and has stirred abolitionists’ expectations for bolder changes toward greater reductions in the near future of violent crimes classified as capital.⁴⁶² However, it is worth noting that the three offenses—organizing prostitution, forcing others into prostitution, and obstructing the performance of military duties—are non-lethal acts of interpersonal violence and offenders had been scarcely sentenced to death in practice prior to the Amendment. Besides, one cannot escape the death penalty according to the principle of concurrent punishment for several crimes if he caused grave harm to the victim(s) using violence when committing one of the

⁴⁵⁹ Yan, “How to Understand,” *supra* note 451.

⁴⁶⁰ Gui Huang, “Death Penalty in China after the Ninth Amendment: Legislatively Abolishing and Judicially Limiting” (2016) 4:3 *J. Forensic Science & Criminology* 303 at 303.

⁴⁶¹ During the amendment drafting phase, Prof. Bingzhi Zhao suggested a threshold of commutation to be set at “if he has committed crime and is sentenced to no less than 5 years imprisonment”. But his proposal was not accepted. See, Huang, “Death Penalty in China,” *ibid*.

⁴⁶² Wang & Jia, “New Thinking,” *supra* note 347 at 15, 19.

three offenses.⁴⁶³

Comparing with the exemption of the nine capital offenses, the modification of the standards for determining the death-eligibility for embezzlement and bribe-taking has attracted broader attention: only when the amount involved is extremely large (formerly ¥100,000 RMB), and the offenses have caused extreme damage to national and public interests, shall the death penalty be applied.⁴⁶⁴ A judicial interpretation was issued subsequently in 2016, clarifying an “extremely large amount” to be ¥3,000,000 RMB (approximately \$452,000 USD) or greater.⁴⁶⁵ Embezzlement and bribe-taking are the only two non-violent crimes subject to the death penalty existing in current Chinese criminal law. The rise of the monetary threshold, however, serves to reduce such executions.

On being asked why the above two offenses were retained to be death punishable while there was a national consensus against capital punishment for economic crimes, a legal expert who participated in the drafting process of the 8th & 9th Amendments explained that economic crimes can be defined in both broad and narrow senses (广义和狭义); corruption offenses, in the view of the legislature, should be narrowly construed therefore do not belong to the category of economic crimes.⁴⁶⁶ In the 1979 criminal law, corruption was listed among offenses of encroaching on property whereas in the 1997 criminal law, it became an independent crime category parallel with property and economic offenses.⁴⁶⁷ Offending behaviors relating to corruption were separated into graft, bribery, and embezzlement,

⁴⁶³ Guangquan Zhou, “Several Controversial Issues on the Draft of Amendment IX to the Criminal law of the People’s Republic of China” (2015) 36:5 Law Science Magazine 77 at 78.

⁴⁶⁴ “Criminal Law 2015,” *supra* note 458, arts 383, 386.

⁴⁶⁵ “关于办理贪污贿赂刑事案件适用法律若干问题的解释” [Interpretation of Several Issues Concerning the Application of Law in Handling Criminal Cases Related to Graft and Bribery], *The Supreme People’s Court of the People’s Republic of China*, (18 April 2016), online:<<http://www.court.gov.cn>>.

⁴⁶⁶ Yan, “How to Understand,” *supra* note 451.

⁴⁶⁷ Lu & Zhang, “Death penalty in China,” *supra* note 347 at 369.

reflecting a growing recognition of the epidemic of corruption issues among the Chinese political leaders.⁴⁶⁸ He further implied that the legislature would not put corruption offenses on the abolition agenda in the near future fearing that might be misread by the public as an official condonement of corruption.⁴⁶⁹ Nonetheless, the death penalty used to be frequently applied in the past for to embezzlement and bribery, but in recent years the courts have tended to opt to lenient punishments in the judicial practice.⁴⁷⁰ It is noted that a new form of *Sihuan* —a suspended death sentence without parole or commutation—was introduced deliberately to be used for serious corruption offenses committed from November 2015 onwards.⁴⁷¹ The introduction of this new punishment is the legal response to the anti-corruption campaigns sweeping through the political-penal landscape aiming at mollifying public outrage without expanding the use of the death penalty.⁴⁷²

Initiating legal and institutional reforms in the death penalty regime in China is not merely a legal matter, but also reflects the political climate and public opinion of the time.⁴⁷³ *Minyi* (民意, public opinion) has always been an integral part of the death penalty debate and significantly influenced the formation of the death penalty policy.⁴⁷⁴ Public perception of the moral guilt of an offense varies over time, which makes the scope of crimes that they believe are punishable by death change accordingly. In the meantime, some core values shaping the popular sense of justice have been preserved.

⁴⁶⁸ Lening Zhang, “White-collar crime: Bribery and Corruption in China” in Jianhong Liu, Lening Zhang, & Steven. F. Messner, eds, *Crime and Social Control in a Changing China* (Westport, CT: Greenwood Press, 2001) at 27.

⁴⁶⁹ Yan, “How to Understand,” *supra* note 451.

⁴⁷⁰ Yan, “How to Understand,” *ibid.*

⁴⁷¹ “Criminal Law 2015,” *supra* note 458, art 383. See Miao, “Two Years,” *supra* note 267 at 27, 35.

⁴⁷² Miao, “Two Years,” *id* at 35-36.

⁴⁷³ Lu & Zhang, “Death penalty in China,” *supra* note 347 at 370

⁴⁷⁴ Lewis, “Leniency and Severity,” *supra* note 254 at 321

3.7 High-profile Cases Illuminating the Conception of Popular Justice

3.7.1 The Wu Ying Case

Wu Ying is the daughter of a construction worker and a farmer living in Dongyang city of Zhejiang province in China. By 2007, this 27-year-old girl had successfully secured private investments of over 122 million USD and taken control of nine companies spanning diverse businesses as well as two informal financial institutions for futures trading and stock markets. Wu Ying was arrested in March 2007 on suspicion of illegally receiving public savings deposits and within one month was charged with fraudulent fundraising. In December 2009, she was convicted of financial fraud in an amount of 60.2 million USD and sentenced to death with immediate execution in the first instance trial. She then appealed to the provincial higher court; unfortunately the appellate court upheld the judgment of the first instance court in full.⁴⁷⁵

The constant narration and commentary of Wu Ying's story on Newspaper, Internet, and Television had aroused intense attention of the public. Wu Ying attracted investors with high rates of return but at the end she was not able to raise enough money to pay off the high profits she had promised. Whether she was running a Ponzi scheme was controversial and is beyond the scope of this writing. However, her death sentence was the target of overwhelming protests from the public. People acknowledged that she should be punished for the losses she caused to the investors but argued that she did not deserve to be put to death.

In China, the majority of banks are state-owned and it is difficult for private entrepreneurs to get loans from banks. —Wu Ying's home province, Zhejiang, is one of the

⁴⁷⁵ Flora Sapio, "'Rich Sister' Wu Ying, Judicial Drama and Justice" in Flora Sapio et al, eds *Justice: The China Experience* (Cambridge, UK: Cambridge University Press, 2017) at 178-181.

richest and most developed provinces due to prioritizing and encouraging small businesses in manufacturing a wide range of commodities for both domestic consumption and export. Private loans and underground banks (the grey market) were very active in Zhejiang;⁴⁷⁶ Wu Ying was neither the first nor the last person to raise funds through private financing and loans by promising high returns only to fail when no new investors are brought in or the market turns sour. Investors should be, and indeed are, aware of the high risks when they decide to join such investment schemes.⁴⁷⁷ The victims in Wu Ying's case chose to entrust their investments to unrealistically high rates of return, making them somewhat responsible as well as morally blameworthy for their loss.

After the media revealed that quite a few local government officials, some of whom worked in the public security and court systems, had provided funds to Wu Ying, speculations were rife on the Internet that Wu Ying might have been only the figurehead running the illegal trading and investment schemes for corrupt government officials—how else could a humble young girl like her amass such a fortune in less than two years.⁴⁷⁸ Although it was confirmed that Wu Ying was involved in corruption, the first and second instance verdicts still ignited significant complaints and accusations across the country as people believed she was a scapegoat, and thus that the death sentence was unjust to her.⁴⁷⁹ In an effort to pacify public anger, the SPC reviewed and overturned the death sentence “with care”; the case was sent back to the provincial higher court in April 2012 for a new trial.⁴⁸⁰ Wu Ying received a

⁴⁷⁶ Yu Ran, “Wenzhou Manufacturers Seek New Ways to Produce Wealth”, *China Daily*, (4 May 2011), online: <<http://www.chinadaily.com.cn>>.

⁴⁷⁷ Ran, “Wenzhou Manufacturers,” *ibid*.

⁴⁷⁸ Sapio, “‘Rich Sister’,” *supra* note 475 at 181.

⁴⁷⁹ Sapio, “‘Rich Sister’,” *id* at 184.

⁴⁸⁰ “Chinese Supreme Court Overturns Tycoon Wu Ying's Death Sentence”, *The Guardian*, (20 April 2012), online: <<https://www.theguardian.com> >.

death sentence with a two-year reprieve in May 2012, which was commuted to life sentence in 2014 and further to a 25-year imprisonment in 2018.⁴⁸¹

The overwhelming calls from the public for leniency to Wu Ying are not unique. In fact, the Chinese people's attitude varies considerably in regards to the application of the death penalty to non-violent offenses, specifically misconduct in the economic realm. Empirical studies indicate that, while up to 97% of the public support capital punishment for violent crimes, up to 93% of them disapprove the imposition of the death penalty for economic and financial offenders.⁴⁸² The widening wealth gap between rich and poor in Chinese society is conventionally viewed as a catalyst for social instability. Yet studies indicate that low-income Chinese people are no longer particularly bothered by income inequality.⁴⁸³ When discussing personal wealth, people tend to compare what they have today to their parents or their grandparents in the Mao era, rather than to those who have benefited from the policy of "let some people get rich first".⁴⁸⁴ Low-income individuals are aware of the wealth gap, but most of them attribute others' success to knowledge, diligence, and opportunity. In brief, most Chinese people today are satisfied with their current standard of living, and are optimistic toward their future.⁴⁸⁵ The income disparity in China has not triggered the public resent toward the rich, and people do not hold the same moral revulsion toward economic offenses in the 1980-1990s, or toward violent crimes.

The immense force of public opinion literally saved Wu Ying's life: however, the

⁴⁸¹ “浙江“亿万富姐”吴英由无期减为有期徒刑25年” [The Life Sentence of “Billion Rich Sister” Wuying was Commuted to 25 Years in Prison], *Wenxue City*, (22 March 2018), online: <<http://www.wenxuecity.com>>.

⁴⁸² Lanxiang Jiang, “Setting up Capital Crimes from The Populace's Perspective” (2008) 8:7 *J. of Kunming Uni. of S & T* 75at 83.

⁴⁸³ Sam Sussman, “No, the Chinese Communist Party Isn't Threatened by Income Inequality”, *The Diplomat* (12 December 2013), online: <<http://thediplomat.com>>.

⁴⁸⁴ Sussman, “No, the Chinese Communist Party,” *ibid*.

⁴⁸⁵ Martin King Whyte, “China's Dormant and Active Social Volcanoes” (2015) 75 *The China Journal* 9 at 14.

public's determination as to the moral guilt of an offender also can affect sentencing in the opposite sense as illustrated in the notorious case below.

3.7.2 The Zheng Xiaoyu Case

Zheng Xiaoyu, former director of the State Food and Drug Administration (SFDA) of China, was sentenced to death in the first instance trial in May, 2007, after he was convicted of dereliction of duty and corruption.⁴⁸⁶ SFDA is the top food and drug regulatory authority in China; all new drugs are required to undergo the SFDA's approval process before they can be prescribed. Zheng, who ran the SFDA from 1998 until his arrest in 2005, personally or via his wife and their son, took \$850,000 USD worth of bribes from pharmaceutical companies to expedite approvals of untested, unsafe, and even fake medicines. This resulted in over a hundred deaths domestically and abroad, and numerous patients falling gravely ill due to renal failure.⁴⁸⁷ Zheng appealed in June claiming that the sentence was "too severe" considering that he had given full confession. The appeal was rejected and he was executed in July 2007 upon the SPC's approval.⁴⁸⁸

Zheng's case provoked tremendous disdain and public rage in Chinese society; his execution received a tidal wave of rapturous applause.⁴⁸⁹ It was reported that, through successful bureaucratic manipulation, Zheng managed to have the SFDA under his sole control for over a decade.⁴⁹⁰ As a head of the most powerful agency in China, he was responsible for protecting the public health by ensuring the safety, efficacy, and security of

⁴⁸⁶ Jonathan Watts, "China Sentences former Food and Drugs Chief to Death", *The Guardian*, (29 May 2007), online: <<https://www.theguardian.com>>.

⁴⁸⁷ Simon Elegant, "A Chinese Regulator Sentenced to Die", *Time*, (29 May 2007), online: <<http://content.time.com>>.

⁴⁸⁸ Mark Magnier, "Chinese Applaud Execution of Former Drug Safety Chief", *Los Angeles Times*, (11 July 2007), online: <<https://www.latimes.com>>.

⁴⁸⁹ Magnier, "Chinese Applaud," *ibid*.

⁴⁹⁰ Elegant, "A Chinese Regulator," *supra* note 487.

drugs. With an undergraduate educational background in biology, he was well aware of the results of allowing tainted or fake drugs to enter the pharmaceutical market. His actions, as the judges commented, had “greatly undermined the integrity and the efficiency of China’s drug monitoring and supervision, endangered public life and health, and had a strong negative social impact.”⁴⁹¹

By engaging in his egregious misconduct, Zheng demonstrated his disdain for professional ethics, the trust of the State, and people’s right to life, thereby manifesting his contempt for human beings generally. In addition, Zheng showed no shame, guilt, or remorse for his offenses which indirectly killed hundreds of people. As a high-rank public servant, he was expected to discipline himself following a higher moral code. But he traded power for money with the sacrifice of public health yet still argued that, as an official at the vice-ministerial level, he was privileged and only subject to some administrative penalties such as resignation or records of demerit.⁴⁹² The night before his execution, he protested in his posthumous paper that “I was sentenced to death mainly because my position bears great responsibilities. If I held another position, I would not die even if I took more bribe. [...] A lesson learnt from my tragedy is that one should choose to be an official at a less important position. [...] My biggest regret is that I went into politics. I could have become a university professor and lived happily. I will never go into politics if there is next life.”⁴⁹³ Apparently, Zheng was morally unrepentant and irreformable in that he did not accept his conduct as a flagrant abuse of power and an utter disrespect of the law and human rights.

⁴⁹¹ Elegant, “A Chinese Regulator,” *ibid.*

⁴⁹² Yu Tian & Weiwei Li, “国家药监局原局长郑筱萸警示录” [Warnings from Zheng Xiaoyu, the Former Director of the SFDA] (2018) 10 Party Member Digest 34 at 35.

⁴⁹³ Tian & Li, “Warnings from Zheng Xiaoyu,” *ibid.*

Contrary to what happened in the Wu Ying case, the conception of justice upheld by the State judicial system in the Zheng Xiaoyu case was met with broad consensus among the public:⁴⁹⁴ the repercussions of Zheng's crime throughout the country and abroad were grave enough to justify the death penalty imposed on him. Official corruption is one of the hottest topics of public condemnation; however, the public may not constantly support every death sentence the judiciary issued for cracking down corruption.⁴⁹⁵ The compatibility of the popular sense of justice with the leniency/severity calculus in the State-sponsored criminal system is determined by the moral blameworthiness of the misdeeds and the extent to which the offender has contaminated and may continue to sully the moral integrity of his community. For instance, government officials who embezzled funds or supplies for famine relief in Imperial China were punished more severely than for prosaic corruptive misbehaviours regardless of the actual worth of the embezzled property—usually sentenced to death by immediate strangulation, because famine relief held a kind of sacrosanctity in orthodox ideology for its aim to save the lives of vulnerable people, therefore any abuse of the relief assets was deemed to be particularly heinous.⁴⁹⁶ Zheng Xiaoyu was not sentenced to death because of the amount of the bribes he had taken or his former prominent political position; rather, he was executed for the purpose of eliminating the social perniciousness of his offense,⁴⁹⁷ thereby removing the moral stain he had cast upon the community.

⁴⁹⁴ Discussions on the relationship between the official and popular conception of justice can be seen in Sapio, “‘Rich Sister’,” *supra* note 475 at 187,

⁴⁹⁵ Sapio, “‘Rich Sister’,” *id* at 184,186.

⁴⁹⁶ Joanna Waley-Cohen, “Politics and the Supernatural in Mid-Qing Legal Culture” (1993) 19:3 *Modern China* 330 at 338-339.

⁴⁹⁷ Bingzhi Zhao & Bin Yuan, “On the Current Situation and Trend of China's Criminal Justice Policies: Making Three Typical Death Penalty Cases a Breakthrough Point” (2013) 1:2 *China Leg Science* 3 at 17.

3.8 Summary

The reforms in China's death penalty context have demonstrated the Chinese government's efforts to restrict the application of capital punishment in conformity with the criminal justice policy of "appropriately combining leniency with severity". Both the international human rights community and the Chinese public play a significant role in the ongoing reform process, however, the latter has displayed greater influence. Contrary to the prevailing view in the West that the Chinese leadership tactically uses capital punishment as a political tool to maintain social stability and to support the Party's supreme position,⁴⁹⁸ Chinese policymakers adopted a pro-death penalty stance on certain types of crime such as corruption offenses in order to meet the Chinese populace's expectations for good governance.⁴⁹⁹ The reforms were undertaken aiming at strengthening the Chinese people's confidence in a more transparent and accountable criminal justice system; however, any future changes in the context will tend toward retention of the death penalty in China rather than to the abolition thereof.

Minyi can function as a double-edged sword hanging over the death penalty practices in China. The Chinese public are not indifferent viewers who simply consume the media reports of high-profile cases as an appetizer; rather, they think, evaluate and then form their judgements.⁵⁰⁰ While upholding their conception of justice, the public can sometimes save a convict's life, as exemplified in the Wu Ying case; but sometimes they also can generate intense pressure upon officials in the political-legal system who, as a response, would

⁴⁹⁸ See, e.g.: Bakken, "The Culture of Revenge," *supra* note 4 at 178; Trevaskes, "The Death Penalty," *supra* note 4 at 5; Bakken, "The Norms of Death," *supra* note 3 at 209.

⁴⁹⁹ See, e.g.: Stephen Noakes, "Kill Fewer, Kill Carefully" (2014) 61:3 Problems of Post-Communism 18 at 19.

⁵⁰⁰ Sapio, "'Rich Sister'," *supra* note 475 at 170.

intervene in the judicial leniency/severity calculus in capital cases in order to cater to the emotions and concerns of the masses. The Chinese criminal system has not demonstrated its capabilities in maintaining a balance among political needs, legal rules, and popular consensus, which will be examined in the next chapter.

Chapter 4. Harshness in the Death Penalty Realm of China

In this chapter, I will investigate the “ecology” of the death penalty practice in China. With reference to the multi-sense harshness measuring framework raised by Whitman, I will present the diverse forms of harsh aspects perceived in the Chinese criminal justice system, examine their impacts on the sentencing and administration of the death penalty, and identify their interrelationships and the main forces leading to complexities. Specifically, I will focus on measuring the harshness in the following areas: subjecting offenders of mental illness to the death penalty; extorting confessions by torture; and the harsh side-effect of the institution of death sentence with a two-year reprieve.

Section 4.1 investigates the accessibility of psychiatric assessment for capital crime offenders in China. At present, only the police or judicial authorities can order an assessment whereas offenders’ requests for mental evaluation are subject to the approval of the former, who, in practice, tend to accept requests from offenders bearing misdemeanor charges, but are inclined to refuse in cases of felony offenses. I will identify and map the web of primary stakeholders involved in decision making with respect to the initiation of psychiatric assessments in China, explore the factors militating against the actors from ordering a psychiatric assessment for capital crime offenders raising the defense of insanity, and then explain the background considerations leading to their choices.

Section 4.2 examines the root of wrongful capital convictions in China’s death penalty context—false confessions extracted via police torture. The current Chinese legal system is inadequately equipped to combat police mistreatment of suspects: although strictly forbidden by law, police torture has not been effectively prevented due to some legal

loopholes and practical obstacles. I will explore the factors contributing to the prevalence of coerced confessions in the police investigations of capital cases, and why.

Section 4.3 explores how the inappropriate use of *Sihuan* practically expands the scope of the death penalty. Although acclaimed to be “the best alternative penal mechanism” to the death penalty,⁵⁰¹ the institution of *Sihuan* has functioned as an instrument of the state policy stressing public order and social stability, which endorses abuse of powers by police and judicial authorities, and consequently exacerbates miscarriages of justice in practice.⁵⁰²

4.1 Psychiatric Assessment for Capital Offenders with Mental Illness

In China, certain populations are excluded from the application of the death penalty because of their peculiar physical and/or mental conditions.⁵⁰³ Amongst them, mentally ill offenders are extremely vulnerable in that they generally do not have the knowledge, the capabilities or even the will to assert their rights,⁵⁰⁴ whereas the judicial activities of defense lawyers can be highly restricted in practice.⁵⁰⁵ In a capital punishment retentionist country, psychiatric assessment can be used as an effective tool to protect this specific population from the death penalty.

4.1.1 A Thought-provoking Case

Li Haiwei (李海伟), a 29-year-old farmer claiming insanity in trial, was sentenced to

⁵⁰¹ Johnson & Zimring, “The Next Frontier,” *supra* note 282 at 284.

⁵⁰² Miao, “Two Years,” *supra* note 267 at 32-33.

⁵⁰³ These populations include persons who were not yet been 18 years old or were 75 or over 75 years older while committing the crime, women who were pregnant at the time of trial, deaf-mute or blind wrongdoers, and offenders suffering from mental illness at the time of the offense. See, “Criminal Law 2011,” *supra* note 432, arts 17-19, 49.

⁵⁰⁴ For example, they are more likely to make false confessions under psychological pressures during police interrogation; the mental issues of some offenders might not be very obvious. See, Liliana Lyra Jubilut, “Death Penalty and Mental Illness: The Challenge of Reconciling Human Rights, Criminal Law, and Psychiatric Standards” (2007) 6 Seattle J. for SOC. Just. 353 at 353.

⁵⁰⁵ Jerome A. Cohen, “Struggling for Justice: China’s Courts and the Challenge of Reform”, *World Politics Review*, (14 January 2014), online: <<http://www.worldpoliticsreview.com>>.

life imprisonment in November 2015.⁵⁰⁶ Li came from an impoverished village in northeast China. He was arrested in 2014 for assaulting a man whom he suspected was having an affair with his ex-wife.⁵⁰⁷ During the investigation, his father requested the local police to conduct a psychiatric assessment for Li: there was a family history of mental illness on Li's mother's side; Li had become paranoid and aggressive since 2009, which eventually led to his divorce.⁵⁰⁸ The entire village was aware of Li's conditions; over twenty villagers signed as witnesses to support his father's application.⁵⁰⁹ Unfortunately no assessment was ordered as his father could not afford the assessment fee; Li was then deemed sane and held in a detention center awaiting trial.⁵¹⁰ There he participated in a jailbreak.

On an early morning of September 2014, Li followed two other inmates, escaping from the detention center after subduing a guard, who later died of suffocation.⁵¹¹ He was swiftly captured due to running directly towards his home. When asked why he had chosen the most predictable route, he explained that he had missed his son so much that he just wanted to go back home to see him.⁵¹² Li's father requested for an assessment for his son again and was ready to pay.⁵¹³ But both the police and the procuratorate rejected his request

⁵⁰⁶ Huiying Zhou, "Two Inmates Sentenced to Death for Escape, Killing Guard", *China Daily*, (13 November 2015), online: <<http://www.chinadaily.com.cn>>.

⁵⁰⁷ Ming Zeng, "延寿县越狱案的三张面孔" [A Sketch of The Three Fugitives in The Jailbreak in Yanshou County], *The Beijing News* (8 September 2014) online: <<http://epaper.bjnews.com.cn>>.

⁵⁰⁸ Zeng, "A Sketch of The Three Fugitives," *ibid*.

⁵⁰⁹ "高玉伦逃跑中曾给儿和侄打电话" [Gao Yulun Called His Son and Nephew While He Was on the Run], *LiaoShen Evening News*, (6 September 2014), online: <<http://news.lnd.com.cn>>. This is no common because, in China, most people keep a distance from any judicial disputes and are very reluctant to stand out to be witnesses.

⁵¹⁰ Zeng, "A Sketch of The Three Fugitives", *supra* note 507.

⁵¹¹ "3 Chinese Inmates Kill Guard, Break Out of Jail", *China Daily*, (2 September 2014), online: <<http://www.chinadaily.com.cn>>.

⁵¹² Zeng, "A Sketch of The Three Fugitives," *supra* note 507.

⁵¹³ Knowing Li was re-arrested, his father said to the reporter that his son probably could not avoid an execution. He regretted that he had not borrowed money to pay for an assessment the first time when Li was arrested. See "哈尔滨越狱犯纪实" [Documenting The Three Jailbreakers in Harbin], *China Review*, (10 October 2014), online: <<http://hk.crntt.com>>.

this time stating that a mentally ill person would not have the capacity to break out of jail.⁵¹⁴

Li was charged with breaking out of jail using violence and intentional homicide, and faced the death penalty.⁵¹⁵

In court, Li insisted that he did not plan to break out of the jail or kill the guard, but only wanted to go home to see his son, which was confirmed by the other two jail breakers.⁵¹⁶ According to the other offenders, they allowed Li to participate only because they needed an extra person to subdue the guard and they knew Li would accept because he did not think clearly.⁵¹⁷ They both described Li as a “psychotic” (精神病) who clamored to see his son all the time in the detention centre.⁵¹⁸ They did not disclose their original plan to Li but lured him to participate by promising to help him go home.⁵¹⁹ Li also mentioned that the police officers at the detention centre had forced him to take some psychotropic medicine every day.⁵²⁰

The judges, however, stated that was not relevant to this case.⁵²¹ Legal experts rendered their opinions on various occasions that it is very likely that Li would be sentenced to death.⁵²² Fortunately, Li passed the death penalty eventually as he was deemed accomplice.

⁵¹⁴ “Documenting The Three,” *ibid.*

⁵¹⁵ Both breaking out of jail using violence and intentional homicide are capital crimes according to Arts 232 and 317 of Chinese criminal law. See “哈尔滨延寿县杀警越狱案开审 公诉人宣读起诉书” [Harbin Yanshou County Guard killing and Jailbreak Case on Trial: The Public Prosecutors Read the Indictment], *Tencent News*, (28 April 2015), online: <<http://news.qq.com>>.

⁵¹⁶ Zhou Huiying, “Jailbreak Trio on Trial for Killing Guard in NE China”, *China Daily* (28 April 2015) online: <<http://www.chinadaily.com.cn>>.

⁵¹⁷ Yi Guo & Chong Zhang, “哈尔滨越狱案细节” [Details of the Jailbreak Case in Haerbin], *Legal Daily* (29 April 2015) online: <<http://www.legaldaily.com.cn>>; “哈尔滨9.2杀警越狱案公开审理” [Haerbin 9.2 Jailbreak Trio on Trial for Killing Guard], *Middle-aged Times*, (6 May 2015), online: <<http://epaper.jwb.com.cn>>.

⁵¹⁸ “Haerbin 9.2 Jailbreak,” *ibid.*

⁵¹⁹ “Haerbin 9.2 Jailbreak,” *ibid.*

⁵²⁰ “黑龙江杀警越狱案细节” [Details of the Guard killing and Jailbreak Case in Heilongjiang], *Beijing Morning Post*, (28 April 2015) online: <<http://www.morningpost.com.cn>>.

⁵²¹ “Details of the Guard killing,” *ibid.*

⁵²² See, e.g., Shuang Mei & Hong Wang, “暴动越狱三逃犯或难逃死刑” [Jailbreak Trio Can hardly Avoid the Death Penalty], *Legal Evening News*, (4 September 2014), online: <<http://www.fawan.com>>; Qian Zhang, “专

His mental state, however, was not considered by the judges when making their final decision. Li's story raises significant questions regarding the legal treatment of criminal offenders with mental illness in China, specifically, the role and accessibility of psychiatric assessment in the Chinese criminal justice system.⁵²³

4.1.2 Legislation on Forensic Psychiatric Assessment in China

It was stated in China's first modern criminal law enforced in 1935 that "an act committed by a person who is insane is not punishable".⁵²⁴ But no specific provisions could be found in contemporary criminal procedure law regarding how to determine whether an offender was, in fact, insane. In practice, when necessary, judges or public prosecutors would designate one or more expert witnesses to provide their opinions on offenders' mental state.⁵²⁵ Unfortunately, after years of continuous warfare, no more than 60 qualified psychiatrists were available in China by 1949 serving a population of over 500 million.⁵²⁶

In the following 30 years, psychiatry had barely received any support from the authorities; mentally ill people were deemed "political lunatics" and were imprisoned or even executed.⁵²⁷ The 1979 criminal law stipulated that mental illness can be used as a defense to exempt criminal offenders from punishment: a person is not deemed responsible for his/her

家谈哈尔滨越狱案:未决犯没有与外界见面通话权利" [Experts Commenting on Haerbin Jailbreak Case: Unsentenced Criminals Have No Rights to Meet or Speak with People Outside], *Beijing Youth Daily*, (24 May 2015), online: <<http://epaper.yinet.com>>.

⁵²³ Psychiatric assessment in this article is limited to a process to determine whether a criminal offender has a mental disability to exempt or diminish his criminal responsibility. "Mental evaluation", "psychiatric evaluation", or "mental (health) examination" is also used to refer to the same practice.

⁵²⁴ "中华民国刑法" [Criminal Code of the Republic of China], (promulgated 31 October 1934, effective 1 January 1935), art 19. (China).

⁵²⁵ "中华民国刑事诉讼法" [The Code of Criminal Procedure of the Republic of China], (promulgated 15 March 1935, effective 1 April 1935), art 185. (China).

⁵²⁶ General physicians were greatly insufficient too at that time, about 670 working for every one million inhabitants. See Robin Munro, "Judicial Psychiatry in China and Its Political Abuses" (2000) 14 *Colum. J. Asian L.* 1 at 18.

⁵²⁷ Munro, "Judicial Psychiatry in China," *id* at 19, 33.

misconduct if at the time of such offense, s/he is not able to recognize or control his/her conduct as a result of mental disease.⁵²⁸ The 1997 criminal law further stressed that mentally ill offenders are free of criminal responsibility fully or in part depending on the offenders' mental conditions while committing the offense, and added that the offenders' mental status should be assessed for exemption or mitigation.⁵²⁹ This principle has been kept in the subsequent amendments.

Forensic psychiatry started obtaining official attention in 1984-1985.⁵³⁰ A set of provisional regulations for psychiatric evaluation (精神鉴定) was enacted in 1989 to provide general guidelines on setting up psychiatric evaluation committees, qualification requirements for assessors, and what should be included in a psychiatric assessment report.⁵³¹ Corresponding to the addition of assessment of offenders' mental state to the 1997 criminal law, the term "mental (illness) evaluation" (精神病鉴定) appeared for the first time in the Chinese criminal procedure law. Mental evaluation was acknowledged to be a time-consuming process, requiring the gathering of information and data and making a diagnosis, therefore the criminal procedure law stipulates that the time needed for conducting an appraisal should not be counted in the time for handling the case.⁵³²

However, one cannot find a specific definition for "mental illness" in Chinese

⁵²⁸ "Criminal Law 1979," *supra* note 254, art 15.

⁵²⁹ "A mentally ill person who causes dangerous consequences at a time when he is unable to recognize or unable to control his own conduct is not to bear criminal responsibility after being established through accreditation of legal procedures. ...A mentally ill person who commits a crime at a time when he has not yet completely lost his ability to recognize or control his own conduct shall bear criminal responsibility but he may be given a lesser or a mitigated punishment." See, "Criminal Law 1997," *supra* note 340, art 18. It was the first time that psychiatric assessment was introduced in the Chinese criminal procedure law.

⁵³⁰ Veronica Pearson, "Law, Rights, and Psychiatry in the People's Republic of China" (1992) 15 Int'l J.L.& Psychiatry 409 at 410.

⁵³¹ "精神疾病司法鉴定暂行规定" [Provisional Regulations on the Psychiatric Evaluation of Mental Illness], (promulgated 11 July 1989, effective 1 August 1989). (China).

⁵³² "Criminal Law 1997," *supra* note 340, art 122.

criminal law or in any other related regulations.⁵³³ A widely accepted theory in Chinese criminology is that mental illness falls into three categories, namely, offenders who have been professionally diagnosed with psychosis, those who suffer from moderate or severe intellectual deficiency, or those who show psychotic equivalents.⁵³⁴ Non-psychotic disorders were suggested to be added to the mental illness stipulation in the revision of the criminal law, but the commonly accepted theory prevailed.⁵³⁵ Mental illness is narrowly defined in practice, and mentally ill offenders are usually referred to as being psychotic or retarded individuals in China.

Presently in China, there were no specific provisions describing standard procedures of a psychiatric evaluation, especially who is entitled to start the process. Psychiatric assessment is classified as “forensic identification and evaluation” and subject to the general official-dominated model procedures.⁵³⁶ That is to say, only the police, the people’s procuratorates, and the people’s courts, can initiate a psychiatric assessment in the criminal legal process.⁵³⁷ Offenders, on the other hand, cannot order an evaluation by themselves. They can, at various stages in the criminal legal process, request the agency in charge for an

⁵³³ The concept “mental disorder” (精神障碍) was adopted when the Chinese Mental Health Law was enacted in 2012. Mental disorder refers to “disturbances or abnormalities of perception, emotion, thinking or other mental processes that lead to significant psychological distress or to significant impairments in social adaptation or in other types of functioning”. See, “中华人民共和国精神卫生法” [Mental Health Law of the People’s Republic of China], (Promulgated 26 October 2012, effective 1 May 2013), art 83. (China). Although the Chinese criminal law and criminal procedure law were amended around the same time, the term “mental illness” (精神(疾)病) has been kept in their new versions. In practice, the “mental disorder” has become commonly used and the two terms are interchangeable.

⁵³⁴ Zeqing Hu, “精神病人的刑事责任能力(续)” [Criminal Responsibility of Offenders with Mental Illness (Cont.)] (1998) 4 J of Law & Medicine 181 at 181.

⁵³⁵ Hu, “Criminal Responsibility,” *ibid* at 182.

⁵³⁶ Zhiyuan Guo, “Who Should Be Entitled to Initiate a Mental Examination Process? An Empirical Perspective” in Mike McConville & Eva Pils, eds, *Comparative Perspectives on Criminal Justice in China* (Cheltenham, U.K.: Edward Elgar, 2013) 279 at 287. General Rules on the Procedures for Judicial Authentication (司法鉴定程序通则) promulgated by the Ministry of Justice in 2007 is the primary legal source governing judicial authentications, but it has no practice guidelines for psychiatric evaluations.

⁵³⁷ “Provisional Regulations on the Psychiatric Evaluation,” *supra* note 551, art 17.

assessment. If their request is rejected, however, there is no channel for them to appeal. When an assessment is set up upon an offender's request, normally the costs shall be borne by the offender.⁵³⁸ If the offender is not satisfied with the assessment result, he can, only during a court session, apply for a re-assessment, which needs to be approved by the court and the court's decision is final.⁵³⁹

All forensic psychiatric assessments are required to be entrusted to an assessment agency, not to individual psychiatrists. The 1997 criminal procedure law narrowed the scope of the agencies to hospitals designated by a provincial government,⁵⁴⁰ but this limit was removed in the Amendment in 2012. Internal forensic units of the police or the procuratorates are eligible for conducting appraisals and they have their own ministerial guidelines to follow.⁵⁴¹ External experts are encouraged to become involved to improve the impartiality and transparency of psychiatric assessment. An attending doctor who has more than five years of psychiatry clinical experience or a forensic physician who has forensic psychiatry knowledge, expertise and work experience is deemed to have the statutory qualification to be considered a forensic psychiatric assessor.⁵⁴²

Once a psychiatric assessment is ordered, the agency entrusted generally assigns two assessors for the case.⁵⁴³ The conclusions of an assessment should be provided in writing and

⁵³⁸ This is the general practice in China, and is determined by the judicial authority agency in charge. The only written guidelines can be found were issued by Supreme People's Procuratorate in 2013.

⁵³⁹ 中华人民共和国刑事诉讼法 [Criminal Procedure Law of the People's Republic of China], (amended 14 March 2012), art 192. (China).

⁵⁴⁰ "Criminal Procedure Law 1997," *supra* note 360, art 120.

⁵⁴¹ "公安部刑事技术鉴定规则" [Public Security Ministry's Regulations on Technical Authentication for Criminal Cases], (effective 1 May 1980); "人民检察院鉴定规则(试行)" [Rules for Forensic Evaluations of the People's Procuratorate (Trial Version)], (promulgated 30 November 2006, effective 1 January 2007).

⁵⁴² "Provisional Regulations on the Psychiatric Evaluation," *supra* note 528 art 13.

⁵⁴³ "司法鉴定程序通则" [General Rules on the Procedures for Judicial Authentication], (promulgated 13 August 2007, effective 1 October 2007), art 19. (China).

signed by the assessors. The two assessors make one joint assessment report; if they disagree, they should put a note on the report and a consultation shall be held.⁵⁴⁴ An assessment report is required to present the assessors' diagnosis of the offender's mental illness, identify the offender's possible psychiatric conditions when committing the offense, explain the connection of the mental illness with his/her misconducts, and determine the level of the offender's criminal responsibility.⁵⁴⁵ Since 2012, a noteworthy revision to the criminal procedure law was adopted; assessment conclusions are no longer deemed to be a verdict (结论), rather, the more neutral term "opinions" (意见) is used.⁵⁴⁶

When an offender is found not to bear criminal liability on account of his mental illness, he is turned over to his family or guardian for supervision and control, and the latter are supposed to make appropriate medical treatment arrangement for the offender.⁵⁴⁷ When there is no family or guardian, the offender's work unit, the neighborhood or village committee in the place of the offender's residence, or the local civil affairs department shall act as the offender's guardian.⁵⁴⁸ If the offender is found to have severely harmed people in violence and is believed to continue to pose a potential threat to the public, the court may order or approve the request of the police or the procuratorates for compulsory hospitalization.⁵⁴⁹ However, there are no detailed guidelines on how to proceed with the mandatory treatment, and in which situations the patients can be released.

⁵⁴⁴ "Judicial Authentication 2007," *ibid* arts. 19, 35.

⁵⁴⁵ "Provisional Regulations on the Psychiatric Evaluation," *supra* note 531, art 5.

⁵⁴⁶ "Criminal Procedure Law 2012," *supra* note 539, art 145.

⁵⁴⁷ "Criminal Law 2011," *supra* note 432, art 18.

⁵⁴⁸ 中华人民共和国民法通则 [General Principles of the Civil Law of the People's Republic of China], (promulgated 12 April 1986, effective 1 January 1987), art 17. (China).

⁵⁴⁹ "Criminal Procedure Law 2012," *supra* note 539, arts 284 - 285; "Rules for Forensic Evaluations 2007," *supra* note 541, art. 539; "公安机关办理刑事案件程序规定" [Regulations on Procedures in Handling Criminal Cases by Public Security Organs], (effective 1 January 2013), arts. 331- 332. (China).

Studies indicate that, in practice, most offenders' requests for mental evaluation have been approved during the investigation and prosecution process.⁵⁵⁰ Although suspects are not entitled to initiate a mental assessment in law, raising a request is executing their defense rights,⁵⁵¹ which in practice are being acknowledged and respected.⁵⁵² However, what deserves attention is that the police and the procuratorates tend to accept requests from suspects bearing misdemeanor charges, but are inclined to deny the requests for a psychiatric assessment from felony offenders.⁵⁵³ If no mental evaluation was conducted during investigation and prosecution, the chances that a psychiatric assessment is ordered in the first trial would be very low, as exemplified in Li's story above.⁵⁵⁴ This pattern has been observed in some controversial serious criminal cases in recent years as described below, in which, regardless of some psychiatrists' questioning about the mental status of the offenders, the offenders were executed because of the seriousness of their crimes.

4.1.3 Stakeholders' Roles in Mental Evaluation Process

Part of the forensic psychiatric assessment regime in China can be further glimpsed through the following case stories.

Case 1: Zheng Minsheng (郑民生), a 42 year old laid-off community doctor, was sentenced and executed in 37 days after he stabbed eight elementary school students to death and injured five other students on 23 March 2010 in Nanping, a city of the Fujian province in northwestern China. Without performing any psychiatric examinations, the local police

⁵⁵⁰ See, e.g. Weidong Chen & Lei Cheng, "司法精神病鉴定基本问题研究" [Forensic Examination on Mental Disorder in Criminal Process] (2012) 1 Chinese J of Law 163 at 166.

⁵⁵¹ "Criminal Procedure Law 2012," *supra* note 539, art 14.

⁵⁵² Chen & Cheng, "Forensic Examination," *supra* note 550 at 166.

⁵⁵³ Chen & Cheng, "Forensic Examination," *ibid.*

⁵⁵⁴ Chen & Cheng, "Forensic Examination," *ibid.*

announced that Zheng had no mental issues in a press briefing three days after the massacre. Although his family believed that he might be suffering from paranoid schizophrenia because he kept telling them that his past colleagues were framing him for a murder, neither they, nor Zheng's defense lawyer requested for an evaluation of his psychiatric conditions. His relatives told the media: "Even if he is insane, he has to be executed. He killed eight kids. Heaven forbids!"⁵⁵⁵

Case 2: On 16 July 2006, Qiu Xinghua (邱兴华), a villager of the Shaanxi province in northwest China, murdered ten innocent people in a Taoist temple near his home including the abbot of the temple, because he suspected that the abbot had had an affair with his wife. After the brutal killing, he fried the abbot's internal organs and fed them to dogs. During his escape, he killed one person and injured two others badly for robbery. He was captured 35 days after the temple slaughter, when he sneaked back home.⁵⁵⁶ Quite a few psychiatrists and legal scholars called for an assessment for Qiu, noticing his disturbing behavior. Upon the suggestion of a psychiatrist, Qiu's wife filed a request for a mental evaluation, claiming that Qiu's family had a history of psychiatric illness.⁵⁵⁷ Both the first and second instance courts, however, turned down the request, stating that Qiu was considered to have full criminal responsibility in that he had prepared very carefully prior to the murder, set fires to destroy evidence of his crime, and was able to escape from the police chase.⁵⁵⁸ Qiu was executed on

⁵⁵⁵ Huiqun Cai, "南平杀童案:死刑后,大家都解脱了" [Nanping School Children Killing: Everybody Was Relieved After the Execution], *Southern Weekly*, (1 May 2010), online: <<http://www.infzm.com>>.

⁵⁵⁶ Tao Zhang, "邱兴华案二审维持死刑原判并立即执行" [Qiu Xinghua's Death Sentence was Hold in Second Trial and He Was Executed Immediately], *Westnet*, (28 December 2006), online: <<http://www.cnwest.com>>.

⁵⁵⁷ Yu Xiao & Lin Zhang, "法学教授称应为邱兴华做司法精神病鉴定" [Law Professors Call For a Forensic Psychiatric Assessment for Qiu Xinghua], *Chongqing Morning Post*, (24 December 2006), online: <<http://www.cqcb.com>>; Huiqun Cai, "我不是为邱兴华一人奔走" [I am not Appealing for Qiu Xinghua Solely], *Southern Weekly*, (30 November 2006), online: <<http://www.infzm.com>>.

⁵⁵⁸ Cai, "I am not Appealing," *ibid.*

28 December 2006, immediately after the second sentence was announced in court.⁵⁵⁹ Four days after Qiu's execution, the SPC restored its power to review and approve all death sentences handed down by lower courts.

Case 3: On 1 July 2008, a 28 years old man Yang Jia (杨佳) entered a local police station in Shanghai, killed six police officers and injured five other staff. His lawyer provided some evidence showing that both Yang and his mother had a mental illness history. Shanghai police entrusted a forensic science institute to conduct a psychiatric assessment for Yang. After a meeting with him at the detention centre, without his lawyer and family present, the assessors had a discussion and then presented a report on the same day declaring that Yang was mentally healthy and therefore had full criminal responsibility.⁵⁶⁰ Regardless of the ambiguity surrounding the qualification of the evaluation agency and the validity of the assessment result,⁵⁶¹ the appeal court rejected Yang's parents' request for a re-assessment based on Yang's statement that he was not insane.⁵⁶² Yang Jia was executed in November of the same year.

Case 4: Liu Baohe (刘宝和) was called a "lucky madman" by the media, because he was the first defendant, in decades, declared by the Chaozhou intermediate court in Guangdong province not criminally responsible on the grounds of mental illness: Liu was charged for murder in February 2010 after killing his neighbor and her daughter. The

⁵⁵⁹ Zhang, "Qiu Xinghua's Death Sentence," *supra* note 556.

⁵⁶⁰ Zhiyuan Guo, "Approaching Visible Justice: Procedural Safeguards for Mental Examinations in China's Capital Cases" (2010) 33 *Hastings Int'l & Comp. L. Rev.* 21 at 28; Xiaoyuan Liu, "杨佳的精神病鉴定, 程序严重违法" [Yang Jia's Psychiatric Assessment Procedures Violated the Law Seriously], *BOXUN News* (1 August 2008) online: <<http://news.boxun.com>>.

⁵⁶¹ The appraisal agency was not a hospital, but belonged to the Ministry of Justice, which was criticized not eligible to conduct mental examinations for criminal suspects/defendants. Moreover, the assessors were retained by the Shanghai police department, therefore the neutrality of their examination opinions was disputed. See, Guo, "Approaching Visible Justice," *supra* note 560 at 25-26.

⁵⁶² Guo, "Who Should Be Entitled," *supra* note 536 at 299.

presiding judge of the first trial noticed Liu's abnormal behavior and inconsistent confessions, ordered a psychiatric assessment for him, and later on he was considered insane and exempted from criminal punishment. When his family were informed that Liu would be acquitted, however, they refused to take him back claiming that they were not able to provide him any care or strict supervision at home, nor could they afford the expenses for any medical treatment he needed. Instead, they suggested that the court sentence him to death and execute him to show their apology to the whole village.⁵⁶³

In practice, most psychiatric assessments are carried out during the police investigation period. Empirical studies have found that over 90% of the assessments were ordered by local police.⁵⁶⁴ Compared with prosecutors and judges, local police have more advantages in detecting the mental abnormalities of offenders.

The police system in China has a unique strategy known as mass-line policing, which includes two types of surveillance organizations, namely neighborhood committees and internal security units.⁵⁶⁵ A neighborhood committee consists of volunteers who are familiar with the conditions of a residential area and most inhabitants in that area, and functions as a security safeguard, public health inspector and conflict resolver for the area.⁵⁶⁶ An internal security unit is located within workplaces. All work units are required to set up an internal

⁵⁶³ Huiqun Cai, "疯汉杀人的艰难免刑" [A Tough Process of A Madman Killer's Acquittal], *Southern Weekly* (10 September 2010) online: <<http://www.infzm.com>>.

⁵⁶⁴ See, e.g., Yonghua Qi & Ming Kang, "司法精神医学鉴定无精神病 74 例案例分析及随访" [Analysis and Follow-up Investigation of 74 Cases Found without Psychosis in Forensic Psychiatric Assessment] (2006) 22 *J of Forensic Medicine* 135 at 136; Xingsheng Zhong & Yaqin Shi, "司法精神医学鉴定 210 例的初步分析" [A Preliminary Analysis of 210 Cases Who Received Forensic Psychiatric Appraisal] (1987) 20 *Chinese J of Neurology & Psychiatry* 139 at 140. Their findings were supported by the statistics of the Ministry of Justice, see, Chen & Cheng, "Forensic Examination," *supra* note 550 at 165.

⁵⁶⁵ The mass-line policing is very much similar to the community policing strategy adopted in most western countries. See, e.g. Yue Ma, "The Police System in China" in Liqun Cao, Ivan Y. Sun & Bill Heberton, eds, *The Routledge Handbook of Chinese Criminology* (New York: Routledge, 2014) at 67.

⁵⁶⁶ Victor N. Shaw, *Social Control in China: A Study of Chinese Work Units* (Westport, CT: Praeger Publishers, 1996) at 70.

division to supervise the security measures in the workplace, and to provide information regarding their employees to the police, in order to assist official investigations. Both neighborhood committees and internal security units are directly connected to individual police officers and are accredited to being their eyes and ears within the community.⁵⁶⁷ Depending on the close cooperation and assistance of the neighborhood committees and internal security units, the local police can have an effective surveillance over the residents in its jurisdictional area without frequent patrol or home visits.⁵⁶⁸ Research shows that around 40% of the offenders sent for mental examination are community residents who had a mental illness history that the local police was aware of.⁵⁶⁹

Nevertheless, it is hard to initiate a psychiatric assessment for the investigation of capital crime cases. The cost for assessment is one important factor that the police have to consider when initiating a psychiatric evaluation for suspects who cannot afford it. Criminological experts indicate that severe mental illness is often associated with low socioeconomic status, dangerous neighborhoods, and problematic social relationships.⁵⁷⁰ It is not uncommon in China that serious crime offenders who may have mental health issues come from a low-income family. Before committing the crimes, they very probably had shown abnormal symptoms for an extended period, but were not able to get diagnosed, not to mention being unable to receive timely medical treatment, and appropriate care and supervision from their families or the community. If the local police have reasonable doubt as to the mental status of a low-income offender and order a psychiatric assessment, they have

⁵⁶⁷ Ma, "The Police System," *supra* note 565 at 67.

⁵⁶⁸ Ma, "The Police System," *ibid.*

⁵⁶⁹ Zhong & Shi, "A Preliminary Analysis of 210 Cases," *supra* note 564 at 141.

⁵⁷⁰ See, e.g., Russil Durrant, *An Introduction to Criminal Psychology* (Oxon: Routledge, 2013) at 90.

to bear the costs for the assessment. This responsibility imposes extra financial burden on local police departments and ends up differently affecting different regions in China, because of the uneven development of the regional economies.⁵⁷¹ The budget for regional public legal services varies greatly, because the gap between the local government's fiscal income in wealthy areas and underdeveloped areas is huge. The expenses for forensic psychiatric assessments and potential costs in the subsequent proceedings can become a burden which is hardly bearable in some less developed regions.

Research reveals that significant regional differences exist in China in terms of psychiatric assessment ratios.⁵⁷² In economically developed areas where fiscal funds are sufficient and the awareness of human rights protection are wide spread, the police, compared to their peers in less developed areas, are more likely to start a mental evaluation.⁵⁷³ For example, the police initiated assessments for 700-800 criminal cases on average every year in China's capital city Beijing at an annual rate of 0.8%, whereas the rate is lower than 0.1% in a city of Shanxi, a province where the GDP per capita is below the national average.⁵⁷⁴ An unwritten rule followed by the police in less developed region regarding mental evaluation is that "when it is acceptable either to initiate or not, it is preferable not to initiate" (可鉴定不可鉴定的,不鉴定) and the rule is quite the opposite in the developed regions.⁵⁷⁵ The regional differences can sometimes influence an offender's fate considerably.⁵⁷⁶

⁵⁷¹ Shubham Chaudhuri & Martin Ravallion, "Partially Awakened Giants: Uneven Growth in China And India" *The World Bank*, (1 November 2006), online: <<http://elibrary.worldbank.org>>.

⁵⁷² Chen & Cheng, "Forensic Examination," *supra* note 550 at 168.

⁵⁷³ The economically developed areas include the capital economy region, Yangtze River Delta region, and Pearl River Delta region. Chen & Cheng, "Forensic Examination," *ibid*.

⁵⁷⁴ Chen & Cheng, "Forensic Examination," *ibid*.

⁵⁷⁵ Chen & Cheng, "Forensic Examination," *ibid*.

⁵⁷⁶ See, Ling Zhang, Wenjian Gu & Jia Cheng, "奥迪上海闹市连撞9人续:揭开肇事司机七个疑团" [Hit 9 People and Run in Shanghai: More Details of the Driver], *Oriental Morning Post*, (30 August 2006), online: <<http://dfdaily.com>>; Jie yang, et als, "上海司法鉴定部门称奥迪司机精神鉴定并无私情" [Forensic

A man named Li Wei (李伟), who shared a similar background to Li Haiwei, had a different experience in the largest city in China—Shanghai (上海). Li Wei came from the same province as Li Haiwei did. His father had psychiatric problems and died when he was very young. According to his family, he was a very aggressive person, who often ran away from home for no reason and easily had conflicts with people. An employer felt sympathetic for Li Wei's condition, and gave him a job as a driver for his company in Shanghai at the beginning of 2006. On May 24 2006, Li Wei was caught after he hit 9 people, while driving, including 4 traffic police officers and fled the scene. Li Wei claimed that a killer sent by his girlfriend was chasing him. Shanghai police noticed some mental abnormalities in Li Wei during interrogations. They pulled out the police Emergency phone record on that day and found three calls from Li Wei calling for immediate police assistance before the accident and during his evasion. The Shanghai police then ordered a forensic psychiatric assessment. Understanding that this case had caused wide concern, the entrusted assessment centre assigned two psychiatrists who both had around 20-year experience to carry out the evaluation. As compared to a regular assessment report which generally consists of 3 pages and approximately 1000 words, their report had 6 pages and 5000 words. Li Wei was diagnosed to have been suffering from delusional paroxysm during the accident. He was then escorted to a psychiatric hospital for compulsory treatment without taking criminal responsibility. When his symptoms had been improved, upon his family's request, Li Wei was transferred to a hospital in his hometown where his family could visit him regularly.

Pressure from the government in serious criminal cases can prevent the local police

from initiating a psychiatric assessment even when there is reasonable doubt about the offender's mental state. Take Case 1 above as an example, informed of the accident, the provincial governor and the secretary of the provincial Party committee instructed the local police in Nanping to control the suspect immediately, pacify the victims' families, and maintain social stability.⁵⁷⁷ On the day following the tragedy, some provincial officials came to Nanping and passed on the instruction from higher level leaders—"to close this case in the shortest amount of time with the highest quality in accordance with the law."⁵⁷⁸ Nanping's municipal government then set up a principle of "investigate fast, try fast, and sentence hard" for this case.⁵⁷⁹ Accordingly, the local police arrested Zheng on the same day (24 March 2010), and completed all investigation and interrogation by the early morning of March 25th.⁵⁸⁰ Although the media reported that Zheng might be insane based on their interviews with Zheng's relatives and neighbors, no mental evaluation was arranged by the police for him.⁵⁸¹ The local police and the municipal government explained to the media during the press briefing on March 26th that Zheng had no psychiatric history and therefore was deemed mentally well.⁵⁸² This opinion became the final conclusion on Zheng's mental state. A psychiatric assessment was never mentioned during the following prosecution and court hearings.

⁵⁷⁷ Ying Jiang, ed, "南平 323 惨案回放" [The Playback of Nanping Massacre on March 23] *Beijing Evening News* (24 March 2010) online: Beijing Evening News <<http://bjwb.bjd.com.cn>>.

⁵⁷⁸ Cai, "Nanping School Children Killing", *supra* note 555.

⁵⁷⁹ Haiyong Li, "福建南平血案疑犯供认原计划杀死 30 个孩子" [The Suspect of the Murder in Nanping Confessed He Had Planned to Kill 30 Children], *Yangtse Evening Post*, (26 March 2010), online: <<http://www.yangtse.com>>.

⁵⁸⁰ Li, "The Suspect of the Murder in Nanping," *ibid*.

⁵⁸¹ "南平凶案案犯未确证精神病 熟人揭案犯个性" [The Suspect of Nanping Killing Cannot Be Confirmed Insane; His Acquaintances Reveal His Personalities], *China News*, (24 March 2010), online: <<http://www.chinanews.com>>.

⁵⁸² Cai, "Nanping School Children Killing," *supra* note 555.

Victim families' grief, and the fear and anger of the public can also form a kind of invisible but intense pressure on local police. Also in Zheng's case, for instance, the slaughter happened in the morning when students were lining up in front of the school gate. Everything happened very quickly; some parents even witnessed the death of their children, but by the time they had realized what was happening, it was already too late.⁵⁸³ Due to China's One Child policy, these parents shall probably never have another child.⁵⁸⁴ As for the surviving students, the violent scene and the death of their schoolmates have created a deep psychological trauma on them. Reviewing the media reports, one can find that at the beginning there were discussions about whether the suspect was insane. But later on, the disclosure of the details of Zheng's atrocity and cruelty in the murder and Zheng's confession that he was planning to kill 30 children fueled the public's outrage; Zheng's relatives and acquaintances became silent.⁵⁸⁵ After Zheng's identity was disclosed, Zheng's brothers were fired, because their employers could not bear the pressure from the local community;⁵⁸⁶ his family hid in a secret place fearing that they might face revenge. If Zheng was assessed as being insane, he would have been sent back home under his family's supervision or to a psychiatric facility for involuntary medical treatment. However, such a decision might have caused mass protest in the local community which is deemed detrimental to social stability. Undoubtedly, Nanping police had little will to conduct an assessment for Zheng while under the pressure from both the government authorities and the public.

Nanping police's response in this case is not uncommon. When an extremely heinous

⁵⁸³ Jiang, "The Playback of Nanping Massacre," *supra* note 577.

⁵⁸⁴ It is very common in China that one of the parents has surgical sterilization after their first child was born.

⁵⁸⁵ See, e.g., Cai, "Nanping School Children Killing," *supra* note 555.

⁵⁸⁶ Cai, "Nanping School Children Killing," *ibid*.

crime is committed, the local police will be immediately exposed to greater scrutiny and become the center of public attention. Political intervention usually occurs at this stage stressing that social order reigns supreme among priorities. Ordering a mental examination for a capital crime offender, especially an offender caught red-handed, will be viewed by the public as the police offering a chance to the offender to escape punishment. In Case 4, for example, upon hearing of the initial assessment result, the victim's family insisted that Liu's family had bribed the judges and the assessment agency, and requested a re-assessment from another agency.⁵⁸⁷ The local police deem it a safer choice to presume the offender sane and transfer the case to the procuratorate. After all, both the prosecutors and the judges can order a psychiatric assessment if they have reasonable doubt about the offender's mental conditions. Unfortunately, neither of the two actors have immunity against external pressures when dealing with high-profile cases.

According to statistics, less than 5% of psychiatric assessments were initiated by the procuratorates.⁵⁸⁸ There are three main reasons why the procuratorates appeared less proactive when compared to the police. Firstly, prosecutors build their cases based on the evidence and information provided by the police. Unlike the local police, the prosecutors do not have a close connection with local residents, therefore they usually depend on the police's opinions of the suspects' mental status. Secondly, even if they have observed some signs implying that an assessment is needed, the usual practice is that the procuratorates shall return the case to the local police for either dismissal or supplementary investigations.⁵⁸⁹

⁵⁸⁷ Cai, "A Tough Process," *supra* note 563.

⁵⁸⁸ See, e.g., Qi & Kang, "Analysis and Follow-up Investigation," *supra* note 564 at 136; Zhong & Shi, "A Preliminary Analysis of 210 Cases," *supra* note 564 at 140; Chen & Cheng, "Forensic Examination," *supra* note 550 at 165.

⁵⁸⁹ Chen & Cheng, "Forensic Examination," *id* at 165.

Thirdly, the procuratorates confront the political pressure in an identical manner as the local police do. Initiating a psychiatric assessment for a suspect whom the police have deemed sane may lead the procuratorates to bear the external pressure solely, which they tend to avoid.⁵⁹⁰

Nonetheless, the procuratorates have not been criticized harshly for their inactive attitude in starting mental examinations. In fact, some scholars have questioned whether initiating psychiatric assessment by the police or the procuratorates would undermine their primary duties. In the Chinese criminal system, the police are to reveal crimes and catch wrongdoers, while the procuratorates are to make charges against the suspects and prove them guilty. Considering that wrongdoers may walk free without receiving any punishment after a psychiatric assessment, commentators argue that initiating mental evaluations by the police or the procuratorates is against their bounden duties.⁵⁹¹

So far, most criticisms toward China's official-dominated model in forensic psychiatric assessment have focused on the judges' inappropriate application of their discretionary power.⁵⁹² Statistical data show that only 5% of psychiatric assessments were ordered by the courts, and the judges were even more hesitant to approve a mental evaluation for defendants whose crime may qualify for the death penalty.⁵⁹³ Most discussions in academia revolve around whether the judges have misjudged the necessity of a mental examination or held bias against capital crime defendants.⁵⁹⁴ First instance courts usually

⁵⁹⁰ Chen & Cheng, "Forensic Examination," *ibid.*

⁵⁹¹ See, e.g., Liqin Huang, "Forensic Psychiatric Assessment in Criminal Process" (2010) 5 *Law Review* 109 at 111.

⁵⁹² Guo, "Who Should Be Entitled," *supra* note 536 at 299.

⁵⁹³ Chen & Cheng, "Forensic Examination," *supra* note 550 at 166-167.

⁵⁹⁴ See, e.g., Guo, "Approaching Visible Justice," *supra* note 560 at 30; Xiao & Zhang, "Law Professors Call For," *supra* note 557.

have to bear more pressure than local police and the procurator rates. Criminal investigations are confidential to the public whereas criminal litigation proceedings are comparatively transparent in today's China. Once a public prosecution is raised in the court, the judges are put front and centre. The fact that first instance courts are financed by the local governments makes the judges inclined to comply with the local authorities' directions.⁵⁹⁵ Research has found that first instance courts rarely initiate psychiatric assessments in capital crime cases. Rather, most assessments were ordered by the second instance courts or even by the SPC during its review of death sentences, which, as commentators point out, is because the two superior courts generally are beyond the boundary of the local influential forces, and can take a comparatively neutral standpoint accordingly.⁵⁹⁶

But when dealing with extremely serious criminal cases, the courts at higher levels may also not have much resistance against external pressures. Theoretically, the courts should exercise their judicial powers independently without any interference.⁵⁹⁷ In practice, however, the Party apparatus in China holds an overlying influence on how trials should be run and concluded. In Zheng's case, for instance, following the "try fast and sentence hard" order issued by the municipal party leaders, the local court designated a collegial panel and intervened in advance,⁵⁹⁸ meaning the panel had a pre-trial review of the case materials supplied by the procuratorate. This "decision first, trial later" pattern used to be a popular practice in China which made most criminal trials become a mere formality.⁵⁹⁹ Zheng was

⁵⁹⁵ Cohen, "Struggling for Justice," *supra* note 505.

⁵⁹⁶ Chen & Cheng, "Forensic Examination," *supra* note 550 at 167.

⁵⁹⁷ "Criminal Procedure Law 2012," *supra* note 539, art 14.

⁵⁹⁸ Cai, "Nanping School Children Killing," *supra* note 555.

⁵⁹⁹ It is stressed that the pre-trial reviews should be limited in the criminal procedure law. See Margaret K. Lewis, "Legal Systems in China" in Liqun Cao, Ivan Y. Sun & Bill Heberton, eds, *The Routledge Handbook of Chinese Criminology* (New York: Routledge, 2014) at 55.

prosecuted for intentional homicide on March 27th 2010, tried on April 8th and sentenced to death in court.⁶⁰⁰ His appeal was rejected by the second-instance court in less than two weeks on April 20th; the SPC approved the death sentence in one week and Zheng was executed on April 28th.⁶⁰¹ Neither the two higher level courts considered ordering a mental examination in their review.

Although mental illness is a legitimate mitigating factor, it can turn into an aggravating factor for consideration in the sentencing process when social order and public safety are the paramount concern of the courts. The theory of harmonious society has been integrated into the guidelines for the Chinese judicial system since the beginning of this century. The SPC stressed that the fundamental duties of the people's courts are to solve social conflicts and maintain social stability, and the courts should shift their work focus to dedicating themselves to social harmony.⁶⁰² When hearing and sentencing serious criminal cases, judges are expected to give greater emphasis to protecting public safety, eliminating continuing dangerousness, and preventing mass protests. Researchers have observed that psychiatric assessment is rarely ordered in cases when victims are non-relatives or military or police, or which have caused people's great indignation.⁶⁰³

Preventing "continuing dangerousness" is also a factor that the judges have to consider before they initiate a psychiatric assessment for capital crime offenders. In China's current practice, most of the mentally ill offenders who have been found not criminally

⁶⁰⁰ Cai, "Nanping School Children Killing," *supra* note 555.

⁶⁰¹ Zhaoli Meng & Zheng Liang, "福建南平"3·23"重大凶杀案罪犯郑民生被执行死刑" [The Criminal Zheng Minsheng of Nanping Homicide on March 23 Was Executed], *Xinhua Net*, (28 April 2010), online: <<http://news.xinhuanet.com>>.

⁶⁰² "Opinions of the Supreme People's Court," *supra* note 396.

⁶⁰³ Zhiyuan Guo, "Procedural Safeguards for Mental Examinations in China's Capital Cases" (2012) 9 *Political Science & Law* 35 at 37.

responsible would be released to society. Criminological research has found that severe mental illness is often associated with low socioeconomic status, dangerous neighborhoods, and problematic relationships. As discussed earlier, it is very common that psychotic offenders cannot afford the medical treatment they need, yet there are no sufficient and appropriate care and support services provided by the government and the community. At present, only the psychiatric hospitals run by the Public Security Bureau, which are known collectively as “AnKang hospital” (安康医院), would take the offenders who are ordered by the courts for compulsory hospitalization. Unfortunately, there are only 25 AnKang hospitals in China having 10,000 beds in total whereas the annual increase of mentally ill offenders is about the same number.⁶⁰⁴

Once assessed as bearing no criminal responsibilities, most of the offenders with mental illness shall return home. Without access to affordable medical treatment and care, it is very probable that their symptoms deteriorate and these people become a potential threat to the public, which no doubt constitutes a destabilizing factor to society.⁶⁰⁵ If, by any chance, they cause any severe harm and/or damage again, the agencies which set them free might be identified and held accountable. A senior psychiatrist once criticized China’s current flawed forensic psychiatric assessment system by saying: “when dealing with offenders who might be mentally ill but with low social standing, sentencing or even killing them is convenient.”⁶⁰⁶ This may sound too cynical, but it seems likely that there are not many good

⁶⁰⁴ Chen & Cheng, “Forensic Examination,” *supra* note 550 at 164; Jianhong Feng, “解密安康医院”

“Unveiling Ankang Hospitals”, *The Procuratorate Daily*, (23 April 2014), online: <<http://www.jcrb.com>>.

⁶⁰⁵ Statistics show that, around two thirds of serious crime offenders, who were assessed to be mentally ill and set free, have received very limited medical treatment (less than three months) or none at all. See, e.g., Xiaolong Fang et al, “90 例无责任能力精神病违法者鉴定后处理的随访研究” [Follow-up of Disposal of 90 Psychiatric Cases with Irresponsibility after Forensic Assessment] (2006) 18:5 *Shanghai Archives of Psychiatry* 273 at 275.

⁶⁰⁶ Cai, “I am not Appealing,” *supra* note 557.

alternatives for this special population.

The tragic story shown below exemplifies that in today's China, public safety and societal harmony are superior to mentally ill offenders' individual human rights⁶⁰⁷: on an evening of September 2011, three young children (3, 6 and 7 years old respectively) were found dead in a house in a small village in Jiangsu province. The police soon found out that they were murdered by the home owner, Liu. The three kids were playing with Liu's daughter that afternoon. Later on when Liu's daughter wanted to play outside with them, Liu stopped her, fearing that she might be trafficked. While his daughter was arguing with him, Liu strangled her very hard and made her pass out. Liu thought his daughter was dead and became furious. He blamed the other three kids for her death, and hit all of them to death using sticks. The court ordered a psychiatric assessment for him and he was diagnosed as suffering from schizophrenia when he committed the crime, and deemed partially responsible. However, he was still sentenced to death.⁶⁰⁸ The presiding judge in this case explained in an interview that, the primary factor they considered in sentencing was the nature and the seriousness of the offence, which merited the death penalty, and their second concern was the continuing dangerousness of the offender.⁶⁰⁹ From the judges' perspective, Liu's killing of three innocent young children was extremely heinous, and he himself was also very dangerous to the public, therefore Liu's mental condition could not diminish the punishment

⁶⁰⁷ This peculiar view has been widely noticed and discussed by western scholars in various areas including psychiatrists and legal researchers. See, e.g., Pearson, "Law, Rights, and Psychiatry," *supra* note 530 at 418-419; Lewis M. Bloomingdale, "Chinese Psychiatry after Mao-Zedong" (1980) 10 *Psychiatric Annals* 217 at 223; Hannah Achtenberg, "Mental Health Care in China" (1983) 5 *J Psychiatric Treatment & Evaluation* 371 at 373; Eli Breger, "A Child Psychiatrist's Observations on Care of the Mentally ill in the People's Republic of China" (1984) 15 *Psychiatric Hospital* 127 at 130.

⁶⁰⁸ Xiaoye Pan, Yuan Ren & Xiaobing Zhou, "精神病杀人犯被判死刑" [A Psychiatric Murderer was Sentenced to Death] *Huainan News Net*, (19 October 2012), online: <<http://www.hynews.net>>. The full name of the offender has not been disclosed in the media.

⁶⁰⁹ Pan, Ren & Zhou, "A Psychiatric Murderer," *ibid*.

inflicted on him.⁶¹⁰

The judges also have to worry about the costs of ordering mental evaluations for low-income defendants and the subsequent compulsory hospitalization and medical treatment as well. In Case 4, when the court determined to order a psychiatric assessment, they faced a practical problem: how would the assessment be paid for. Neither the court, the procuratorate nor the local police had the funds to pay for the assessment, because of their budgetary shortfalls. The offender's village committee had to settle the payment at last.⁶¹¹ Upon hearing that the offender might be set free, the whole village was thrown into great panic. Therefore, the judges had to commit him to compulsory hospitalization. However, the county where he lived is impoverished; no individuals or agencies would voluntarily bear the admission costs for him. Eventually the chief justice of the court reached the county Party committee secretary; the secretary instructed the government of the town where the offender lived to pay the hospital admission fees first and then to apply for a subsidy at the county's civil affairs bureau.⁶¹² Meanwhile, to avoid protest from the victims' family, the county leaders and the chief justice of the court paid several visits to them and offered to cover the four-year university tuitions for their surviving child.⁶¹³

Obviously, this case should not be considered a model experience that can be recommended and duplicated in China. Moreover, we cannot be certain whether the result would be favorable to the offender. There was no further report on who would bear the costs in his subsequent treatment at the hospital. Medical expense in arrears is a very common

⁶¹⁰ Pan, Ren & Zhou, "A Psychiatric Murderer," *ibid.*

⁶¹¹ Cai, "A Tough Process," *supra* note 563.

⁶¹² Cai, "A Tough Process," *ibid.*

⁶¹³ In rural areas in China, families are allowed to have two children without penalties imposed. Cai, "A Tough Process," *ibid.*

problem in most of the AnKang hospitals in China.⁶¹⁴ Without guidance or instructions from superior authorities, the hospitals cannot determine from whom they should collect the unpaid balance. Meanwhile, they cannot release the patients due to their dangerousness. A general practice amongst regular hospitals in China is that all medication and treatment would be suspended if a patient fails to pay his medical fees on time. It is not certain whether this is the same rule applied within AnKang hospitals, but one should not be very optimistic considering only three AnKang hospitals across the country receive financial funding regularly from local governments.⁶¹⁵ It is very possible that some mentally ill offenders end up being psychiatrically detained on an indefinite or even permanent basis.

Nevertheless, in most cases the judges turn down a defendant's request for mental evaluation at their discretion. Empirical studies indicate that, although they may be subject to political pressure in some high-profile criminal cases, the judges make their refusal decisions mostly because they do not see the necessity.⁶¹⁶ However, psychiatric experts often question whether judges have sufficient knowledge to do the 'pre-screening'.⁶¹⁷ In Case 2, the judges did not believe a man who was able to carefully plan and scout for his murder, and successfully escape from the police chase could be mentally ill. A psychiatrist challenged the judges' opinion, citing the Reagan assassination attempt and argued that a mentally ill person can be very good at planning, stalking, and circumventing security measures.⁶¹⁸ Some common features have been observed in cases in which the court's rejection of a psychiatric

⁶¹⁴ Feng, "Unveiling Ankang Hospitals," *supra* note 604.

⁶¹⁵ Feng, "Unveiling Ankang Hospitals," *ibid.* The three public-funded AnKang hospitals are located in Beijing (the capital city), Shanghai (the biggest and most developed city in China) and Heilongjiang province.

⁶¹⁶ Guo, "Who Should Be Entitled," *supra* note 536 at 291.

⁶¹⁷ Guo, "Who Should Be Entitled," *ibid.*

⁶¹⁸ Cai, "I am not Appealing," *supra* note 557.

assessment request sparked wide discussions among psychiatry professionals: the offenders' motive and criminal methods were *extremely* abnormal, which raises reasonable doubt about the offenders' mental state; the judges, on the other hand, stressed that there was no ground to initiate a mental examination, because the offenders committed the crime in an organized way, and appeared in good spirits during the investigation and the trial.⁶¹⁹ It is not uncommon that, in practice, most judges are prone to pre-assessing the mental state of the defendants based on their stereotyped understanding of mental illness.

Commentators point out that there is a pervasive misunderstanding among the populace and the judicial authority agencies that forensic psychiatric assessment conclusions have a legal binding effect on court decisions.⁶²⁰ I argue that this misunderstanding was created by the law and strengthened in judicial practice. Besides giving a medical diagnosis of the assessed offender's psychiatric conditions, psychiatrists are required to determine whether the offender has full, partial or nil criminal responsibility, and psychiatric assessment conclusions had been regarded as verdict in law until 2013. In China's criminal justice system, psychiatrist assessors are supposed to supplement the professional knowledge and expertise that the judges lack, therefore, conducting psychiatric assessments is deemed exercising a state power, and the assessors are performing quasi-judicial functions during assessment.⁶²¹

While psychiatric assessors are assigned a quasi-judicial power, however, there are too few guidelines regarding standard procedures required for a transparent and reliable evaluation process. Researchers have noticed that, in practice, standards of psychiatric

⁶¹⁹ Chen & Cheng, "Forensic Examination," *supra* note 550 at 166.

⁶²⁰ Daming Sun, "对邱兴华杀人案的司法鉴定学反思" [Discuss Qiu Xinghua Murder Case from the Perspective of Forensic Science] (2008) 5 Chinese Criminology Rev 51 at 56.

⁶²¹ Jie Yuan, "我国司法精神鉴定主体制度的法律思考" [Legal Thoughts on the Subject Institution in Forensic Psychiatric Assessment] (2003) 4 Chinese J of Forensic Sciences 46 at 46.

assessment vary greatly depending on the availability of resources and the courts determine whether the way that an assessment is conducted is acceptable at their discretion.⁶²² Although all evaluation results are required to be presented in writing, sometimes an assessment is carried out in court orally.⁶²³ While an assessment generally includes a four-hour interview with the patient and a series of physical examinations including EEG, the Weschler Intelligence Test, the Eysenck Personality Inventory, and the MMPI,⁶²⁴ the psychiatrists' conclusions on Yang Jia's mental status based on a meeting with him at the detention centre were accepted by the court (see Case 3). Cross-examination is often skipped because neither the judges nor the assessors see the necessity as most defendants and their defense attorneys can hardly conduct a same-level professional debate with the assessors, or hire a psychiatrist as their witness to challenge the assessment conclusions. In practice, less than 5% of assessed offenders were able to question their assessors in court.⁶²⁵

The technically unbeatable status of forensic psychiatric assessment conclusions makes the courts very cautious when initiating an assessment. If a judge is not able to challenge an assessor's medical diagnosis, he has to accept their medical conclusions, and furthermore has to admit the assessor's legal opinions on the offender's criminal responsibility, because the assessor's legal opinions are an integrated part of the evaluation result.⁶²⁶ In other words, if a judge, who rarely has any medical background, cannot deny the medical contents in a psychiatric assessment report, he has to passively accept the legal

⁶²² Pearson, "Law, Rights, and Psychiatry," *supra* note 530 at 412.

⁶²³ Pearson, "Law, Rights, and Psychiatry," *ibid*.

⁶²⁴ Pearson, "Law, Rights, and Psychiatry," *ibid*.

⁶²⁵ Aiyang Zhang, "精神鉴定意见的司法判定" [Judicial Determination of the Psychiatric Expert Opinions] (2011) 26: 4 Legal Forum 142 at 143. Financial burden is a main reason for this phenomenon. But on the other hand, most psychiatrists are very cautious to present as expert witnesses for defendants in capital cases.

⁶²⁶ Zhang, "Judicial Determination of," *ibid* at 146.

contents in that report. The probative value of psychiatric assessment has been soundly strengthened because, in practice, over 90% of the assessment results have been adopted by the courts.⁶²⁷ Statistics indicate that at least 60% of evaluation conclusions are positive, meaning that over a half of the offenders assessed have been exempt or partially exempt from criminal responsibility.⁶²⁸

As explained earlier, offenders who claim insanity in China do not have to confront a dilemma: either to go to jail or to stay in a psychiatric hospital.⁶²⁹ Rather, their chances to be set free are very high. Naturally, some offenders tend to take advantage of psychiatric assessment to be released. Without appropriate supervision, the superior status of psychiatric assessment is likely to cause malpractice and corruption. A notorious case in 2009 disclosed that at least six psychiatrists at the Kang Hospital in Inner Mongolia province had taken bribes to provide false assessment reports over many years to help serious crime offenders evade punishment.⁶³⁰ Presently, most local courts in China have established an internal policy to allocate the power to initiate psychiatric assessment to the Adjudication Committee (AC). An AC is set up in people's courts at all levels to discuss important or difficult cases and other issues relating to the judicial work. Members of the ACs comprise of the president (the chief), vice presidents, and senior judges of the court, who are appointed by the standing committees of the people's congress in the region. That is to say, neither the judges nor the chief justice of the court have to bear the pressure and the risks for approving a mental

⁶²⁷ Chen & Cheng, "Forensic Examination," *supra* note 550 at 167.

⁶²⁸ Chen & Cheng, "Forensic Examination," *id* at 166-167.

⁶²⁹ Guo, "Who Should Be Entitled," *supra* note 536 at 292.

⁶³⁰ Heyan Wang, "操纵司法鉴定: 内蒙古窝案" "Manipulating Forensic Assessment: A Group Crime in Inner Mongolia" (2010) 2 *New Century Weekly* 86 at 87-91.

evaluation for a defendant who is deemed sane by both the police and the procuratorates.⁶³¹

One may question whether the defense lawyers had performed their duties to the fullest in the above-mentioned cases. Actually, defense lawyers in today's China are also subject to political and public pressures. Prior to the privatization of law firms in the early 1990s, there were no independent defense lawyers in China because the legal profession had worked as state legal workers and their salaries were paid by the government.⁶³² Instead of providing legal expertise assistance to their clients in court proceedings, Chinese lawyers by then were required to serve the interest of the government hence collaborate with the judicial authorities in searching for the truth—when a lawyer was aware of some evidence unfavorable to his client but crucial to the case, he was obliged to persuade the defendant to reveal.⁶³³ Although the legal profession as a whole has acquired due respect in contemporary Chinese society, criminal defense lawyers sometimes still confront public hostility and resistance from other actors in the judicial system.⁶³⁴

The amendment of the Chinese criminal procedure law in 2012 allowed a defense lawyer to meet his client after the first interrogation or on the first day of detention for the first time.⁶³⁵ Prior to 2012, defense lawyers were not permitted to obtain access to any judicial documents or their clients until the case had been transfer to the procuratorates.⁶³⁶ Defense lawyers used to be given approximately one week to prepare for the trial, and their

⁶³¹ Chen & Cheng, "Forensic Examination," *supra* note 550 at 166-167.

⁶³² Cohen, "Struggling for Justice," *supra* note 505.

⁶³³ Gelatt, "The People's," *supra* note 194 at 272.

⁶³⁴ Yi Sheng, "A Promise Unfulfilled: The Impact of China's 1996 Criminal-Procedure Reform on China's Criminal Defense Lawyers' Role at the Pretrial Stage (Part 2)", *Perspectives*, (31 March 2004), online: <www.law.yale.edu/documents/pdf/Part_2.pdf>.

⁶³⁵ "Criminal Procedure Law 2012," *supra* note 539, art 33.

⁶³⁶ "Criminal Procedure Law 1997," *supra* note 360, art 36.

job mainly focused on finding mitigation factors to plead for lighter sentence in court.⁶³⁷

In Case 3, the legal aid lawyer designated by Shanghai police met Yang Jia soon after he had been arrested, because the local procuratorate had intervened in advance. But later on, when two defense lawyers entrusted by Yang Jia's father wanted to see him, their request was rejected because the local procuratorate disapproved the meeting.⁶³⁸

Having financial hardship or claiming being mentally ill does not necessarily make an offender eligible for legal aid—only when he does not have a defender but is facing life imprisonment or the death penalty, shall the legal aid agency appoint a defense lawyer for him.⁶³⁹ In practice, most legal aid lawyers do not have proper psychiatric knowledge and/or received special training for effectively raising insanity defense on behalf of their clients. They often failed to provide sufficient evidence to convince the judicial authority agencies to initiate a psychiatric assessment.⁶⁴⁰ In addition, some lawyers' personal stereotyped perception of mental illness may encourage their responsiveness to the judicial authority's opinions. In an interview prior to the first trial, Yang Jia's legal aid lawyer told the media that he thought Yang Jia was mentally well, and predicted that very possibly he would be sentenced to death.⁶⁴¹

Defense lawyers have to compromise when confronting external pressures. A psychiatrist disclosed in his blog that, upon hearing of the Nanping school massacre (Case 1), most people around him doubted if any lawyer would dare defend the killer Zheng because

⁶³⁷ Sheng, "A Promise Unfulfilled," *supra* note 634.

⁶³⁸ Liming Zhang, "'杨佳袭警案'的程序公正问题透视" [Analyzing Procedural Fairness Issues in the Case of Yang Jia Assaulting Police Officers] (2009) 1 *Legal Science* 19 at 22.

⁶³⁹ "Criminal Procedure Law 2012," *supra* note 539, art 34.

⁶⁴⁰ Guo, "Procedural Safeguards," *supra* note 603 at 37.

⁶⁴¹ "杨佳辩护律师: 即使曾被打伤杨佳也难逃死刑" [Yang Jia's Defense Lawyer: Yang Jia Can Hardly Avoid the Death Penalty Even If He Once was Wounded by the Police], *Guangzhou Daily*, (8 July 2008), online: <<http://gzdaily.dayoo.com>>.

the lawyer might be assaulted by victims' families.⁶⁴² Certainly Zheng was assigned a legal aid defense lawyer, however, the lawyer's performance in trial implied that he was too constrained to fully defend his client. The lawyer did not request a mental examination for Zheng; instead of searching for further evidence to save Zheng's life or to lessen his culpability, he declared in court on behalf of Zheng that he had no objection to the criminal evidence provided by the prosecutor and the accusation of intentional homicide.⁶⁴³ The only defense he prepared for Zheng was to remind the court that Zheng had made a complete confession and requested that the judges take Zheng's cooperative attitude into consideration when sentencing.⁶⁴⁴

Reviewing articles and media reports about capital crime cases in which the mental state of the offenders was controversial, one can easily find that most criticisms against the current psychiatric assessment practice are from academics. The public, on the contrary, have few objections to the application of punishment in most cases to serious crime offenders regardless of their mental health problems. In the Nanping killing case, the silence of the local community including the offender's family to the offender's mental state is a good demonstration. Even for those who were found not able to bear criminal responsibility, it is not uncommon that their families or guardians refused to take them back.⁶⁴⁵ In practice, the

⁶⁴² Jian Wu, "有人去为郑民生辩护吗?" [Does Anyone Want to Defend Zheng Minsheng?], (8 April 2010), *Psychological Space-Time* (blog), online: <http://blog.sina.com.cn/s/blog_49add9b80100i8y6.html>.

⁶⁴³ See, e.g., "南平砍杀学生者扰乱法庭半小时愿承担三成责任" [Nanping Student Killer Harassed the Trial for Half an Hour and Was willing to Take 30 Per Cent of the Alleged Culpability], *Beijing Times*, (9 April 2010), online: <<http://www.jinghua.cn>>; Yinggui Tong, "谁将郑民生逼到绝望" [Who Pushed Zheng Minsheng to Despair], (23 April 2010), *Crisis Game* (blog), online: <<http://www.caogen.com/blog>>.

⁶⁴⁴ "残杀 13 小学生郑民生当庭被判死刑" [Zheng Minsheng Was Sentenced to Death in Court for Slaughtering 13 Elementary Students], *WangChao Net*, (9 April 2010), online: <<http://tc.wangchao.net.cn>>.

⁶⁴⁵ Even some mentally ill individuals who had not committed crimes were refused by their families after medical treatment and had been sent back to the mental health rehabilitation institution. See, e.g., Qiyang Zheng, "精神病患者痊愈出院却回不了家 家属多不愿接回" [Mental Health Patients Cannot Return Home after Treatment—Refused by Their Families], *Fuzhou News*, (20 March 2015), online: <<http://fj.qq.com>>.

judicial agencies had to either transfer the offenders to a psychiatric hospital or keep them in detention centres.⁶⁴⁶ No legislation has addressed how these people, who were abandoned by their families and society, should be managed.

Most Chinese people hold a complex attitude toward mentally ill lawbreakers. On one hand, they are aware of related stimulations in the criminal law and acknowledge that offenders with mental illness should not be (fully) punished. In daily life, they tend to avoid having any conflict with the person who they think is abnormal, because “madman kills without consequence”. On the other hand, psychiatric assessment, in their eyes, is a tool to help offenders be alleviated of their deserved punishment, and often they would question the fairness and accuracy of the assessments confirming offenders’ insanity. The populace still believe whoever breaks the law should take responsibilities, and mentally ill offenders’ families are to be blamed for failing to prevent the offending, and accordingly, should take responsibilities for all the pain and damage the mentally ill offenders have caused.

4.1.4 Stigma of Mental Illness in Chinese Society

Public stigma refers to the general public’s discriminatory perception of and reaction to people with mental illness.⁶⁴⁷ The stigma can create negative impacts on mentally ill individuals, their family members and their social connections.

Studies indicate that traditional Chinese people had two-level explanations describing a person’s mental illness, in which the first level was articulated in traditional Chinese

⁶⁴⁶ See, e.g., Guangzheng Zhang et al, “刑事案件的司法精神病学鉴定 154 例案件随访” [Following-up Investigation of Forensic Psychiatry Assessments in 154 Criminal Cases] (2005) 40 *J. of Zhengzhou Uni. (Medical Sciences)* 924 at 925; Guangzheng Zhang et al, “河南省刑事案件司法精神病学鉴定案例的随访研究” [Following-up Investigation of Forensic Psychiatry Assessments in Criminal Cases in Henan Province] (2006) 22 *J. of Forensic Medicine* 104 at 106.

⁶⁴⁷ Tahirah Abdullah & Tamara L. Brown, “Mental Illness Stigma and Ethnocultural Beliefs, Values, and Norms: An Integrative Review” (2011) 31 *Clinical Psychology Rev* 934 at 936.

medical theories, whereas the second level attributed the illness to supernatural factors.⁶⁴⁸ When someone started behaving abnormally, people around usually would say the person was sick and suggested him to see a doctor—a traditional Chinese medicine doctor. Traditional Chinese medicine has a long history and has accumulated a wealth of knowledge concerning mental illness. As early as in first century A.D, mental illness symptoms were already described in the oldest Chinese medical text, the Yellow Emperor's Manual of Corporeal Medicine (黄帝内经).⁶⁴⁹ In the following thousands of years, elite doctors' understanding of the disease etiology and their cures were gradually added to this classical book.⁶⁵⁰ Chinese people believed certain madness symptoms were caused by Yin-Yang imbalance (阴阳失调)—a breakdown of the internal environment of the human body and a disharmony of a person's body and soul. It was believed that such an imbalance could be relieved using Chinese herbal medicine and/or acupuncture, especially at the incipient stage.⁶⁵¹

But if a patient's symptoms could not be mitigated by Chinese medicine, people would turn to the second level explanations. There were three widely-accepted causes for mental illness including retributions for wrongful conducts, being possessed by evil spirits, and the soul's separation from the human body.⁶⁵² At this stage, patients and their families no longer expected much from the traditional Chinese medical treatment, rather, they placed their hope on folk-remedies, prayers, charity, sacrifices, restitutions, and rites of exorcism.⁶⁵³

⁶⁴⁸ Vivien W. Ng, *Madness in Late Imperial China: From illness to Deviance* (Norman: University of Oklahoma Press, 1990) at 28.

⁶⁴⁹ Ng, "Madness in Late Imperial China," *ibid.*

⁶⁵⁰ Ng, "Madness in Late Imperial China," *id* at 28, 33.

⁶⁵¹ Ng, "Madness in Late Imperial China," *id* at 33-37,

⁶⁵² Ng, "Madness in Late Imperial China," *id* at 51.

⁶⁵³ Ng, "Madness in Late Imperial China," *ibid.*

The public's attitude toward mental patients would become less empathetic and friendly along with the deterioration of the patients' symptoms. When the patients were at the first stage, people provided them with care and sympathy. Once the patients were cured, they would be accepted by society and were able to have a normal life. But when the patients entered the second stage, people would think that the patients themselves were to blame for the illness. The popular view or belief was that the patients (or their family members) must have done some sins in previous and present lives, or that they were possessed by some demonic spirits due to their inferior physical condition or inappropriate desire, or that they were not able to control their spirit because of personal weak characters.⁶⁵⁴ This is how mental illness was stigmatized.

The terms “*dian*” (癲), “*kuang*” (狂), and “*feng*” (瘋) were traditionally used to describe mental illness, and later were adopted in official standard.⁶⁵⁵ *Dian* means “insane without excitation or epileptic”, *kuang* means “raging, unpredictable wildness”, and *feng* is “mad or crazy”.⁶⁵⁶ It is noteworthy that some psychological illness, which appears passive or non-aggressive in the stage of attack, such as “depression”, generally is considered to be caused by weakness in the patients' spiritual strength instead of mental health issues.⁶⁵⁷

While growing up, kids were repeatedly reminded that mentally ill people were ridiculous,

⁶⁵⁴ Abdullah & Brown, “Mental Illness Stigma,” *supra* note 647 at 941. It is argued that this belief has a connection with *Samsara* in Buddhism asserting that people's behaviours in this life shall determine their reincarnation. See, Chow S. Lam et al, “Chinese Lay Theory and Mental Illness Stigma: Implications for Research and Practices” (2010) 76 *J. of Rehabilitation* 35 at 36.

⁶⁵⁵ The term *dian* appeared the first time in *Shi* (《诗经》, The book of Songs) and *kuang* in *Shangshu Weizi* (《尚书·微子》, The Book of Historical Documents). “*dian*”, “*kuang*”, and “*feng*” were taken as medical terms for mental illness in *Kang-Xi Dictionary*, an encyclopaedia compiled in 1716 BCE pursuant to the order of Emperor Kang-Xi of the Qing dynasty. See, Ju-K'ang T'ien, “Traditional Chinese Beliefs and Attitudes toward Mental Illness” in Wen-Shing Tseng & David Y.H. Wu, eds, *Chinese Culture and Mental Health* (Orlando, FL: Academic Press, 1985) at 68.

⁶⁵⁶ See, e.g., T'ien, “Traditional Chinese Beliefs,” *ibid*; Ng, “Madness in Late Imperial China,” *supra* note 648 at 37.

⁶⁵⁷ Lam et al, “Chinese Lay Theory,” *supra* note 654 at 36.

violent, and dangerous, and should be kept at a distance.⁶⁵⁸ In this way, the public stigma was amplified. People with mental illness used to be described as “a very helpless class,”⁶⁵⁹ and their families had to either hide the fact of the mental illness, or live with shamefulness in a hostile and discriminatory environment once the truth was exposed.⁶⁶⁰

The historical family system in Chinese society has determined that families are the primary care providers for mentally ill people. Living in a continental country, ancient Chinese farmers had to stick to their land for survival, and so did their descendants, because the land could not be moved.⁶⁶¹ Besides these facts, the family had to live together for economic considerations, meaning one lived with his grandparents, parents, uncles, and cousins.⁶⁶² With economic conditions as its basis, the ethical significance of this family system was further confirmed by Confucianism.⁶⁶³

A primary Confucian theory is that stable social relationships can build up and maintain an orderly and harmonious society.⁶⁶⁴ Among the fundamental social relations *Wulun*, three of which are family relationships, and ruler-subjects is assimilate to that between parents and their offspring.⁶⁶⁵ In Confucian doctrine, humans are identified as relational beings by their harmonious interdependence, most often on family members.⁶⁶⁶ Thus, family became the core unit of the Chinese social universe, and the responsibilities for

⁶⁵⁸ Abdullah & Brown, “Mental Illness Stigma,” *supra* note 647 at 939.

⁶⁵⁹ Robert D. Lamson, *Social Pathology in China: A Source Book from the Study of Problems of Livelihood, Health, and the Family* (Shanghai: Commercial Press, 1935) at 416-417.

⁶⁶⁰ Pearson, “Law, Rights, and Psychiatry,” *supra* note 530 at 167.

⁶⁶¹ Fung & Bodde, “A Short History,” *supra* note 30 at 21.

⁶⁶² Fung & Bodde, “A Short History,” *ibid.*

⁶⁶³ Fung & Bodde, “A Short History,” *id* at 30.

⁶⁶⁴ Lam et al, “Chinese Lay Theory,” *supra* note 654 at 36.

⁶⁶⁵ “孟子•滕文公上” [Mencius: Tengwengong Shang]; “孟子•梁惠王上” [Mencius: Lianghuiwang Shang].

⁶⁶⁶ Lam et al, “Chinese Lay Theory,” *supra* note 654 at 36.

mentally ill members naturally fell upon their families.⁶⁶⁷ Take the last imperial dynasty, Qing, as an example, families were ordered to confine their mentally ill family members strictly and registered their names at the local government authorities.⁶⁶⁸ Whenever a mentally ill person committed an offense, his family would be punished collectively.⁶⁶⁹

Today Chinese people no longer live in extended-family relationships, but the essential conception of the family system has been inherited. It is natural and obvious to most Chinese people today that supervising mentally ill people or paying for medical treatment and professional care is the obligations of their families; mental health services, financial or moral support are rarely provided by the government and society. Meanwhile, there is a lack of an understanding of the influence of mental illnesses on people's behavior in contemporary China, because public mental health education is still a poorly explored area. Influenced by the stigma, most mentally ill people and their families are less respected and isolated in their communities.⁶⁷⁰

Traditionally, mentally ill offenders were often punished for their misconduct because mental illness was deemed as deviance instead of an unhealthy condition of the body or mind. About 2000 years ago, Han Feizi (韩非子), the founder of the Legalism school stressed that “a psychotic can not escape from punishment according to the law” (狂则不免人间法令之祸).⁶⁷¹ Han Feizi's strong attitude set up a cornerstone for the legal tradition in dealing with offenders with mental illness. After the Han dynasty had replaced Qin, the Confucian perception of mental illness, however, did not suggest substantially different treatment to

⁶⁶⁷ Ng, “Madness in Late Imperial China,” *supra* note 648 at 16.

⁶⁶⁸ Ng, “Madness in Late Imperial China,” *id* at 103.

⁶⁶⁹ Munro, “Judicial Psychiatry in China,” *supra* note 526 at 15.

⁶⁷⁰ Abdullah & Brown, “Mental Illness Stigma,” *supra* note 647 at 937.

⁶⁷¹ Xiehe Liu, “Psychiatry in Traditional Chinese Medicine” (1981) 138 *British J. of Psychiatry* 429 at 429.

mentally ill offenders.

According to Confucianism, people's humanity is verified and signified by their social relations and responsibilities;⁶⁷² a decent person (君子) is supposed to manage all his social relationships appropriately based on his virtues which are rendered in his conduct in accordance with *Li*—the social and legal norms of contemporary society.⁶⁷³ That is to say, a decent person should show his humanity in his behaviors which are recognized to be appropriate and acceptable in his temporal social context. From the Confucian perspective, people with mental illness do not possess the fundamental ethic virtues as human being, therefore can not maintain positive social relationship. Rather, they pose a threat to social order and harmony.

The low tolerance of mental illness in Legalism and Confucianism determined the historical unfavorable legal treatment of mentally ill offenders in Imperial China.⁶⁷⁴ In the Han dynasty, for instance, mentally ill offenders would be executed publicly for killing their moms or brothers, which was a severe violation of a Confucian ethic - filial piety.⁶⁷⁵ Comparing with physically disabled offenders, mentally ill offenders received less sympathy and leniency in criminal law.⁶⁷⁶ The mental state of offenders had not been considered in the imperial criminal law until the 17th century, whereas the added legal provisions mainly focused on isolation and punishment.⁶⁷⁷ In the Qing dynasty, mentally ill offenders were subject to prison sentences for homicide, and the death penalty if they had murdered their

⁶⁷² Yuen, "Human Rights in China," *supra* note 99 at 292.

⁶⁷³ Yuen, "Human Rights in China," *id* at 293; Liu, "Psychiatry in Traditional," *supra* note 671 at 21.

⁶⁷⁴ See, e.g., Fung & Bodde, "A Short History," *supra* note 30 at 38; Bodde, "Dominant Ideas," *supra* note 55 at 293; Lu & Miethe, "China's Death Penalty," *supra* note 2 at 29.

⁶⁷⁵ Lam et al, "Chinese Lay Theory," *supra* note 654 at 37.

⁶⁷⁶ Tiechu Jiang, "中国古代精神病人犯罪法探析" [On the Law of Psychopath Crime of Ancient China] (2005) 190 *The Northern Forum* 151 at 154.

⁶⁷⁷ Ng, "Madness in Late Imperial China," *supra* note 648 at 67.

grandparent(s) or more than one non-relative.⁶⁷⁸

The popular punitive attitude in Chinese society towards mentally ill offenders has passed down to present. The harsh legal tradition can still be seen in today's criminal practice: the official-dominated model of psychiatric assessment has its solid grounds;⁶⁷⁹ psychiatric assessment has not effectively exempted serious crime offenders with mental illness from the death penalty. It is the fact the interest of this special population is deemed subordinate to the public security in practice that denies their access to a reliable psychiatric evaluation and further exemption to the death penalty.

I now turn to investigate the abuse of authority in law enforcement, specifically at the police investigation stage, and explore how the fundamental rights and the dignity of another vulnerable social group—the innocent—are disregarded in a legal system that prioritizes social stability and collective interest. Police investigation is a crucial step in the criminal justice process because, once a person is charged on the basis of the incriminating evidence obtained during the investigation, a conviction is almost guaranteed in China—a jurisdiction that has an annual conviction rate higher than 99.9%.⁶⁸⁰ Again I will begin with a case which illustrates how an innocent police officer was tortured into confessing to a double murder he did not commit.⁶⁸¹

⁶⁷⁸ Ng, "Madness in Late Imperial China," *id* at 113.

⁶⁷⁹ Guo, "Who Should Be Entitled," *supra* note 536 at 292-294.

⁶⁸⁰ Hong Lu, Yudu Li & Charlotte Hu, "The Criminal Justice System and the Death Penalty" in Bin Liang & Hong Lu, eds, *The Death Penalty in China: Policy, Practice, and Reform* (New York: Columbia University Press, 2015) at 43; Te-ping Chen, "China Convicts Almost Everyone It Accuses; One Group Is Fighting Back", *The Wall Street Journal*, (1 July 2016), online: <<https://www.wsj.com>>.

⁶⁸¹ For the details of the Du Peiwu case in Section 4.2, please refer to Jiahong He, *Back from the Dead: Wrongful Convictions and Criminal Justice in China* (Honolulu, HI: University of Hawai'i Press, 2016) at 36-38; Kuo-hsing Hsieh, *The Exclusionary Rule of Evidence: Comparative Analysis and Proposals for Reform* (Surrey, UK: Ashgate, 2014) at 153-154; Craig S. Smith, "Chinese Fight Crime With Torture and Executions", *The New York Times*, (9 September 2001), online: <<https://www.nytimes.com>>; Hatla Thelle, "Torture in China" (2006) 16:3 *Torture* 268 at 268; "杜培武:我是反侦查经验丰富的警察, 但是到最后,我还是招供了" [Du Peiwu: I

4.2 Torture: A Deeply-rooted Scourge in Police Investigation Practices

Du Peiwu (杜培武) was a police officer of the Bureau of Substance Abuse Control in Kunming city, Yunnan province in the southwest of China. In April 1998, Du was detained as the suspect for the murders of his wife and her lover, who were found shot dead in a car. In the police office, he was deprived of sleep and interrogated non-stop for 10 days. Although Du insisted on his innocence, the police interrogators believed he had the motive and opportunities. Du was required to take a one-day long polygraph test; the conclusion is that he “probably knew the full circumstances of the case, or had participated in committing the crime.” The ‘scientific’ test result encouraged the interrogators; the interrogation continued and became harsher. After being physically tortured—hanged by his handcuffed wrists, shocked with a cattle prod, and seriously beaten—for 20 days, the ex-police officer reached his breaking point and admitted his guilt. He embellished his confession with details following the interrogators’ hints but got beaten again for not being able to locate the murder weapon. He had to narrate that he took the gun apart and threw the pieces into a lake.

On June 26th, the police informed the procuratorate that they had solved the case. In the detention centre, Du submitted a Charge of Extorting a Confession form to the prosecutor on duty, and upon his request, the prosecutor took four photos of his injuries. In July, the procuratorate issued a warrant for the arrest of Du for murder; the first trial was held on December 17th at the Kunming Intermediate Court.

In court, Du and his defense attorney claimed that his confessions should not be

Am an Experienced Police Officer, but I Admitted Guilt at Last], *Sohu*, (20 Sep 2018), online: <<http://www.sohu.com>>; Mingxuan Gao & Benxin Zhu, “论二审死刑案件的公开审理” [Capital Cases in Second-instance Should be Publicly Tried], *Ai-Sixiang*, (6 November 2011), online: <<http://www.aisixiang.com>>.

admitted because they were obtained through torture. Du showed the judges his injuries and requested the prosecutor to display the photos, but the prosecutor denied that any photos had been taken. The judges adjourned the trial because of this unexpected happening. Before the second trial, Du secretly hid a set of clothes he had worn during the interrogations under his pants. During the trial, when the prosecutor said the photos were missing, Du pulled out the blood-stained clothes as evidence of torture. But the presiding judge told him to put the clothes away and to stop entangling the torture issue. When Du claimed that he had not committed the murders, the presiding judge responded “Then prove it!”

Despite the lack of physical evidence connecting him to the murders, Du was convicted and sentenced to death on February 5, 1999. When announcing the verdict, the presiding judge told Du that the death sentence could be suspended if he confessed where the murder weapon was hidden, which of course Du had no idea. Du filed an appeal at the provincial higher court. No oral hearing was held in the second instance trial; the appellate panel reviewed the dossier of the first instance trial and confirmed that “the facts are basically clear, and the evidence admitted in the first trial is legitimate and valid.” But the panel modified the original death sentence to a *Sihuan* because “some of the defense lawyer’s opinions were acceptable.” The murder weapon was discovered two years later and the actual perpetrators confessed; Du was acquitted after serving 26 months in prison, and soon was reinstated in the position which he formerly held.

The miserable experience during the interrogations has left ugly scars on Du’s body, and he suffered from chronic headaches, which was later diagnosed as a symptom of brain atrophy. Du’s story was exposed in the media and triggered a nationwide condemnation of

forced confessions. In January 2001, the MPP issued a Notice on prohibiting the use of force confessions in criminal cases as the basis of verdict, in which the Du Peiwu case was cited. The two police officers responsible for the torture were charged and received a suspended sentence of 18 and 12 months in prison respectively.

The Du Peiwu case was not isolated in China. Xiong and Miao documented a total of 122 death penalty cases wrongfully convicted in 1983-2012 (revealed by October 26, 2016), and found that murder and robbery accounted for the majority of the cases, and all defendants suffered torture during police investigation.⁶⁸² No capital cases erroneously convicted after 2012 has revealed because the lapse of time is insufficient for such cases to be publicly known: in most jurisdictions, it takes an average of ten years for erroneous convictions to be discovered and it may take longer in China.⁶⁸³

The real number of cases of wrongful convictions due to forced confessions in China is unknown. However, the data below reflect the severity of this issue: in a 2006 survey, seventy percent of prisoners confirmed that they knew someone who had made a false statement under coercion;⁶⁸⁴ at least 1800 police officers were punished for their involvement in torture in 2009;⁶⁸⁵ a total of 1317 cases involving police mistreatment were retried in 2014.⁶⁸⁶

⁶⁸² Moulin Xiong & Michelle Miao, "Miscarriages of Justice in Chinese Capital Cases" (2018) 41:3 *Hastings Int'l & Comp.L. Rev.* 273 at 273, 280, 312. Earlier in 2008, another study of 50 wrongful conviction cases conducted stressed the torture issue as well. See Jiahong He & Ran He, "刑事错案中的证据问题—实证研究与经济分析" [An Empirical Study and Economic Analysis of Wrongful Convictions and Evidence Problems] (2008) 26:2 *Trib. Pol. Sc. & Law* 8 at 8-9.

⁶⁸³ Xiong & Miao, "Miscarriages of Justice," *id* at 320.

⁶⁸⁴ Ira Belkin, "China's Tortuous Path toward Ending Torture in Criminal Investigations" (2011) 24 *Colum. J. Asian L.* 273 at 276.

⁶⁸⁵ Belkin, "China's Tortuous Path," *ibid*.

⁶⁸⁶ "中国在禁止酷刑方面取得进展" [Progress has been made on Prohibiting Torture in China], *UN News*, (18 November 2015), online: <<https://news.un.org>>.

Critics point out that, while the causes of miscarriages of justice can be complex and multi-dimensional, ill-treatment during police custody and pre-trial detention for extraction of confession is the crucial causative factor.⁶⁸⁷ The Chinese government has acknowledged the importance of curbing coerced confessions in the criminal justice system; measure after measure has been taken since 1997 in response to the exposure of repeated wrongful convictions.⁶⁸⁸ Safeguards can be found in substantive and procedural laws: torture is explicitly forbidden in the Chinese criminal law and criminal procedure law; the public can protest police mistreatment based on the administrative litigation law; torture victims can sue the perpetrators for compensation pursuant to the administrative penalty law; free legal counseling services are available to victims according to the legal aid institutions.⁶⁸⁹ But high incidences of police torture suggest that reality can lag far behind the well-intentioned laws. Despite being prohibited, police torture is still rife in practice because it is the fastest way to get a confession.⁶⁹⁰

4.2.1 Confessions: The King of Evidence?

The faith in confessions in modern Chinese law enforcement is inherited from the principles of “convictions begin with confessions (罪从供定)” and “no case without confessions shall be recorded(无供不录案)” upheld in the imperial criminal system.⁶⁹¹

Suspects were expected to admit the alleged crimes cooperatively showing their remorse and

⁶⁸⁷ Sam Poyser & Rebecca Milne, “No Grounds for Complacency and Plenty for Continued Vigilance: Miscarriages of Justice as Drivers for Research on Reforming the Investigative Interviewing Process” (2015) 88:4 *The Police Journal: Theory, Practice and Principles* 265 at 266; Thelle, “Torture in China,” *supra* note 681 at 269.

⁶⁸⁸ Belkin, “China’s Tortuous Path,” *supra* note 684 at 277.

⁶⁸⁹ “Criminal Law 1997,” *supra* note 340, art 43. Police who tortured suspects to death shall be punished by life imprisonment or death. Thelle, “Torture in China,” *supra* note 681 at 270.

⁶⁹⁰ Hsieh, “The Exclusionary Rule of Evidence,” *supra* note 681 at 121.

⁶⁹¹ Belkin, “China’s Tortuous Path,” *supra* note 684 at 276; Jiahong He, “Miscarriage of Justice and Malpractice in Criminal Investigations in China” (2016) 16:1 *China Review* 65 at 66.

propensity for reform.⁶⁹² If the suspects denied the accusations, the magistrate would not hesitate to employ harsh methods, such as beating, to pressure them into confessing. As introduced in chapter 2 (2.4), the magistrate was respected as the parent-official and the beating of the suspects was not considered torture; rather, it was deemed akin to a father disciplining his child. From a Confucian perspective, it is the moral responsibility of the suspect to confess, thus demonstrating his remorse and desire to reconcile with his community; if the suspect is reluctant, the use of force to extract a confession that was “the *sine qua non*” of conviction would be justified.⁶⁹³

The “from confession to evidence” model employed in the investigation practices in today’s China is attributed to the historical belief of the high probative value of confessions.⁶⁹⁴ Especially when investigative resources are limited, the investigators would place a premium on confessions.⁶⁹⁵ Below is the typical routine of a criminal investigation in China: Once they have obtained some evidence, investigators would concentrate on apprehending a suspect; after the suspect is detained, interrogations follow immediately, and all possible means are to be employed until a confession is extracted; thereafter, the investigators start hunting for evidence supporting the confession. The evidence they seek to collect (such as material evidence, documents, testimonies, or expert opinions) is aimed to solidify what the suspect has confessed and then to get the suspect finally convicted;

⁶⁹² He, “Miscarriage of Justice,” *ibid.*

⁶⁹³ Gelatt, “The People’s,” *supra* note 194 at 265; WeiWu & Tom Vander Beken, “Police Torture in China and its Causes: A Review of Literature” (2010) 43:3 *The Australian and New Zealand J. of Criminology* 557 at 571-572.

⁶⁹⁴ I quoted “the king of evidence” from Belkin’s article. See, Belkin, “China’s Tortuous Path,” *supra* note 684 at 276, 279.

⁶⁹⁵ Belkin, “China’s Tortuous Path,” *id* at 279.

contradictory evidence might well be overlooked.⁶⁹⁶ This is widely known as a pattern of “arrest first, find evidence later” in police practices.⁶⁹⁷

In China, the police would not announce that a case is solved until the suspect has admitted that he is guilty. A confession gives the procuratorates confidence to initiate prosecution proceedings, and it is much easier for the court to convict and sentence the defendant.⁶⁹⁸ The fact that the police can detain a suspect for a lawful period of thirty-seven days, which is also extendable under certain circumstances, maximizes the opportunities for the police to obtain a confession.⁶⁹⁹

During the lengthy period of detention, suspects are quasi isolated: police interrogations are conducted in secret whereas defense lawyers are not allowed to be present.⁷⁰⁰ According to the lawyers law, the defense lawyers can meet their clients after the initial investigation. However, the police are typically resistant; the meetings of defense lawyers and their clients may be rejected or monitored if the police believe it is necessary.⁷⁰¹ Without early access to and legal assistance of a lawyer, the only feasible option for the suspects is to make a confession satisfactory to the interrogators in order to avoid further ill-treatment.

Prior to the Amendment of the criminal procedure law in 2012, the proposal of adopting the right of an offender to remain silent had received staunch opposition from police

⁶⁹⁶ Belkin, “China’s Tortuous Path,” *ibid*; He, “Miscarriage of Justice,” *supra* note 691 at 65.

⁶⁹⁷ He, “Miscarriage of Justice,” *ibid*.

⁶⁹⁸ He, “Miscarriage of Justice,” *ibid*; Weiping Lin, “和谐社会语境下死刑诉讼程序的冲突与平衡—33例死刑错案的实证分析” [Conflicts and Balance in the Prosecution Process of Capital Cases in a Harmonious Society— An Empirical Study of 33 Wrongful Convictions] (2009) 4 *Public Security Research* 43 at 44. The author is a police officer.

⁶⁹⁹ 中华人民共和国刑事诉讼法 [Criminal Procedure Law of the People’s Republic of China], (amended 26 October 2018), arts.150, 160. (China). Belkin, “China’s Tortuous Path,” *supra* note 684 at 279.

⁷⁰⁰ Belkin, “China’s Tortuous Path,” *id* at 280.

⁷⁰¹ Belkin, “China’s Tortuous Path,” *ibid*.

representatives for fear that it might impede the search for truth.⁷⁰² But proponents cited cases of wrongful conviction and argued that the right to remain silent would effectively prohibit extracting confessions by force.⁷⁰³ Opponents then argued that the existing principles of “reliance on evidence”, “no credulousness on confessions”, and “no extortion of confessions by torture” would suffice to prevent wrongful convictions.⁷⁰⁴ Ultimately, the right to remain silent did not appear in the Amendment. As a compromise between due process and truth-finding, the idea of *in dubio pro reo* was incorporated in the revisions by stating “no person shall be found guilty without being judged as such by a People’s Court.”⁷⁰⁵ This amendment is viewed as a demonstration of China’s efforts in complying with its international human rights obligation under treaties such as the International Covenant on Civil and Political Rights (ICCPR) which states that no person should be compelled to testify against himself or to confess guilt.⁷⁰⁶ But commentators expressed their concerns about the scale and scope of the protection of this right in practice, given that no detailed provisions appeared in criminal procedure law regarding how to enforce said right.⁷⁰⁷

Although forcing people to self-incriminate is forbidden by law, suspects are not entitled to the right to keep silent. Instead, they are obliged to “truthfully answer the questions of the investigators.”⁷⁰⁸ The MPS further stressed in 2013 that criminal suspects

⁷⁰² Lijuan Xing, “The Rhyme of History: A Transition of Legal Culture in China Crowned by the Criminal Procedure Law 2012” (2015) 23:1 Asia Pacific Law Rev 31 at 59.

⁷⁰³ Xing, “The Rhyme of History,” *ibid*.

⁷⁰⁴ Xing, “The Rhyme of History,” *id* at 60.

⁷⁰⁵ “Criminal Procedure Law 2012,” *supra* note 539, art 50; “Criminal Procedure Law 2018,” *supra* note 699, art 52; Xing, “The Rhyme of History,” *ibid*; Leyun Lu, “坚持疑罪从无落实无罪推定精神” [Upholding the Principle of *In Dubio Pro Reo* to Fulfill the Spirit of Presumption of Innocence], *Procuratorial Daily*, (19 May 2014), online: <<http://newspaper.jcrb.com>>.

⁷⁰⁶ Xing, “The Rhyme of History,” *id* at 59.

⁷⁰⁷ Xing, “The Rhyme of History,” *ibid*.

⁷⁰⁸ “Criminal Procedure Law 2018,” *supra* note 699, art 120 ; Lin, “Conflicts and Balance,” *supra* note 698 at 44.

should truthfully answer questions raised during police investigations.⁷⁰⁹ Theoretically, this principle is aimed to favour suspects in that they would be eligible for leniency if they “truthfully confess [...] as well as acknowledge guilt.”⁷¹⁰ However, the stipulated obligation of suspects to cooperate and confess allows the police to assume that the suspects bear some burden of proof, and in effect lends legitimacy to the confession-oriented mode of police interrogations. Consequently, investigators tend to invest lesser efforts in improving methods, tools, and techniques for evidence collection but significantly rely on interrogations to secure evidence for a conviction.⁷¹¹

Another factor contributing to the prioritization of confession over evidence is the deeply rooted mindset of legal personnel that suspects are presumed guilty until their guilt is confirmed.

4.2.2 Investigations Operated on a Presumption of Guilt

The Chinese approach to criminal procedure is not “the presumption of innocence”, rather it is “seeking truth from facts” as enunciated in the 1979 criminal procedure law that “take facts as the basis and the law as the yardstick.”⁷¹² As a concept deeply entrenched in Chinese legal culture, however, the “presumption of guilt” once was reflected in the language of the law: “suspects” under arrest or in detention are referred to as “offenders”;⁷¹³ “alleged crimes” are already deemed “crimes” prior to the end of trial;⁷¹⁴ and the legal standard for

⁷⁰⁹ “Procedures in Handling Criminal Cases,” *supra* note 549, art 198.

⁷¹⁰ “Criminal Procedure Law 2018,” *supra* note 699, art 120; Zegang Jin & Lijun Wei, “对刑讯逼供原因的再认识—兼论办案人员素质不高导致刑讯逼供的命题” [Re-recognition of the Reasons of Coerced Confessions as well as Discussion of the Low Quality of Police Investigators] (2010) 25:4 *The Rule of Law Forum* 51 at 55-56.

⁷¹¹ Jin & Wei, “Re-recognition of the Reasons,” *id* at 56.

⁷¹² “Criminal Law 1980,” *supra* note 254, art 4. Gelatt, “The People’s,” *supra* note 194 at 260-261.

⁷¹³ “Criminal Law 1980,” *id* art 39. Gelatt, “The People’s,” *id* at 285.

⁷¹⁴ “Criminal Law 1980,” *id* art 11; “Criminal Law 1997,” *supra* note 340, art 15; Gelatt, “The People’s,” *id* at 281.

arresting a suspect is when the principal facts of his “crime” have been clarified.⁷¹⁵

Despite the modern versions of the subsequent Amendments, a predetermination of guilt was practically reinforced in the periodic anti-crime campaigns: one was viewed as guilty the moment his name appeared on the list of suspects, and the police would endeavour to seek a confession and evidence establishing the guilt of the suspect; quotes of arrests and cases to be solved were set up and taken as indicators for performance evaluation.⁷¹⁶ In a system which had immersed for years in a culture of heavy-penaltyism strengthened in the Strike Hard atmosphere,⁷¹⁷ the abrogation of the “presumption of guilt” from the police culture is inevitably challenging.

The remnants of the influence of the class-oriented doctrines dominant in the Maoist legal system—wherein criminals were identified as “enemies” of socialism and the people, and not entitled to procedural safeguards—have somewhat justified the abuse of police investigative power.⁷¹⁸ Protection for individual rights was prescribed in Article 2 of the criminal procedure law; however, Chinese scholars point out that the preservation of human rights is subordinate to the ultimate goal of combating crimes as set in Article 1, because Article order matters.⁷¹⁹ When suspicion is strong enough, interrogators may feel morally justified to employ harsh interrogation techniques, such as torture, to elicit responses which confirm their suspicions, because they are trying to find the “truth” in accordance to the ultimate purpose of the law.⁷²⁰ Taking the notorious She Xianglin (佘祥林) case as an

⁷¹⁵ “Criminal Law 1980,” *id* art 40; Gelatt, “The People’s,” *id* at 286.

⁷¹⁶ Thelle, “Torture in China,” *supra* note 681 at 273

⁷¹⁷ Trevaske, “Suspending Death,” *supra* note 357 at 236.

⁷¹⁸ Hsieh, “The Exclusionary Rule of Evidence,” *supra* note 681 at 121.

⁷¹⁹ Xing, “The Rhyme of History,” *supra* note 702 at 57. Lewis mentioned that word order matters in interpreting Chinese policies as well. See, Lewis, “Leniency and Severity,” *supra* note 254 at 318.

⁷²⁰ Wu & Beken, “Police Torture in China,” *supra* note 693 at 563.

example, after he was exonerated and the fact that he was tortured into a confession to a non-existent murder was brought into the spotlight, one of the police interrogators who was suspended for investigation due to his involvement in the torture of She Xianglin committed suicide. He wrote in his own blood “I was wronged” (我冤枉), then hanged himself—to him, he was just doing his job therefore should not be subject to any punishment.⁷²¹

The notion of ‘presumed guilty until guilt is confirmed’ has resulted in a biased trend in evidence collection practice. In a study of 137 wrongful conviction cases, researchers found an overwhelming one-sided pattern of evidence collection at the pre-trial stage.⁷²² Police investigators are supposed to conduct a comprehensive, objective, and thorough search for evidence; evidence that establishes either the innocence or the guilt of the suspect should be collected. In practice, however, when an investigator holds a pre-judgement of a suspect attributable to a subjective analysis of the case, the likely traits of the perpetrator, implausible eyewitnesses, and sometimes merely a personal impression of the suspect, the collection of evidence might be maneuvered in a direction to confirm his prejudicial opinions.⁷²³ He tends to put greater emphasis on to the evidence proving the guilt of the suspect while ignoring the evidence suggesting the opposite as a “blind spot”.⁷²⁴ The Two Zhangs’ case below illustrates how exculpatory evidence was excluded due to the bias of police investigators.⁷²⁵

One day in May 2003, two truck drivers in Zhejiang province—Zhang Hui (张辉) and

⁷²¹ Xin Sun, “例数以往错案“买单者”” “Who is Paying for the Wrongful Convictions?” *Sina*, (13 June 2010), online: <<http://news.sina.com.cn>>.

⁷²² He, “Miscarriage of Justice,” *supra* note 691 at 74.

⁷²³ He, “Miscarriage of Justice,” *ibid*.

⁷²⁴ He, “Miscarriage of Justice,” *ibid*.

⁷²⁵ For details of the Two Zhangs’ case, please refer to Elisa Nesossi, “Wrongful Convictions: The Useful Injustice?” in Flora Sapio et al, eds, *Justice: The China Experience* (Cambridge: Cambridge University Press, 2017) at 152-153; Na Jiang, “*Wrongful Convictions in China: Comparative and Empirical Perspectives* (Berlin: Springer, 2016) at 50; William Wan, “In China, Forced Confessions Draw Fresh Scrutiny”, *The Washington Post*, (20 April 2013), online: <<https://www.washingtonpost.com>>.

his uncle Zhang Gaoping (张高平) gave their fellow village girl a free ride on their way transporting freight to Shanghai. They dropped her off near a highway underpass where she said she would take a taxi to go meet her sister. The girl was found raped and dead on the next morning. Being identified by the local police as the last persons to see the victim alive, Zhang Hui and his uncle were detained as primary suspects. They denied the accusations, but after 5-day interrogation without food and sleep, Zhang Hui broke first. He admitted that he killed the girl with a stone, but then was reminded that “you raped the girl first and then you choked her to death.” His uncle resisted longer, and accordingly suffered more: he was waterboarded; forced to squat with feet far apart for hours while being handcuffed; and forced to smoke with cigarettes full of his mouth and got beaten if any one cigarette burned faster than another. He finally yielded to the torment and confessed to that which he had never done. Their confessions were used as the basis for their indictment; Zhang Hui and his uncle were sentenced to death and life imprisonment respectively in the first instance, which were commuted to death penalty with a two-year reprieve and 15-years imprisonment after appeal. The two innocent men had spent ten years in jail by the time the real perpetrator was revealed.

Had the police investigators held a neutral attitude in evidence collection, Zhang Hui and his uncle would not have undergone the abuse which, according to the uncle, sapped their will to live.⁷²⁶ At the crime scene, some scrapings of human tissue were found under the victim’s fingernails, likely the result of the victim attempting to defend herself. A DNA test later showed that it belonged to neither of the two Zhangs nor any other person involved as

⁷²⁶ Jing Cai, “没有法律保障谁都可能被冤到死亡边缘” [Everyone Could be Wronged to Death with Legal Protection] (27 May 2016), *Ifeng* (blog), online: <<http://bobao.blog.ifeng.com/article/44804140.html>>.

the police were aware. But the local police did not follow this lead; rather, they declared that the evidence was “irrelevant to the facts of the case,” and excluded it.⁷²⁷ In actuality, it was the key evidence used to find the real killer 10 years later. The two Zhangs stated that they had continued their trip after they had dropped off the victim and requested the police to double check, but the police did not pull out the surveillance videos on the highway or near the crime scene to see whether they had the time and chance to commit the crime.⁷²⁸ The perpetrator was a taxi driver; if the police had checked the footage, they might have found some valuable clues. But the police investigators were so dogged in their presumption of the two Zhangs’ guilt that they focused all their efforts on extorting confessions.

The obsession of the police with confession is further strengthened by the institutional goal of the public security authority that stresses solving crimes.⁷²⁹

4.2.3 High Clearance Rate-oriented Investigation

When high-profile criminal cases ensue, community passions are inflamed by gruesome facts, and the public always call for a successful arrest and swift punishment of the offenders. The police clearance of criminal cases was once touted by the media as instrumental to social stability: for instance, 3,000 cases were cleared in two days in Hunan province, and the police in Sichuan province solved 6,704 cases, including 691 murders, robberies or bombings, in six days.⁷³⁰ Since the MPC issued a Directive in November 2004 instructing that “homicide cases must be solved” in response to rising serious crimes and concerns about weakening social order, the police criminal investigation practices in China

⁷²⁷ He, “Miscarriage of Justice,” *supra* note 691 at 75; Jiang, “Wrongful Convictions in China,” *supra* note 725 at 50.

⁷²⁸ Jiang, “Wrongful Convictions in China,” *id* at 50, 61.

⁷²⁹ Lu, “The Criminal Justice System,” *supra* note 686 at 55.

⁷³⁰ Smith, “Chinese Fight Crime,” *supra* note 681.

had been guided by two popular slogans for over a decade: “cracking the case by the deadline (限期破案)” and “crimes involving deaths must be cracked (命案必破)”.⁷³¹ Clearance rates were set up within police agencies across the country—up to 90 percent in some areas—as an important indicator to measure police effectiveness.⁷³² Whether police investigators could reach or exceed the clearance rate was linked to financial or material rewards and their career advancement; failure to solve cases might lead to reprimand or demotion.⁷³³

This resulted in a dramatic increase in the number of cleared homicide cases: the national clearance rate was 89.6 percent in 2005, higher than that of some developed countries equipped with well-trained personnel and modern detection techniques—for example, 87 percent in the United Kingdom, 81 percent in France, 78 percent in Canada, and 63 percent in the United States; the Chinese number rose to 93.75 percent in 2007.⁷³⁴ An analysis of twenty-three *wrongful death penalty convictions* found that all of these cases were declared solved by the police hastily: the average time span from the day of the crime to the detention of the suspect(s) was 26.3 days; in six cases the police caught the suspect on the same day or the next day, which raises the question of whether and how the police detectives found the time to conduct full-scale investigations.⁷³⁵

On one hand, the Chinese police are demanded by the government and the public to solve criminal cases quickly—the more gruesome the facts of the crime, the more intense the

⁷³¹ Lu, “The Criminal Justice System,” *supra* note 686 at 55.

⁷³² Kam C. Wong, *Chinese Policing: Theory and Reform* (New York, NY: Peter Lane Publishing, 2009) at 166, 178; “河南警方废除破案率考评指标防范逼供冤假案” [Henan Police Abolishes Crime Clearance Rate to Prevent Coerced Confessions and Wrongful Convictions], *China News Weekly*, (25 November 2013), online: <<http://www.chinanews.com>>; Hsieh, “The Exclusionary Rule of Evidence,” *supra* note 681 at 121.

⁷³³ Hsieh, “The Exclusionary Rule of Evidence,” *ibid*.

⁷³⁴ Jin & Wei, “Re-recognition of the Reasons,” *supra* note 710 at 55.

⁷³⁵ Peng Fang, “死刑错案的理性分析” [A Rational Analysis of Wrongful Convictions in Death Penalty Cases - An Empirical Study of 33 Wrongful Death Cases Reported by the Media] (2006) 18 *Crim. L. Comment.* 27 at 42.

pressure would be. On the other hand, particularly at the local level, the police do not have adequate financial, human, or technological resources to conduct thorough and meticulous investigations efficiently.⁷³⁶ Insufficient operating budgets for police investigation has been a long-standing issue in China: the importance of the physical evidence-centred investigation model has not been fully acknowledged by the Chinese government; investment in criminal investigations has lagged behind the increased crime rate and the changes in crime patterns.⁷³⁷

In addition, there is a significant shortage of competent police officers and forensic technicians who have the advanced knowledge and techniques to process credible evidence. Research has found that, without sufficient professional education and training, sometimes police investigators even disturb the crime scene by incidentally destroying forensic materials, such as fingerprints, shoeprints, and DNA.⁷³⁸ When physical evidence is limited, the police do not have the expertise to devise an intelligence-led investigation plan to form reasonable grounds for identifying real offenders; naturally, as a vice Procurator General of the SPP indicated, in most cases the police depend heavily on suspects' confessions; as such, "interrogation is still playing an important role in current investigative works."⁷³⁹

The theory behind the pursuit of quick clearance of capital cases is that special attention and intense pressure would motivate the police to identify guilty offenders rapidly, and in most cases the pressure does produce the intended consequences. Unsuccessful police

⁷³⁶ Human Rights Watch, "Tiger Chairs and Cellbosses: Police Torture of Criminal Suspects in China" (2015) Human rights Watch Working paper, online:<https://www.hrw.org/sites/default/files/report_pdf/china0515_web.pdf>.

⁷³⁷ Wu & Beken, "Police Torture in China," *supra* note 693 at 566-567.

⁷³⁸ Wu & Beken, "Police Torture in China," *ibid*.

⁷³⁹ Wu & Beken, "Police Torture in China," *id* at 567.

investigations are seen as a humiliating failure of the police's efforts to fight crime and arouse concerns about public safety.⁷⁴⁰ When the deadline is approaching, the police who are most anxious to solve the case would be motivated to take a short-cut: obtaining a confession.⁷⁴¹ The danger is that interrogators may go too far by using coercive and manipulative methods including violence to extort confessions and manufacture corroborative evidence to convince themselves and the public, which unsurprisingly can lead to erroneous convictions.⁷⁴²

To many police investigators, extracting confessions by force is an efficient and effective solution to many difficult cases.⁷⁴³ In capital cases, the police do not expect that the suspects would describe their offenses voluntarily and truthfully because their lives are at stake; when suspects do not talk, evidence is weak, and persuasion skills are inadequate, police interrogators are likely to use extralegal means to obtain incriminating statements. Empirical research finds that over 80 percent of Chinese police investigators have used force to extract a confession, quite a few of whom were awarded as "Exemplary Police Officers" for their valour and meritorious services.⁷⁴⁴ In point of fact, the lead investigator of the Two Zhangs' case was honoured as female Sherlock Holmes and interviewed on TV several times. Ironically she was also the lead investigator who ended up apprehending the real perpetrator in the two Zhangs' case after he raped and murdered another young girl.⁷⁴⁵ Du Peiwu admitted to reporters that he himself had used force before during interrogation because "at

⁷⁴⁰ Samuel R. Gross, "Lost Lives: Miscarriages of Justice in Capital Cases" (1998) 61:4 *Law and Contemporary Problems* 125 at 135.

⁷⁴¹ Gross, "Lost Lives," *ibid.*

⁷⁴² Gross, "Lost Lives," *id.* at 135, 140.

⁷⁴³ Yue Ma, "The Powers of the Police and the Rights of Suspects under the Amended Criminal Procedure Law of China" (2003) 26:3 *Policing: An Intl J of Police Strategies & Management* 490 at 505.

⁷⁴⁴ Jin & Wei, "Re-recognition of the Reasons," *supra* note 710 at 53-54.

⁷⁴⁵ Wenting Zhou, "Wrongly Jailed Want More Compensation", *China Daily*, (22 May 2013), online: <<http://www.chinadaily.com.cn>>.

that time I presumed suspects somewhat guilty but now I no longer hold any prejudice”; rather, he would remind them that they can refuse to answer any questions irrelevant to the case.⁷⁴⁶

The widespread and persistent use of torture during police investigation is also attributable to the permissive attitude of police leadership.⁷⁴⁷ According to Chinese criminal law, when torture results in serious injuries or death, the responsible persons shall be held liable for aggravated assault or murder, which is punishable by life imprisonment or death.⁷⁴⁸ So a view shared within the police system is that coercing confessions by force is acceptable as long as it does not result in serious injuries or death.⁷⁴⁹ Certain police investigators interpret that extorting confession via excessive means should be deemed to be organizational behavior for the purpose of cracking crimes, and that individual investigators should therefore be exempt of liabilities.⁷⁵⁰ It is noted that some superintendents and upper rank officials care much more about whether their police officers are able to solve difficult cases than the methods used to accomplish the goal.⁷⁵¹ They assess the performance of their officers primarily based on the actual clearance rates even though they are aware that extralegal means might be employed.⁷⁵² When receiving complaints against police mistreatment, they tend to cover for their officers, for example, by blocking the inquiries or

⁷⁴⁶ “Du Peiwu: I Am an Experienced Police Officer,” *supra* note 681.

⁷⁴⁷ Ma, “The Powers of the Police,” *supra* note 743 at 505.

⁷⁴⁸ 中华人民共和国刑法(2017 修正) [Criminal Law of the People's Republic of China (2017 Amendment)] (amended 4 November 2017), arts 247, 232, 234. (China). Ma, “The Powers of the Police,” *supra* note 743 at 504.

⁷⁴⁹ Jin & Wei, “Re-recognition of the Reasons,” *supra* note 710 at 56.

⁷⁵⁰ Gang Liu, “萧山劫杀案蒙冤者详述逼供过程:曾不堪折磨咬掉舌尖” [The Wrongfully Convicted in the Xiaoshan Murder Case Described the Process of Coercing Confession: He Bit off the Tip of His Tongue under Intolerable Torture], *The Beijing News*, (25 June 2013), online: < <http://www.beijingnews.com.cn>>.

⁷⁵¹ Ma, “The Powers of the Police,” *supra* note 743 at 505.

⁷⁵² Ma, “The Powers of the Police,” *ibid*.

seeking a settlement with the victims privately in exchange of the latter's waiver of rights to sue.⁷⁵³

The public revulsion of torture is easily inflamed by the exposure of wrongful convictions. However, not all confessions elicited by torture are always false: after all, wrongful convictions only account for a small percentage of the millions of criminal cases the police registered every year.⁷⁵⁴ The public believe that innocent people consist of a minority of the suspects who are tortured based on a common premise that serious crime cases receive more attention, more resources, and are to be examined under more intense scrutiny than other cases; therefore, errors are less likely to occur.⁷⁵⁵ Victims of police torture include the real perpetrators and offenders who were forced to admit to crimes they did not commit.⁷⁵⁶ What happens to these populations during police investigation receives little attention from the public; community condemnation of torture of them is barely heard because, in essence, these people are criminals.⁷⁵⁷ Even some victims of wrongful convictions defended their investigators by saying that the police did not mean to do wrong to innocent people.⁷⁵⁸ The public care much more about whether offenders can be prosecuted and punished than the procedures used during truth-finding process. This selectively indifferent attitude of the public in effect constitutes a full tolerance of police torture. Next time when a serious crime

⁷⁵³ Ma, "The Powers of the Police," *ibid.*

⁷⁵⁴ Min Cui, "再论遏制刑讯逼供" [Holding back Interrogational Torture] (2003) 2 J. of Zhejiang Police College: Public Security Science J., 24 at 26; Xiong & Miao, "Miscarriages of Justice," *supra* note 682 at 316.

⁷⁵⁵ Gross, "Lost Lives," *supra* note 740 at 126.

⁷⁵⁶ Human Rights Watch, "Tiger Chairs and Cellbosses," *supra* note 736 at 34.

⁷⁵⁷ Jin & Wei, "Re-recognition of the Reasons," *supra* note 710 at 56; Xingliang Chen, "陈兴良评大案:“留有余地”的判决,给冤案发生埋下祸根" [Reviews on High-profile Cases by Chen Xingliang: Sentencing with "Reservation" is the Source of Wrongful Convictions], *ZhiHu*, (25 June 2018), online: <<https://zhuankan.zhihu.com>>. ZhiHu is a website founded in China which functions like Quora.

⁷⁵⁸ Liu, "The Wrongfully Convicted," *supra* note 750; "贵州蒙冤“杀人犯”自杀拒减刑: 减刑是侮辱我" [Wrongfully Convicted Murderer in Guizhou Province Refused Commutation: Commutation is an Insultation to Me], *The Paper*, (12 August 2015), online: <thepaper.cn>.

involving horrific violence occurs, the pressure from local political authorities and public would again form a social context in which the police are likely to act in service of local interest above the laws.

The Chinese government has officially admitted torture is widely practiced in police investigation and attributes coerced confessions to the great pressure frequently born by police.⁷⁵⁹ Commentators argue that the police in other jurisdictions also work under pressure, but the police investigators are offered more political and legal leeway to extract confessions in China.⁷⁶⁰ Although forced confession is referred to as a “malignant tumour”, it is difficult to remove from the Chinese criminal justice system because the police and the public share the view that the end justifies the means.⁷⁶¹ Prohibition of police torture has failed because local political authorities and the populace implicitly offer permission to the police for the ultimate goal of fighting crime, namely catching the actual perpetrators; hence this gives the police leverage to disregard the preventive measures.⁷⁶²

Court trial, as another crucial part of the complex machinery of criminal justice, is practically the last resort for innocent defendants who were tortured into confessing to a capital crime. When Du Peiwu was hiding that bloodstained outfit under his pants, he placed his hope on the judicial authority for justice. However, the court’s indifference towards his accusation of police torture and the presumed-guilty attitude of the judges demonstrate the harshness in the application of punishment in China—a discrepancy between the law in

⁷⁵⁹ Belkin, “China’s Tortuous Path,” *supra* note 684 at 278.

⁷⁶⁰ Belkin, “China’s Tortuous Path,” *ibid.*

⁷⁶¹ Belkin, “China’s Tortuous Path,” *ibid.*

⁷⁶² James H. Lebovic, *Planning to Fail: The US Wars in Vietnam, Iraq, and Afghanistan* (New York, NY: Oxford University Press, 2019) at 169.

books and the law in action with respect to judicial independence and exclusion of illegally-obtained evidence.

4.3 Suspending Death: Leniency with Dire Consequences

Proponents of the institution of *Sihuan* advocate broad application of suspended death sentence in order to mitigate the risk of mistakenly executing innocents in death penalty retentionist jurisdictions, and to offer the possibility for wrongful convictions to be reversed. The growing use of this supposedly lenient form of death penalty, however, has manifested some undue harshness in the context.⁷⁶³

4.3.1 The Court's Reluctance to Exclude Illegally-Obtained Evidence

Criminal trials in China rely heavily on dossiers provided by the police: instead of providing a platform for oral arguments between the prosecutor and the defendant and his defense lawyer, a trial is basically a process during which judges evaluate the written evidence included in the dossier, supplemented by their own observation.⁷⁶⁴ Consequently, conviction and sentencing depend chiefly on how judges evaluate written materials, particularly on their judgement regarding the legitimacy of the evidence in the cold files.⁷⁶⁵

Coerced confession is explicitly prohibited in Chinese criminal procedure law in that “a confession [...] extorted by torture or obtained by other illegal means [...] shall be excluded.”⁷⁶⁶ However, the exclusionary provision does not cover other evidence developed on the basis of a tainted confession.⁷⁶⁷ In police investigation practices, investigators would

⁷⁶³ Miao, “Two Years,” *supra* note 267 at 36.

⁷⁶⁴ I note the description of the criminal justice system in the Netherlands. See, Taru Spronken & Yufeng Chai, “A Summary of the Application of the Exclusionary Rule in Europe” in Weidong Chen & Taru Spronken, eds, *Three Approaches to Combating Torture in China* (Cambridge, UK: Intersentia Publishing, 2012) at 31.

⁷⁶⁵ Spronken & Chai, “A Summary of the Application,” *ibid.*

⁷⁶⁶ “Criminal Procedure Law 2018,” *supra* note 699, art 56.

⁷⁶⁷ Wu & Beken, “Police Torture in China,” *supra* note 693 at 566.

not stop after having obtained a statement of guilt from the suspect; they will endeavor to secure some objective evidence supportive to the statement. The fact that evidence procured on the basis of coerced confession is admissible to the court and can be used to convict the defendant who confessed under torture renders the effect of the exclusionary rule of evidence superficial.⁷⁶⁸

In addition, when a defendant claims in trial that he admitted guilt under torture, the law does not provide explicit guidelines as to whether the judges should initiate a review of the evidence-gathering process, nor whether the police or the procuratorate should bear the burden of proof in showing that the confession was lawfully obtained.⁷⁶⁹ Hence the law gives judges full discretion to determine whether and how to verify whether a defendant's confession was obtained through torture. Some judges, as commentators criticized, are influenced by the presumption of guilt, and would therefore tend to disregard the defendant's claim and instead focus on determining the guilt of the defendant—especially when they are dealing with high-profile cases, as illustrated in the Du Peiwu case.⁷⁷⁰

Even when the court initiates an investigation, judges rarely order forensic medical examinations to investigate torture. In China, a police investigator is generally not required to testify for the cases he has investigated.⁷⁷¹ In practice, once they believe that they have obtained sufficient evidence to convict a suspect, the police shall declare that the case is solved and transfer the case to the procuratorate.⁷⁷² Even when a defendant claims in court that his confession was extorted by torture, the police interrogators still do not need to be

⁷⁶⁸ Wu & Beken, "Police Torture in China," *id* at 566-567.

⁷⁶⁹ Wu & Beken, "Police Torture in China," *ibid*.

⁷⁷⁰ Xiong & Miao, "Miscarriages of Justice," *supra* note 682 at 297

⁷⁷¹ Xiaofeng Wu, "An Analysis of Wrongful Convictions in China" (2011) 36:2 Okla City UL Rev 451 at 458.

⁷⁷² Wu, "An Analysis of Wrongful Convictions," *ibid*.

present at trial. Instead, it shall suffice for the police to issue an affidavit declaring that no illegal means were employed during interrogations.⁷⁷³ Naturally the judges would conclude that no evidence of torture is founded according to the written denial from the police investigators.⁷⁷⁴ In this sense, the burden of proving that torture was used lies on the defendant. If the interrogators used some special means leaving no obvious physical marks on his body, the defendant's claim shall be rejected.⁷⁷⁵

Researchers point out that the main cause of erroneous verdicts is the purely passive attitude of the Chinese judiciary towards evidence provided by the police in practice.⁷⁷⁶ The operation of the Chinese criminal justice system depends on a harmonious cooperation among three key actors—the Police, the Procuratorate and the Court; as introduced earlier, Chinese criminal procedure is featured with a 'streamlined-production' structure in which the courts have long been criticized for their lack of independence.⁷⁷⁷ Judges are not blind to the flaws in coerced confessions when an innocent person is charged, since false or made-up facts generally fail to establish a link in the chain of evidence.⁷⁷⁸ But their powers are limited with respect to the admissibility of evidence provided by the police. It is noted that judges barely exercise their exclusionary power, especially when they are trying serious criminal cases; exclusion of evidence obtained via torture or other illegal methods has hardly occurred in practice because of its strong probative value.⁷⁷⁹ The fact that judges frequently ignore

⁷⁷³ Wu, "An Analysis of Wrongful Convictions," *ibid.*

⁷⁷⁴ Wu & Beken, "Police Torture in China," *supra* note 693 at 566-567.

⁷⁷⁵ Wu, "An Analysis of Wrongful Convictions," *supra* note 771 at 458.

⁷⁷⁶ Hsieh, "The Exclusionary Rule of Evidence," *supra* note 681 at 151; Xiong & Miao, "Miscarriages of Justice," *supra* note 682 at 305.

⁷⁷⁷ Wu & Beken, "Police Torture in China," *supra* note 693 at 567.

⁷⁷⁸ Xiong & Miao, "Miscarriages of Justice," *supra* note 682 at 305.

⁷⁷⁹ Hsieh, "The Exclusionary Rule of Evidence," *supra* note 681 at 151.

allegations of torture and mete out guilty verdicts based on the evidence obtained from police investigation is the leading reason why innocent people are wrongfully convicted.⁷⁸⁰

It is not an exaggeration to say that the outcome of the police investigation predicts the consequence and shapes the quality of the subsequent criminal trial.⁷⁸¹ In capital cases leading to immediate execution, while passively admitting the evidence of guilt provided by the police, judges can only exercise their caution and leniency in sentencing if they are not completely convinced by the evidence—a suspended death sentence then becomes their top option.

4.3.2 *Sihuan*: Resulting from Sentencing with Reservation

Empirical studies show that the majority of capital cases resulting in miscarriage of justice proceeded following a pattern from “presumption of guilt” in the first instance to “extenuation for residual doubt” (疑罪从轻) in the second instance and finally to “exoneration and release” in the retrial initiated because either the actual perpetrators are apprehended or the presumed-dead victims turned up alive and well.⁷⁸² In the 122 wrongfully convictions in Xiong & Miao’s study, only 4.1 percent of the innocent defendants were exonerated in the second instance after being incarcerated for an average of two and a half years.⁷⁸³

As an actor in the network of cooperation and collaboration in the iron triangle, Chinese appellate courts are inclined to affirm the guilty verdict of the first-instance.⁷⁸⁴

⁷⁸⁰ Hsieh, “The Exclusionary Rule of Evidence,” *ibid*; Xiong & Miao, “Miscarriages of Justice,” *supra* note 682 at 305.

⁷⁸¹ I took reference to the description of the criminal justice system in the Netherlands. See, Spronken & Chai, “A Summary of the Application,” *supra* note 764 at 31.

⁷⁸² Chen, “Reviews on High-profile Cases,” *supra* note 757.

⁷⁸³ Xiong & Miao, “Miscarriages of Justice,” *supra* note 682 at 273, 280, 312.

⁷⁸⁴ Xiong & Miao, “Miscarriages of Justice,” *id* at 305-306.

When they notice fabricated facts or implausible evidence, the appeal collegiate panel is prone to ordering a retrial rather than reversing the original verdicts and acquitting the defendants: among the above-mentioned 122 cases, eighty five verdicts were found to be problematic in the second-instance on grounds that the evidence failed to prove the defendant's guilt beyond a reasonable doubt; however, eighty of them were sent back to the original first-instance courts for a retrial.⁷⁸⁵ When the appellate courts have doubts as to the reliability of the evidence for the convictions at the first instance, especially if police torture was allegedly involved, judges would tend to commute the original sentences to a lighter punishment, such as reducing the death penalty to a death sentence with a two-year reprieve in capital cases, in order to avoid the irreversible error—wrongful executions.

It is stipulated in the criminal law that *Sihuan* would be warranted if two conditions are met, namely: the offense is punishable by death, and an immediate execution is not necessary. However, there are no provisions or judicial interpretations with respect to what circumstances render an immediate execution as unnecessary. Commentators argue that the vagueness was left deliberately for judicial discretion and political expediency.⁷⁸⁶ Corresponding to the adjustment to the criminal justice policy towards less harsh punishment since the mid-2000's, the vast majority of death sentences are postponed in practice as long as there is any extenuating circumstance acknowledged by the court.⁷⁸⁷ The extenuating circumstances is broadly interpreted, thereby including not only typical factors such as the

⁷⁸⁵ Xiong & Miao, "Miscarriages of Justice," *ibid.*

⁷⁸⁶ Trevaskes, "Suspending Death," *supra* note 357 at 36.

⁷⁸⁷ Dongyan Lao, "死刑适用标准的体系化构造" [Systematic Structure of Applicable Standards for the Death Penalty] (2015) 1 Chinese J of L.170 at 172-173; Zongyi Yue, "死刑适用标准及五类重点案件的死刑适用原则浅探" [The Application Standard for the Death Penalty and Five Types of Major Cases] *Shandong Province People's Procuratorate*, (10 May 2018), online: <<http://www.sdjcy.gov.cn>>.

gravity of the offense and the continuing dangerousness of the offender, but also factors such as evidence issues, preventive effects, and public opinion.⁷⁸⁸

The theory justifying the extensive application of *Sihuan* is that erroneous conviction in capital cases can be overturned if exonerating evidence is exposed;⁷⁸⁹ in other words, a suspended death sentence saves the lives of the wrongfully convicted and also gives them a hope to have their name cleared eventually, as per the common expression in media circles that “justice maybe late but never absent.”⁷⁹⁰ Undoubtedly *Sihuan* has played an important role in the reformist push to “kill fewer” by reducing the risk of executing innocent people.⁷⁹¹ However, counter to the legislature’s expectations, the extended use of *Sihuan* in practice has contributed to the miscarriage of justice phenomenon.

A bizarre combination of “seeking truth from facts” with *in dubio pro reo* along with the latent influence of the “presumption of guilt” has resulted in an abusive use of *Sihuan* in the sentencing of capital cases in China. The legitimate ground of this institution is the principle of sentencing with reservation for capital cases with doubts since the SPC stated that “if the evidence for conviction is confirmative, but the evidence which affects sentencing contains any doubtful point, space shall be left at the time of sentencing.”⁷⁹² The original purpose of this principle is to protect the rights of defendants facing the ultimate punishment when the evidence does not fully support the necessity for an immediate execution. However,

⁷⁸⁸ Lao, “Systematic Structure,” *id* at 173.

⁷⁸⁹ Miao, “Two Years,” *supra* note 267 at 32.

⁷⁹⁰ Jiahong He, “姗姗来迟的正义” [Delayed Justice] (2016) 7 Rule of law for People 84 at 84.

⁷⁹¹ Trevaskes, “Suspending Death,” *supra* note 357 at 222.

⁷⁹² “关于进一步严格依法办案确保办理死刑案件质量的意见” [Opinions on Strengthening Handling Cases in Strict Accordance with Law and Guaranteeing the Quality of Handling Death Penalty Cases] (effective 9 March 2007), art 35. (China). The Opinions was jointly issued by the SPC, SPP, MPS, and the Ministry of Justice. Also see, Xinqing Wang & Zheng Li, “论留有余地判处死缓案件—兼论判决结果的相对合理性” [Imposing Suspended Death Sentences with Certain Reservation- The Relative Reasonableness of Sentencing Outcomes] (2006) 13 Chin. Crim. Sci. 81 at 82-83; Chen, “Reviews on High-profile Cases,” *supra* note 757.

it has been misinterpreted in practice and extensively applied to cases when there are doubts about the evidence required to validate a capital conviction.⁷⁹³ In other words, despite the lack of hard evidence to support the capital accusation, instead of presuming the defendant not guilty, the court may impose a lighter punishment, namely *Sihuan*, considering the gravity of the capital offense and its severe impact on social order.

Investigation of the wrongful capital convictions indicates that, when dealing with high-profile capital cases, most judges would opt for *Sihuan* as a default choice and tend to disregard or circumvent the doubts they hold even if they are not completely convinced of guilt by the evidence presented.⁷⁹⁴ The ambiguous wording of the applicable conditions for *Sihuan* endorses a broad interpretive space for judges to impose a suspended death sentence on the grounds that an immediate execution is not necessary in light of their doubts.⁷⁹⁵ In most cases, a *Sihuan* sentence becomes a compromise between judges who hold doubts and the police and prosecutors seeking the death penalty; the judges would feel less morally guilty when wrongful convictions come to light in that they have at least saved the lives of the innocent.⁷⁹⁶ In an interview about a wrongful capital conviction, the presiding judge said “We had been in doubt, so we thought it is better to give a suspended death sentence without killing him.”⁷⁹⁷ This operation of imposing lighter sentences for suspicious convictions has become a routine practice in the Chinese criminal system since the death penalty policy was

⁷⁹³ Chen, “Reviews on High-profile Cases,” *ibid*.

⁷⁹⁴ Wang & Li, “Imposing Suspended Death Sentences,” *supra* note 792 at 82. A list of the cases can be found in Note 3, He, “Miscarriage of Justice,” *supra* note 691 at 88-89. Other studies please refer to Fang, “A Rational Analysis,” *supra* note 735; Jiahong He, *迟到的正义: 影响中国司法的十大冤案* [*Delayed Justice: Ten Wrongful Convictions that Significantly Impacted the Chinese Justice System*] (Beijing, China: Law press, 2014).

⁷⁹⁵ Miao, “Two Years,” *supra* note 267 at 37.

⁷⁹⁶ Miao, “Two Years,” *id* at 32-33.

⁷⁹⁷ Xiong & Miao, “Miscarriages of Justice,” *supra* note 682 at 311.

reformed towards restricting the use of capital punishment in 2007: the number of innocent defendants sentenced to *Sihuan* doubled in 2007-2012.⁷⁹⁸ Although this practice noticeably decreased immediate executions, it connives at judges' failure in exercising their power to curb false convictions and confessions obtained by force.

The passive attitude of courts arises from the tacit obligation of judges to protect social order and to maintain social stability.⁷⁹⁹ Institutional reforms and practices in the Chinese legal system are subordinate to the overarching state policy; the foremost purpose of the Chinese criminal justice policy is to contribute to building up the overall "harmonious society" framework.⁸⁰⁰ When trying cases involving violent incidents, judges are required to take the extent of social harm that the crimes have caused into consideration—harm from crimes should be treated as a main cause of social instability rather than solely to individual victims.⁸⁰¹ The application of *Sihuan* is not immune from the political atmosphere and becomes an instrument of the state policy.⁸⁰²

4.3.3 An Invisible Hand Weighing Leniency and Severity

Commentators criticize that pragmatic calculations play a major role in determining when the suspended death penalty is employed or not in practice.⁸⁰³ When *Sihuan* is deemed insufficient to guard social stability, appellate courts may aggravate the punishment in cases involving factors eligible for leniency just because of the Party's fears of the masses' loathing, as exemplified in the cases below.⁸⁰⁴

⁷⁹⁸ Xiong & Miao, "Miscarriages of Justice," *id* at 297, 307.

⁷⁹⁹ Trevaskes, "Suspending Death," *supra* note 357 at 223.

⁸⁰⁰ Minas, "Kill Fewer," *supra* note 309 at 38.

⁸⁰¹ Trevaskes, "Suspending Death," *supra* note 357 at 223.

⁸⁰² Trevaskes, "Suspending Death," *id* at 233.

⁸⁰³ Trevaskes, "Suspending Death," *ibid*; Miao, "Two Years," *supra* note 267 at 36.

⁸⁰⁴ Trevaskes, "Suspending Death," *ibid*.

The Li Changkui case is a homicide triggered by a neighbourhood dispute, an offense category eligible for leniency according to the SPC's guidelines.⁸⁰⁵ In May 2009, Li Changkui (李昌奎), a migrant labour worker, raped and killed his former girlfriend who lived in the same village in Yunnan province. There were some financial and personal disputes between Li and the girl's families and Li's marriage proposal was rejected. On May 14, Li went to see the girl who was at home looking after her three-year-old brother. When their quarrel escalated into a fight, Li knocked the girl down and raped her. Then he threw her little brother who witnessed the whole process against the wall, killing him. He fled the village, but gave himself up to the police four days later. Li was sentenced to death with immediate execution in the first-instance trial. On appeal, the offense was recognized as violence escalating from a personal dispute. In March 2011, the provincial higher court commuted the original sentence to a *Sihuan* considering that Li had turned himself in and made full confession, and offered to make monetary compensation to the victims' family, which were deemed signs of remorse. The court further announced that this was a landmark case demonstrating their implementation of the policy of restricting the use of the death penalty.

The victims' family was not satisfied with the result; their lawyer posted the details of this case on his blog which had over two million followers and soon captured national attention. Commentary on the Internet was overwhelmingly on the side of the victims' family and the legal bases for the commutation were attacked: his killing of the 19-year-old girl and the little boy was seen as extremely heinous; the financial compensation he offered,

⁸⁰⁵ For more details of this case, please refer to Trevaskes, "Suspending Death," *id* at 234-235; Ira Belkin, "Justice in the PRC: How the Chinese Communist Party Has Struggled with Managing Public Opinion and the Administration of Criminal Justice in the Internet Age" in Flora Sapio et al, eds, *Justice: The China Experience* (Cambridge, UK: Cambridge University Press, 2017) at 215-217.

according to the victims' family, could not even cover the expenses for the victims' funeral. Allegations were spreading online that some judicial corruption might have involved and motivated the judges to spare the life the evil criminal. In response to the soaring public criticism, the provincial higher court held a press conference in July 2011 declaring that no corruptive behaviours were found during the appeal process. They presented details of their reasoning for the sentence, and explained that Li's misbehavior, although violent, was less threatening to community safety than violent crimes committed by career criminals, therefore the collegial panel made their judgement based on their interpretation of the criminal justice policy "appropriately combining leniency with severity".

However, public anger was not mollified. A petition signed by 200 villagers was filed requesting for the re-opening of the case. Following the instructions of the local Political-Legal Committee (PLC, 政法委, a committee within the CCP), the case was retried in August; the decision at the second-instance was withdrawn and a death sentence with immediate execution was issued on August 22, 2011. Under the intense political pressure to appease public indignation, the SPC approved the reinstated death sentence quickly; Li was executed on September 29, 2011.

The Li Changkui case is just one of the capital cases that contained mitigating factors eligible for a comparatively lenient punishment, namely *Sihuan*, but ended up with an immediate execution pushed by hostile public opinion. Three months before Li's execution, the SPC approved the execution of a 21-year-old music academy student because netizens had surged forth calling for the death penalty: Yao Jiabin accidentally hit a woman when he was driving home in an evening. Fearing she might demand huge compensation for her

injuries, Yao stabbed her to death. He fled the crime scene but later turned himself in to the police, and his parents offered a substantial sum of money to compensate the victim's family. Again this is a typical case that normally falls under the guidelines for leniency. But Yao was still sentenced to death as the court acknowledged the decision was influenced by public commentary and online poll result—10,710 out of 11,100 surveyed netizens voted for the death penalty. One commentator compared the netizens' behaviours in this case to violent leftist actions in the Cultural Revolution, since Yao "was shouted to death by the people."⁸⁰⁶

Since the late 1990s, the political leadership in China has focused on combatting social disunity and instability by solidifying relations between of the Party and the masses.⁸⁰⁷ It is believed that the phenomenon of 'trial by public opinion'⁸⁰⁸ in the Chinese criminal justice system can "boost the confidence of the masses in the Party and strengthen their flesh-and-blood connection with the Party."⁸⁰⁹ Former President Hu Jintao instructed in 2008 and 2009 respectively that judges and procurators "should take their lead from the people" and "In their work, [...] shall always regard as supreme the Party's cause, the people's interest, and the constitution and law."⁸¹⁰ The 'three Supremes' doctrine (三个至上) places the roles of the Party and of the people at the same level as, if no higher than, the role of Law among the three supreme concerns of judicial work.⁸¹¹ This leaves the formal judicial decision-making process vulnerable to political interference and public scrutiny at both the

⁸⁰⁶ Belkin, "Justice in the PRC," *id* at 212-215.

⁸⁰⁷ Trevaskes, "Suspending Death," *supra* note 357 at 222.

⁸⁰⁸ Legal scholars have reminded caution be paid to this phenomenon. See Ira Belkin, "Justice in the PRC," *supra* note 805 at 206.

⁸⁰⁹ Speech of former Prime Minister Li Peng published on People's Daily on 24 November, 2001, translated and cited by Miao, "Capital punishment in China," *supra* note 262 at 238.

⁸¹⁰ Speech of former President Hu Jintao during the 2009 National Conference on Political-Legal Work, convened by the Central Political-Legal Committee, translated by Belkin in "Justice in the PRC," *supra* note 805 at 209-210.

⁸¹¹ Belkin, "Justice in the PRC," *id* at 209.

central and provincial levels.

The vacillation of the judicial attitude between pro-leniency and pro-severity is endorsed by the SPC. The president of the SPC stated in 2008 that death penalty decisions should be based on the “feelings of the people” because it is the only way to unite “legal effects” and “social effects.”⁸¹² In its judicial interpretations issued in 2010, the SPC stressed that one of the goals of combining leniency and severity in sentencing capital cases is to maintain social harmony and stability.⁸¹³ In weighing leniency and severity, courts were required to consider “whether the handling of case will win the broad support of the public and maintain social stability,” “whether it will contribute to reducing social protest and enhancing social harmony.”⁸¹⁴

Consequently, the Chinese judicial system was given a license to use the death penalty or *Sihuan* as a political device to cater to the mood of the masses. In response, for example, the president of the Henan provincial higher court proclaimed in a criminal trial work conference in August 2011 that “where nothing but the execution of the offender will assuage the masses’ anger, courts must hand down a sentence of immediate execution. [...] When deciding death penalty cases, lower courts must take into full consideration community attitudes and public opinion.”⁸¹⁵ He also suggested lower courts to take the demand of local community into account when determining whether to be lenient or severe in sentencing.⁸¹⁶

⁸¹² Xinhua News 2008 translated by Belkin in “Justice in the PRC,” *id* at 210.

⁸¹³ “关于贯彻宽严相济刑事政策的若干意见” [Opinions on Implementing the Criminal Policy of Combining Leniency with Severity] (effective 8 February 2010), art 1. (China).

⁸¹⁴ “Opinions on Implementing the Criminal Policy,” *id*, art 5.

⁸¹⁵ Wentan Zhu, “河南高院：不杀不足以平民愤的要坚决判死刑” [Henan Provincial Higher Court: We Must Resolutely Sentence Offenders to Death if Not Killing Will Fail to Pacify the Public’s Anger], *DaHe Daily* (25 August 2011) online: <<https://china.huanqiu.com>>, translated by Trevaskes, “Suspending Death,” *supra* note 354 at 235.

⁸¹⁶ Trevaskes, “Suspending Death,” *id* at 236.

Provisional rules were promulgated accordingly to enable the courts to follow public opinion when possible.⁸¹⁷ As more and more people have access to the Internet in China, their ability to learn about criminal cases and share their individual thoughts with a larger group of audience has increased accordingly. The public proactively present their opinions online as to how justice can be or should be delivered, especially in high profile criminal cases. A consistent phenomenon behind most judicial decisions is that, when the public express sympathy for an offender, some lenient treatment would be available; but if the public feel the opposite, a more severe punishment would eventually be imposed despite the fact that the law does not appear to warrant the severity of the punishment, which, in capital case sentencing, is measured in lives.⁸¹⁸

4.4 Summary

This chapter discusses the factors conducive to the harshness in the death penalty regime in China. An examination of the role and concern of the primary stakeholders in China's psychiatric assessment context reveals that psychiatric evaluation has not effectively exempted capital crime offenders with mental illness from the death penalty.

The codified obligation of offenders to truthfully answer interrogation questions, the presumption of guilt embedded in the legal culture, and the unreasonable expectation that police rapidly solve every case together contribute to the pervasive phenomenon of interrogational torture, which breeds miscarriages of justice. The view shared among the police, the public, and other actors in the criminal justice system that desirable consequences

⁸¹⁷ Belkin, "Justice in the PRC," *supra* note 805 at 207.

⁸¹⁸ Belkin, "Justice in the PRC," *ibid* at 207.

justify the means explains why the statutory prohibition has failed in preventing wrongdoings of law enforcement in China.

Although the original purpose of *Sihuan* was to offer merciful treatment for capital offenders with legally recognized mitigating circumstances, it has become the preferred default setting in practice to accommodate cases where judges hold doubts about the incriminating evidence. The vague language of the statutory provision permits the application of *Sihuan* to defendants who confess guilt under torture. Ostensibly the growing issuance of suspended death sentences has reduced the number of executions: the popularity of *Sihuan*, on some occasions, is the outcome of a compromise courts made to meet political and social needs—ensuring the public that serious crimes threatening social order are to be punished swiftly.⁸¹⁹ Meanwhile, the purpose of pacifying public indignation grants the courts a license to sentence someone to death according to the judgement in the court of public opinion.⁸²⁰

The issues discussed in this chapter will continue to undermine the legislature's incentive to restrain use of the punishment by death as long as China's central leadership emphasizes the primacy of social stability over individual human rights.

⁸¹⁹ Miao, "Two Years," *supra* note 267 at 27.

⁸²⁰ Belkin, "Justice in the PRC," *supra* note 805 at 218.

Chapter 5. Directions for Future Capital Punishment Reforms

Capital punishment is labeled in most Western jurisdictions as “a violation of human rights” that should not be available as a government punishment.⁸²¹ There has been a tendency in international human rights reporting to focus on criticizing the retention of capital punishment in China but pay less attention to examining why the centralized power of the authoritarian government has not contributed to the abolition as it did in Europe. While acknowledging the effort of the international community devoted to promoting reform in China’s death penalty regime, historical interactions between the two parties consist mainly of pressure and shaming from the international community and, on China’s side, resistance to the so-called Western interventionist human rights policy because it regards capital punishment as a criminal justice issue instead of an issue of state power and human rights.⁸²²

This chapter shall firstly address China’s conventional responses to the international abolition campaign and explain why it has been able to resist the overwhelming calls for abolition, and the thinking behind its defensive attitude towards pressures from the West. Given that the legitimacy of capital punishment cannot be challenged in the foreseeable future, I shall then explore what reformatory measures should be considered to overcome the harshness disclosed in Chapter 4 to ensure that the death penalty is fairly imposed and justly administered.

Specifically, a two-pronged approach is recommended to gradually change the police mindset of presumption of guilt, decrease investigators’ addiction to coercive interrogation

⁸²¹ David Garland, *Peculiar Institution: America’s Death Penalty in An Age of Abolition* (Cambridge, MA: Belknap Press of Harvard University Press, 2010) at 114.

⁸²² Yuchao Zhu, “China and International “Human Rights Diplomacy” (2011) 9:2 *China: An International Journal*, 217 at 224-225.

methods, and move police investigation away from confession-oriented interrogation thus protecting detainees/suspects from ill-treatment or torture.

A guideline defining what constitutes “the extremely serious crime” eligible for capital punishment is in dire need so that the “the extremely serious” test does not have to completely rely on the “unbridled judicial discretion”,⁸²³ and the impact of extra-judicial interventions in capital sentencing can be reduced to some extent.

In addition, a judicial procedural flaw with respect to the imposition of *Sihuan* shall be highlighted: while death sentences by immediate execution are entitled to the review and approval of the SPC, provincial courts are the final review and approval authority for cases resulting in suspended death sentences. In other words, all suspended death sentences are to be reviewed by judges in an appellate court which upheld the decisions in appeal. A centralization of the review and approval power at the SPC shall significantly overcome the arbitrary issuance of *Sihuan* at lower courts.

5.1 China’s Response to Western Abolitionist Pressure and Criticism

The Europe-led worldwide movement against capital punishment, together with international organizations, has focused on China since the end of the 1990s, seeking changes for progress towards reduction, and eventual abolition, of the death penalty in China.⁸²⁴ The Council of Europe, the European Union, member states of Europe and European-based NGOs, conducted human rights dialogues, seminars and joint projects aiming to convince China that the death penalty is a fundamental violation of basic human rights; scholars and officials of

⁸²³ Michelle Miao, “Defining Death-Eligible Murder in China” (2019) 67:2 Am J Comp L 327 at 333.

⁸²⁴ Miao, “Examining China’s Responses,” *supra* note 391 at 47.

the political and legal authorities from both sides have actively participated in the process.⁸²⁵

The United Nations, Amnesty International and other human right organizations have watched attentively the evolution of the capital punishment policy and the administration of the death penalty in China. Commentators note that, contrary to the US' indifference to the external criticisms to its retention of capital punishment, China has positively responded to the "mind-changing" approach as demonstrated in the statement of the Chinese delegation in the United Nations in 2007 that "we are seeking to limit the application of the death penalty in China. [...], the application of the death penalty will be further reduced and it will be finally abolished."⁸²⁶ Consequently, a series of reforms were launched along with the transformation of China's death penalty policy from Strike-Hard oriented infliction of the death penalty to "kill fewer, kill carefully" and to the current "appropriately combining leniency with severity".⁸²⁷ The attitudinal change of the Chinese government toward the death penalty and considerable decrease of death sentences and executions in practice have been acknowledged by the international community.⁸²⁸

Despite the domestic consensus on restricting the use of the death penalty, China's insistence on the territorial sovereignty over capital punishment has not changed. In 1994, the head of the Chinese delegation stated before the third Committee of the 49th session of the United Nations General Assembly that "the abolition of capital punishment was an internal matter to be decided by states; it was therefore unrealistic to request all countries to abolish it."⁸²⁹ In 2007, although China expressed its willingness to discuss restricting the use of the

⁸²⁵ Miao, "Examining China's Responses," *id* at 52.

⁸²⁶ Miao, "Examining China's Responses," *id* at 50, 56-57.

⁸²⁷ Miao, "Examining China's Responses," *id* at 47, 56.

⁸²⁸ Miao, "Examining China's Responses," *id* at 50.

⁸²⁹ Miao, "Examining China's Responses," *ibid*.

death penalty via bilateral or multilateral dialogues, it denied—confronting the abolitionists’ pressures—the possibility of abolishing of capital punishment in China in the foreseeable future.⁸³⁰ In 2012, China voted against the United Nations “Moratorium on the use of the death penalty” (A/C.3/67/L.44/Rev.1), which was initiated by the EU together with eight member states, calling for suspension of capital punishment throughout the world.⁸³¹

Insisting on capital punishment as an internal affair of State, China sees all initiatives launched by Western countries promoting abolition of the death penalty in China as political intervention of its sovereignty.⁸³² Despite the acknowledgement that human rights issues factor in the administration of the death penalty, such as execution method and the human dignity of criminals, China criticizes that exerting pressure on a State against its retention of capital punishment is an invasion of the State’s domestic criminal justice system, therefore any attempt “to achieve a universal moratorium on capital punishment” is infeasible.⁸³³

This nationalist argument was validated when China was requested by foreign governments to exclude using the death penalty to some specific capital offenders, as exemplified in the Akmal Shaikh case. Akmal Shaikh was a British citizen who was convicted of smuggling 4.03 kg heroin into China in 2007.⁸³⁴ According to contemporary Chinese criminal law, any smuggling or trafficking of heroin in an amount of more than 50 grams is punishable by death.⁸³⁵ He was sentenced to death in the first-instance trial in 2008. In the meantime, being aware that Shaikh was facing the death penalty, his family claimed

⁸³⁰ Miao, “Examining China’s Responses,” *id* at 50-51.

⁸³¹ Miao, “Examining China’s Responses,” *id* at 51.

⁸³² Miao, “Examining China’s Responses,” *id* at 53.

⁸³³ Miao, “Examining China’s Responses,” *ibid*.

⁸³⁴ Ian Freckelton, “Mental Illness, Sentencing and Execution: The Disturbing Death of an Englishman in China” (2010) 17:3 *Psychiatry, Psychology and Law* 333 at 336.

⁸³⁵ “Criminal Law 1997,” *supra* note 340, art 347.

that he had a bipolar disorder and a delusional personality; British human rights agencies represented by Reprieve, the Foreign and Commonwealth Office (FCO) of the U.K., and some elite British politicians including the then Prime Minister Gordon Brown, urged the Chinese government to conduct a psychiatric assessment for Shaikh.

Reprieve sent a British forensic psychologist to China, who commented that Shaikh might have been manipulated by professional drug smugglers when he was in the condition of delusional psychosis—the psychologist requested to examine Shaikh’s mental state himself.⁸³⁶ The Chinese authorities rejected his request but agreed to let local doctors to do the examination. However, Shaikh refused by claiming that he was mentally well.⁸³⁷ Eventually the appellate court did not order a psychiatric assessment because the evidence submitted by Shaikh’s defense attorney was not deemed sufficient to support the claim that Shaikh was mentally ill when conducting the offense.⁸³⁸ The first-instance decision was upheld by the appellate court and approved by the SPC; Shaikh was executed at the end of 2009.⁸³⁹

The execution of Shaikh sparked a diplomatic crisis between China and the U.K. The U.K. was furious at China’s uncooperative attitude towards its many appeals (27 in total) and request for a psychiatric appraisal by the British psychologist.⁸⁴⁰ China interpreted the British government’s behaviour as an abuse of political power to intervene in the Chinese judiciary system. This specific drug smuggling case was reminiscent, to the Chinese people, of China’s defeat at the hands of the U.K. in the Opium Wars, and the subsequent “century of

⁸³⁶ Freckelton, “Mental Illness,” *supra* note 834 at 337.

⁸³⁷ Freckelton, “Mental Illness,” *ibid.*

⁸³⁸ Miao, “Examining China’s Responses,” *supra* note 391 at 60.

⁸³⁹ Freckelton, “Mental Illness,” *supra* note 834 at 337.

⁸⁴⁰ Miao, “Examining China’s Responses,” *supra* note 391 at 60.

humiliation” during which the political and legal sovereignty of China and the dignity of the Chinese people were seriously violated. Given this retrospective, the Chinese public, feeling offended by that the U.K. had sought superior legal treatment for its citizen, wanted their government to send a message to the world that the days of foreigners telling China what to do were over.

The Chinese government was resolute in its response. The Spokeswoman of the Chinese Foreign Ministry indicated that the British accusations were groundless and stressed that “Nobody has the right to speak ill of China’s judicial sovereignty. [...] It is the common wish of people around the world to strike against the crime of drug trafficking.”⁸⁴¹

The issues brought up in this case were perceived in a substantially different nature by China and the U.K.: the British government wanted to save its citizen’s life in the name of human rights whereas China was defending its sovereignty over the administration of domestic criminal justice.⁸⁴² The British government believed its conception of the right of life was universal therefore should have been applied to this case, yet it did not proceed to any human rights dialogues with China. Instead, it adopted a shame approach to spark a round of critiques in Western media of China’s violation of human rights in its application of the death penalty, and successfully harmed China’s international reputation due to this case.⁸⁴³ What the U.K. had done was taken by China as a challenge of its state sovereignty and dignity. The condemnations in Western media against the execution of Shaikh, as well as China’s retention of capital punishment, were viewed by Chinese people as bias against, and even hatred toward, China. The Chinese government’s firm attitude toward Western

⁸⁴¹ Miao, “Examining China’s Responses,” *ibid.*

⁸⁴² Miao, “Examining China’s Responses,” *ibid.*

⁸⁴³ Miao, “Examining China’s Responses,” *ibid.*

anti-death penalty forces has won praises from Chinese people, which in turn reinforces the political legitimacy of the government.

Some Western commentators are aware that the changes towards greater leniency in the Chinese death penalty policy was initiated significantly by compelling internal forces instead of succumbing to external pressures from foreign abolitionists; criticisms and shame may not result in expected human rights reforms because China would feel “that there are double standards at work”.⁸⁴⁴ The political status of capital punishment and the human rights appeal of the abolition movement were European innovations in the late 20th century.⁸⁴⁵ China, however, is not among the nations which are “under the most substantial European influence” in terms of either geography or economy; hence, it has the strength to refuse to cater to the abolitionist agenda that Europe has been trying to export.⁸⁴⁶

Moreover, the capital punishment regime in China is not as complicated as in other retentionist jurisdictions in that it does not (*prima facie*) involve non-criminal factors related to, e.g., religion, race, or vigilante traditions, which are commonly cited by abolitionists as counter-arguments to retention of the death penalty. The criminal justice policy in China is favorable to people in racial and ethnic minority groups—a tradition that has developed through history.⁸⁴⁷ In Imperial China, leniency usually was given to offenders from minority ethnic backgrounds, because it was believed that these offenders were raised in a completely

⁸⁴⁴ Minas, “Kill Fewer,” *supra* note 309 at 58-59; Randall Peerenboom, “Assessing Human Rights in China: Why the Double Standard?” 38 *Cornell Int’l L.J.* 71 at 73 (2005); Pitman Potter, “China and the International Legal System: Challenges of Participation” (2007)191 *China Q.* 699 at 712-713.

⁸⁴⁵ Johnson & Zimring, “The Next Frontier,” *supra* note 282 at 10-11.

⁸⁴⁶ Johnson & Zimring, “The Next Frontier,” *id* at 7-8.

⁸⁴⁷ Xingdong Hu & Yanhong Zhu, “中国历史上少数民族刑事案件法律适用问题研究” [The Application of Criminal Law to Minority Offenders in Ancient China] (2009) 26:3 *Journal of Yunnan Nationalities University* 53 at 56-58; Huashuang Yang, “从北朝法制建设看中国古代民族间法文化的交流” [Legal Culture Exchange Among Ethnic Groups in Ancient China: the Legal Construction in the Northern Dynasties] (2011) 7 *Journal of Ethnology* 42 at 42-45.

different culture without full access to Confucianism, hence judges tended to give them (as well as their community) a chance to get educated, namely to be Confucianized. Accordingly, unlike in the US, Chinese people do not feel guilty in the face of criticism to the race discrimination issue in the application of the death penalty.

Despite the overwhelming public support of the death penalty, a vigilante tradition has not developed in Chinese society because Chinese people, either in the past or today, collectively entrust the government to exercise its state power to put a convicted offender to death. On the other hand, today's new media environment provides the public opportunities to witness the trial of high-profile cases, and to scrutinize and debate the delivering of justice. The internet offers a platform for netizens to voice their own agendas instead of simply accepting the official version of what happened.⁸⁴⁸ Their opinions are read by the government as an indicator of the public confidence in the efficiency and accountability of the legal system.

Empirical studies conducted by Western scholars have found that most Chinese people see the gap among social classes and the social inequalities in an objective rational manner: the public's anger toward inequality and distributive injustice reached a peak around the early 2000's, but has diminished along with access to internet and technologies; most people believe that China today is fair enough to enable ordinary citizens to get ahead and prosper based on hard work, talent, and training.⁸⁴⁹ In the death penalty context, the public has positively indicate their acceptance for the removal of economic offenses from the list of

⁸⁴⁸ Joshua Rosenzweig, "State, Society and the Justice Debate in Contemporary China" in Flora Sapio et al, eds, *Justice: The China Experience* (Cambridge, UK: Cambridge University Press, 2017) at 35.

⁸⁴⁹ Marten King Whyte, *Myth of the Social Volcano: Perception of Inequality and distributive Injustice in Contemporary China* (Stanford, CA: Stanford University Press, 2010) at 181-182.

capital crimes, as exemplified in the Wuying case discussed above in Chapter 3—if it had taken place ten years ago, Wuying likely would not have escaped the death penalty.

The persistence of capital punishment in China is essentially based on Chinese people's long-standing commitment to the Confucian sense of justice; capital punishment in China is framed as an instrument, along with other forms of penalty, to serve classic criminal justice purposes rather than as an issue of state power or human rights. The Western abolitionist theories have not been able to persuade China that capital punishment has no efficacy as a means serving unified goals of retribution, deterrence, denunciation and moral purgation. Miscarriage of justice in individual cases due to bureaucratic wrongdoing so far has not proven capable of undermining the ideological foundation of China's state-centred capital justice system.⁸⁵⁰

China does not consider the abolition of the death penalty as a legal and political imperative. Despite the noticeable reforms in the context, the Chinese legislature and public still regard capital punishment as an indispensable component of domestic criminal justice.⁸⁵¹ The regular response is that the death penalty is only applied to the most heinous crimes in China which complies with the International Covenant on Civil and Political Rights (ICCPR).⁸⁵² Proponent scholars have cited empirical data arguing that no country with a population of over 100 million (even democratic America and Japan) has abolished the death penalty, which proposes an interesting topic for future research into whether China's unique physical characteristics, namely its dense population and vast territory, result in the continued

⁸⁵⁰ Rosenzweig, "State, Society," *supra* note 848 at 30.

⁸⁵¹ Miao, "Examining China's Responses," *supra* note 391 at 52.

⁸⁵² It is stated in Article 6, paragraph 2 of the ICCPR that "in countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes."

use of the death penalty.⁸⁵³ To date, the Chinese authorities have presented strong resistance to external pressures and attempts at shaming (mainly from Europe), and support for the death penalty among domestic political and legal elites and the populace has remained stable.⁸⁵⁴

As the central leadership of a highly centralized country, the Chinese government has the sovereign power to initiate any top-down reforms of longstanding legal practices because they do not have to face the risk of being tossed out in the next election cycle.⁸⁵⁵ However, public opinion is an integral part of and plays a decisive role in the debate over the death penalty. It is arguable that a radical abolition move would jeopardize the authority of the Chinese government, but its choosing to accommodate the feelings of the masses shall definitely shore up its legitimacy.⁸⁵⁶ Although the reforms in China's context have confirmed that the use of the death penalty shall be continually restrained and reduced, a counter-majoritarian abolition is not near.

I argue that, looking ahead to the next phase of reforms, the debate between China and the international anti-death-penalty community should aim at how to fulfill the gap between the administration of the death penalty and the international human rights standards in an incremental manner. If the latter leaves the final goal of abolition to the distant future, but at present focuses on what safeguards can and should be established or improved to eliminate the harshness in the administration of the death penalty as discussed in Chapter 4,

⁸⁵³ Empirical studies indicate that the average population of the retentionist countries is 170 million. See, Jianjun Bai, "Dialogues between Criminologist Scholars from Mainland and Taiwan" (2015) 24:4 *Journal of Henan Police College* 26 at 31.

⁸⁵⁴ Miao, "Examining China's Responses," *supra* note 391 at 52.

⁸⁵⁵ Lewis, "Leniency and Severity," *supra* note 254 at 321.

⁸⁵⁶ Lewis, "Leniency and Severity," *ibid.*

China's attitude might be more cooperative and bilateral or multilateral human rights dialogues shall gain momentum.

As introduced earlier, the information obtained from police investigations forms the basis for decision making of the prosecutors and judges in China. How the police conduct the pre-trial questioning of suspects can significantly impact on the outcomes of subsequent judicial proceedings, and ultimately, the fairness of the criminal justice system.⁸⁵⁷ Apparently, reforms in combating torture during police custody and pre-trial detention are becoming increasingly imperative in China.

5.2 Measures to Prevent Acts of Torture

I suggest a two-pronged approach to improve the efficiency and reliability of police investigations of criminal cases. As discussed in Chapter 4, the major incentive for Chinese police investigators to use coercion and torture is the objective of eliciting a confession, and the dominant presumption of guilt makes them believe that it is appropriate to do so. Hence, expanding knowledge deriving from research that torture does not work and providing alternative tools for police investigators shall constitute an effective preventative measure against torture.

There are compelling reasons to educate the Chinese police officers that inhumane or degrading treatment is proven to be a counterproductive way of collecting evidence and solving crime. Scientists find that stress and suffering have a profound impact on people's brain and cognitive ability and make them vulnerable to confessing, thus reducing the

⁸⁵⁷ Julia Kozma & Asbjørn Rachlew, "Combating Torture During Police Custody and Pre-Trial Detention", *Council of Europe*, (22-23 March 2018), online: < <https://cas.coe.int>>.

accuracy or credibility of the information they provide.⁸⁵⁸ These findings are attested by robust experiments as well as police investigation practices.⁸⁵⁹ The fact that physical or psychological abuse is likely to yield false confessions, thereby allowing the real perpetrators to escape, violates the police commitment to fighting the impunity of perpetrators still at large and further jeopardizes the fairness of the criminal justice system that they swear to defend. Only when the police investigators have understood that aggression and intimidation do not facilitate the flow of reliable information, will they discard the traditional harsh interrogation techniques and commit themselves to some non-accusatory, information gathering approaches once they find the alternatives applicable and effective.

The international human rights community can also consider reinforcing cooperation with China by introducing other jurisdictions' practices which have proved effective in solving crime, as well as implementing the UN Convention against Torture. As a good example, PEACE (Planning and preparation, Engage and explain, Account, Closure and Evaluation) employed in the police system of England and Wales has shown to be as a prime model of investigative interviewing and been introduced to various jurisdictions of the world.⁸⁶⁰ Investigative interviewing was adopted at the beginning of 1990s. Back then, the British police were requested to change their approach from coercive confession-oriented interrogation to investigative interviewing—"an evidence-based approach, designed to gather and test accurate and reliable information."⁸⁶¹ Theories and techniques for conducting investigative interviewing have been refined and enriched through scientific studies and

⁸⁵⁸ Michael Boyle & Jean-Claude Vullierme, "A Brief Introduction to Investigative Interviewing: A Practitioner's guide", *Council of Europe*, (2015), online: < <https://cas.coe.int>>.

⁸⁵⁹ Boyle & Vullierme, "A brief Introduction," *ibid*.

⁸⁶⁰ Kozma & Rachlew, "Combating Torture," *supra* note 857 at 22-23.

⁸⁶¹ Kozma & Rachlew, "Combating Torture," *ibid*.

practices since then. With the alteration of the major objective of police questioning to obtaining accurate and reliable information, the subsequent judicial proceedings depend heavily on evidence rather than confessions. This practice is widely recognized by global scholars and practitioners as “the safest and most efficient approach to solve crime.”⁸⁶²

The international human rights community can assist China in integrating the most updated investigative expertise and tools into the training programmes designed for the Chinese police to equip them with the underlying theories, modern forensic tools, interpersonal communication strategies and human rights standards. Thinking skills that enable investigators to collect, synthesize and analyze evidence to form reasonable grounds for conclusion and subsequent legitimate actions should be emphatically introduced as well. Evidence-based thinking skills will enhance not only the accuracy and credibility of information collected in the investigative processes but also day-to-day policing work.⁸⁶³

Altering the mindset of presumption of guilt and dismantling the widespread belief in coercive interrogation tactics demands a change of police investigation culture in China.⁸⁶⁴ Besides the above proposed training for current police officers, strict selection criteria should be set up in the recruitment of investigators in order to attract candidates with suitable attitudes, aptitudes and thinking models. Below is a list of personal traits for potential qualified investigators summarized by Canadian experts that can be taken as a reference.

- Being passionate about following the facts to discover the truth,

 - with a goal of contributing to the process of justice

- Being detail-oriented and observant of the facts and the timelines of events

⁸⁶² Kozma & Rachlew, “Combating Torture,” *ibid.*

⁸⁶³ Kozm & Rachlew v, “Combating Torture,” *ibid.*

⁸⁶⁴ Kozma & Rachlew, “Combating Torture,” *ibid.*

- Being a flexible thinker, avoiding tunnel vision, and being capable of concurrently examining alternate theories while objectively using evidence as the measure to confirm or disconfirm validity of theories
- Being patient and capable of maintaining a long-term commitment to reaching a conclusion
- Being tenacious and not allowing setbacks and false leads to deter continued efforts
- Being knowledgeable and skilled at the tasks, process, and procedure while respecting legal authorities and the limitations to take action
- Being self-aware of bias and intuitive responses, and seeking evidence to support gut-feelings
- Being trained in the processes of critical thinking that provide reliable analysis of evidence that can later be described and articulated in reports and court testimony.”⁸⁶⁵

While the change of police culture in China is a long-term goal, the second prong of the approach addressing the reliability of police investigation must aim to adopt preventative measures complying with the international obligations under relevant anti-torture norms and standards – notably treaties to which China is party. Such measures include, but are not limited to: 1. Persons deprived of their liberty by the police should be fully and effectively informed of their fundamental rights; 2. Persons deprived of their liberty by the police should have prompt access to legal counsel; and, 3. An independent investigating agency should be

⁸⁶⁵ Rod Gehl & Darryl Plecas, *Introduction to Criminal Investigation: Processes, Practices, and Thinking* (New Westminster, BC: Justice Institute of British Columbia, 2016) at 7-8.

set up to address complaints of police ill-treatment. Empirical studies find that these safeguards prove to be among the most effective ones in preventing torture.⁸⁶⁶ The international human rights community has the resources and experts to help China introduce these measures based on how they have been effectively implemented in practice in other jurisdictions.

It is noteworthy that the right to a lawyer will serve as a weak preventative tool in practice unless certain criteria are met: lawyers should intervene from an early stage when their clients are in police custody, i.e. lawyers should be given chances to meet and speak with their clients privately before they get questioned; vulnerable populations, such as offenders with mental illness who request for legal aid services, should be assigned lawyers with specialized training and experience; and more importantly lawyers should be allowed to be present during interrogations.⁸⁶⁷ Failure in promoting these criteria would reduce a detainee's chances of even seeking assistance from lawyers when the risk of torture is highest. Unfortunately, reforms in this area have received strong resistance from the police in China. The legal profession, especially criminal defense lawyers, is in a weak position when they are confronting the police and judicial authorities. A lawyer commented on this phenomenon as follows:

“[...] many [lawyers] don't dare to represent clients who file [torture] complaints. Because this can offend the authorities, and if you offend them, and afterwards you need their help in your work, what are you

⁸⁶⁶ Kozma & Rachlew, “Combating Torture,” *supra* note 857 at 22-23.

⁸⁶⁷ Kozma & Rachlew, “Combating Torture,” *ibid.*

going to do? Beggars can't be choosers.”⁸⁶⁸

A more serious issue in the criminal defense context is that defense lawyers challenging the police on torture may be charged with enticing suspects to falsify evidence or changing suspects' testimony contrary to facts,⁸⁶⁹ as exemplified in the widely reported Li Zhuang Case in which Li was imprisoned for lawyer's perjury as he found evidence of torture while he was defending his client and had a clash with the local police.⁸⁷⁰ Moreover, legal aid subsidies for criminal cases are lower than for civil cases in most regions in China although the workload is much heavier.⁸⁷¹ Suspects and offenders depending on legal aid services can hardly find experienced practitioners to take their cases; some defense lawyers carry out defense work in a short, shallow and fast way (短平快) as they intentionally focus their time and resources on preparing for court arguments in order to avoid the potential risks of direct confrontation with the police or judges.⁸⁷² Overcoming the practical obstacles to assure a detainee's early access to legal counsel and improving the working conditions of criminal defense lawyers in China demand urgent attention from the international legal community and can constitute primary topics for human rights and rule-of-law projects.

Explicitly introducing “torture” as a crime in law is another crucial step in strengthening the preventive system. In the current Chinese criminal law, torture is not treated as an independent criminal offense; rather, it belongs to the criminal category of assault when a serious injury or a death has been caused and the perpetrators (i.e. torturers) are to be

⁸⁶⁸ Human Rights Watch, “Tiger Chairs and Cellbosses,” *supra* note 736 at 59-60.

⁸⁶⁹ “Criminal Procedure Law 2018,” *supra* note 699, art 306.

⁸⁷⁰ Human Rights Watch, “Tiger Chairs and Cellbosses,” *supra* note 736 at 60; Liu & Halliday, “Criminal Defense,” *supra* note 286 at 141.

⁸⁷¹ Bibek Bhandari, “China's Legal Community Reflects on 'Lawyers for All' Trial Run”, *Six Tone* (13 Oct 2017) online: <<http://www.sixthtone.com>>.

⁸⁷² Liu & Halliday, “Criminal Defense,” *supra* note 286 at 8.

punished as regular offenders attacking others by the use of violence.⁸⁷³ This may encourage interrogators to apply torture techniques that leave unidentifiable marks of “serious injury” in order to circumvent the law. Neither can victims file complaints nor the authorities investigate the police’s illegitimate use of force with direct reference to the norms and standards of torture in law.⁸⁷⁴ From a torture-prevention perspective, one has to come to the conclusion that Chinese criminal law prohibits intentional injury, but not torture *per se*. Thus, the important role that legally declaring torture as an independent official crime would play in the prevention of police ill-treatment cannot be overstated.

The above proposed measures will be desirable also for other stakeholders in the criminal justice system, in particular prosecutors and judges, since they do not want to be placed in a difficult position when encountering suspects/defendants displaying visible injuries or with confessions that appear to have been extracted under duress.

A reduction of PLC’s control over the policing and sentencing discourse can also contribute to the prevention of police ill-treatment and torture. The overall legal system in China is under the supervision of the central PLC based on the mindset that the party has the supreme authority and control; both the chief justice and the chief prosecutor are required to report to the chair of the central PLC.⁸⁷⁵ The central and local PLCs can significantly impact the outcomes of individual cases within their jurisdiction: stressing the importance of ‘stability maintenance’, the PLC usually steps in when high profile cases occur and tends to resort to some extra-legal solutions to swiftly address social frustration.

⁸⁷³ “Criminal Law 2017,” *supra* note 748, arts 232, 234, 247.

⁸⁷⁴ Valentin Geftter, “‘Torture’ in Criminal Law: Legal Norms and Standards of Judicial Review”, *Legal Dialogue*, (6 November 2017), online: <<https://legal-dialogue.org>>.

⁸⁷⁵ Chang Wang & Nathan H. Madson, *Inside China's Legal System* (Cambridge, UK: Chandos Publishing, 2013) at 71-72.

When necessary, the PLC would call in heads of the Police, the procuratorate and the court to “harmonize” their opinions with respect to cases, namely to determine whether the cases should be handled leniently or severely and make sure the three agencies shall conform with the PLC’s views and desire as to outcomes. The PLC has the power to approve the arrest of suspects, make charging decisions, and instruct the AC of courts to deliver a death sentence in the name of maintaining social stability.⁸⁷⁶

In the Zhao Zuohai case, for example, the local procuratorate returned the case to the police twice for re-investigation because the evidence was insufficient although Zhao had confessed (under torture); however, following the order of the Secretary of the local PLC, the case eventually landed in court and Zhao was convicted and sentenced to death with a two-year reprieve.⁸⁷⁷ After the wrongful conviction of Zhao was disclosed, the Secretary (by then retired) told reporters that he knew very little about law as his background was in Mine Electromechanical Engineering.⁸⁷⁸

The former Chair of the central PLC, Zhou Yongkang, had served five years as the Minister of Public Security (police chief); it is not a secret that the leadership of the police used to dominate the PLCs from national down to county level, which explains why the majority of police mistreatment had been overlooked. Beyond their investigative powers, the influence of the police on (death) sentencing is crucial.⁸⁷⁹

The intervention of the PLC has been criticized as an obstacle to police professionalism

⁸⁷⁶ Wu, “An Analysis of Wrongful Convictions,” *supra* note 771 at 468.

⁸⁷⁷ Wu, “An Analysis of Wrongful Convictions,” *id* at 466.

⁸⁷⁸ “审理“赵作海案”的三个法官被停职” [Three Judges Who Tried Zhao Zuohai Cases Have Been Suspended], *HangZhou Daily*, (15 May 2010), online: <<https://hzdaily.hangzhou.com.cn>>.

⁸⁷⁹ Lewis, “Leniency and Severity,” *supra* note 254 at 322.

and independent trial in China.⁸⁸⁰ The 5th generation leadership, represented by Xi Jinping, acknowledges that the PLC's abuse of state power has aroused a crisis of credibility facing the overall legal enforcement authorities; hence, actions have been taken to restore the accountability of the criminal justice system since the new leadership took the power at the end of 2012.⁸⁸¹ Notably, the central PLC issued its very first Guidelines on Miscarriages of Justice in August 2013, stressing that the police and the judicial authorities should not let 'public opinion hype', 'case-solving deadlines' or (local) 'stability preservation' influence their decisions in criminal cases.⁸⁸²

In addition to the issuance of the new Guidelines, a series of sweeping anti-corruption campaigns have been launched within the party and military bureaucracies. Zhong Yongkang and quite a few high-ranking or local PLC heads were taken down on charges of corruption, taking massive bribes, or offering "power and money" in exchange for sexual favours. Subsequent to the penalization of these PLC officials was the reopening of some questionable capital cases in which they had been involved, which resulted in the disclosure of police torture and wrongful conviction/execution of innocent people, as exemplified in the notorious Nie Shubin case in Hubei province.

Nie was executed in 1995 at the age of 20 for a rape and murder he did not commit. The actual perpetrator was caught and confessed in 2005; however, the head of the Hubei provincial PLC at the time, Zhang Yue, who was called "King of Hubei PLC" and former head of Hubei

⁸⁸⁰ Shumei Hou & Ronald Keith, "China's Supreme People's Court within the 'Political-Legal System'" in Björn Dressel, ed, *The Judicialization of Politics in Asia* (London: Routledge, 2012) at 164.

⁸⁸¹ Rosenzweig, "State, Society," *supra* note 848 at 26.

⁸⁸² Fei Chen & Jing Wu, "中央政法委出台首个防冤假错案指导意见" [The Central Political-Legal Committee Issued Guidelines on Miscarriages of Justice], *China People's Court*, (14 August 2013), <online: <http://rmfyb.chinacourt.org>>; Rosenzweig, "State, Society," *id* at 51.

provincial police, insisted that the Nie Shubin case was iron-clad and refused to overturn the conviction. The PLC suggested to the perpetrator not to mention Nie's case; when he refused, he was tortured to revise his confession. The whole scene became even more ridiculous when the perpetrator shouted in the court "I killed one more" while the prosecutor asserted his innocence. Zhang Yue even instructed the court to sentence the perpetrator to death because he was the strongest witness in the Nie Shubin case. Nie Shubin was finally declared innocent in December 2016 after Zhang Yue was arrested for taking bribes of \$22.4 million USD in April 2016.⁸⁸³

The current central leadership has recognized the close ties between the legitimacy of the party and overcoming the public's dissatisfaction with the heavy politicization in the criminal justice system. PLCs at all levels are under scrutiny in the ongoing anti-corruption movement which is aimed at bringing more "flies and tigers" to justice. In addition, according to the authorities, the PLC is suggested not to intervene in any individual cases excepted when foreign or national security affairs are involved.⁸⁸⁴ This demonstrates the central leadership's determination and efforts to remove the primary political obstacle to judicial independence in the delivery of justice.⁸⁸⁵ Meanwhile, more legal safeguards can be put in place to increase the accountability and transparency of the decision-making processes for capital cases in China.

⁸⁸³ Han Qin, "幕后黑手:“河北王”张越与聂树斌冤案” [The Mastermind: The "King of Hebei" Zhang Yue and Wrongful Conviction of Nie Shubin], *DuoWei News*, (2 December 2016), online: <www.dwnews.com> ; Mengyao Wang, "被控受贿 1.57 亿 涉聂树斌案的“河北政法王”张越受审” [Zhang Yue, the "King of Hubei PLC", Who Was Involved in Nie Shubin Case Was Convicted of Taking Bribes of 157 Million RMB], *Beijing News*, (20 April 2017), online: <<http://www.bjnews.com.cn>>.

⁸⁸⁴ "除涉外等领域外政法委不再介入个案” [The Political-Legal Committee No Longer Intervenes in Individual Cases Except in Foreign-related Matters etc.], *Sina*, (23 November 2013), online: <<http://news.sina.com.cn/>>.

⁸⁸⁵ Rosenzweig, "State, Society," *supra* note 848, at 48-49.

5.3. Statutory Guideline for Capital Sentencing

The judicial application of the death penalty in China depends heavily on the criminal justice policy, however, the open-textured policy is not instructive enough as to how to appropriately mete out criminal justice in the handling of capital cases.⁸⁸⁶ The broad and vague language of the criminal policy leaves room for the legislature and judicial system to redefine the life-death boundary in capital cases to accommodate the evolving societal standards and community consensus; but on the other hand, the linguistic flexibility allows stakeholders involved at various stages of capital cases to determine when to be lenient and when to be severe based on their interpretation of the policy.⁸⁸⁷

As a behind-the-scene actor, the ACs within Chinese courts play a pivot role in supervising proceedings and making the final decision in capital cases. The present sentencing scheme grants the ACs adjudication power over the sentencing opinions of collegiate panels; the trials, appeals, and reviews of capital cases are determined collectively by the AC members instead of individual judges.⁸⁸⁸ The AC's decision-making process generally consists of four steps: (1) the collegiate panel submits to the committee a written report including their findings of the case and suggestions for sentencing dispositions; (2) the presiding judge of the collegiate panel presents the panel's judgement orally in front of the committee members; (3) the committee members discuss the case and make a collective decision drawing the line between life and death; (4) the collegiate panel announces the (AC's) sentencing decision in court or in writing.⁸⁸⁹ As such, when an AC has ruled on a case,

⁸⁸⁶ Liang, "The Fate," *supra* note 270 at 260-261.

⁸⁸⁷ Lewis, "Leniency and Severity," *supra* note 254 at 319; Miao, "Defining Death-Eligible Murder," *supra* note 823 at 332.

⁸⁸⁸ Miao, "Defining Death-Eligible Murder," *id* at 336.

⁸⁸⁹ Miao, "Defining Death-Eligible Murder," *ibid*.

the court must follow that decision; the AC has the conclusive authority in determining whether the death penalty is appropriate in a particular capital case.⁸⁹⁰

Commentators have questioned the democratization and transparency of the above decision-making mechanism in that the opinions of AC members with higher bureaucratic rank carry more weight than that of junior members as the latter are reluctant to challenge their leaders.⁸⁹¹ Some judges disclosed that AC members' decisions could be affected by their age, gender, ideology, or personal bias.⁸⁹² In a murder case, for instance, the only female member in the AC insisted that a death sentence with immediate execution should be imposed because the offender had raped the victim before he killed her whereas the remaining male members disagreed on that rape being an aggravating factor to trigger a death sentencing.⁸⁹³ In another murder case in which the offender was a migrant worker, one AC member successfully persuaded the committee to agree to an immediate execution because of his own disdain for migrant workers.⁸⁹⁴

In fact, significant sentencing disparities in similar capital cases have been observed among courts in different regions as well as among decisions made by the same court because, as a judge from a provincial higher court pointed out, the current law and policies with respect to capital sentencing have failed to "sufficiently instruct us on whom the death sentence with immediate execution should be imposed."⁸⁹⁵

In December 2008, the SPC announced its plan to create a sentencing guideline, as a

⁸⁹⁰ Miao, "Defining Death-Eligible Murder," *ibid.*; Wang & Madson, "Inside China's," *supra* note 875 at 75.

⁸⁹¹ Miao, "Defining Death-Eligible Murder," *id.* at 337.

⁸⁹² Miao, "Defining Death-Eligible Murder," *id.* at 338.

⁸⁹³ Miao, "Defining Death-Eligible Murder," *ibid.*

⁸⁹⁴ Miao, "Defining Death-Eligible Murder," *ibid.*

⁸⁹⁵ Miao, "Defining Death-Eligible Murder," *Id.* at 338, 343.

component of the Chinese legalization framework, to unify the standards for capital sentencing across the county.⁸⁹⁶ However, except for its Guiding Opinions enforced in 2012 on sentencing regular criminal cases and scattered guiding cases, the SPC has not come up with a guideline which specifically articulates what mitigating and aggravating factors should be considered and how they should be interpreted and weighed in determining whether a death sentence with immediate execution is justified. In 2013, the SPC pledged its determination to prevent egregious miscarriages of justice,⁸⁹⁷ which requires taking steps to make legal institutions less prone to excesses of severity in sentencing due to unfettered discretion.

It is impossible to convert the criminal justice policy into a precise mathematical formula of mitigating or aggravating factors. However, a guideline refining criteria for what constitutes an extremely serious crime that is punishable by death shall ensure prosecutors to know when to propose a lenient sentence or even completely remove the death sentence as an option in particular cases; enable judges to identify under what circumstances that they should emphasize lenient or severe aspects in sentencing, and uphold their independent decisions in the face of external political pressures; equip defense lawyers to be more proactive in the capital sentencing process by focusing on their resources on collecting evidence of mitigating circumstances and advocate for leniency for their clients; and strengthen public confidence in court judgement that leniency or severity will be applied equally despite the socioeconomic, financial or social status of offenders.

⁸⁹⁶ Minas, "Kill Fewer," *supra* note 309 at 60-61.

⁸⁹⁷ "关于建立健全防范刑事冤假错案工作机制的意见" [Opinions on Establishing and Improving the Working Mechanisms for the Prevention of Miscarriages of Justice in Criminal Cases] (effected 9 October 2013). (China).

In the present capital practice in China, the accused is very likely to be convicted and sentenced to death with a reprieve when there is doubt in the minds of judges about the validity of his confession and reliability of the evidence. The fact that the courts put a premium on suspended death sentences as the safest and smartest way to expand leniency has neglected and even encouraged police torture and ultimately led to wrongful convictions.

5.4 Elevating the Judicial Review of *Sihuan*

Empirical research indicates that most judges admitted that the criteria for issuing a suspended death sentence are not clearly defined therefore their decision making depends chiefly on “the needs of the parties and the social circumstances”.⁸⁹⁸ The SPC, through judicial opinions and circulars, suggests lower courts to consider *Sihuan* in the majority of capital cases originating from domestic or neighbourhood disputes; however, this sentencing principle has been extensively used by lower courts to controversial capital cases somewhat linking to the political context of maintaining social stability. Similar scenarios occur in practice as was previously the case with death penalty review—the provincial courts carry both appellate and review roles and scrutinize their own decisions; the empowerment of provincial higher courts for *Sihuan*’s final review correlated with the spread of wrongful convictions.⁸⁹⁹ The rubber-stamping attitude and dismissive review process adopted by provincial higher courts⁹⁰⁰ make the present-day supervision of capital sentencing even more cursory than that in imperial China where all death sentences (immediately executable or not) handed out by local magistrates and reviewed by the provincial judiciary were to be on hold

⁸⁹⁸ Miao, “Defining Death-Eligible Murder,” *supra* note 823 at 343.

⁸⁹⁹ Xiong & Miao, “Miscarriages of Justice,” *supra* note 682 at 323.

⁹⁰⁰ Sunderland, “Criminal Law Reform,” *supra* note 261 at 24-25.

for a central collective review at the annual Autumn Assizes;⁹⁰¹ the ‘stay of execution’ (缓决) directly issued by the provincial Judicial Commissioner was also subject to the review and approval of the highest judicial authorities.⁹⁰²

Commentators point out that the suspended death sentence is a form of capital punishment in essence rather than an independent sentencing option.⁹⁰³ The provisions with respect to the definition, eligible offender scope and administration of *Sihuan* are classified under the heading “Capital Punishment” in the Chinese criminal law:⁹⁰⁴ it is applied to offenders who commit the most serious crimes punishable by death but whose execution is suspended for a fixed term; whether the execution is to eventually be implemented is determined by the offenders’ behaviours during the reprieve period. The distinction between the death penalty and suspended death sentence only exists in the technical details of how the punishments are administrated.⁹⁰⁵ If the death penalty is the dark stain on the penal spectrum, *Sihuan* is a part of that stain but in a lighter shade.

As such, the legitimate ground for provincial higher courts having the final authority for approving *Sihuan* is implausible. Theoretically, because suspended death sentence is a form of capital punishment, offenders sentenced with *Sihuan* should be entitled to the final SPC check. Excluding this population from this layer of legal protection makes them vulnerable to political intervention due to concern for social stability and local protectionism.⁹⁰⁶ No matter how low the chances are that an inmate’s suspended death

⁹⁰¹ Kim & LeBlang, “The Death Penalty,” *supra* note 41 at 98.

⁹⁰² Meijer, “The Autumn Assizes,” *supra* note 127 at 11.

⁹⁰³ Miao, “Two Years,” *supra* note 267 at 30.

⁹⁰⁴ “Criminal Law 2017,” *supra* note 748, arts 49-51.

⁹⁰⁵ Miao, “Two Years,” *supra* note 267 at 30.

⁹⁰⁶ Miao, “Two Years,” *id* at 33.

sentence will ultimately be carried out at the end of the reprieve, that inmate has a right to the scrutiny by a judicial body with the highest authority within the jurisdiction.⁹⁰⁷ The relaxation in the judicial review procedure in capital cases has contributed to the surge in arbitrary sentencing of suspended death penalties, which in practice tips the balance between leniency and severity towards harshness.

It is an imperative task for the Chinese legislature to overcome the procedure weakness leading to the abuse of this institution so that an innocent person will no longer be at a high risk of being wrongly convicted. Placing the power for the final verification and approval of suspended death sentences with the SPC should be put on the agenda for the next phase of capital punishment reforms in China. In this sense, the unfettered use of *Sihuan* at lower courts can be curbed, and the centralization of the review power of *Sihuan* shall function as a lynchpin in the move to reduce harshness in China's capital punishment context.

5.5 Summary

It is noteworthy that, as pointed out by some observers, human rights dialogues should aim at “changing minds with logic” instead of involving processes of “shaming and denunciations”;⁹⁰⁸ the “diplomacy of shame” strategy used mainly by the West in the human rights area since the 1990s has been argued to be counterproductive in enhancing human rights in China.⁹⁰⁹ While seeking effective techniques for human rights dialogues, the international community should deepen its understanding, in a culturally-sensitive manner, of

⁹⁰⁷ Miao, “Two Years,” *ibid*.

⁹⁰⁸ Thomas Risse & Kathryn Sikkink, “The Socialization of International Human Rights Norms into Domestic Practices: Introduction” in Thomas Risse, Stephen C. Ropp & Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge, UK: Cambridge University Press, 1999) at 14.

⁹⁰⁹ Alan M. Wachman, “Does the Diplomacy of Shame Promote Human Rights in China?” (2001) 22: 2 *The Third World Quarterly* 257 at 259, 265, 268

the rationale justifying the retention and application of the death penalty in China and China's domestic political and legal landscape, and identify the barriers to progress insofar as China may be more open to international death penalty norms.

As Garland points out, "like Tolstoy's families, abolitionist nations all seem alike, but every death penalty nation is retentionist in its own way".⁹¹⁰ Abolitionists are confronting a key challenge to convince China to transform the issue of capital punishment from a question of criminal justice policy into an issue of human rights: the death penalty is perceived and employed in China as a sanction for crime in the form of execution; if everyone must be treated equally under the law regardless of race, gender, religion, national origin, or other characteristics, then an offender's status as a human being cannot constitute the basis for exemption of execution, which is considered a part of criminal justice (i.e. a leniency justified by the distinctions and inequality which the human rights approach appears to be against). Engaging on this will require a deeper analysis and treatment of problematical concepts with broader implications.

While condemnation of capital punishment is mainstream and overwhelming in the international arena, death sentences have been steadily and markedly increasing worldwide since 2013.⁹¹¹ Meanwhile, capital punishment reintroduction campaigns have surged in major abolitionist regions (e.g. Turkey and the Philippines). In fact, even in European countries where the death penalty had been abandoned for years, the breadth of public support is still pronounced.⁹¹² The impact of this phenomenon remains to be seen, although it

⁹¹⁰ Garland, "Peculiar Institution," *supra* note 821 at 22.

⁹¹¹ "The Death penalty in 2016: Facts and figures", *Amnesty International*, (11 April, 2017), online: <<https://www.amnesty.org>>.

⁹¹² Zimring, "The Contradictions of," *supra* note 26 at 127.

does remind us that the death penalty's tenacity has not been adequately examined in the conventional discourse.⁹¹³

China has made noticeable progress in restricting the death penalty with caution and prudence.⁹¹⁴ In the absence of controversy about religion, race discrimination and vigilante culture, the retention of capital punishment in China may be more impervious to abolitionists' claims than that in other jurisdictions. With that being said, in order to become a responsible member of, and construct a positive image within, the international community, China should endeavor to promote institutional and procedural changes in line with international norms and standards, in particular those protecting the rights of offenders facing capital punishment, consider transforming its previous passive position ("target") into that of an autonomous agent, and engage in the international death penalty debate, including possible contributions to the evolution of the international death penalty norms.

⁹¹³ Banes, "The Heart," *supra* note 1 at 22.

⁹¹⁴ Su, "The Present and Future," *supra* note 326 at 439.

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