Reforms on the Death Penalty in China

*1 Jiang Na, 2 Han Rong

*1 Professor of law, Beijing Normal University, China
2 L.L.M Candidate, Law School of Beijing Normal University, China

Abstract
This paper examines the package of legislative and judicial reforms in China that followed the discovery of high-profile wrongful convictions in capital cases since 2005. The goal of death penalty reforms was to protect human rights of the accused. This paper will show that, if the reforms are considered in this light, it is clear that their intent has been frustrated by legal loopholes in the death penalty system. The legal loopholes allow death sentences for non-violent crimes. Although the 2011 Amendment to Criminal Law of the PRC greatly reduces the number of crimes publishable by death in law, further reforms will be suggested.

Keywords
China’s Reforms; The Death Penalty; Wrongful Convictions; Symbolic Reform; Substantive Progress

Wrongful convictions in death penalty cases are one of the greatest problems facing China’s criminal justice system. Since 2005, there have been two major waves of death penalty reforms, each of which was instigated by a high profile wrongful conviction involving the death penalty. The first wave was mainly motivated by discovering the wrongful conviction of SHE Xianglin and the second primarily by identifying the wrongful conviction of Zhao Zuohai. As China’s response to such notorious wrongful convictions in capital cases, both consecutive waves of death penalty reforms start first from the SPC’s resumption of its power to review death sentences in 2006, followed with Amendment VIII in 2011 with a shrinking scope of the death penalty. Based on lessons from wrongful convictions in capital cases, this paper will explain why the death penalty reforms are more symbolic than substantive, and then suggest further reforms and creative ways to ensure that these reforms will actually be implemented.

The highest court in China is called the Supreme People’s Court. After the discovery and correction of SHE Xianglin’s wrongful conviction, the SPC established its own tribunals to review all sentences of death with immediate execution. The SPC also required appeal courts to ensure that all capital trials are open to the public, so as to increase transparency, enhance accountability and make it easier to avoid wrongful convictions. These two reforms on the SPC’s review power were delineated by the Standing Committee of the National People’s Congress’s modification of the Organic Law of the People’s Court in 2006.

1.1 Case Study
SHE Xianglin was convicted in 1994 of the murder of his wife, Zhang Zaiyu, in Hubei Province of...
Central China. The 28 year old security guard SHE was arrested by local police because of identifying a female body with the dead body of Mr. SHE’s wife who disappeared, and investigators badgered SHE in 10 days’ interrogation until he eventually confessed to the crime of murdering his wife. During investigation, the female body was identified as his wife in a medical expert evaluation report mainly based on the probable similarities of both height and coincident time between death and disappearance rather than DNA testing. Then, SHE attempted to recant false confession at trial, but was not allowed to ask for disclosure of evidence, to counsel before a case was submitted to the court for trial or to cross-examination with the prosecution, as he would be pursuant to the 1996 CPL or current CPL.

The wrongful conviction of SHE Xianglin called for the SPC to cautiously unify the power to review death sentences handed down to diverse provincial courts for immediate execution, which was subsequently implemented with the adoption of the Outline of the People’s Court on the Second Five-Year Reform [1]. Both the presumption of innocence and the right to silence were also recommended, but neither of which has not yet been implemented. SHE’s case also marked an important turning point for a new penal policy of Combining Punishment with Leniency, which will decrease the number of death sentences and wrongful executions. However, the SPC’s review process is rudimentary and inadequate. Some reviews take place in privacy, without enough input from defense council. To prevent more wrongful convictions, the reviews should be conducted in public, should involve more participation by the defense and should be expanded to cover all serious sentences, not just death with immediate execution.

1.2 Significant Shortcomings in Practice

Although ‘the authorities in multiple agencies have issued a flurry of complementary regulations and notices’ to ameliorate the effect of misjudged cases, nearly all of them tend to generate ‘new conflicts and ambiguities for defense lawyers’ [2]. Without attention on the scope of State secrets, for instance, the relevant restrictive provisions are often abused to influence lawyers’ meetings in criminal cases so that they would not efficiently practice law to safeguard the legitimate rights of criminal suspects, particularly those facing the death penalty. The worst is the criminal risks that practicing lawyers may take in defense work. Since 1997 CL Article 306 specifies the crime of defender and agent ad litem’s destroying evidence, falsifying evidence, or interfering with witnesses, those intending ‘to contravene facts, change their testimony or make false testimony’ in criminal procedure will be sentenced to fixed term imprisonment or criminal detention. This appears to lead to more hazards for defense lawyers in the criminal process and even become an expedient for other parties’ use to retaliate upon the accused party at a disadvantage.

2. Amendment VIII to Criminal Law in 2011

After revelation of many wrongful convictions in death penalty cases, particularly the wrongful conviction of Zhao Zuohai, more reform proposals focus on limiting the use of capital punishment from various aspects. There is a need to examine the misjudged case of Zhao so as to evaluate the importance of seriously limiting and reducing the scope of the death penalty.

2.1 Case Study

A farmer Zhao Zuohai was convicted of murder in 1999 for killing a fellow villager [3]. His unqualified lawyer attempted to question the prosecutor about ‘unclear facts and insufficient evidence’ and defend for his innocence against being prejudiced from the allegations of intentional killing in court [4]. But the trial judge ignored them and affirmative defense concluding with his murder conviction and death sentence [5]. The main evidence against Mr. Zhao came from his oral confessions of murder during interrogation [6], which was denied by the less educated defense for confessions were caused by police torture for over one month during his arrest [7]. The fact is that Zhao was confessed to murder nine times due to 33 days’ torture by police, with his hands cuffed, stick beaten, food and sleep denied [8] except for chili water and having firecrackers set off over his head during interrogation before confession [9], as well as detaining and beating his wife for witness testimony on his killing scene [10], by which means they were ‘trying to identify the headless body’ with the supposed ‘victim’ as the key to their ‘investigation’ [11].

Local policemen’s work in this was subsequently found to be seriously flawed [12], following the revelations and inquiries into the wrong Case Zhao. Mr. Zhao was finally proved to be factually innocent and judicially exonerated by the Henan HPC at retrial [13]. It shows several significant errors in all evidence of his murder that has been illegally obtained by police and randomly used by judges without a qualified lawyer’s legal aid, under the instruction of ‘fast trial and judgment’ from the local
Political Legal Committee [14]. The miscarriage of justice was inquired by a disciplinary investigation team and supervision office of the HPC that suspended a chief judge responsible for the review of Zhao’s death sentence from his duty [15], apart from three other judges involved [16]. The innocent Zhao later received RMB 650,000 (US$ 96,000) in compensation [17], including RMB 120,000 (US$17,572) extra ‘for his mental distress’ [18].

2.2. The Applicable Scope of the Death Penalty

Amendment VIII eliminates the use of capital punishment for 13 non-violent offences that are less or hardly practiced. More precisely, 55 crimes subject to the death penalty remain with a drop of 19.1 percent in Chinese legislation. It also allows for leniency to offenders above 75 years old, by stating that the death penalty is generally not applicable to those reaching the age of 75, albeit with an exception [19]. Similar to cutting back the number of capital crimes, such exclusion also benefits less death sentences or executions to promote human rights protection and better prevent wrongful convictions in capital cases.

Positively, the latest developments on death penalty reform will be a new step and major move by China closer to abolition of the death penalty, after the SPC took back the review and approval of all death sentences. This partly results from largely reducing the number of capital crimes in the draft revision to the 1997CL, first proposed in recent 30 years and without substantive changes of the total before that. Negatively, the latest developments tend not to be a landmark on China’s death penalty reform as expected. China still has a long way to go in its strict limit on use of capital punishment as required by the ICCPR, not to mention towards eventual abolition of the death penalty. China has not yet become a party to the ICCPR [20], but is still exploring what effect of its reform on the death penalty between its legislation and ICCPR provisions. This could be demonstrated from several primary aspects.

Both the broad applicable scope of the death penalty in principle and non-violent crimes subject to the death penalty, still exist as major obstacles to reform progress. This relates to misunderstanding or abuse of ‘the most serious crimes’, as stipulated in ICCPR Article 6(2). Since the definitions on serious crimes vary from one country to another, the vague formulation has been adopted with varying interpretations. This seems to lead to the conclusion that ‘States are completely free to qualify a crime’ as ‘serious’ or ‘most serious’[21], but it has been universally accepted to exclude petty offences from the scope of its use. Without an explicit definition in any international instruments, there are various explanations on this concept in the UN practice. Nonetheless, the Human Rights Committee expressed the reading of the ‘most serious crimes’ so restrictively as to consider the death penalty as ‘a quite exceptional measure’ [22]. The Economic and Social Council confirmed that the scope of this term ‘should not go beyond intentional crimes, with lethal or other extremely grave consequences’ in the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty [23]. Any intentional crimes which infringe life appear to be ‘most serious crimes’ and apply the death penalty [24]. The ‘other extremely grave consequences’ appear to indicate that other circumstances, e.g., circulation of ‘secret information to an enemy in wartime’, may lead to large-scale loss of life [25]. Moreover, the Special Reporter on Extrajudicial, Summary or Arbitrary Executions considers that ‘the death penalty should be eliminated for crimes such as economic crimes and drug-related offences’ [26], apart from ‘other so-called victimless offences, or activities of a religious or political nature’, or ‘actions primarily related to prevailing moral values’ [27].

Additionally, one of the legislative patterns is the ‘absolute punishment of the death penalty’ [28] for certain crimes [29]. This takes the death penalty as the sole and mandatory punishment, regardless of any circumstances. Other lighter penalties would not be applied to replace with capital punishment at the discretion of judges. This leaves no possibility of limiting and reducing the imposition of capital punishment for these crimes. Even if they could be explained as ‘the most serious crimes’ punishable by death, the legislative pattern appears not to justify this case ‘as a quite exceptional measure’ [30]. Obviously, China fails to essentially adopt strict limits on its use given ‘a huge gap between policy and practice’ [31], though the present death penalty policy is ‘to kill less’ and cautiously [32], ‘those who do not have to be killed should not be sentenced to death’ [33] as the guideline for the application of the death penalty [34].

3. Future Reforms on the Death Penalty

As those facing the death penalty proceed through criminal justice system in China, their progress is marked by the random use of the death penalty with a suspension of execution or other forms of rights violations detrimental to a designed balance of the accused, procuratorates and
courts in a triangular structure. To mend these flaws, all executions should be suspended and ‘China’s judicial system urgently needs to be reformed’ [35], in order to remedy potential errors in death sentences and executions, apart from ‘the comprehensive implementation of the rule of law’ to meet the ‘increasing demands of the public for justice’ [36].

Increased transparency is also necessary to prevent the wrongful conviction of the innocent. Transparency also allows for the effective and broad supervision of the justice system so as to prevent abuses of power. As the case studies demonstrate, the biggest implementation flaws remain in recording interrogations and in the review process for death sentences. Actual practices in these areas do not meet the standards laid down by the government and the SPC. To mend these flaws, the role of the defense counsel should be expanded so that defense counsel could appear and make submissions to the SPC’s final review of death penalty cases. Also, the use of state secrets as evidence against the accused should be curtailed. To ensure proper implementation, the inclusion of diverse actors’ effective participation in the final review process would help rectify injustices.

More importantly, China should abolish the death penalty as soon as possible. Even if the other reforms I suggest are implemented, it will still be difficult to avoid in wrongful convictions in practice. Once an innocent person has been wrongfully convicted and executed, that innocent person’s life cannot be returned. The first step in China’s gradual abolition of the death penalty should be to urgently abolish the death penalty with immediate execution. The second step should be to largely reduce the number of capital crimes by legislative reforms. The third step should be to stop the application of the death penalty in practice, turning death sentences into a form of life imprisonment. The fourth is to finally abolish the death penalty with suspended execution. Among all possible reforms, an immediate moratorium on executions would be most helpful in reducing the catastrophic miscarriages of justice.

4. Conclusion

China’s response to such notorious wrongful convictions in capital cases is inadequate, albeit with two consecutive waves of death penalty reforms from 2006 till now. Given a lack of definition on the scope of State secrets and other significant shortcomings in practice, current reforms have been more symbolic than substantive so that they cannot mend major flaws as lessons from wrongful convictions in capital cases. Further reforms on the death penalty are needed in creative ways in order to better fill in the loopholes in legislation and ensure the actual implementation of these reforms. Apart from the abolition of the death penalty used for non-violent crimes and defense lawyers’ professional risks in legislation, both increased transparency in each stage of the criminal process and an immediate moratorium on executions in capital cases would also help reduce wrongful convictions or executions in China.

References

3. Misjudged case of Zhao Zuohai Being Solved, the HPC Setting up 9 May as ‘A Warning Day’, Henan Daily, Dahe Net.
12. Niu Yahao (2010) 6 Policemen have been prosecuted over the Case of Zhao Zuohai extorted confession by torture.
13. Misjudged case of Zhao Zuhai Being Solved, the HPC Setting up 9 May as A Warning Day, Henan Daily, Dahe Net.


20. UN Doc. A/RES/2200A (XXI), 999/UNTS/171.


27. Ibid 39: 63.


33. Ibid 40.


36. Id.