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Review Procedure for Death Penalty in China: 'Last Straw' or a Formality to the Defendant?

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ABSTRACT

Every human being has the inherent right to life. However, the death penalty is the severest penalty and deprives the convicted person of his life. Against the background of more and more countries abolishing the death penalty, it is necessary for China, the nation with the highest number of executions as reported by International Amnesty, to examine its policy on the death penalty. This article consists of four parts. Part One introduces the court system and the trial process in China, with a view to help understand the current practice of handling criminal cases. Part Two reviews the historical development of the review procedure for the death penalty in the People's Republic of China since its foundation. Part Three examines the problems with the review procedure in practice. Part Four contains recommendations for the improvement of the review procedure. It is submitted that the power of reviewing death penalty cases (especially cases involving immediate execution) should be subject to ultimate decision by the Supreme People's Court. On the basis that China is not yet ready to abolish the death penalty, it is argued that it should restrict the availability and review procedure of the death penalty, insist on fewer and more considered executions, prevent wrongful executions and thus better protect the human rights of defendants. Without these additional protections, the procedure can only be a formality in practice rather than the 'last straw' envisaged by law.

ABSTRAK

Setiap manusia mempunyai hak untuk hidup. Walau bagaimanapun, hukuman mati merupakan hukuman yang paling berat dan ini menafikan hak orang yang bersalah untuk terus hidup. Berdasarkan sejarah latar belakang, semakin banyak negara yang menghapuskan hukuman mati, adalah perlu bagi China sebagai negara yang paling banyak melaksanakan hukuman mati menurut Laporan International Amnesty, untuk melihat kembali polisi hukuman mati yang dilaksanakan. Oleh itu, rencana ini mempunyai empat bahagian. Bahagian pertama memperkenalkan sistem mahkamah dan proses perbicaraan di China bertujuan memberi pemahaman mengenai amalan semasa mengenai pengendalian kes jenayah. Bahagian kedua membincangkan perkembangan sejarah tentang semakan prosedur hukuman mati di Republik Rakyat China semenjak penubuhannya. Bahagian ketiga pula menganalisis masalah berhubung dengan prosedur semakan dari segi amalannya. Sementara itu, bahagian keempat mengandungi saranan bagi memperbaiki prosedur semakan. Adalah dihujahkan bahawa kuasa untuk menyemak kes-kes yang membawa hukuman mati (terutamanya kes-kes yang melibatkan pelaksanaan hukuman segera) hendaklah tertakluk kepada keputusan muktamad Mahkamah Rakyat Agung. Berdasarkan kenyataan bahawa Negara China belum

bersedia untuk menghapuskan hukuman mati, dihujahkan bahawa hukuman mati hendaklah diperketatkan pemakaian dan prosedur semakannya dengan harapan pelaksanaan hukuman mati semakin berkurangan dan lebih bertimbang rasa, menghalang pelaksanaan hukuman yang salah dan lebih melindungi hak kemanusiaan defendan. Tanpa perlindungan tambahan ini, prosedur hukuman mati hanya menjadi satu formaliti dan bukannya ' last straw' yang digambarkan oleh undang-undang.

INTRODUCTION

Since Cesare Beccaria (1738-1794) expressed his opinion on the abolition of the death penalty in his book *On Crimes and Punishments* in 1764, the issue of either retaining or abolishing the death penalty has been a heated topic worldwide. According to modern tendencies, more and more countries are choosing to abolish the death penalty. Up to April 2005, after Bhutan, Greece, Samoa, Senegal and Turkey had abandoned the death penalty in 2004, the total number of countries that have abolished the death penalty in law or practice is 120. A third of those countries have abandoned the death penalty in the past 15 years, a trend that Amnesty International says shows a "continued move closer to the universal abolition of capital punishment." In other words, only 76 countries retain the death penalty, and few of those nations actually carry out executions each year.[1] The reduction and restriction and eventual abolition of death penalty would appear to have become an irresistible trend in the international community.

The political reality in China today is that the death penalty cannot be abolished in the immediate future. It is difficult for both state leaders and the public to accept the idea of abolishing the death penalty because of the traditional ideology that "the killer compensates the victim with his life", legislative orientation and severe social security problems.[2] In the absence of abolition, thus China's policy is to restrict the application of the death penalty and insist on fewer and more guarded executions. This policy was established after the foundation of the People's Republic of China in 1949. For example, Chairman Mao Zedong said:

> Once a head is chopped off, history shows that it cannot be restored, nor can it grow again as chives do after being cut. If we chop off a head by mistake, there is no way to rectify the mistake, even if we want to; we must stick to fewer and more cautious execution of the death penalty.[3]

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1 Amnesty International, 2005, Facts and Figures on the Death Penalty. (online). http://www.deathpenaltyinfo.org/newsanddev.php?scid=30 (April 2005).

2 X.L. QIU, 'On the nature of the death penalty' (2002) 2 *Politics and Law* 54; F. Zhang, 'Rational thinking of the death penalty system in China' (2003) 1 *Journal of Henan Judicial Police Vocation College* 67; W.G. Feng, 'Several consideration on current policy on the death penalty in China' (2003) 8 *Journal of Gansu Institute of Political Science and Law* 60.

3 Literature Research Office of the Chinese Communist Party Central Committee (ed.), *Selections of Mao Zedong's Speech,* Beijing People's Press, 1996, Vol. 7, pg. 38.

After the reform of the Criminal Procedure Law in 1996 and the Criminal Law in 1997, China continued its policy on the death penalty. To this effect, the law restricts the application of the death penalty by confining the object, subject and execution and accusations, increases the jurisdiction level of death penalty cases,[4] and provides a system of compulsory appointment of a pro bono lawyer as defender for the defendant in the trial of first instance[5] and a review procedure.[6]

According to International Amnesty's news report, there were 3,797 executions worldwide in 2004; nations carrying out the most executions were China (3,400), Iran (159), Vietnam (64), United States (59) and Saudi Arabia (33).[7] Among them, China accounts for 89.5% of the total executions. Apart from its dense population and the huge amount of crime, there may be some other reasons for the many executions in China. For instance, some scholars have argued that the standard of applying the death penalty may have been lowered in practice.[8] It is against this background that the author revisits the procedure relating to the review procedure for the death penalty in China, reviews the historical development of the review procedure, analyzes current problems and advances recommendations for reform.

COURT SYSTEM AND CURRENT PRACTICE OF COURT TRIAL IN CHINA

In order to facilitate readers to understand review procedure for the death penalty, it is necessary to have a brief introduction to the current court system and trial in China. According to the Organic Law of People's Courts, the courts are composed of the Supreme People's Court (located in Beijing), local courts (basic courts, including people's tribunals, the Higher People's Courts and Intermediate Courts), and special courts such as military courts.[9]

Basic People's Courts have jurisdiction as courts of first instance over ordinary criminal cases. Intermediate People's Courts have jurisdiction as courts of first instance over cases endangering State security, ordinary criminal cases punishable by life imprisonment or the death penalty and criminal cases in which the offenders are foreigners. The Higher People's Courts have jurisdiction

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4 According to the law, only the court at the level of Intermediate People's Court or above has the jurisdiction to hear cases involving the death penalty. See Criminal Procedure Law of the People's Republic of China, articles 20-23.

5 Criminal Procedure Law of the People's Republic of China, article 34.

6 Ibid., articles 199-202.

7 Amnesty International, 2005.

8 Y.T. Hu, J.L. Zhang & X.L. Qiu, 'Three men talking about the death penalty (Part V)' (1999) 2 *Chinese Lawyer* 53.

9 Organic Law of People's Courts of the People's Republic of China 1983, article 2.

as courts of first instance over major criminal cases that pertain to an entire province (or autonomous region, or municipality directly under the Central Government). The Supreme People's Court has jurisdiction as the court of first instance over major criminal cases that pertain to the whole nation.[10]

Within the court at each level, a judicial committee is set up as an important organ through which the Party's collective leadership is to be implemented. The committee is responsible for internal judicial supervision within the court, which is to summarize the judicial experience, discuss major difficult cases and other issues regarding judicial work.[11] Citizens who have the right to vote and to stand for election, have reached the age of 23 are eligible to be elected president, vice president, chief judge or judge, if they had not been deprived of political rights. As for the educational requirement, there was no clear provision in the Organic Law of People's Courts of the People's Republic of China until 1995 when the Judges Law clearly stipulated the judges' qualifications—the minimum requirement is a law graduate from a college or university or non-law major but having professional knowledge of law or a bachelor of law with one year's working experience.[12]

Trials of criminal cases of first instance in the Basic and Intermediate People's Courts are conducted by a collegial panel composed of three judges or of judges and people's assessors totaling three. However, cases in which summary procedure[13] is applied in the Basic People's Courts may be tried by a single judge. Trials of cases of first instance in the Higher People's Courts or the Supreme People's court are to be conducted by a collegial panel composed of three to seven judges or of judges and people's assessors totaling three to seven. Trials of appealed and protested cases in the People's Courts are conducted by a collegial panel composed of three to five judges. The members of a collegial panel shall be odd in number. One judge shall act as the presiding judge in charge of the trial process.[14]

After the hearings and deliberation, the collegial panel shall make a judgment. If opinions differ when the collegial panel conducts its deliberations, a decision shall be made in accordance with the opinions of the majority. If the case is difficult, complex or important, and the collegial panel considers it difficult to make a decision, the collegial panel shall refer the case to the president of the court for him to decide whether to submit the case to the judicial committee for discussion and decision. The collegial panel shall execute the decision of the judicial committee.[15]

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[10] Criminal Procedure Law of the People's Republic of China, articles 19-22.

[11] Organic Law of Peoples' Courts of the People's Republic of China, article 10.

[12] Judges Law of the People's Republic of China, article 9.

[13] The sentencing is less than three years fixed-term imprisonment.

[14] Criminal Procedure Law of the People's Republic of China, article 147.

[15] Ibid., articles 148-149.

If the defendant, private prosecutor, victims or their legal representatives refuse to accept a judgment or order of first instance made by a local People's Court at any level, they shall have the right to appeal in writing or orally to the People's Court at the next higher level. Similarly, a local People's Procuratorate at any level may protest against the judgment if it considers that there is some definite error in a judgment or order of first instance made by a People's Court at the same level. The time limit for an appeal or a protest against a judgment is 10 days and the time limit for an appeal or a protest against an order is five days; the time limit is counted from the day after the written judgment or order is received. The protest or appeal shall be submitted in written form within the time limit.[16]

Generally speaking, a People's Court of second instance shall form a collegial panel and open a court session to hear a case of appeal. The exception is, however, if after consulting the case file, interrogating the defendant and heeding opinions of the other parties, the panel thinks the criminal facts are clear, it may open no court session.[17] After hearing a case of appeal or protest against a judgment of first instance, the People's Court of second instance shall make decisions according to different situations: (1) to order rejection of the appeal or protest and affirm the original judgment; (2) to revise the judgment; (3) to rescind the original judgment and remand the case to the People's Court which originally tried it for retrial.[18] The judgment of two instances is final and binding on the parties.

EVOLUTION OF THE REVIEW PROCEDURE FOR DEATH PENALTY IN CHINA

The system of review procedure for the death penalty is unique: the Higher People's Courts and the Supreme People's Court jointly exercise the power of reviewing cases involving the death penalty (including execution with two years suspension). It is a prerequisite procedure before execution of cases involving death penalty by law. It is claimed that the procedure plays a positive role in fighting against crime and protecting human rights and serves as a safeguard for the correct implementation of the policy on the death penalty, for preventing wrongful executions and strictly controlling the application of death penalty. Generally speaking, the power on reviewing death penalty cases in China has gone through the process of decentralization and centralization since the foundation in 1949.

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[16] Ibid., articles 180-183.

[17] A People's Court of second instance shall open a court session to hear a case protested by a People's Procuratorate.

[18] Criminal Procedure Law of the People's Republic of China, article 189.

FROM 1949 TO 1966

1949-1966: In 1950, the first National Political-legal Conference decided that ordinary cases involving the death penalty should be approved by the provincial Higher People's Court or above before execution; important cases involving the death penalty were to be subject to approval by the Supreme People's Court before their executions. In 1954, the Organic Law of People's Courts provided:

If the defendant disagreed with the final judgment or order of death penalty made by an intermediate people's court or the Higher People's Court, he or she can apply for the review by the court at the next higher level.[19]

According to this provision, the power to review death penalty cases was subject to both the Higher People's Court and the Supreme People's Court. Later, according to the resolution passed by the Eighth Session of the Chinese Communist Party in September 1956,[20] the Second Conference of the First Session of National People's Congress decided that all cases involving the death penalty were subject to the judgment or approval of the Supreme People's Court. However, in 1958, the Supreme People's Court officially stated that, from then on, all cases involving the death penalty with two years' suspension need not be submitted for approval by the Supreme People's Court.

FROM 1966 TO 1976

During these ten years, China experienced its Cultural Revolution, a political movement initiated and led by the Chairman Mao Zedong (1893-1976) to renew the spirit of Chinese revolution.[21] China went into an era without law and order. The power to review death penalty cases was subject to the Revolutionary Committee of each province, autonomous region or municipality. In reality, the review procedure for the death penalty did not exist at all.

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[19] Organic Law of People's Courts of the People's Republic of China 1954, article 11.

[20] The resolution stated: "Except that for a small number of miscreant criminals which caused people's popular indignation should be sentenced to death penalty, the other criminals should be exempted from death penalty...If the case involved death penalty, it should be subject to the final judgment or approval of the Supreme People's Court."

[21] The Red Guard Movement, personal worship to Chairman Mao, Class Struggle, Big-Character Poster, intellectuals going to mountain areas and the village to receive labour education became mainstreams at this time. The public security organs, courts and procuratorates were ignored and became the objects of attack by the Red Guards according to the slogan "Smash the public security, courts and procuratorates". This movement was a disaster not only to individuals but also the state. See, for example, H. M. Tanner, *Strike hard: Anti-crime campaigns and Chinese Criminal Justice: 1979-1985*, New York: East Asia Program, Cornell University, 1999, pg. 31; S. Lubman, 'Form and function in the Chinese Criminal Process' (1969) 4 *Columbia Law Review* 557.

FROM 1979 TO 1996

According to the Criminal Law 1979, Criminal Procedure Law 1979 and the Organic Law of People's Courts 1983, the power to review cases involving the death penalty was subject to the Supreme People's Court in China. For example, Article 43 of the Criminal Law 1979 states:

> Except for cases involving death penalty sentenced by the Supreme People's Court, all other cases involving death penalty should be submitted to the Supreme People's Court for approval.

Similarly, Articles 144 and 145 of the Criminal Procedure Law 1979 provide:

> Cases involving death penalty shall be subject to the approval of the Supreme People's Court; if the defendant does not appeal in the case of death penalty sentenced by an Intermediate Court as the first instance, the case shall be reviewed by the Higher People's Court and submitted to the Supreme People's Court for approval.

Likewise, Article 13 of the Organic Law of People's Courts provides:

> Except for cases involving death penalty sentenced by the Supreme People's Court, all the cases shall be submitted to the Supreme People's Court for approval.

Compared with the situation in 1950s, however, the crime rate went up and public security problems became serious after 1978 when China started to reform and open up to the outside world. This made both the public and state leaders realize the importance of fighting crime to secure a stable environment for economic development.

Against this background, China delegated the partial power of reviewing cases involving the death penalty to the Higher People's Courts and Higher Military Court in the 1980s and 1990s in order to punish serious crimes in time and to carry out the policy of speedy and severe punishment against criminals. The first delegation was when the 13th Meeting of the Fifth Session of the Standing Committee of the National People's Congress in 1980 approved the recommendations of the Supreme People's Court and the Supreme People's Procuratorate on the authorization to the Higher People's Courts to exercise the power of reviewing some cases involving the death penalty. Thus under the authorization of the Supreme People's Court, the Higher People's Court of the province, autonomous region and municipality had the power of reviewing and approving the death penalty in cases involving such serious crimes as homicide, rape, robbery and arson in 1980. In the following year, the 19th Meeting of the Fifth Session of the Standing Committee of the National People's Congress passed the *Decision of the Standing Committee of the National People's Congress Regarding Approval of Cases Involving the Death Penalty*. In this decision, it was provided:

In order to promptly suppress active criminals who seriously undermine public security by committing murder, robbery, rape or arson, or causing explosions, etc., the following Decision is made regarding the approval of cases involving the death penalty.

From 1981 through 1983, the cases of criminals who commit murder, robbery, rape or arson, cause explosions, spread poisons, breach dikes or undermine transportation or electric power equipment, do not have to be submitted to the Supreme People's Court for approval if the Higher People's Court of a province, autonomous region, or municipality directly under the Central Government has imposed the death penalty in a judgment of final instance; or an Intermediate People's Court has imposed the death penalty in a judgment of first instance, the defendant does not appeal, and the sentence is approved by a Higher People's Court; or a Higher People's Court has imposed the death penalty in a judgment of first instance and the defendant does not appeal. In 1983, the Second Meeting of the Sixth Session of the Standing Committee of the National People's Congress passed the *Decision of the Standing Committee of the National People's Congress Regarding the Revision of the Organic Law of People's Courts of the People's Republic of China.* According to this decision, Article 13 of the Law after the revision provided:

Cases involving sentences of death, except for those cases where the sentences are imposed by the Supreme People's Court, shall be submitted to the Supreme People's Court for approval. The Supreme People's Court may, when it deems necessary, authorize Higher People's Courts of provinces, autonomous regions, and municipalities directly under the Central Government to exercise the power to approve cases involving the imposition of death penalty for homicide, rape, robbery, causing explosions and others gravely endangering public security and disrupting social order.

In addition, the Supreme People's Court authorized Higher People's Courts of Yunnan, Guangdong, Guangxi, Sichuan and Gansu in 1991, 1993 and 1996 to exercise the power of reviewing and approving the death penalty in cases involving drugs, with the exception of cases involving foreigners and judgments made by the Supreme People's Court.[22]

FROM 1996 TO PRESENT

During this period, great changes appeared in China's criminal justice system. The Criminal Procedure Law and the Criminal Law were amended in 1996 and 1997 respectively in order to assist economic development and fight against

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[22] Notice of the Supreme People's Court on Partially Authorizing Higher People's Court of Yunnan the Power of Reviewing Drug Cases involving Death Penalty 1991; Notice of the Supreme People's Court on Partially Authorizing Higher People's Court of Guangdong the Power of Reviewing Drug Cases Involving Death Penalty 1993; Notice of the Supreme People's Court on Partially Authorizing Higher People's Courts of Guangxi, Sichuan and Gansu the Power of Reviewing Drug Cases Involving Death Penalty 1996.

crime as well as to improve the protection of human rights in China. The two laws after the reform repeated the provisions of the laws in 1979 as far as the review procedure for the death penalty is concerned.

In general, for instance, article 200 of the Criminal Procedure Law states that the death penalty shall be subject to approval by the Supreme People's Court. But if a case of first instance where an Intermediate People's Court has imposed the death penalty and the defendant does not appeal shall be reviewed by a Higher People's Court and submitted to the Supreme People's Court for approval. If the Higher People's Court disagrees with the death penalty judgment, it may bring the case up for trial or remand the case for retrial. Cases of first instance where a Higher People's Court has imposed the death penalty and the defendant does not appeal, and cases of second instance where the death penalty has been imposed shall all be submitted to the Supreme People's Court for approval. Moreover, if a case where an Intermediate People's Court has imposed the death penalty with a two-year suspension of execution, shall be subject to approval by a Higher People's Court. According to the law, reviews by the Supreme People's Court of cases involving the death penalty and reviews by a Higher People's Court of cases involving the death penalty with a suspension of execution shall be conducted by collegial panels composed of three judges.[23]

Despite the provisions mentioned above, the Supreme People's Court continued its old practice of partially authorizing the power of reviewing cases involving death penalty to the Higher People's Courts. In September 1997, the Supreme People's Court issued the *Notice on Partial Authorization of the Power on Reviewing Cases involving the Death Penalty*, which allowed the Higher People's Court and the Military Court to exercise the power on reviewing and approving the death penalty in cases involving homicide, rape, robbery, causing explosions and others gravely endangering public security and disrupting social order and other serious crimes endangering social security and public order.

Moreover, the Supreme People's Court authorized the Higher People's Courts in Guizhou, other provinces and Military courts in 1997 to exercise the partial power of reviewing and approving the death penalty in cases involving drugs, with the exception of cases involving foreigners and judgments made by the Supreme People's Court.[24]

If one observes the process of exercising the power on reviewing cases involving the death penalty, partial authorization by the Supreme People's Court serves to simplify criminal procedure and to improve its efficiency, thereby helping the judicial organs to impose speedy and severe punishment on criminals.

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[23] Criminal Procedure Law of the People's Republic of China, articles 199-202.

[24] Notice of the Supreme People's Court on Partially Authorizing Higher People's Court of Guizhou the Power of Reviewing Drug Cases Involving Death Penalty 1997; Notice of the Supreme People's Court on Partially Authorizing Higher People's Courts and Military courts the Power of Reviewing Drug Cases Involving Death Penalty 1997.

This practice in fact avoided the delay of disposition of criminal cases, eased the workload of the Supreme People's Court, punished crimes speedily and thus improved adjudicative efficiency. "The swifter and closer to the crime a punishment is, the juster and more useful it will be."[25] This was considered extremely effective in punishing flagrant crimes and carrying out the criminal policy of speedy and more severe punishment in the early 1980s when China faced serious social security and public order problems. However, after more than two years' practice of partial authorization of the reviewing power, the social order problem remained unsatisfactory, and further analysis of such authorization is required to discover whether it is working as expected. In the second part, the problems related to the review procedure for the death penalty will be examined and discussed.

PROBLEMS RELATING TO THE REVIEW PROCEDURE FOR DEATH PENALTY

When it comes to the review procedure for the death penalty, there are several problems in practice, such as conflicts of applicable laws, inconsistency in the application of death penalty in different areas, the closed and administrative nature of the review procedure, the combination of procedure of second instance and review procedure in practice, "paper" trials at the second instance[26] and the system of seeking instruction from the authority.

CONFLICT BETWEEN APPLICABLE LAWS

According to the Criminal Law and the Criminal Procedure Law, the power of reviewing cases involving the death penalty is subject to the Supreme People's Court. For instance, Article 48 of the Criminal Law provides that, except for judgments made by the Supreme People's Court according to law, all sentences of death shall be submitted to the Supreme People's Court for approval; and sentences of death with suspension of execution may be decided or approved by a High People's Court, articles 199-201 of the Criminal Procedure stipulate had similar provisions.

In practice, ironically, the Supreme People's Court, based on the *Decision of the Standing Committee of the National People's Congress Regarding the Revision of the Organic Law of People's Courts of the People's Republic of China* in 1983, as we have seen, delegated the Higher People's Courts and the

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[25] R. Bellamy (ed.), *Beccaria, on crimes and punishment and other writings*, Cambridge University Press, 1995, pg. 48.

[26] The judge of second instance makes a judgment based on his understanding of case files transferred by the people's Procuratorate, instead of investigating and verifying facts by examination and cross-examination of evidence in court.

military courts in 1997 to exercise the power of reviewing and approving death penalty in cases involving homicide, rape, robbery, causing explosions and others gravely endangering public security and disrupting social order and other serious crimes endangering social security and public order.

A key problem is a conflict between current applicable laws in practice. Which law should be given prior effect, Criminal Law 1997 and Criminal Procedure Law 1996 or the *Decision of the Standing Committee of the National People's Congress Regarding the Revision of the Organic Law of People's Courts of the People's Republic of China* in 1983? According to the hierarchy theory of law, when there is a conflict between the laws passed or made by the National People Congress and its Standing Committee, the law passed or made by the former will prevail. In addition, when a new law is contrary to an old law, the new law would normally supersede the old one. Therefore, it is obvious that the legal basis upon which the Supreme People's Court relied in 1997 is lacking when it decided to partially authorize the power on reviewing cases involving the death penalty.

THE REVIEW PROCEDURE FOR THE DEATH PENALTY IN CHINA HAS A CLOSED AND ADMINISTRATIVE NATURE

As an independent criminal procedure, neither defence lawyer nor prosecutor can participate in it, since there is no requirement for an open hearing. In fact, it is the judge playing "a monodrama".[27] According to the Supreme People's Court, the review procedure of death penalty is a special procedure different from the procedure of first or second instance. Since the law does not expressly provide if the lawyer can participate in the review procedure, the lawyer cannot make use of the provisions on the procedure of first or second instance to apply to participate in the review procedure.[28] In general, the court at the lower level submits death penalty cases to the court at the next higher level for approval. The judge(s) at the next higher level will make an order after reading the case files and interrogating the defendant. Such a review is not public: it is a secret process conducted by reading case files. Therefore, the initiation of review procedure for the death penalty is strongly administrative in nature.[29] Lacking the involvement of the prosecution, the defence and the defendant, the method of paper review of cases involving the death penalty cannot help clarify

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[27] H.C. Li & Q.S. Zhang, 'Revisit review procedure for the death penalty in China' (2000) 2 *Studies on Law and Business*, 87.

[28] Telephone Reply of the Supreme People's Court on Issues relating to Lawyers' Participation in the Litigation of Second Instance and Review Procedure of Death Penalty, 1992.

[29] Y. Liu, 'Review of review procedure for the death penalty' (2002) 5 *Journal of Hunan Public Security College* 47; X.D. Ji & W.W. Xia, 'Theoretical rethinking of review procedure for the death penalty' (2003) 3 *Journal of Shandong Public Security College* 19.

differences in evidence or fact between the prosecution and the defence, nor find out the 'objective truth', and thus fails to protect the defendant's lawful rights. In addition, under the closed procedure, "review procedure for death penalty may be abused if there is no effective supervision and restriction".[30] Similarly, the rate of correcting possible mistakes by the court is less effective. One Chinese scholar pointed out that, for example, after the review procedure, the rate of rescinding the death penalty by law is no more than 0.5% of the total cases involving the death penalty in China.[31] In this situation, the review procedure for the death penalty cannot play its due role envisaged by law; consequently, its procedural value is limited.

DISPARITY IN THE APPLICABLE STANDARD OF THE DEATH PENALTY

Since part authorization of power on reviewing the death penalty, only one third of cases involving the death penalty has been reviewed and approved by the Supreme Court.[32] In other words, around two thirds of cases are reviewed and approved by the Higher People's Courts. The decentralization of reviewing the death penalty will result in different standards of application, which cannot guarantee the quality of decisions and makes it difficult for the State on a macro level to control the application of the death penalty.

Such disparity may result from the vague provisions of some offences in the Criminal Law, different situations in different areas and different educational level, quality and understanding of the judges. This, therefore, cannot prevent wrongful killings or reduce mistakes and thus guarantee the fulfillment of judicial justice.[33] For example, if the amount of drugs is more than 100 grams in a case involving a drug crime in Gansu Province, a defendant may be sentenced to death. While for the same type of crime, a defendant in Shanghai will not be given the death penalty unless the amount of drugs involved is more than 400 grams.[34] In addition, when the Higher People's Courts review and approve cases involving the death penalty, if under pressure from local government (e.g., the need of social stability) or the parties concerned, they are likely to

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[30] Y.S. Chen, 'Revisit the system of review procedure for the death penalty in China' (2004) 4 *A Study of Comparative Law* 101.

[31] R.H. Chen, *Forefront problems of the criminal procedure,* China People's University Press, 2000, pg. 469.

[32] S.P. Luo, 'Current situation on review procedure for the death penalty and legal thinking' (1995) 2 *Jurist* 31.

[33] K.J. Zhou & L.B. Yan, 'Analysis of current problems on review procedure for the death penalty and the anticipations' (1999) 4 *Shandong Law Science* 50; X.D. Ji and W.W. Xia, *supra note 31.*

[34] D.L. Zhou, 'On the improvement of review procedure for the death penalty (2004) 8 *People's Justice* 44.

choose the death penalty with immediate execution instead of the execution with two years' suspension, so as to achieve the combination of good social and legal effect of the trial. In a word, the inconsistency in the applicable standard for the death penalty breaks the principle of uniform application of the law and the legal system.

COMBINATION OF PROCEDURE OF SECOND INSTANCE AND REVIEW PROCEDURE FOR THE DEATH PENALTY IN PRACTICE

In fact, the review and approval by the Higher People's Courts in most death penalty cases according to the authorization of the Supreme People's Court is no longer a prerequisite before the execution. Because in practice, in cases where the Higher People's Courts have the power to review death penalty, the courts will always give a clear indication in the judgment or order of second instance that "according to the rule of the Supreme People's Court on partial authorization to the Higher People's Court on the power of reviewing cases involving death penalty, this judgment (or order) is the judgment (or order) of reviewing and approving the death penalty." According to judges, this practice has a legal basis - *Specific Rules on the Procedure of Trying Criminal Cases issued by the Supreme People's Court* in 1994. Article 169 of the *Specific Rules* provided:

> To the case of first instance where an Intermediate People's Court has imposed a death penalty, and if the defendant appeals or if the People's Procuratorate protests, the Higher People's Court may make a decision or order of maintaining death penalty after the review of second instance.

But this practice will reduce one "safeguard", which makes the review procedure for death penalty a formality and significantly reduces its role as a remedial procedure. It will not only write off the essential difference between the procedure of second instance and the review procedure and omit one filtering mechanism, but also deprive the defendant of lawful rights and interests.[35] As a result, the adjudicative quality cannot be guaranteed. Moreover, some scholars have argued that, whether it is the case of second instance or review procedure for death penalty, so long as it is under the jurisdiction of the same court, it will be subject to the same adjudication committee. The result of the discussion in the meeting of the adjudication committee is often the final judgment of the case. In fact, it still makes the review procedure for the death penalty a formality.[36]

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[35] W.D. Chen (ed.). *A Survey report on the problems relating to the Implementation of criminal procedure law*, China Fangzheng Press, Beijing, 2001, pg. 204.

[36] K.J. Zhou & L.B. Yan, 'Analysis of current problems on review procedure for the death penalty and the anticipations'.

THE JUDGMENT OF SECOND INSTANCE IN MOST CASES IS MADE ACCORDING TO "PAPER' TRIALS

Second instance as an independent procedure, has the function of finding out and correcting mistakes of the judgment made in the trial at first instance in order to punish the criminals correctly and protect a citizen's lawful rights and interests. In essence, public trial is to put the whole process of the trial under the understanding, review and supervision of the society. In light of the legislative intent, the case of second instance should be heard in public, with some exceptions relating to cases having "clear facts". However, in practice, the court of second instance conducts a "paper" trial without open court session in most cases, including those involving the death penalty. For example, one Higher People's Court in China has an internal rule that the rate of hearing cases of second instance involving the death penalty shall be kept within 10-20%, excluding cases protested by the People's Procuratorate. This is said to be true, if the appellate cases involve many defendants, many items of crimes, defendant's withdrawal, or complicated evidence.[37] A policy based upon such administrative considerations (cost-effectiveness and speed) cannot by its nature provide confidence in the outcome which should be individualized and thoughtful.

Obviously, judgment of second instance made based on the reading of "paper" without opening court sessions and parties' involvement in court can save human and material resources,[38] but it has a fatal defect: it is quite likely to be operated in "camera", which is disadvantageous to finding out mistakes, especially factual mistakes. For example, Du Peiwu's Case[39] and Li Huawei's Case[40] were "heard" by judges of second instance through reading case files

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[37] M.X. Gao & B.X. Zhu, 'On public trial in cases of second instance' (2004) 4 *Modern Law Science* 55.

[38] Y. J. Zhang, 'Problems on review procedure for the death penalty' (2004) 1 *Law Science Magazine* 48.

[39] Du Peiwu was a police officer in the Drug Abstaining Station of Kunming Public Security Bureau, Yunnan. On 22 April 1998, Du's wife WXX and Mr. WJB, Deputy Director of Lu'nan Public Security Bureau of Kunming were found shot dead in a mini van. Du was detained on 2 July 1998 on suspicion of intentional homicide. On 5 February 1999, Kunming Intermediate People's Court in the first instance found Du's intentional homicide established and sentenced him to the death penalty. After the appeal, Yunnan Higher People's Court changed the sentence to death penalty with two years' suspension. In June 2000, when a case of homicide and robbery by a group of suspects was detected by the police in Kunming, Du's case was found to have been a wrongful verdict. On 6 July 2000, Yunnan Higher People's Court in the retrial procedure announced that new evidence proved that Du was innocent.

[40] Li Huawei was a staff member of the Cement Factory of Yingkou, Liaoning Province. On 29 October 1997, his wife XW was murdered in their home. After open sessions, Yingkou Intermediate People's Court sentenced Li to death with two years suspension on 4 December 1998. On 12 January 1999, Liaoning Higher People's Court dismissed Li's appeal and

without open court session. The convicted individuals were released and declared innocent after the real suspects were caught. If they had been executed immediately, no court could correct the mistakes. In March 2005, unverified news revealed another case in which a young guy in Hebei Province, Nie Shubin, was wrongly convicted and executed 10 years ago.[41] To the sorrowful parents, they can do nothing but may get state compensation if this case is finally found to be wrong. But no money can bring back their son's life.

In addition, the practice of closed trial is contrary to the International Covenant of Civil and Political Rights, which China signed in 1998. Article 14 of the Covenant says:

> In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

In addition, the defendant has the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. As a result, the requirement of public trial not only applies to first instance cases, but also to that of second instance and retrial. This is the minimum requirement of a fair and public trial in the criminal justice.

THE SYSTEM OF LOWER LEVEL COURTS SEEKING INSTRUCTIONS FROM HIGHER LEVEL COURTS MAY MEAN THAT THE FIRST INSTANCE BECOMES THE FINAL

In practice, if the case is considered important or complicated, the court at the lower level often reports to the court at the next higher level orally or in writing and asks for instructions. Sometimes, even if the court at the lower level does not report and ask for instruction, the judge from the court at the next higher level will go down to guide the trial in the court of first instance if the case is considered of great importance.[42] The system of reporting and seeking

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maintained the original judgment of first instance. In July 2000, when the real murderer, his neighbour, who was involved in another case, confessed to the murder of XW, Li was declared innocent and released.

41 'One guy was executed death penalty for rape and the real criminal was caught 10 years later', *New Beijing Daily,* 15 March 2005.

42 L.X. Jiang, 'Procedural safeguard in cases involving the death penalty' (2000) 3 *Yunnan Law Science* 75.

instructions from the court at the next higher level in fact makes the procedure of second instance a formality, because the judgment at first instance is in essence also that of the second instance. This breaches a basic principle of criminal procedure because, as some scholars point out, this system deprives the defendant of the right to appeal and the procedural safeguard of second instance.[43]

WHAT IS THE WAY-OUT FOR REVIEW PROCEDURE FOR THE DEATH PENALTY?

Fairness and efficiency is the everlasting pursuit of justice. In China, against the background that "the state's respect for and protection of human rights" has been enshrined into the Constitutional Law 2004,[44] it should give priority to fairness when there is a conflict between fairness and efficiency. The significance of preventing the life of a criminal being taken by mistake is far more important than that of speedy and timely punishment.[45] The problems relating to the review procedure for the death penalty necessitate a two-step improvement in order to restrict execution of death penalty, to avoid possible wrong executions and to better protect the human rights of defendants.

TO SECURE ALL CASES OF SECOND INSTANCES TO BE HEARD IN PUBLIC

The first step is to emphasize the need for a public hearing in second instance cases, especially cases involving the death penalty. Therefore, it is suggested that changing the last paragraph of Article 187 of the Criminal Procedure Law to "a People's Court of second instance shall conduct an open hearing if the case is protested by the people's procuratorate or if a case involving death penalty is appealed by the defendant." As we mentioned above, the major function of the trial of second instance is to find out and correct mistakes and to protect a citizen's lawful rights and interests. Although it is difficult to require all cases of second instance to be heard in public because of increased caseload considerations, it is worthwhile to allocate more human, financial and material resources for the judicial system and the procedural and substantive protection of the human rights of defendants, in order to give substance to the notion of predominance of life and the criminal policy of less and cautious execution of the death penalty.[46]

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[43] Ibid., 74.

[44] Constitutional Law of the People's Republic of China 2004, Article 33.

[45] B.Z. Zhao & Y.A. Shi, 'Procedural safeguard on cautious application of the death penalty—Review of current review system of the death penalty and suggestions for improvement' (2004) 4 *Modern Law Science* 61.

[46] M.X. Gao & B.X. Zhu, 'On public trial in cases of second instance', pg. 56.

Furthermore, public trial in second instance is also a requirement of criminal justice which conforms with the minimum standard of international conventions. It will play a key role in correcting mistakes in cases of first instance, especially when those involve human life. As a result, in second instance cases involving the death penalty, the Higher People's Court shall organize a collegial panel and conduct an open hearing by law. The prosecutors and the defence should be required to attend court and express their opinion on the case, so as to maintain the defendant's lawful rights. In addition, when the court of second instance reviews cases involving the death penalty, it should organize another collegial panel to review and approve cases in order to fulfill the safeguard role of the review procedure and avoid the combination of procedure of second instance and review procedure.[47]

Recently, it was reported that, under the influence of the speech that the reviewing power of death cases will be exclusively exercised by the Supreme Court, cases of second instance involving death penalty had been expressly required or planned to open court session in some places in 2006, such as Beijing, Shanghai, Tianji, Hainan, Qinghai and Hebei Provinces.[48] It is obvious that China's judiciary realized the importance of open trial in the second instance, especially when death penalty is involved. People may have reason to be optimistic that this requirement can be fulfilled nationwide in the near future, as it is easier, comparatively speaking, to fulfill the three requirements in the first step. However, it can only serve as a makeshift arrangement as it can not solve the problems mentioned above effectively.

EXCLUSIVE EXERCISE OF THE REVIEWING POWER BY THE SUPREME PEOPLE'S COURT

On the basis of the inability to abolish the death penalty in China, the second step shall be the improvement of the review procedure for the death penalty. In the long run, the power of reviewing the death penalty should be subject exclusively to the Supreme People's Court. As discussed above, the defect of decentralized power on reviewing cases involving the death penalty reduced one procedural safeguard to ensure correct application and execution and thus

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[47] If the same court exercises the procedure of second instance and of review for death penalty, it will make no difference to the defendant, because according to the judicial interpretation, all death penalty cases will be discussed by the adjudication committee, and once the result in the case of second instance is made, it is difficult to change in the review procedure for death penalty.

[48] For example, see X. Ni , 'Higher people's court in Beijing and Shanghai conducted open trial of cases involving the death penalty' *Legal Daily*, 23 January 2006; X.Y. Wan, 'Xiao Yang: All cases involving the death penalty shall be heard in public by the Court of Second Instance in the second half of this year', *China Youth Daily*, 25 February 2006.

affected substantive justice.[49] Therefore, the uniform exercise of the review procedure for the death penalty by the Supreme People's Court would contribute to ensure a uniform standard in the application of death penalty, safeguard the quality of cases involving the death penalty and better implement the policy of fewer and cautious executions.

Second, the exercise of the review procedure by the Supreme People's Court would ensure uniform application of death penalty nationwide and avoid the current practice of combining the procedure of second instance and review procedure for the death penalty. Third, by reviewing and approving death penalty cases, the Supreme People's Court can also summarize working experience and guide its courts to a correct understanding and implementation of the law.[50] Fourth, it would help to fulfill judicial justice.[51] As discussed above, one defect of decentralized exercise of the review procedure for the death penalty is that it reduced one safeguard for correct execution of the death penalty, which will affect substantive fairness to certain extent. This is also why 41 representatives signed and supported the proposition of Shanxi and Beijing delegations in the Second Meeting of the Tenth Session of National People's Congress in 2004, which proposed that "the power of reviewing cases involving the death penalty should be subject to the Supreme People's Court", which caused widespread interest in society.[52]

At present, most scholars and practitioners realize the importance of correctly exercising the power of reviewing death penalty and thus restricting executions. Although there are many suggested versions as to the ways of improving the review procedure, almost all agree that the power of reviewing the death penalty should be subject to the Supreme People's Court in the long run.[53]

In practice, however, if the power on reviewing cases involving death penalty is exclusively subject to the Supreme People's Court, the number of

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[49] K.J. Zhou & L.B. Yan, 'Analysis of current problems on review procedure for the death penalty and the anticipations' pg. 51.

[50] J. Han & W. Chen, 'A discussion of returning the power of reviewing the death penalty' (2002) 4 *Journal of Anyang Normal College* 29.

[51] In addition, some scholars have argued that, after returning the power on reviewing the death penalty to the Supreme People's Court, the final decision on the death penalty is not made by local courts and further indicates that leaders of local government and Party Committee cannot interference with the decision of death penalty any more, which helps to promote justice and protect human rights. See X.L. Qiu, 'On the due process of the death penalty' (2004) 4 *Modern Law Science* 44.

[52] Y. Huang, '41 representatives jointly suggested the supreme people's court take back the power of reviewing the death penalty' *China Youth Daily*, 13 March 2003.

[53] For example, see X.D. Ji & W.W. Xia, 'Theoretical rethinking of review procedure for the death penalty' pg. 21; Z.C. Li, 'Analysis of combined application of procedure of second instance and review procedure for the death penalty' (2004) 5 *Journal of National Procurators College* 71.

cases it would have to deal with is bound to increase sharply. Consequently, the Supreme People's Court cannot review all the cases in time, as it is impractical to increase substantially its personnel and financial budget at the moment.[54] One judge said: [55]

> There is a total of 600 staff in the Supreme People's Court, in which 60% of them are responsible for trial work. Take the First Criminal Court for example. There are 4 collegial panels in the Court, among which one panel is responsible for research and the other three are responsible for criminal trials.... If one panel can deal with one case each week, how can we finish the task of so many cases! Even all the staff in Supreme People's Court working for 24 hours without any rest can not deal with the cases.

To this problem, scholars have raised a number of solutions. Among them, there are four typical schemes. The first scheme proposes to set up a Court for the Review of the Death Penalty in the Supreme People's Court, responsible for the approval and review of cases involving of death penalty. In order to set up this court, the Supreme People's Court would have to increase its personnel and budget, and organize the review court by transferring judges from other courts and from the Higher People's Courts and experts from legal professionals.[56]

The second scheme is based on the first, which suggests dividing the Court for the Review of the Death Penalty into several circuit courts. As accredited institutions, these circuit courts would be stationed in different areas according to administrative divisions. They would not be subject to the leadership of local government or party committee. The organization of the court would be the same as in the first scheme.[57]

The third scheme proposes the setting up of branches of the Supreme People's Court as the best way to perform the power of reviewing cases involving the death penalty. Through amendment of the Organic Law of People's Courts, a branch court would be an accredited institute of the Supreme People's Court. This would not only ensure the uniform exercise and application of the review

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[54] If we take the number of executions of death penalty as a reference, the Supreme People's Court will have to review more than 2200 cases a year. This is the main reason, in my view, that the Supreme People's Court has not taken back the power of reviewing the death penalty. However, some scholars also argued that another important reason is leaders in some areas strongly resisted such a proposal to take back the review power. See X. L. Qiu, 'On the due process of the death penalty' (2004) 4 *Modern Law Science* 44.

[55] S. Zhuang, 'Loopholes on review procedure for the death penalty from saving the life under the knife edge: An observation of Yan'an version'. (online). http//monk.3322.net/zensigusi/zsgs 0404.htm (20 February 2004).

[56] B.Z. Zhao & Z.H. Xiao, 'The debate between expansion and restriction of the death penalty' (1998) 10 *Law Science* 5; Y. Wang, 'Review procedure requires further improvement—Revisit DONG Wei's Case' (2003) 2 *Hebei Law Science* 108.

[57] H.C Li & Q.S. Zhang, 'Revisit review procedure for the death penalty in China' pg. 89.

procedure for the death penalty, but also guarantee timely disposition of cases involving the death penalty.[58]

The fourth scheme puts forward the idea of three instances being the final as a replacement of the current review procedure, so far as the cases of death penalty are concerned. Defendants who are sentenced to death would be compelled to appeal to the Higher People's Court. The Higher People's Courts would hear the case in public according to the procedure of second instance. If the judgment for the death penalty was maintained, the defendant or the procuratorate could either appeal or protest to the Supreme People's Court. This scheme will ensure that the power of final decision on the death penalty is subject to the Supreme People's Court.[59]

The four schemes have their own characteristics, but in my opinion, the first one is preferable. Although it may make the Supreme People's Court organizationally overstaffed in order to set up a special review court, it requires fewer staff and a smaller budget and may be less local and less subject to external interference than that in the second and third schemes. The fourth scheme envisages changing the current provision of second instance being final, but in my opinion, it is improper to force the defendant to appeal to the Higher People's Court, as the defendant has right to make his own decision whether to appeal or not. According to news reports, it is quite likely that the first scheme will be adopted. For example, it is reported that the Central government in China has approved the Supreme People's Court to expand its personnel quota and more than 300 judges were enrolled from local courts nationwide in order to form the third, fourth and fifth criminal courts of the Supreme People's Court responsible for reviewing and approving cases involving death penalty, which will be located in Beijing.[60]

As to the form of reviewing cases involving the death penalty, it should be heard in public with some exceptions. Meanwhile, in order to restrict the number of cases to be reviewed by the Supreme People's Court, a public hearing

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[58] D.L. Zhou, 'On the improvement of review procedure for thed penalty' (2004) 3 *Law Science Magazine* 15-16; B.Z. Zhao & Y.A. Shi, 'Procedural safeguard on cautious applications of the death penalty – Review of current review system of the death penalty and suggestions for improvement'. However, some people disagree. In their view, as a statutory and prerequisite procedure, it shall be only executed by the Supreme People's Court, and the excuse of work load pressure cannot be an argument to abolish or restrict the review procedure for death penalty. See S.P. Luo, 'Saving the life before the execution by shooting' and returning of the power on reviewing death penalty cases' (2002) 10 *People's Justice* 47.

[59] W.D. Chen & J.H. Liu, 'On the reform of three instances being final in the case involving the death penalty' (2004) 4 *Modern Law Science* 67-68; R.H. Chen, 'Forefront problems of the criminal procedure', pg. 475.

[60] X.D. Ke & L.L. Zhao, 'The Supreme People's Court will Take back the power of reviewing cases involving death penalty next year and three Criminal Courts have been increased within the Supreme People's Court', *Guangzhou Daily*, 6 September 2005.

should be applicable only in cases appealed by the defendant. When the court hears the appellate case, both the prosecution and the defence lawyers should attend the court hearing. It is necessary to help find out the truth in a timely manner to ensure proper application of law and thus to better protect the defendant's lawful interests and rights.[61]

Finally, there should be a reasonable time limit for the review procedure of cases involving death penalty. Up to now, there is no provision on the time limit for the review procedure for death penalty in the Criminal Procedure Law. This would not help the fight against crime in time nor improve working efficiency. As for the time limit, some scholars have suggested that the time limit be one month, and could be prolonged for another half a month or one month after the approval of the President of the court under special circumstances.[62] While according to a survey, most judges hoped to set a time limit of the review procedure of three months, and it shall not exceed half a year if the case is complicated or of great importance.[63] In my opinion, it is better to set the time limit for reviewing the death penalty within two months; if the case is complicated or important, it can be extended for another two months, but it should not exceed half a year.

CONCLUSION

Generally speaking, the review procedure for the death penalty in China has significant value as a special procedure. Under the international trend of more and more countries restricting and gradually abolishing the death penalty, the problems about the review procedure will hinder the realization of judicial justice and the protection of human rights. Therefore, the improvement of the review procedure for the death penalty, given that it is impossible to abolish the death penalty in China at the moment, seems essential in practice from the perspective of protecting human rights of the defendant, correctly enforcing criminal policy of less and cautious executions of death penalty and consequently restricting its application. Only by further improvement can it act as the 'last straw' for the defendant.

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[61] Y.S. Chen, 'Revisit the system of review procedure for the death penalty in China' (2004) 4 *A Study of Comparative Law* 104. Meanwhile, some people also disagree with the proposal of public trial in the review procedure, because the review procedure is different from the procedure of first or second instance, and the prosecution has expressed their opinions on the case clearly in the two instances. See D.L. Zhou, 'On the improvement of review procedure for the death penalty' pg. 46.

[62] Y. Liu, 'Review of review procedure for the death penalty' pg. 48.

[63] D.L. Zhou, 'On the improvement of review procedure for the death penalty' pg. 45.

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