

**DEATH PENALTY REFORMS IN CHINA: LESSONS FROM
WRONGFUL CONVICTIONS?**

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DEATH PENALTY REFORMS IN CHINA: LESSONS FROM WRONGFUL CONVICTIONS?

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Abstract:

This paper examines the package of legislative and judicial reforms in China that followed the discovery of several high-profile wrongful convictions in death penalty cases since 2005. The goal of such death penalty reforms was to protect human rights of the accused and prevent future wrongful convictions more generally. Since 2005, there have been two waves of such reforms. In order to understand the full effects of these two waves of reform, it is necessary to consider their effect on the entire human rights process. 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 and that the root causes of wrongful convictions involving capital cases have not yet been overcome in China. The legal loopholes allow death sentences for non-violent crimes and traditional police and judicial practices to continue and will lead to future wrongful convictions in capital cases. Although the 2011 Amendment to Criminal Law of the PRC (Amendment VIII) greatly reduces the number of crimes punishable by death in law and the 2012 Criminal Procedure Law of the PRC (CPL) brings more transparency and accountability to criminal justice institutions, further reforms will be suggested. First, China should completely abolish the death penalty for any non-violent crimes in law and immediately suspend all death sentences and executions until a water-proof net to prevent wrongful convictions can be established in practice. Second, an increased role of the defence counsel should be emphasized in any proceedings of death penalty cases, and police interrogations should be fully recorded in order to play back an entire recording of interrogations at trial. Finally, the use of state secrets as evidence against those facing the death penalty should be curtailed.

I. INTRODUCTION

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 first start from the SPC's resumption of its power to review death sentences in 2006, followed with revision of state compensation regimes in 2010 as remedy for wrongful convictions, then Amendment VIII in 2011 with a shrinking scope of the death penalty, and basically ends with the latest reform in current criminal procedure law of 2012. Unfortunately, each of these reforms proved inadequate in part due to opposition from the police, the

procuratorate and the judiciary. 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.

II. DEATH PENALTY REFORM IN 2006: RESUMING THE SPC'S POWER TO REVIEW

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.

A. 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.

Four months after the HPC remanded SHE's case for retrial in January 1995, his mother who provided 'conscience witness' on SHE's wife alive, were arrested for being falsely accused of the crime of 'covering up convicts' at the detention center for over nine months. Unfortunately, this new clue of the wife's existence known to police and judges was not regarded as evidence source of case

facts¹, under the pressure of the local Political-Legal Committee (*Zheng Fa Wei*)², though consistent with the new evidence of factual innocence used to reverse SHE's conviction of guilt. He eventually obtained the chance of a new retrial in 2005, but only after Zhang Zaiyu who was considered to be 'dead in the past 11 years' turned up alive and returned home. On 13 April, 2005, the local court quashed SHE's murder conviction after considering new evidence, and officially declared him factually innocent to release SHE out of prison during a retrial. The prosecutor in the case agreed that an acquittal should be entered and provided 4 copies of evidence on his factual innocence including the DNA identification on the 'victim' ZHANG, SHE himself and their daughter at trial, later the responsible personnel who extorted his confession by torture or ignored it was investigated and punished for his wrongful conviction.³ He subsequently received over RMB 456,900 (US\$ 71,779) in compensation, for wrongs and financial aid for his family.⁴

What causes wrongful convictions like those in Case SHE Xianglin? Wrongful convictions are ultimately the result of a desire on the part of the police, procuratorate and judiciary to achieve a high rate of convictions. These three bodies, known as the "iron triangle" due to their tendency to work together, would usually rather convict the innocent than allow a case to go unsolved. Combined with an inquisitorial system, the traditional idea of a presumed guilt leads to wrongful convictions because prosecutors and judges work together. The wrongful conviction of SHE has first resulted from a false confession that SHE was tortured into during 10 days' interrogation and the judicial personnel excessively depended on,

¹ Wang Gang, *The 'Case Facts' of SHE Xianglin Reflecting Defects for Chinese Judicial Reform on the Way Again*, CHINA NEWS NET (Apr. 25, 2005), available at <http://www.chinanews.com/news/2005/2005-04-25/26/566773.shtml>.

² It is a very powerful and specialized organ within the Chinese Communist Party (CCP) in charge of political-legal work that refers to the work basically undertaken by courts, procuratorates and departments of public security in the Chinese context, consequently formerly instructing courts how to handle cases and launching the so-called 'strike hard' campaigns on three kinds of crimes many times.

³ Liu Zhihua, *All Personnel Responsible for Handling the Misjudged Case of SHE Xianglin Killing Wife in Those Years Being in Bandh and Investigation*, XINHUA NET (Apr. 4 2005), <http://news.163.com/05/0414/14/1HABLO2H0001122E.html>.

⁴ Yan Lin & Mu Yu, *SHE Xianglin Receiving RMB 460,000 Yuan in Reconciliation of His Compensation Case*, CHINA COURT NET (Sept. 2, 2005), <http://old.chinacourt.org/public/detail.php?id=176068>.

and then was directly rooted in their abuse of power to handle the case against criminal procedures so as not to be corrected in time.⁵

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*⁶. 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 defence council. To prevent more wrongful convictions, the reviews should be conducted in public, should involve more participation by the defence and should be expanded to cover all serious sentences, not just death with immediate execution.

B. 1996 CPL: Establishment of the Adversarial System

China's 1996 CPL was enacted in part to remedy such flaws as demonstrated in wrongful convictions. The CPL substantially revised the former CPL by introducing an adversarial process to replace the inquisitorial tradition. It also introduced new evidence rules to protect defence witnesses from police retribution, expanded the role of defence counsel and enshrined the convict's right to petition for a retrial. Most of the major revisions in 61 additional articles share a common theme—a desire to establish an adversarial system of trial so as to prevent miscarriages. Any other improvements consistent with the above theme would promote the rights of the accused to equal treatment under the law and rectify the structural imbalance among the three parties of the prosecutorate, the defence and court. But regrettably, 1996CPL still retains non-adversarial controls in law or practice, of which the 'Three Difficulties' and 'Big Stick 306' are major problems defence lawyers often face⁷ in diverse forms, e.g.,

⁵ Ching-Ching Ni, *False Conviction Highlights Legal Flaws in China*, L.A. TIMES (Apr. 9, 2005), <http://community.seattletimes.nwsourc.com/archive/?date=20050409&slug=chinarights09>.

⁶ S. P. C., THE SECOND FIVE-YEAR REFORM OUTLINES FOR THE PEOPLE'S COURT (2005).

⁷ TERENCE C HALLIDAY & LIU SIDA, *Birth of a Liberal Moment? Looking Through a One-Way Mirror at Lawyers' Defence of Criminal Defendants in China*, in FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM 72, 87 (Terence C Halliday, Lucien Karpik & Malcolm M Feeley eds., 2007).

obstruction, harassment, intimidation⁸. This could constitute the major tasks of latter amendments to the current criminal justice systems, for next round of reform towards the adversarial system.

Why was the 1996 CPL insufficient? Does China need new laws, or are current laws not implemented properly? An examination of the above case SHE provides answers to these questions. It has been generally accepted that the main causes of wrongful convictions in capital cases were police torture leading to false confessions, prosecutorial misconduct, ineffective legal representation, passive judges and abuse of court jurisdiction. As with many cases, wrongful convictions were not rectified until incontrovertible evidence of the accused's innocence was discovered because judges wished to cover up their mistakes. Faced with the 'iron triangle' of police, procuratorate, and court in close cooperation with one another to jointly maintain a tight control over the process of capital cases, 'lawyers and defendants were almost completely lost in diagnostic struggles over how the law actually worked and how it should work'.⁹ Most of these practices are contrary to what is required by the 1996 CPL and reveal the poor implementation of that law. Alas, shortfalls in the law as written also contributed to such wrongful convictions, albeit as secondary causes.

C. Significant Shortcomings in Practice

Even though in criminal defence lawyers' role has been significantly expanded by the 1996CPL with reinforcement of the 2007 Lawyers' Law,¹⁰ and the SPC also restore the review power of death sentences, their strengthened 'functionality' still 'remains more on paper than in practice'.¹¹ The recent high-profile cases of TAO

⁸ Walking on Thin Ice: Control, Intimidation and Harassment of Lawyers in China, HUMAN RIGHTS WATCH (2008), <http://www.hrw.org/reports/zoo8/chinao4o8/chinao4o8web.pdf>; Mike P. H. Chu, Criminal Procedure Reform in the People's Republic of China: The Dilemma of Crime Control and Regime Legitimacy, 18 UCLA PAC. BASIN L.J.157 (2000); Ethan Michelson, Lawyers, Political Embeddedness, and Institutional Continuity in China's Transition from Socialism, 113 A. J. S. 352 (2007); Dean G. Rojek, The Criminal Process in the People's Republic of China, 2 JUST. Q. 117, 121 (1985).

⁹ Sida Liu and Terence C. Halliday, *Recursivity in Legal Change: Lawyers and Reforms of China's Criminal Procedure Law*, 34 LAW & SOC. INQUIRY 911-950 (2009).

¹⁰ Zhonghua Renmin Gongheguo Lvshi Fa (中华人民共和国律师法) [Law of the People's Republic of China on Lawyers] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2007, effective June 1, 2008), <http://www.lawinfochina.com/display.aspx?id=6463&lib=law> [hereinafter 2007 Lawyers' Law].

¹¹ Li Enshen, *The Li Zhuang Case: Examining the Challenges Facing Criminal Defense Lawyers in China*, 24 Colum. J. Asian L. 130 (2010-2011).

Jianhua¹², LENG Guoquan¹³ and LI Zhuang illustrate this phenomenon.¹⁴ In case TAO, it is the first execution in Beijing following the restoration of SPC review as Chinese state media reported on 28 June 2007. Without relating to lawyers' representations to the review panel,¹⁵ the media only reported that the second instance court in open session heard the details of the case, overruled his appeal to maintain death sentences in the original judgment of first-instance court, and the SPC reviewed the death penalty¹⁶. In case LENG, he was sentenced to death, following an unfair trial of his leading a criminal gang engaged in smuggling and trafficking drugs, by local IPC in December 2009. Among four different lawyers appointed for him, the judicial authorities forced the first one to resign after he took pictures of LENG's scars which he said were a result of torture, while the second and third were denied access to him. The fourth lawyer filed a complaint claiming torture, whereas in 2010 the Provincial procuratorate concluded that the allegations of torture were unfounded. At the trial, LENG's lawyer had no chance to cross-examine key witnesses. Since at his appeal at the HPC, LENG showed the court scars on his head, wrists and legs he said were inflicted through torture, the case was sent back for re-trial.¹⁷ Worse in case LI, the defense lawyer was sentenced to imprisonment for 'perjury and obstruction of justice' due to 'allegedly instructing his witness to lie'.¹⁸

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'.¹⁹ Without definition on the scope of State secrets, for instance, the relevant restrictive provisions are often abused to influence lawyers' meetings in criminal cases so

¹² First death penalty prisoner executed in Beijing following restoration of SPC review, CHINA YOUTH DAILY, June 28, 2007; also This year's first death penalty prisoner executed this morning, LEGAL EVENING NEWS, June 27, 2007.

¹³ Case LENG Guoquan Changed to Life Imprisonment for Drug Smuggling and Trafficking in the First-Instance of Its Retrial, BJNews.com.cn, Nov. 24, 2011, http://epaper.bjnews.com.cn/html/2011-11/24/content_294863.htm?div=-1.

¹⁴ Wang Huazhong, *Lawyer Jailed for Falsification*, CHINA DAILY, Feb. 10, 2010, <http://www.chinadaily.com.cn/usa/2010-02-10/content-11015852.htm>.

¹⁵ People's Republic of China The Olympics countdown – broken promises, A. S. A., Apr. 30 2007, at 6.

¹⁶ First execution in Beijing following the SPC's restoration of the power to review death sentences, BEIJING EVENING NEWS, June 27, 2007, <http://news.qq.com/a/20070627/003230.htm>.

¹⁷ BJNews.com.cn, *supra* note 13.

¹⁸ Li, *supra* note 11.

¹⁹ See *id.*; see also Yi Sheng, *A Promise Unfulfilled: The Impact of China's 1996 Criminal-Procedure Reform on China's Criminal Defense Lawyers' Role at the Pre-trial Stage (Part 2)*, 5 PERSP. 1 (2004).

that they would not efficiently practise law to safeguard the legitimate rights of criminal suspects, particularly those facing the death penalty. The worst is the criminal risks that practising lawyers may take in defence 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 defence lawyers in the criminal process and even become an expedient for other parties' use to retaliate upon the accused party at a disadvantage.

III. STATE COMPENSATION REGIMES IN 2010: IMPROVING REMEDY FOR DEATH

While SHE Xianglin was given some compensation for his 11 year imprisonment, it was generally accepted that the amount he received was inadequate. Negative public opinion following Case SHE led China to introduce a new State Compensation Law (SCL) in 2010.

Problems with the old law included limitations on what sufferings deserved compensation, too many procedural obstacles to obtaining compensation and inadequate provision of funds to pay out compensation awards. Under the 1994 SCL, those who endured mental suffering as a result of their wrongful convictions could not recover for such injuries. The 2010 SCL explicitly allows for compensation on the ground, even through state negligence, without criminal courts' findings or other departments' written acknowledgement before application. It also imposed a duty on detention facilities to demonstrate that they did not mistreat a wrongfully convicted prisoner. Previously, the onus was on the claimant to show that they were tortured, a procedural obstacle that made it very difficult to collect compensation. This reform greatly simplifies the procedural requirements to obtain compensation.

Moreover, even those who succeeded in obtaining an order for compensation had difficulties of collecting their awards because the 1994 SCL left the organs under compensatory obligations to provide the compensation award, as indicated from the fact of Cases SHE Xianglin and ZHAO Zuohai. Many of such organs were too poor to actually provide the funds they were ordered to pay. This situation was also supported by the statistics in the year of 2009 when among

748 concluded cases of criminal compensation, less than one half of them and only 305 ones that national courts dealt with, successfully received state compensation.²⁰ The 2010 SCL created a new system under which compensation fees are included in the public finance and budgets at various levels to safeguard the financial payment of compensation.

Unfortunately, further reforms of the compensation system are required. The hearing procedure for compensation is still closed to the public and to the wrongfully convicted claimant. The claimant is not allowed to have any effective participation in the decision-making process. Most egregiously, courts are given the power to decide whether to compensate for their previous wrong decisions, with an obvious conflict of interest.

IV. AMENDMENT VIII IN 2011: SHRINKING THE SCOPE OF THE DEATH PENALTY

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.

A. Case Study

A farmer ZHAO Zuohai was convicted of murder in 1999 for killing a fellow villager.²¹ 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.²² But the trial judge ignored them and affirmative defence concluding with his murder conviction and death sentence.²³ The main evidence against Mr. ZHAO came from his oral confessions of murder during

²⁰ *China adopts amended state compensation law to better protect human rights*, PEOPLE'S DAILY ONLINE, Apr. 30, 2010, available at <http://english.peopledaily.com.cn/90001/90776/90785/6968846.html>.

²¹ Misjudged case of ZHAO Zuohai Being Solved, the HPC Setting up 9 May as ‘A Warning Day’, DAHE NET, <http://www.dahe.cn/xwzx/dhfd/jrfd/sgys/index.html>.

²² Shi Yu, *Driven Miscarriages of Justice*, SOUTHERN CITY NEWSPAPER, May 19, 2010, available at <http://gcontent.oeeee.com/1/e3/1e328ebc91246864/Blog/a84/0dd815.html>.

²³ Elizabeth M. Lynch, *Who Will Be Watched: Margaret K. Lewis on China's New CPL & Residential Surveillance*, CHINA LAW & POLICY, Sept. 25, 2012, <http://chinalawandpolicy.com/tag/zhao-zuohai/>.

interrogation,²⁴ which was denied by the less-educated defence for confessions were caused by police torture for over one month during his arrest²⁵. 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 denied²⁶ except for chili water and having firecrackers set off over his head during interrogation before confession²⁷, as well as detaining and beating his wife for witness testimony on his killing scene,²⁸ by which means they were 'trying to identify the headless body' with the supposed 'victim' as the key to their 'investigation'.²⁹

Local policemen's work in this was subsequently found to be seriously flawed,³⁰ 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.³¹ 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*³². 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 duty³³, apart from three other judges involved³⁴. The innocent ZHAO

²⁴ *People's opinion: What did make Case Zhao Zuohai misjudged?* PEOPLE NET, May 11, 2010, <http://opinion.people.com.cn/GB/11569658.html>; See Shi, *supra* note 22.

²⁵ Wang Jingqiong and Li Yuefeng, *Murder convict set free after 'victim' turns up*, CHINA DAILY, May 10, 2010, available at www.chinadaily.com.cn/china/2010-05/10/content_9826537.htm; Zhao Zuohai gains 120,000 yuan extra, SHANGHAI DAILY, May 19, 2010, available at http://www.china.org.cn/china/2010-05/19/content_20074842.htm

²⁶ See Lynch, *supra* note 23.

²⁷ Zuo Likun, *'Killer' jailed for 10 yrs; then victim returns*, CHINA DAILY, May 7, 2010, available at http://www.chinadaily.com.cn/china/2010-05/07/content_9823402.htm.

²⁸ Clifford Coonan, *ZHAO Zuohai: Beaten, framed and jailed for a murder that never happened*, THE INDEPENDENT, May 14, 2010, available at <http://www.independent.co.uk/news/world/asia/zhao-zuohai-beaten-framed-and-jailed-for-a-murder-that-never-happened-1973042.html>.

²⁹ See Wang, *supra* note 25.

³⁰ Niu Yahao, 6 policemen have been prosecuted over the Case of ZHAO Zuohai extorted confession by torture, SICHUAN ONLINE, July 14, 2010, <http://www.sina.com.cn>,

³¹ See DAHE NET, *supra* note 21.

³² Wen Yuanzhu, Tracking Misjudged Case Zhao Zuohai: The Defence Counsel that the Court Designated for Zhao Zuohai Being A Trainee Then, GUANGZHOU DAILY, May 15, 2010, available at <http://news.sina.com.cn/c/2010-05-15/040320276147.shtml>.

³³ Senior judge suspended after wrongful conviction, CHINA DAILY, May 19, 2010.

later received RMB 650,000 (US\$ 96,000) in compensation,³⁵ including RMB 120,000 (US\$17,572) extra 'for his mental distress'³⁶.

B. 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.³⁷ 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,³⁸ 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

³⁴ *Three Judges Were Interdicted for Designating a Trainee Then to Defend for Zhao Zuohai*, SOUTHERN CITY NEWSPAPER, May.19, 2010, available at <http://news.hexun.com/2010-05-15/123708405.html>; GUANGZHOU DAILY, *supra* note 32.

³⁵ CHINA DAILY, *supra* note 33.

³⁶ *Zhao Zuohai Gains 120,000 Yuan Extra*, SHANGHAI DAILY, May 19, 2010, available at http://www.china.org.cn/china/2010-05/19/content_20074842.htm.

³⁷ *China Tempers Justice with Mercy by Amending Criminal Law*, XINHUA NET (Aug. 24, 2010), http://news.xinhuanet.com/english2010/china/2010-08/24/c_13458525.htm.

³⁸ UN Doc., A/RES/2200A (XXI), <999>U.N.T.S.171.

completely free to qualify a crime' as 'serious' or 'most serious',³⁹ 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'.⁴⁰ 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' the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.⁴¹ Any intentional crimes which infringe life appear to be 'most serious crimes' and apply the death penalty.⁴² 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.⁴³ Moreover, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions considers that 'the death penalty should be eliminated for crimes such as economic crimes and drug-related offences',⁴⁴ apart from 'other so-called victimless offences, or activities of a religious or political nature', or 'actions primarily related to prevailing moral values'.⁴⁵

Additionally, one of the legislative patterns is the 'absolute punishment of the death penalty'⁴⁶ for certain crimes⁴⁷. This takes

³⁹ R. Sapienza, *International Legal standards on Capital Punishment*, B.G. Ramcharan eds., THE RIGHT TO LIFE IN INTERNATIONAL LAW, Dordrecht: Martinus Nijhoff Publishers, 1985, p.286.

⁴⁰ General Comment No. 06: The right to life (Article 6): 30/04/82.

⁴¹ Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, UN Doc., E/Res/1984/50(25/05/1984).

⁴² Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Comments of the Human Rights Committee, CCPR/C/79/Add.1(Algeria25/09/92)[5].

⁴³ Nigel S. Rodley, *Human Rights and Humanitarian Intervention: The Case Law of the World Court*, 38 ICLQ 219(1989).

⁴⁴ Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc.E/CN.4/1998/68[94].

⁴⁵ CHINA DAILY, *supra* note 33.

⁴⁶ Hu Changlong, *Sixing Anjian Chengxu Yanjiu*[Research on Issues of Procedures for Capital Cases] 177 (Publishing House of the Chinese People's Public Security University, 2003).

⁴⁷ They are the 5 crimes of the Crimes of Endangering National Security, including treason, the crime of splitting the country, crime of defecting to the enemy and turning traitor, crime of stealing, secretly gathering, purchasing, or illegally providing State secrets or intelligence for an organization, institution, or personnel outside the country, the crime of supporting enemy; the crimes of the Graft and Bribery, and the crime of fabricating rumors to mislead people on the Crimes of Violation of Duty by Military Personnel.

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’.⁴⁸ Obviously, China fails to essentially adopt strict limits on its use given ‘a huge gap between policy and practice’⁴⁹, though the present death penalty policy is ‘to kill less’ and cautiously⁵⁰, ‘those who do not have to be killed should not be sentenced to death’⁵¹ as the guideline for the application of the death penalty⁵².

V. LATEST REFORM IN 2012: CURRENT PROCEDURE LAW FOR CAPITAL CASES

As I have shown, previous attempts to prevent wrongful convictions were inadequate. This failure is due primarily to flaws in their implementation, and secondarily to weaknesses in the reforms themselves. In response to the wrongful convictions of SHE and ZHAO, China has amended the 1996 CPL as the 2012 CPL, effective 2013. This new CPL includes China’s first rule for the exclusion of illegal evidence, further expands the role of defence counsel, enhances the ability of the accused to seek supervision from higher courts and makes death penalty reviews more transparent. Both progress and problems will be respectively explored.

A. Adversary progress in principle

As the *White Paper on Judicial Reform in China* stressed,⁵³ the 2012CPL has further reformed and improved the system of advocacy to make it play a due role in human rights protection, particularly on the right to defense of suspects and defendants and on lawyers’ rights to practice during criminal litigation. Since the *White Paper* aims to

⁴⁸ General Comment No. 06: The right to life (Article 6): 30/04/82.

⁴⁹ *China: Horrific New Year*, AI:ASA 17/007/2005, <http://web.amnesty.org/library/index/engasa170072005>.

⁵⁰ Mao Zedong, *Mao Zedong Selected Works* [Mao Zedong Xuanji] 1271 (People’s Publishing House, 1991).

⁵¹ *Id.* at 40.

⁵² Zhao Bingzhi, Gradual Abrogation of the Death Penalty Regarding the Non-Violent Crimes from the perspective of Chinese Death Penalty Policy, in *THE ROAD OF ABOLITION OF THE DEATH PENALTY IN CHINA—REGARDING THE ABOLITION OF THE NON-VIOLENT CRIMES AT THE PRESENT STAGE* 18 (Zhao Bingzhi, ed., 2004).

⁵³ *Judicial Reform in China*, INFORMATION OFFICE OF THE STATE COUNCIL OF THE PRC, Oct. 9, 2012, available at <http://www.scio.gov.cn/zfbps/ndhf/2012/201210/t1226620.htm>.

‘provide a snapshot view of the progress of legal reform in China over the past’ decade, official views on the system suggest ‘what the top level of the Chinese government believes is important’ about criminal advocacy and its development in China’s justice practice.⁵⁴ The helpful development of adversarial system mainly relate to several major aspects:

The 2012CPL specifies criminal suspects’ right to appoint a defender from their first interrogation or compulsory measures to ensure timely defense and resolve legal inconsistencies concerned. It also expands the scope of legal assistance to investigation, prosecution review processes and trials in criminal litigation, as well as that of people entitled to receive such assistance to better protect the rights to defense. Albeit with few cases as exceptions, it does ‘provide a legal guarantee for lawyers to overcome difficulties in meeting with the suspect or defendant, accessing to materials concerning the case and obtaining evidence through investigation’,⁵⁵ Further, its Articles 120, 222, 239 and 240 clarify the role of lawyers in the final review process conducted by the SPC to enhance adversarial protections for suspects and defendants in capital cases.

Nonetheless, different from lawyers’ increasing role and number, ‘judges in China has remained static at about 200,000’, which indicates ‘an increasing workload for the judges’ and the negative effects on ‘the quality of decisions’ given that Chinese still makes ‘active use of the court system to resolve disputes’.⁵⁶ Consequently, there are more problems remained to be solved not only in China’s criminal laws including the 2012 CPL but also in their implementation, of which those on death penalty reforms are as follows in practice:

B. Remained problems in practice

Due to the inadequacy of legal safeguards on the adversarial system in the above-mentioned two waves of death penalty reform, the practice of adversarial processes would not guarantee due process in all criminal trials, including those resulting in death sentences. Apart from legal deficiencies, political, cultural and institutional

⁵⁴ Dan Harris, *Judicial Reform in China and Its Impact on Foreign Investment*, LEGAL NEWS, Oct. 31, 2012, available at <http://www.chinalawblog.com/2012/10/judicial-reform-in-china-and-its-impact-on-foreign-investment.html>.

⁵⁵ INFORMATION OFFICE OF THE STATE COUNCIL OF THE PRC, *supra* note 53.

⁵⁶ Harris, *supra* note 54.

factors constitute remained obstacles in China's planned road to developing the adversarial system, which cannot satisfy international requirements but goes against 'fair trial' as a part of *National Human Rights Action Plan of China (2012-2015)*⁵⁷. These problems or obstacles concerned could be examined as follows.

1. Legal Obstacle in Criminal Laws

It is likely that that the 2012CPL will be no more effective than the 1996CPL at preventing and correcting wrongful convictions. The law leaves open several legal loopholes that could be abused. For example, the new exclusionary rules are unclear and could be nullified by biased judges. Laws penalizing defence lawyers who zealously defend their clients have not been abolished. The remedies provided to the wrongfully convicted are still limited. There are still no constitutional or statutory protections of the right to silence or the presumption of innocence that would ensure the exclusion of illegal evidence. Checks and balances on judicial, prosecutorial and police powers are flawed and often not implemented. The root causes of all of these loopholes derive from three 'traditional' factors that persist in China's justice system. They are:

- (1) The traditional idea of a presumption of guilt,
- (2) The traditional pattern of imbalanced powers between the defence and prosecution,
- (3) The reluctance of judges to abandon the traditional system of inquisitional process.

As long as these three practices persist, China's transition to an adversarial system of criminal justice where the rights of the accused are protected will be impossible.

And finally, defense counsel, even being fully trained lawyers, are often unable to adequately present their clients' cases. As demonstrated by Case LI Zhuang, for instance, criminal lawyers are vulnerable to prosecution for the crime of 'falsifying evidence' under Article 306 of the *1996CL*, according to which they are prohibited from tampering with evidence and 'coercing or inducing witnesses' to change testimony.⁵⁸ The article has been widely criticized as the legal

⁵⁷ Full Text: *National Human Rights Action Plan of China (2012-2015)*, XINHUA NET, (June 11, 2012), http://news.xinhuanet.com/english/china/2012-06/11/c_131645029.htm.

⁵⁸ Its Article 306 provides that 'If, in criminal proceedings, a defender or legal agent destroys or forges evidence, helps any of the parties destroy or forge evidence, or coerces the witness or induces him into changing his testimony in defiance of the facts or give false testimony, he shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention; if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years. Where a witness's testimony or other evidence provided, shown or quoted by a defender or

obstacle to China's development of the adversarial system for its ambiguous language, uncertain implementation and human rights violations. Most suspected lawyers face up with the risk that Article 303 poses, when testimony has been changed after lawyers' involvement, potentially promoting it to serve 'as a weapon of the authorities to retaliate against defense lawyers who provide successful legal representation'.⁵⁹ Its nature was identified by the All China Lawyers Association's statistical analysis on 79 appealed cases and Chinese legal academic examination as reflecting 'professional discrimination' against lawyers given the shortage of 'provisions to criminalize the authorities' misconduct in the criminal process'.⁶⁰

Moreover, Chinese legal practitioners have concerned about the 'Big Stick Article 306' hanging over lawyers' heads in their criminal defense practice than ever,⁶¹ because case LI incited fierce controversy and defense lawyers considered its abusive use as 'procuratorial retaliation' against them.⁶² Though review of reports on a number of lawyers who were charged under Article 306, only a very few of them were sentenced to prison but the conviction of LI Zhuang indicated 'the alarming deterioration of the environment for lawyers in criminal adjudication'.⁶³ The outcome of *Case LI* did 'aggravate difficulties in representation of criminals at the pre-trial stage' and 'worsen the existing imbalance of power between defense lawyers and law enforcement agencies'.⁶⁴ Although the waves of criminal justice reform attempted to promote the adversary system

legal agent is inconsistent with the facts but is not forged intentionally, it shall not be regarded as forgery of evidence.'

⁵⁹ Li, *supra* note 11; See Chen Xingliang, Wei Bianhu Quan Bianhu, Xingshifa Shiye Zhong de Bianhu Quan [Defending the Defense Right: Defense Right from the Perspective of Criminal Law], 1 FAXUE [LEGAL SCI.]15,17(2004).

⁶⁰ Quanguo Lixie Weiquan Gongzuo Baogao [Work Report of the All China Lawyers Association to Uphold Lawyers' Rights], ZHONGHUA QUANGUO LÜSHI XIEHUI [ALL CHINA LAWYERS ASSOCIATION] 2 (2002); Chen Ruihua, Falü Zhiye Gongtongti Xinicheng le ma: yi Bianhu Lüshi Diaochaquan wei Qieru de Fenxi [Has the Law Community Been Formed?-Analysis Based on the Defense Lawyer's Investigatory Right], 3 ZHONGGUO SIFA [JUST CHINA]19(2008).

⁶¹ Yu Ping, Glittery Promise vs. Dismal Reality: The Role of a Criminal Lawyer in the People's Republic of China after the 1996 Revision of the Criminal Procedure Law, 35 VAND. J. TRANSNAT'L L. 827, 857 (2002).

⁶² Austin Ramzy, *China's Dark City: Behind Chongqing's Crime Crackdown*, TIME, Mar. 15, 2010, available at <http://www.time.com/time/magazine/article/0,9171,1969642-2,00.html>.

⁶³ CHEN RUIHUI, *Wenti yu zhuyi zghijian* [BETWEEN PROBLEMS AND PRINCIPLES] 402, ([China Renmin University Press]) (2008); HUMAN RIGHTS WATCH, 'WALKING ON THIN ICE': CONTROL, INTIMIDATION AND HARASSMENT OF LAWYERS IN CHINA 4(2008), available at <http://www.hrw.org/reports/zoo8/chinao4o8/chinao4o8web.pdf>.

⁶⁴ Li, *supra* note 11.

by enhancing lawyers' role and ensuring the accused procedural protections,⁶⁵ Chinese lawyers still encounter with the same obstacle of professional threats in providing effective legal representation and the difficulty is just the tip of the iceberg in criminal defense.

2. Political Influence: Party's interference

Another obstacle is the undesirable political influence on conviction or sentencing in criminal cases. Under the current political and judicial systems, Party and government organizations may interfere with criminal trials and there might have political pressure to pass death sentences, as demonstrated from wrongful convictions reported in recent years of China. Such influence usually leads to 'serious doubts about the effectiveness of the above-mentioned legal reforms' in the context of Chinese legal culture.⁶⁶

Worse, the criminal justice system remains highly vulnerable to corruption⁶⁷ and political interference, so that the police, PPs and PCs are not independent and remain under the supervision of the local politics and law commissions of the Chinese Communist Party (CCP). In fact, extralegal factors always wield 'undue influence on the implementation' of relevant laws due to 'the deviousness of legal development in China' and thus many legal issues cannot be resolved by legal measures but likely determined by political considerations.⁶⁸ The traditional practices eliminate the triangular structure that should exist between the judge, the prosecution and the defence, with each actor playing a distinct role in order to obtain justice. The criminal trial is instead turned into something akin to an assembly line. This assembly line begins with the police at one end, the prosecution next and the judge last, in which criminal injustice is the final product. Often, the initial input to the line is forced confession. This "conveyor belt" is ultimately powered by pressure from the Political-Legal Committee, to reach a verdict of guilt, even where the accused is innocent and the penalty is death. Where the accused can show doubt, authorities are much more likely to seek a death

⁶⁵ See CHEN JIANFU, CHINESE LAW: CONTEXT AND TRANSFORMATION 334 (2007); Yi, *supra* note 19; Chen Guangzhong, Mianchi chengfa zuifan yu baozhang renqan xiang jiehe, lizu guoqing yu jiejian guowai xiang jihguo [*Combining the Punishment of Criminals and the Protection of Human Rights, Combining Relying on Domestic Particularities and Borrowing Western Experiences-Few Thoughts from Participation of the Criminal Procedure Law Reform*], *zhengfa lunfan* [TRIB. POL. SC. & L.], no. 6, 1996, at 29-30.

⁶⁶ Li, *supra* note 11.

⁶⁷ Hongming Cheng & Ling Ma, White collar crime and the criminal justice system: Government response to bank fraud and corruption in China, *Journal of Financial Crime*, (2009) Vol. 16 Issue: 2, pp.166-179

⁶⁸ Li, *supra* note 11.

sentence with a reprieve rather than an acquittal, so as to maintain a very high, indeed, almost a full conviction rate. Given that the CCP commissions remains dominant in every aspect of Chinese people's political and legal lives⁶⁹, real improvement in lawyers' role eventually benefit from its will and 'commitment to constructing a state genuinely ruled by law'.⁷⁰

3. Cultural Cause: Crime Control v. Rights

After the *1996 CPL* ended with failure in equalizing the balance of power between crime control and suspects' rights protection, the *2012 CPL* and other legal mechanisms, currently effective, are likely to run into similar cultural impediments in implementation, without changing tradition potentially against rights. Combined with pressure of striking against crimes that might increase authorities' hostile attitude towards lawyers, the crime control-oriented culture cannot fade much as more adversarial reform progressed.

Given the Chinese tradition of stressing 'social stability and the value of crime control' in ultimate priority, 'the authorities are more likely to place weight on the pursuit of crime control, and to intentionally weaken lawyers' capability to challenge their exercise of power' in criminal process.⁷¹ Also, because 'society's collective interests are always above individual rights' according to Confucian thinking,⁷² Chinese lawyers used to be 'thought to be devious',⁷³ and had no real equivalent with authorities⁷⁴. Responding to emerging crime and official corruption,⁷⁵ an inquisitorial system was adopted to strike down them in the *1979 CPL*, where the relationship among the law enforcement agencies of police, procuratorates and courts, characterized as the 'Iron Triangle', 'was sequential and coordinative' for 'combating crime'.⁷⁶ Oppositely, lawyers who are 'required to be loyal to the socialist cause and to put the interests of

⁶⁹ See Dominant-party system, From Wikipedia, the free encyclopedia, http://en.wikipedia.org/wiki/Dominant-party_system.

⁷⁰ Li, *supra* note 11.

⁷¹ Li, *supra* note 11.

⁷² Randall Peerenboom, *Rights, Interests, and the Interests in Rights in China*, 31 STAN. J. INT'L L. 359, 362 (1995).

⁷³ See Frankie Fook-Lun-Leung, *The Re-Emergence of the Legal Profession in the People's Republic of China*, 6 N.Y.L. SCH. J. INT'L & COMP. L. 275 (1985); Dean G. Rojek, *The Criminal Process in the People's Republic of China*, 2 JUST. Q. 117, 143 (1985).

⁷⁴ Yi, *supra* note 19.

⁷⁵ See Olivia Yu, *Corruption in China's Economic Reform: A Review of Recent Observations and Explanations*, 50 CRIME, L. & Soc. CHANGE 161, 161-62 (2008).

⁷⁶ Liu & Halliday, *supra* note 9, 925.

society first⁷⁷ played a minor role in the criminal process, making it a 'formality' only⁷⁸.

To relieve tension between crime control and rights protection, the adversarial system was adopted in the 1997 CPL to improve criminal lawyers' effectiveness in protecting human rights and to redefine the role of three agencies at trial, including the judiciary as a neutral and independent arbitrator⁷⁹. But evidently, 'crime control has still unduly dominated the operation of criminal proceedings', e.g., court trials focusing on crime control and the police's or procuratorates' preference to accusatory practices, which indicates the intensified ideal of crime control 'in the mentality of law enforcement agencies'.⁸⁰ Under this influence, some investigators in the police or procuratorates tend to obtain crucial evidence by all means against law, such as torture, beatings and other illegal ways.⁸¹ This could be demonstrated from both recent high-profile wrongful convictions and miscarriages of justice in Chongqing's "beat black"⁸² campaign, involving such cases as related to tortured criminal suspects, their family⁸³ or defense lawyers in three authorities' 'streamlined work processes'⁸⁴ on policing crimes. The target of anti-crime campaign has expanded from the accused⁸⁵ to

⁷⁷ See LAWYERS COMMITTEE FOR HUMAN RIGHTS, CRIMINAL JUSTICE WITH CHINESE CHARACTERISTICS: CHINA'S CRIMINAL PROCESS AND VIOLATIONS OF HUMAN RIGHTS 38 (1993); Li, *supra* note 11.

⁷⁸ Daniel C. Turack, *The New Chinese Criminal Justice System*, 7 CARDOZO J. INT'L & COMP. L. 59 (1999).

⁷⁹ Pamela A. Seay, Law, Crime and Punishment in the People's Republic of China: A Comparative Introduction to the Criminal Justice and Legal System of the People's Republic of China, 9 IND. INT'L & COMP. L. REV. 143, 148 (1998).

⁸⁰ Li, *supra* note 11.

⁸¹ AMNESTY INTERNATIONAL, PEOPLE'S REPUBLIC OF CHINA: Law REFORM AND HUMAN RIGHTS 13 (1997); Guo Zhizhong, Xingsun bigong de falv fenxi [The Legal Analysis of Forced Confession Through Torture and Ill Treatment], Gong'an Yanjiu [POLICING STUD.], no. 4, 2007, 64.

⁸² Li Zhuang: Chinese Defense Lawyer Who Was Found Guilty of Suborning Perjury, in Category Archives: Asia, <http://wrongfulconvictionsblog.org/category/asia/page/4/>.

⁸³ E.g., SHE Xianglin, <http://ntdtv.org/en/news/china/china-focus/2012-12-19/what-li-zhuang-case-signals-for-china-s-legal-reform.html>; see also Public Security Bureau Compensates She Xianglin for Wrongful Imprisonment, Source: Xinhua - Chinese (2005-10-28), <http://www.cecc.gov/pages/virtualAcad/index.phpd?showsing=27834>.

⁸⁴ CHEN RUIHUA, xingshihengxu qianyan [THE FRONTIERS PROBLEMS OF CRIMINAL LITIGATION] 535 (zhongguo renmin daxue chubanshe [China Renmin University Press]) (2005); SONG YINHUI & Wu HONGYAO, shenqian chengxu yanjiu [THE STUDY OF PRETRIAL PROCEEDINGS], 5 (zhongguo zhengfa daxue chubanshe [China University of Political Science and Law Press]) (2002)

⁸⁵ See Official calls for protection of suspects' rights, Xinhua (2006-11-20), http://www.chinadaily.com.cn/china/2006-11/20/content_737426.htm; see also Lin Yi, Chinese police

their family,⁸⁶ and even to defence lawyers who undertake legal duties and observe professional ethics, e.g., in *Case LI Zhuang*⁸⁷. To curb above-mentioned miscarriages of justice under the incomplete adversarial system, the effective *2012 CPL* further reforms the way three authorities carry out criminal justice by strengthening adversary to better human rights protection on the vulnerable defence party. Although early cases in its implementation from 2013 have not yet indicted ‘how serious China’s new leadership is about meaningful reform’⁸⁸, an undesired past did suggest how important to promote human-rights culture.⁸⁹

4. Institutional Factors: Evaluation Systems

Apart from occupational discrimination in public,⁹⁰ the relevant evaluation systems as institutional factors underlie ‘the antagonism between the authorities and defense lawyers’,⁹¹ in exercising their powers to deal with lawyers, albeit as an integral part’ of their criminal justice work⁹². The evaluation systems, regardless reward or remedy, essentially failed to incentivize authorities’ work as designed, but mislead them ‘to pay more attention to the success of their criminal accusations than to the justice’⁹³.

Since 1978, an administrative evaluation system has been established in each law enforcement agency to evaluate officials’ achievements,⁹⁴ together with political ethics, which determine their

chief’s widow alleges torture after he dies in custody, *The Guardian* (14 January 2011), <http://wrongfulconvictionsblog.org/category/asia/page/4/>.

⁸⁶ See Tortured, Wrongly Imprisoned Man Compensated (*China Daily* October 28, 2005), <http://www.china.org.cn/english/2005/Oct/146896.htm>.

⁸⁷ See What Li Zhuang Case Signals for China’s Legal Reform, NTD Television (19 December 2012),

<http://ntdtv.org/en/news/china/china-focus/2012-12-19/what-li-zhuang-case-signals-for-china-s-legal-reform.html>; see also Tian Lei, Liz huang an de shen ceng jia zhi [*The Deeper Value of the Li Zhuang Case*], *Nanfeng chuang* [S. WIND WINDOW], Jan. 17, 2010.

⁸⁸ What Li Zhuang Case Signals for China’s Legal Reform, NTD Television (19 December 2012), <http://ntdtv.org/en/news/china/china-focus/2012-12-19/what-li-zhuang-case-signals-for-china-s-legal-reform.html>.

⁸⁹ See J Li, Human Rights vs. State Interests in China: Case Studies, *New Zealand Journal of Asian Studies* 9, 2(2007):147-68

⁹⁰ Yi, *supra* note 19.

⁹¹ Li, *supra* note 11.

⁹² Jianfu Chen, *A Criminal justice System for a New Millennium?*, in CHINA’S LEGAL REFORMS AND THEIR POLITICAL LIMITS 5 (Eduard B. Vermeer & Ingrid d’Hooghe eds., RoutledgeCurzon 2002).

⁹³ Li, *supra* note 11.

⁹⁴ Wan Yi & Shi Qingzheng, *Jianchayuan jixiao kaohe shizheng yanjiu* [*Empirical Study of the Appraisal System in the Procuratorates*], 1 *Dongfang faxue* [ORIENTAL L.] 2009, p.28.

rewards, promotions, salary adjustments or demotions. In handling criminal cases, the highest evaluation standards are the rate of prosecution for investigators, namely that of ‘submitted cases finally prosecuted by the procuratorate’,⁹⁵ or conviction rate for responsible prosecutors, without the opportunity of prizes if cases are annulled or suspects are freed at trial.⁹⁶ All of the relevant authorities could benefit from the conviction, after which was reported that the courts give money to the Political-Legal Committee by transfer of criminals’ bank funds.⁹⁷ In addition, a wrongful-conviction responsibility system constitutes another salient part of the evaluation mechanism. The responsibility system in various regulations is designed to administratively penalize law enforcement officers for their incorrectly handling cases, but wrongful convictions have long been regarded as the only form absent of successful conviction that may lead to internal punishments from working agencies in fact. It is because the orientation of crime control drives the authorities to evaluate an acquittal or return of the case to the People’s procuratorates as delinquency of duty, rather than as a positive approach to reduce wrongful death sentences.

VI. FUTURE REFORM IN CHINA: LESSONS FROM WRONGFUL CONVICTIONS

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’,⁹⁸ 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’⁹⁹.

A holistic approach is necessary to end these traditional practices. There is a need to reform the entire criminal process because it is

⁹⁵ Jiang Lijun, Lun Woguo Gong’an Jiguan De Jixiao Pinggu Jizhi [The Discussion of the Appraisal System in the Public Security Organs], 6 Gong’an Xuekan [J. ZHEJIANG POLICE C.] 79, 80 (2002).

⁹⁶ Wan Yi & Shi Qingzheng, Jianchayuan Jixiao Kaohe Shizheng Yanjiu [Empirical Study of the Appraisal System in the Procuratorates], 1 Dongfang Faxue [ORIENTAL L.] 28, 34-35 (2009).

⁹⁷ Si Weijiang, Dark Find from Chongqing’s “Beat Black” Campaign, CHINA DIGITAL TIMES, <http://chinadigitaltimes.net/2012/07/dark-find-from-chongqings-beat-black-campaign/>.

⁹⁸ Information Office of the State Council of the PRC, Full Text: Judicial Reform in China, Xinhua News, http://news.xinhuanet.com/english/china/2012-10/09/c_131895159.htm.

⁹⁹ *Id.*

impossible to introduce methods to prevent wrongful convictions except as an organic part of systematic reforms to China's whole legal system. It is generally accepted that the 'greatest obstacle that China faces in achieving lasting reform is not in legislating new laws, but in implementing them. If any reform is to work, incentives that lead judges to value high rate convictions over achieving justice must be abolished. Police and prosecutors should be encouraged to rely on legally obtained evidence only and not forced confessions. Finally, laws penalizing defence lawyers to protect the defence's right should be removed.

Currently, law enforcement officers require special nurturing, among which judges are at the core of potential expansionist practitioners that prevailing scholarships put emphasis on. Other legal actors including educators, lawyers and regulators, also require recognition and acceptance of adversarial reform and act on the transitional reality to fill in the justice gap and prevent miscarriages of justice. Particularly, the standards of wrongful convictions need to be corrected, independent from the interference of crime control and other non-criminal law factors. Even though innocence and exoneration has been sharply defined and universally acknowledged to be 'a political, social and scientific process' not fully within the criminal justice system,¹⁰⁰ wrongful convictions in media reports cannot necessarily be acquitted or exonerated by the PCs, e.g., controversial illegal money-raising case¹⁰¹. Accordingly, all legal actors need to enhance their understanding of how new laws, such as the 2010 SCL, Amendment VIII and the *2012CPL*, work, and of the essential regime shifting to adversarial process and of its proper way

¹⁰⁰ Kent Roach, *Exonerating the Wrongful Convicted: Do We Need Innocence Hearings in Honouring Social Justice* 55, 55 (Margaret E. Beare ed., 2008). Christopher Sherrin, *Declarations of Innocence*, 35 *Queens L.J.* 437 (2010). Jiang Lijun, *Lun Woguo Gong'an Jiguan De Jixiao Pinggu Jizhi* [The Discussion of the Appraisal System in the Public Security Organs], 6 *Gong'an Xuekan* [J. ZHEJIANG POLICE C.] 79, 80 (2002).

¹⁰¹ Mo Hong'e, Wu Ying case underlines need for private financing reform, *Xinhua News*, http://news.xinhuanet.com/english/china/2012-04/21/c_131541731.htm; Associated Press in Beijing, Chinese supreme court overturns tycoon Wu Ying's death sentence, *the guardian*, <http://www.guardian.co.uk/world/2012/apr/20/chinese-supreme-court-wu-ying>; C_Luan , Supreme court disapproves death penalty for Wu Ying, *Xinhua News*, http://news.xinhuanet.com/english/china/2012-04/20/c_131541052.htm; Mu Xuequan , Death-sentenced businesswoman receives lighter penalty following heated debates, *Xinhua News*, http://news.xinhuanet.com/english/china/2012-05/21/c_131601890.htm; Ye Tan, Wu Ying and the case for financial reform, *China.org.cn*, http://www.china.org.cn/opinion/2012-04/28/content_25263575.htm; Ye Tan, Wu Ying and the case for financial reform, *China.org.cn*, http://www.china.org.cn/opinion/2012-04/28/content_25263575.htm.

in application to prevent wrongful convictions, of which both occupational and professional ethical training for judicial staff¹⁰² remains to be further intensified.

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, police interrogations should be fully recorded and the entire recording should be played back at trial. Second, the role of the defence counsel should be expanded so that defence counsel is allowed to appear and make submissions to the SPC's final review of death penalty cases. Finally, 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 review process of wrongful convictions would help rectify far more miscarriages of justice.

Moreover, the tension between local party committees and law enforcement authorities should be promisingly eased. As the latest development, a white paper on the 'Judicial Reform in China', issued in October 2012, has regarded the 'fairly and independently' exercising of judicial powers as a fundamental objective of China's on-going judicial reform,¹⁰³ without mentioning the supremacy of Party in judicial work. While 'deemphasizing of the party's role in the judicial system keep open the possibility of more substantial change than the system has seen',¹⁰⁴ undoubtedly, serious obstacles still exist in China. Together with corruption permeating the judiciary, a lack of checks and balances within the system serves to undercut the efficacy of safeguards relevant to criminal justice. The effectiveness of criminal laws is in capital cases dependent on a broader institutional framework within which the laws operate, including an independent and impartial judiciary as the cornerstone of fair trial and due process. It largely relies on independence of individual judges and adequate checks and balances in the judicial system, as well as the strong codes of professional ethics.

¹⁰² INFORMATION OFFICE OF THE STATE COUNCIL OF THE PRC, *supra* note 53.

¹⁰³ *Id.*

¹⁰⁴ Stanley Lubman, Reading Between the Lines on Chinese Judicial Reform, CHINA REALTIME REPORT, <http://blogs.wsj.com/chinarealtime/2012/10/28/reading-between-the-lines-on-chinese-judicial-reform/>.

Third, 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.

There is also an urgent need to create an independent body to review convictions. To fill the "justice gap" between what has been promised to the accused and what the system actually delivers, future legislative reform should focus on introducing more adversarial processes for the accused and suspects. An independent review body could combine the strengths of both the inquisitorial and adversarial systems to ensure that both defence counsel and review panel committee members are able to seek the truth. The review panel could also be granted the task of determining compensation for the wrongfully convicted, ensuring that compensation decisions are not made by the parties that decided the original case. The panel could also be given the duty of making regular reports to the People's Congress to suggest further reforms to prevent wrongful convictions.

VII. CONCLUSION

In summary, there has been a package of death penalty reforms in China that followed the discovery of several high-profile wrongful convictions in capital cases since 2005. The goal of such reforms was to protect human rights of the accused facing the death penalty, to prevent future wrongful convictions or to cautiously limit the use of the death penalty more generally.

The above difficulties in recent death penalty reforms of China have demonstrated from the mentioned cases of wrongful convictions. In addition to the broad use of capital punishment as a punishment for non-violent offences, the manner in which mechanisms introduced to prevent and discover wrongful convictions are often nullified by close cooperation between the police,

procuratorates and judiciary. Even if the Amendment VIII can be properly implemented, the latest development concerned is just a new step closer to abolition of the death penalty and not a landmark at all because the Chinese legislation still deviates from its policy on the death penalty and is quite far from some requirements of core ICCPR provisions. Although the general applicable scope-‘extremely serious crimes’ seems consistent with ICCPR Article 6(2), the total of 55 crimes carrying the death penalty has extensively covered many non-violent crimes and clearly gone beyond the above ideal scope.

Moreover, the 2012 CPL and 2010 SCL seem beneficial to better protect human rights of those facing the death penalty or greatly enhance lawyers’ role by complementary legal schemes, but an expected impact on such issues at the core of human rights and criminal justice failed to be achieved in actual implementation. It is the deeply-rooted cultural factors in China’s death penalty reforms that are most likely to diminish their role. If wrongful convictions and executions are to be prevented, at the very least, the immediate execution of prisoners who lose their final appeal must be abolished. To counteract the effect of close co-operation between the three bodies, an independent body to review all serious convictions should be created, of which the independence from any judicial bodies and political-legal committees is at the core. It is expected to better prevent potential errors in death sentences and executions in China’s long march towards gradual abolition of the death penalty.