

A Comparative Analysis of Capital Punishment in the United States and China

Amnesty International recently reported that the People's Republic of China ("PRC") and the United States ("U.S.") are both among the five countries that have had the highest number of executions over the past five years.¹ While the PRC has failed to provide any official statistics, the country was estimated to have executed thousands of citizens over the last year.² The PRC remains the world leader in executions with 68 capital offenses, including tax fraud and counterfeiting currency.³ In comparison, the U.S. executed a substantially lower number, 43 people in 2011, with murder, espionage, treason, and death-related felonies being the only permissible crimes that are subject to capital punishment.⁴

Both nations have adopted similar retributive theories on proportionality, but the practical applications of these theories are significantly different.⁵ The Eighth Amendment of the U.S. Constitution prohibits the federal government from imposing "cruel and unusual punishments..."⁶ PRC's Constitution contains no provisions analogous to the Cruel and Unusual Punishment.⁷ However, the National People's Congress drafted a new Criminal Code in 1998, providing that, "The punishment shall be equivalent to the criminal acts committed by offenders and the criminal responsibilities that the offenders shall bear."⁸ Similar to the American principle, the PRC's Criminal Code considers the degree of harm caused and the moral culpability in order to ensure proportional punishments.⁹ While the theories may be similar, PRC's radically different culture and

¹ *Top 5 Executioners in 2011*, Amnesty International, <http://www.amnesty.org/en/death-penalty/top-5-executioners-in-2011>.

² Simon Rogers, *Death Penalty Statistics, Country by Country*, The Guardian, (March 27, 2012), <http://www.guardian.co.uk/news/datablog/2011/mar/29/death-penalty-countries-world#data>.

³ Ryan Florio, *The [Capital] Punishment Fits the Crime: A Comparative Analysis of the Death Penalty and Proportionality in the United States of America and the People's Republic of China*, 16 U. Miami. Int'l. & Comp. L. Rev. 43, 45 (2008).

⁴ Rogers; Florio at 45.

⁵ *Id.* at 61.

⁶ U.S. Const. amend. VIII.

⁷ Florio at 59.

⁸ *Id.* at 60.

⁹ *Id.* at 61.

emphasis on collective, societal welfare over individual freedoms have contributed to a different understanding of proportionality.¹⁰

American jurisprudence widely observes principles of sparing the mentally ill from execution and the mentally incompetent from standing trial.¹¹ Similarly, Article 18 of the PRC's Criminal Code states that if a mentally ill patient lacks the capacity to appreciate the criminality of his conduct, he or she should not bear criminal responsibility for the act.¹² Article 9 also states that a psychiatric evaluation in criminal cases should include whether the person is competent to stand trial, but there is no further guidance on how to handle someone who is deemed incompetent.¹³ While Chinese statutes may oppose death penalties against those with mental disorders, it lacks procedural safeguards to enforce this regulation and the practice arguably remains in effect today.¹⁴

The PRC's Constitution states that "[t]he people's courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals."¹⁵ However, the PRC's government exerts significant pressure and influence on the courts to abide with current political policies over statutes and precedent.¹⁶ As a result, the courts have provided no guidance on the new Chinese Criminal Code or the necessary degree of harm to render a crime punishable by death.¹⁷ While PRC's Constitution protects certain procedural rights, it is not an enforceable contract, but rather a descriptive document that proposes certain ideals.¹⁸ There is no effective review of procedural errors, because violations of a person's supposed constitutional rights are considered unenforceable against the government.¹⁹ In the United States, a defendant receives procedural protections through every stage of capital punishment adjudications and maintains a right to an attorney and

¹⁰ *Id.* at 61.

¹¹ Zhiyuan Guo, *Approaching Visible Justice: Procedural Safeguards for Mental Examinations in China's Criminal Cases*, 33 *Hastings Int'l & Comp. L. Rev.* 21, 33-34 (2010).

¹² *Id.* at 34.

¹³ *Id.* at 35.

¹⁴ *See generally id.* at 39.

¹⁵ Florio at 80-81.

¹⁶ *See Id.* at 83.

¹⁷ *Id.* at 82.

¹⁸ Kelly Brown, *Execution for Profit? A Constitutional Analysis of China's Practice of Harvesting Executed Prisoners' Organs*, 6 *Seton Hall Const. L.J.* 1029, 1049 (1996).

¹⁹ *Id.* at 1050.

trial by jury.²⁰ In contrast, a Chinese defendant could be sentenced to death without ever consulting an attorney or having an opportunity to face his accusers.²¹

In response to international pressure, the Supreme People's Court announced a plan to ensure a "uniform application of law" in order to prevent the arbitrary enforcement of rules.²² This resulted in a reinstatement of mandatory reviews on death sentences by the Supreme People's Court.²³ Prior to this reform, *stare decisis* did not exist in the PRC and as a result, judges did not view other cases as an authoritative precedent.²⁴ By centralizing the review of death sentences, the PRC attempted to ensure consistency by adding additional oversight.²⁵ Unfortunately, the process lacks transparency with foreign observers not being allowed to observe the Supreme People's Court reviews.²⁶ While the new regulations are supposed to reform China's criminal procedure law, they fail in application.²⁷ It is an ineffective plan intended to appease international concerns, while still allowing the Chinese Communist Party to circumvent the rules in order to further the interests of the state.²⁸

The death penalty in China can be traced back to the sixteenth century BC as one of the Shang Dynasty's "Old Five Punishments" (along with face tattooing, nose amputation, feet amputation, and castration.)²⁹ Capital punishment has been a prominent element of China's criminal sentencing for centuries and any reforms upon this system will take time. On March 9, 2007, the Supreme People's Court issued further provisions, ensuring that the death penalty's application would be slowly reduced and "implemented with a greater commitment to procedural justice."³⁰ While no execution figures have been provided, the Supreme People's Court claims that the rate has fallen by thirty-three

²⁰ *Id.* at 1044-1046.

²¹ *Id.* at 1045.

²² Florio at 84.

²³ *Id.* at 85.

²⁴ *Id.* at 84.

²⁵ Stephen Minas, "Kill Fewer, Kill Carefully": An Analysis of the 2006 to 2007 Death Penalty Reform in China, 27 UCLA Pac. Basin L.J. 36, 51 (2009).

²⁶ *Id.* at 62.

²⁷ John T. Boxer, *China's Death Penalty: Undermining Legal Reform and Threatening National Economic Interest*, 22 Suffolk Transnat'l L. Rev. 593, 618.

²⁸ *Id.* at 618.

²⁹ Bin Liang, Sources of Variation in Pro-Death Penalty Attitudes in China, 46 Brit. J. Criminology 119, 120 (2006).

³⁰ Minas at 46.

percent during the first year's implementation.³¹ It remains uncertain whether these new provisions will make a lasting difference, but the social attitudes in the PRC over capital punishment appear to be changing. According to a recent survey, most Chinese college students still view capital punishment favorably, but now prefer the option of life sentencing without parole.³² Compared to the largely ineffective results of international pressure, the changing norms within the PRC will most likely have a greater effect in perpetuating real change within the system.

³¹ *Id.* at 60.

³² Bin at 128-129.