

Historical Outline of the Contemporary Criminal Law in China

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I . Introduction

The modernization of Chinese criminal law started from the law reform of late Qing Dynasty in the late nineteenth century and the early twentieth century. One of the symbolized achievements of the movement is the *New Criminal Law of Qing Dynasty* promulgated formally by the Qing government in January, 1911. In a certain sense, this more than one hundred years of history is a miniature of Chinese modern legal history. Just as the process of China's modernization, the history of the contemporary criminal law in china has distinct characteristics of the era and it can be divided into four periods. Except for the periods of the beginning period

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of law reforming in late Qing dynasty, the other three periods, in order, are the following: the period of initial building of the Republic of China (the second part), the transformation period from foundation of new china to reform and openness(the third part), the developing period since reform and openness(the forth part). In addition, the forth part can be further divided into two parts: the period of the *1979 Penal Code* (the Old Penal Code) and the period of the *1997 Penal Code* (the New Penal Code). This article intends to draw an outline of the first three periods, and focuses on the fourth period and the reform and development of Chinese death penalty system at this time. There is a brief summary in the end of this article to give a general understanding of the history of Chinese contemporary criminal law.

II . The Period of Initial Building of the Republic of China (1912-1949)

The law reform didn't save the fate of the late Qing government. Shortly after the *New Criminal Law of Qing Dynasty* was published, the 1911 Revolution erupted before the new law came into force. The Nanjing provisional government was established around the concept of constitutional republic and it means China entering the history of the Republic of China. The Nanjing Provisional Government(1911-1912) kept using the *New Criminal Law of Qing Dynasty*. But because this law was short-lived, it has no specialized criminal law except for several criminal statutes. In the period of Beiyang Government(1912-1927), the *New Provisional Criminal*

Law of the Republic of China was enacted on the basis of directly deleting or modifying the *New Criminal Law of Qing Dynasty*. In the period of the Nanjing National Government(1927-1949), the *Criminal Law of the Republic of China* was enacted in 1928 and was amended in 1935, which was one of “*the Six Law Books*” of the Nationalist Party. Meanwhile, the Nanjing provisional government also issued a series of single criminal laws.

At the same time before the foundation of New China, the areas led by the Communist Party also enacted some regulations with the nature of the criminal law, such as the *Regulation of Chinese Soviet Republic on Punishment of Counter Revolution* in 1934, the *Regulation on Punishment of Traitors during Anti-Japanese War (draft)* in 1939, the *Regulation on Punishment of Robbery during Anti-Japanese War (draft)* in 1939 and the *Regulation on Punishment of Corruption* in 1948. All of these set a solid foundation for the establishment and development of the criminal law system after the founding of China.¹⁾

III. The Transformation Period from Foundation of New China to Reform and Openness(1949-1978)

On the eve of the foundation of New China, February of 1949, the Central Committee of the Communist Party of China abolished the “*the Six Law Books*”²⁾ of the Nationalist Party explicitly. The People’s Republic of China

1) Gao, Mingxuan / Zhao, Bingzhi, *The Evolution of China’s Criminal Law Legislation* (China: Law Press, 2007), p.30.

2) The Central Committee of the Communist Party of China published the *Instruction of Abolishing “the Six Law Books” of Nationalist Party and*

was established on October 1, 1949 which marked Chinese regime construction and legal construction entering into a new historical period.

In almost 30 years from 1949 to 1978, China didn't enact a unified penal code, but a group of single criminal law on the needs of national construction and installed some subsidiary criminal laws in some non-criminal law, such as the *Regulation of the People's Republic of China on Punishment of Counter Revolution* enacted in 1951, the *Regulation of the People's Republic of China on Punishment of Corruption* enacted in 1952, etc.

In a word, the criminal legislations in this period are special regulations aiming at certain crimes which met the need to fight against certain crimes at that time. Besides, the formulation and implement of these single criminal laws accumulated a lot of experience for the formulation of the penal code. There is no denying that its defects that the punishment range of these single criminal laws were small and its implement mainly depended on policy were obvious.³⁾ Depending on policy leads to serious instrumentalism of the criminal law, and the result is that "the establishment and modification of the criminal law would depend on the needs of political struggle; the application of the criminal law would change along with the political situation; the study of the criminal law would pursuit the principle of catering to legislation and actual needs. The pragmatic concept of the criminal law...makes the legislation of the criminal law lack of foresight."⁴⁾ since

Confirming the Judicial Principle in Liberated Areas in February, 1949. It declared that abolishing the old judicial system of Nanjing National Government and the judicial work should base on the new law rather than "the Six Law Books". This instruction became the intellectual foundations for the new China's legal construction.

3) Gao, Mingxuan, *The Emergence and Development of Chinese Criminal Law* (China: Peking University Press, 2012), preface, p.30.

4) Chen, Xiaofeng, *Research on Legal Culture of China* (China: Henan People's

1966, China went through the turmoil of decade-long Cultural Revolution. The legal system construction was destroyed and the development of the criminal law was stagnant during this period.

IV. The Developing Period since Reform and Openness (since 1979)

1. The Period of the *1979 Penal Code* (also Known as the Old Penal Code)(1979-1997)

The first penal code of the New China was adopted in July, 1979. It proclaimed that the history of New China without the penal code ended and the construction of Chinese criminal legal system entered a new historical period.

1.1 The Emergence and Birth of the *1979 Penal Code*

It has undergone a difficult course to formulate the *1979 Penal Code*. At the beginning of the People's Republic of China(PRC), the Commission of Legislative Affairs of the Central People's Government had sketched out two legislative drafts, *Chinese Criminal Law Outline Draft* (1950) and *Chinese Criminal Law's Guiding Principle Draft* (1954). But these two drafts didn't enter into the formal legislative process. The first constitution of the New China was adopted in 1954 and since then the legal office of the

general offices in the Standing Committee of the National People's Congress (NPC) was responsible for the drafting of the penal code. The drafting work started from October, 1954 and they had sketched out 22 drafts till June, 1957. Then there was a four-year dormant period, and after that with the cooperation by authorities, the legal office drew up the 33rd draft in 1963. But this penal code draft was put on the shelf because of the tumultuous Cultural Revolution, and the drafting work was totally interrupted.

After the downfall of the Gang of Four in 1976, the Legal Group of Central Committee formed a revision team of the penal code draft to amend the 33rd draft and sketched out two manuscripts. The legislative affairs commission of the Standing Committee of NPC then drafted three manuscripts successively on the basis of the 33rd draft. At the Second Session of the Fifth NPC, the second manuscript was adopted on July 1, 1979, which was officially promulgated on July 6, 1979 and came into effect on January 1, 1980.⁵⁾ The first penal code of the New China came into being at last.

Professor Gao, Mingxuan was invited to take part in the drafting work of the 1979 Penal Code from 1954 to 1979. When looking back the tortuous course, he said, "An issued penal code just including 192 provisions maybe the minimum penal code among the world. Its incubation time is 25 years actually since the drafting by the legal office of the general offices in the Standing Committee of NPC. In fact, the drafting work took five years and the other 19 years were at a standstill. There was a four-year stagnation since the 22nd draft stroke out and a fifteen-year sleeptime since the 33rd

5) Details and difficulties of the drafting of the *1979 Penal Code* could be also seen in Gao, Mingxuan / Zhao, Bingzhi, *The Overview of Document Literature of Criminal Legislature in New China*, the first volume(China: Chinese People's Security University Press, 1998), p.136.

draft's emerge. ...Through 30 years after the foundation, China finally got its first extensive penal code.”⁶⁾

1.2 The Structure and Characteristics of the *1979 Penal Code*

The *1979 Penal Code* was divided into two parts, 13 chapters including 192 articles. The first part is general provisions including 5 chapters, 89 articles providing the guiding ideology, the mission and the application range of the criminal law, crimes, penalty, the concrete application of penalty and important system of penalties. The second part is specific provisions including 8 chapters, 103 articles, stipulating the classification of crimes and the elements and the statutory sentence of all kinds of specific crimes. There were 129 concrete accusations in specific provisions. According to different objects of crimes, the content of specific provisions can be divided into eight categories which are specified in eight chapters. The first chapter provided Crimes of Counter Revolution (15 articles); the second chapter provided Crimes of Endangering Public Security (11 articles); the third chapter provided Crimes of Disrupting the Order of the Socialist Economy (15 articles); the fourth chapter provided Crimes of Infringing upon Citizen's Right of the Person and Democratic Rights (19 articles); the fifth chapter provided Crimes of Property Violation (7 articles); the sixth chapter provided Crimes of Obstructing the Administration of Public Order (22 articles); the seventh chapter provided Crimes Against Marriage and Family (6 articles); the eighth chapter provided Crimes of Dereliction of Duty (8 articles).

6) Gao, Mingxuan / Zhao, Bingzhi, *The Evolution of China's Criminal Law Legislation* (China: Law Press, 2007), p.43.

1.3 Partly Modification of the 1979 Penal Code: Single Criminal Laws and Subsidiary Criminal Laws

1.3.1 24 Single Criminal Laws

In the 1979 Penal Code, there was no provision of Crimes of Servicemen's Transgression of Duties. It was not negligence but in consideration of the crime's specificity and complexity. What's more, the drafting work was much later than the draft of the penal code. It would definitely postpone the arrival of the penal code if merging the drafts into the penal code. So the drafters decided to draw up single criminal law outside the penal code. This is the *Interim Regulations on Punishment of Servicemen Who Commit Crimes Contrary to Their Duties* adopted by the Standing Committee of NPC on June 1, 1981. In fact, since this regulation was adopted in June, 1981 and before the New Penal Code was adopted in 1997, there were 24 single criminal laws adopted successively by the Standing Committee of NPC, specifically as follows: *Decision Regarding the Handling of Criminals Undergoing Reform Through Labor and Persons Undergoing Rehabilitation Through Labor Who Escape or Commit New Crimes* on June 10, 1981, *Decision on Checking Death Penalty* on June 10, 1981, *Decision Regarding the Severe Punishment of Criminals Who Seriously Sabotage the Economy* on March 8, 1982, *Decision Regarding the Severe Punishment of Criminals Who Seriously Endanger Public Security* on September 2, 1983, *Supplementary Provisions Concerning the Punishment of the Crimes of Smuggling* on January 21, 1988, *Supplementary Provisions Concerning the Punishment of the Crimes of Embezzlement and Bribery* on January 21, 1988, *Supplementary Provisions Concerning the Punishment of the Crimes of Divulging State Secrets* on September 5, 1988,

Supplementary Provisions Concerning the Punishment of the Crimes of Catching or Killing Precious and Endangered Species of Wildlife under Special State Protection on November 8, 1988, *Decision Regarding the Punishment of the Crimes of Desecrating the National Flags and the National Emblem of the People's Republic of China* on June 28, 1990, *Decision on the Prohibition against Narcotic drugs* on December 28, 1990, *Decision on the Punishment of Criminal Who Smuggle, Produce, Sell or Disseminate Pornographic Materials* on December 28, 1990, *Supplementary Provisions Concerning the Punishment of the Crimes of Excavating and Robbing Sites of Ancient Culture or Ancient Tombs* on June 29, 1991, *Decision on the Strict Prohibition against Prostitution and Whoring* on September 4, 1991, *Decision Regarding the Severe Punishment of Criminals Who Abduct and Traffic in or Kidnap Women and Children* on September 4, 1991, *Supplementary Provisions Regarding the Imposition of Punishment in Respect of Offences of Tax Evasion and Refusal to pay Tax* on September 4, 1992, *Decision Regarding the Punishment of Criminals Engaged in Aircraft Hijacking* on December 18, 1992, *Supplementary Provisions Regarding Punishing Crimes of Counterfeiting Registered Trademarks* on February 22, 1993, *Decision on Punishment of the Crimes of Production and Sale of Fake or Substandard Commodities* on July 2, 1993, *Supplementary Provisions on the Severe Punishment of Crimes of Organizing or Transporting Other Persons to Illegally Cross the National Border (Frontier)* on March 5, 1994, *Decision Regarding the Punishment of the Crimes of Infringement of Copyright* on July 5, 1994, *Decision Concerning Punishment of Crimes against the Company Law* on February 28, 1995, *Decision on Punishment of Crimes of Disrupting Financial Order* on June 30, 1995, *Decision on Punishing Crimes of Falsely Marking Out,*

Forging or Illegally Selling Special Invoices for Value-added Tax on October 30, 1995.

1.3.2 Accessory Criminal Law

China modified the *1979 Penal Code* by working out some accessory criminal laws in 107 non-criminal laws.⁷⁾

The additions and modifications of single criminal laws and accessory criminal laws mentioned above are mainly as followed: 1) 130 new crimes were added causing that the amount of crimes of specific provisions expanded more than double, which means the original 129 crimes expanded to more than 260 crimes; 2) for the space effect, added the universal jurisdiction; 3) for the subject of crime, added unit crimes to some crimes; 4) for the system of sentencing, added several circumstances of heavier punishment and a few circumstances of lighter punishment, mitigated punishment or be exempted from punishment; 4) the fine punishment began to refine the regulations of fine amount, including the system of normal amount and time-ratio fine system; 5) raised the legally-prescribed punishment of some concrete accusation which was appropriate with the criminal policy of strike-hard campaign.

In this period, profound changes occurred in all aspects of china by reforming domestically and opening-up to the world, such as politics,

7) For instance, there are provisions like “whereas the case constitute a crime, criminal responsibility shall be affixed” in laws such as the *Cultural Relics of the People’s Republic of China*, *Patent Law of the People’s Republic of China*, *Custom’s Law of the People’s Republic of China*, *National Security Law of the People’s Republic of China*, *Foreign Trade Law of the People’s Republic of China*, *Insurance Law of the People’s Republic of China*, and so forth.

economy and society. The additions and modifications that single criminal laws and accessory criminal laws made for the *1979 Penal Code* mentioned above are the reflection of the new situation, new characteristics and new problems of the crimes in the new period in this background and take on the feature of learning from the advanced legislative countries. But the following problem was that there were so many single criminal laws and accessory criminal laws and as a result, the criminal law system was in disorder and its content was easily repeatable. Under this situation, it was neither convenient for the judiciary to use nor good for legal popularization. In order to exert the function of the criminal law in social protection and assurance of human rights, it is necessary to introduce a new penal code by comprehensive and systematic amendment.

2. The Period of the *1997 Penal Code* (also Known as the New Penal Code)(since 1997)

2.1 The Amendment Process of the *1997 Penal Code*

The *Major Points of Work of the Seventh Session of the Standing Committee of the National People's Congress* listed amendments of the penal code in legislation programs clearly on July 1, 1988. Then through investigation, conferences, compiling articles, seeking advices, drafting the revised criminal law, the New Penal Code was finally adopted at the Fifth Session of the Eighth National People's Congress on March 14, 1997 and was promulgated at the same day and came into effect on October 1, 1997. "This is the most complete, the most systematic and a milestone penal code with the time."⁸⁾

2.2 Characteristics and Progresses of the 1997 Penal Code

The 1997 Penal Code is made up of three parts which include general provisions, specific provisions and supplementary provisions, 15 chapters, a total of 452 articles. Among them, the first part of general provisions provided the general principles of crime, criminal liability and penalty, including 5 chapters, 101 articles. There are 10 chapters, 350 articles in the second part of specific provisions, providing the classification of crimes and the elements and the statutory sentence of all kinds of specific crimes. On the style, the 1997 Penal Code adopted the big chapter system used in the 1979 Penal Code, added two chapters such as Crimes of Impairing the Interests of National Defense and Crimes of Servicemen's Transgression of Duties; modified Crimes of Counter-revolution to Crimes of Endangering National Security; removed Crimes of Corruption and Crimes of Bribery from the chapter of Crimes of Property Violation and the chapter of Crimes of Dereliction of Duty in the 1979 Penal Code, forming a new chapter namely Crimes of Embezzlement and Bribery; abolished the chapter of Crimes Against Marriage and Family, and combining these crimes into the chapter of Crimes of Infringing upon Citizen's Right of the Person and Democratic Rights. So the specific provisions increased from 8 chapters to 10 chapters, a total of 413 crimes. These ten chapters are, in order, as follows: the first chapter of Crimes of Endangering National Security(12 articles), the second chapter of Crimes of Endangering Public Security(26 articles), the third chapter of Crimes of Disrupting the Order of the Socialist Market Economy(92 articles), the forth chapter of Crimes of Infringing upon

8) Gao, Mingxuan, *The Emergence and Development of Chinese Criminal Law* (China: Peking University Press, 2012), Preface, p.4.

Citizen's Right of the Person and Democratic Rights(31 articles), the fifth chapter of Crimes of Property Violation(14 articles), the sixth chapter of Crimes of Obstructing the Administration of Public Order(91 articles), the seventh chapter of Crimes of Impairing the Interests of National Defense(14 articles), the eighth chapter of Crimes of Embezzlement and Bribery(15 articles), the ninth chapter of Crimes of Dereliction of Duty(23 articles), and the tenth chapter of Crimes of Servicemen's Transgression of Duties (32 articles). The third part just has a provision providing the implementation date of the *1997 Penal Code* and clearing the relation between the New Penal Code and single criminal laws passed before.

As far as the exterior system, the *1997 Penal Code* properly adjusted the construction of the criminal law, making the system more perfect. At the same time, by deleting, changing and integrating regulations of the *1979 Penal Code*, all single criminal laws and subsidiary criminal laws in 17 years since 1979, the New Penal Code of 1997 brought them into its corresponding proportion, perfecting the charges system of the criminal law, possessing distinct progressive meanings. The improvements in its contents mainly embody on the following aspects:

Firstly, the *1997 Penal Code* stipulated basic principles of the criminal law in explicit terms, and abolished the analogy provision. Article 3 of the New Penal Code provided the Principle of Legality; Article 4 stipulated the Principle of Equality; Article 5 formulated the Principle of the Balance between Crime and Punishment. Above all, the confirmation of the Principle of Legality and the abolishment of the analogy provision have historic significance, indicating the value orientation of Chinese criminal law turning to both protecting society and human rights from only focusing on social rights. These changes make the great progresses in legislative spirit,

legislative content and legislative techniques of Chinese criminal law, meaning a milestone of the construction of Chinese criminal law.

Secondly, the provisions of the validity of the criminal law were perfected. In terms of time, the New Penal Code reiterated the principle of observing old laws and light punishment, the principle of observing new laws no longer applying. In terms of space, the principle of universal jurisdiction was provided and the jurisdiction of crimes Chinese citizens committed abroad was expanded. The perfecting of the validity of space of the criminal law is a reflection of the openness of China and a deepening international communication.

Thirdly, unit was affirmed as a subject of crimes. In the *1979 Penal Code*, only natural persons could commit crimes while the New Penal Code set a section in the second chapter specially providing the concept and punishment principle of unit crime, and provided relevant unit crimes in specific provisions of the criminal law.

Fourthly, the clarity of specific crimes was increased. This aspect mainly embodied in the split of the crime of hooliganism, speculation and dereliction of duty which were called “Pocket Crime”. For example, the *1997 Penal Code* split the crime of hooliganism into the following five charges: the coercive indecency and insulting offence, affray crime, the crime of creating disturbances, the crime of assembled prurience and the crime of luring minors to join a crowd engaging in licentious activities. This clarity is the requirement and reflects of the explicitness principle of the Principle of Legality in the setting of concrete charges and accusations.

In addition, the New Penal Code made it clear that juvenile delinquency should be treated with leniency, and perfected a series of systems including self-defense, recidivists, voluntary surrender, meritorious performance,

suspension of sentence, commutation of punishment and parole.

In brief, the promulgation and implement of the New Penal Code basically achieve the uniformity and integrity of Chinese criminal law, carried out the principle of rule of the criminal law, strengthened the function of the criminal law to protect society and human rights. Therefore, the New Penal Code was highly valued by all circles of society especially by the theoretical and practical circles of the criminal law, and also got the attention from the international circles of the criminal law.⁹⁾

2.3 Further Improvement of the *1997 Penal Code*: Amendments and Legislative Interpretations

2.3.1 1 Decision and 8 Amendments

After the promulgation of the *1997 Penal Code*, in order to meet the needs of China's rapid economic development and social transformation, the amendment of the New Penal Code followed with it. Following the legislative tradition of "supplementary provision", the Standing Committee of NPC adopted the *Decision on Punishing Fraudulent Purchase, Evasion of Foreign Exchange and Illegal Buying and Selling Foreign Exchange Crimes* on December 29, 1998. However, the Standing Committee of NPC adopted the *Amendment to the Criminal Law of the People's Republic of China* On December 25, 1999, which is the first time taking the form of amendment to amend the penal code in Chinese legislation history. Since then, the form of amendment has been adopted as the form to amend the criminal law. It can well balance the relationship between stability and

9) Gao, Mingxuan, *The Emergence and Development of Chinese Criminal Law* (China: Peking University Press, 2012), Preface, p.4.

adaptability of the criminal law, which means the legislative development in techniques of Chinese criminal legislation. Hitherto, the Standing Committee of NPC has adopted 8 Amendments to the Criminal Law.¹⁰⁾

By the time the *Amendment VIII to the Criminal Law* was adopted, China has 452 concrete charges at the moment, adding 41 new charges and deleting 2 charges. Except for adding new charges, by modifying the constitutive element of the crime, the legislature changed the content of some charges materially or changed charges for the original charges which did not fit the content. For statutory sentence, the New Penal Code raised statutory sentences of some crimes, for instance, the maximum sentence of the crime of organizing and leading terrorism crimes was raised to life imprisonment from 10 years in prison; it reduced statutory sentences of some other crimes, for example, by setting two statutory sentences, the minimum statutory sentence of kidnapping was reduced from 10 years to 5 years in prison.

It is worth noting that the *Amendment VIII to the Criminal Law* adopted in 2011 broke the tradition that amendments only amend concrete charges in specific provisions, modifying general provisions for the first time. This embodied in changes in penal system, for instance, excuse on punishment of the old men over 75 years when the crime was committed, providing that the recidivist system cannot apply to minors explicitly, adding the community correction system, and so on.

2.3.2 9 Legislative Interpretations.

In order to solve divergences in understanding the criminal norms when

10) The dates of Amendments to the Criminal Law from the second to eighth are, in turn, August 31, 2001, December 29, 2001, December 28, 2002, February 28, 2005, June 29, 2006, February 28, 2009 and February 25, 2011.

Chinese judicial authorities apply the Penal Code, the Standing Committee of NPC adopted 9 legislative interpretations to the *1997 Penal Code*.¹¹⁾ The issues of the criminal application in the above legislative interpretations are the following: the implication and scope of the State Functionaries; the implication of violating the land administrative law and approving the confiscation, expropriation and occupation of land illegally; the characteristics of under-world organization; the meaning of appropriating public money “for personal use”; the meaning of “has the ability to execute the judgment or order made by a People’s Court but refuses to do so, if the circumstances are serious”; the scope of the subject of official misconduct crime; the meaning of “credit card”; the meaning of “other invoices which can be used to defraud a tax refund for exports or to offset tax money”; and whether provisions on artifacts could be applied to fossils of paleovertebrates and paleoanthropoids of scientific value.

11) These 9 legislature interpretations, in order, are the following: *Interpretations on the Second Paragraph of Article 93 of the Criminal Law* on April 29, 2000, *Interpretations on the Article 228, 342 and 410 of the Criminal Law* on August 31, 2001, *Interpretations on the First Paragraph of Article 294 of the Criminal Law* on April 28, 2002, *Interpretations on the First Paragraph of Article 384 of the Criminal Law* on April 28, 2002, *Interpretations on Article 313 of the Criminal Law* on August 29, 2002, *Interpretations on Chapter Nine of Subject of Legal Malpractice* on December 28, 2002, *Interpretations on Regulations of Credit Card in the Criminal Law* on December 29, 2004, *Interpretations on Regulations on Other Invoices Which Can Be Used to Defraud a Tax Refund For Exports or to Offset Tax Money in the Criminal Law* on December 29, 2005, and *Interpretations on Applications of Regulations of Cultural Relic in the Criminal Law Also Applied to Fossils of Paleovertebrates and Paleoanthropoids of Scientific Value* on December 29, 2005.

3. Death Penalty In China

3.1 Policy of Death Penalty in China

Since Italian Beccaria discussed the necessity of abolishing death penalty systematically in 1776, the investigation and reflection on the function of death penalty have swept the globe. With the development of the concept of human rights, death penalty was abolished in law or in reality in most countries and became a piece of history.¹²⁾ Even in countries retaining death penalty, capital punishment was little applied judicially, and countries carrying out it are much less.¹³⁾ From the review of circumstances since China's reform and openness, the basic policy of death penalty in China is "to reserve death penalty, to strictly control death penalty", "the less

12) According to some statistics, over two-third countries and districts in the world have abolished death penalty in law or in reality at the end of June 30, 2009. Among them, countries and districts which abolished death penalty of all crimes are up to 95; 8 countries or districts abolished death penalty of ordinary crimes, 35 countries and districts abolished death penalty in reality(not carrying out any capital punishment in past ten years). So to speak, as many as 138 countries and districts abolished death penalty in law or in reality. See Roger Hood, *The Death Penalty: A World-Wide Perspective*(the fourth edition)(China: Chinese People's Security University Press, 2009), p.1.

13) In East Asia, there are legislations on death penalty in Japan and South Korea. In South Korea, charges leading to death penalty are up to 80, which is more than China. However, although there are legislations on death penalty in Japan and South Korea, death penalty are seldom applied in practice. For instance, in Japan, death penalty charges are 17, but in practice capital punishment is executed only in robbery and murder and seldom criminals are executed. For not executing capital punishment for more than 10 years, South Korea has been listed in countries which had abolished death penalty in reality.

the better, the more cautious the better”.¹⁴⁾ But, in front of the growing trend of abolishing death penalty, the revolution of death penalty system in China will become a hot issue of the discussion of Chinese criminal law theorists, a difficult issue in amending the criminal law by national legislature and a central issue at home and abroad.

3.2 Changes of Death Penalty in Chinese Criminal Legislation

To carry out the basic policy of Chinese death penalty, the *1979 Penal Code* stipulated conditions, objects and approval process of death penalty in general provisions, and provided the system of death penalty with a suspension of execution. Specific provisions also required prudently applying. It is worth noting that the system of death penalty with a suspension of execution has been applied since 1951, which is an important creation in Chinese penalty execution system and an important way to control the application of death penalty and to carry out the policy of “to kill less”. In practice, criminals who are sentenced to death with a suspension of execution always got commuted sentences after two years, and seldom were executed. However, legislation on death penalty in China expanded in single criminal laws after the *1979 Penal Code*, the standards of death penalty to concrete charges were reduced, and heavy penalty thoughts kept growing. In the *1997 Penal Code*, the standard of death penal was changed from “extraordinarily evil” to “extremely serious offences”; in terms of the control of objects, the *1997 Penal Code* abolished the provision that minors could

14) See Article 4 of the *Opinions on Further Strictly Dealing with Cases to Make Sure the Quality of death penalty*, published by the Supreme People’s Court, Supreme People’s Procuratorate, Ministry of Public Security, and Ministry of Justice on March 9, 2007.

be sentenced to death penalty with a suspension of execution, and reaffirmed the death penalty shall not be imposed “on persons who have not reached the age of 18 at the time the crime is committed or on women who are pregnant at the time of trial”. The object of death penalty was further limited in the *Amendment VIII to the Criminal Law*, that is, death penalty shall not apply “to a person who has attained the age of 75 at the time of trial, except where the person has caused the death of others by especially cruel means.”

There were 15 charges involving death penalty in 7 articles in the 1979 *Penal Code*. By the expansion of single criminal laws, charges on death penalty reached 71 in China before the penal code was modified in 1997. In the 1997 *Penal Code*, charges involving death penalty were reduced to 68. What is dramatic is that the *Amendment VIII to the Criminal Law* eliminated the death penalty for 13 economy-related and non-violent offences. Although in judicial practice, these 13 offences were few or seldom applied, but the elimination means the reform orientation of death penalty, and helps to support the judicial reform of controlling the application of death penalty.¹⁵⁾

3.3 Approaches and Outlook of the Reform and Abolishment of Chinese Death Penalty

So to speak, the basic agreement in Chinese theory and practice now is to abolish death penalty, but there are disputes on how to make it. Reformist put forward the concept of “one-hundred-year dream of abolishing death penalty”,¹⁶⁾ asserting that the application of death penalty should be

15) Zhao, Bingzhi / Ruan, Qilin / Li, Hong, “Focus Topic in Criminal Law Revision”, *China Law* Volume 1(2011), pp.27-34.

16) Hu, Yunteng, *General Theories of Death Penalty* (China: Chinese University of Political Science and Law Press, 1995), p.302.

controlled and reduced on the basis of present death penalty system, and finally abolished it. People who advocate abolishing death penalty immediately say that one hundred years are too long. Limited reform do not support death penalty, and it is a more pragmatic option in face of China's national conditions with strategies of: (1) limiting the object scope of the application of death penalty constantly; (2) making breakthrough in economy-related and non-violent offences just as the *Amendment VIII to the Criminal Law* did, eliminating death penalty charges massively in order and abolishing death penalty finally. The order of abolition is economy-related and non-violent offences, corruption and bribery offenses and violence offenses.¹⁷⁾

Of course, the abolition of death penalty is not only legal problem, but an issue involving the country's political options, the socio-psychological expectation of the common people, social ethics and public recognition. The reform and abolition of death penalty in China is not an overnight thing.

V. Brief Summary

By reviewing and combing the history of Chinese contemporary criminal law, we at least can reach the following conclusions:

Firstly, the history of Chinese contemporary criminal law shares the same fate with Chinese modern development. The history of Chinese contemporary criminal law is difficult and tortuous, and it is also the result of labor and wisdom by several generations.

17) Zhao, Bingzhi, "Progress and Tendency of Death Penalty Revolution in Contemporary China", *Science of Law* Volume 11(2011), pp.14-20.

Secondly, with the hone of more than one hundred years, China built a relatively well-developed criminal law system with the penal code as the core and foundation. In terms of legislative technique, amendments become the main mode to amend the criminal law, and legislative interpretations are important as a source of law. With a more positive attitude of passion and open mind, China's criminal scholars are developing international communications.

Thirdly, the thought and achievements of protecting human rights in the modern criminal law become an important step in the construction of Chinese criminal law and the important guarantee of running the country according to the law.

Lastly, despite significant progresses in Chinese criminal law, there is still room for refinement. For instance, legislature should closely concern about and duly react to new problems in modern information crimes, environmental crimes and organized crimes. There is still a long way to go for China to solve the following problems, such as how to deal with transnational crimes and international crimes in the face of the challenges of globalization, and to carry out basic principles of criminal rule of law by the United Nations, to adjust the penalty structure, especially the connection between death penalty and life sentence, and reform and abolition of death penalty, and so forth.

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[국문초록]

중국현대형법 역사개요

王 新*

중국현대형법의 역사는 선명한 시대적 특징을 갖고 있는데 기본적으로 4개의 시기로 나눌 수 있다: 청나라 말기 변법수율(變法修律)운동의 발단시기, 중화민국의 첫 개척시기, 신중국 성립으로부터 개혁개방 전의 과도기적 시기, 개혁개방 이후 현재까지의 발전완성시기. 백여 년의 발전을 거쳐 중국은 지금의 ‘형법전’을 중심으로 비교적 완벽한 형법체계를 형성하였다. 입법기술 면에서 형법수정안은 주요한 법개정방식이며, 현대형법의 인권보장 이념을 반영한 성과를 흡수하였다.

주제어 : 중국형법, 형법전, 형법수정안, 인권보호, 사형

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