

# **The Death Penalty in China from a European Perspective**

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## **1. The Legal Framework of Imposing and Enforcing the Death Penalty in China, Political Developments and Empirical Information on Executions**

### *1.1 The legal framework of the death penalty*

The general legal requirements for imposing and enforcing the death penalty are found in the general part of the new Chinese Criminal Code as well as in the Chinese Criminal Procedural Code, both in force since 1997. The criminal provisions in the special part of the Criminal Code carry each one the minimum and maximum penalties that may be imposed for specific types of crimes – a technique found also in the criminal laws of continental Europe. However, codified Chinese criminal law has a rather short history. It was at the beginning of 1980 when the first Criminal Code Book of the People's Republic of China went into force. In 1997, the Criminal Code as well as the Procedural Code were completely revised and amended. The amendments of the substantial and procedural criminal law have led to considerable progress on the way to establishing a justice system in China based on the rule of law and principles of justice. In the general part of the Criminal Code Book, the principle of „nulla poena sine lege“ was introduced, the possibility of using analogy to the disadvantage of a defendant was outlawed. As regards retroactive enforcement of criminal law, the principle was adopted that newly introduced criminal statutes can in principle not be enforced with the exception that the new law provides for more lenient punishment than did the old statute. Furthermore, the system of criminal sanctions underwent an in-depth revision. In the special part of the criminal law book, we find that the criminal offence of counterrevolutionary action was abolished. However, an offence statute „endangering national security“ was introduced that replaced the former offence statute of counterrevolution.

With ongoing economic and social change as well as continuation of the policy of opening China the reform of criminal law obviously has developed accordingly. However, it should be noted that the new Chinese substantial and procedural criminal law is still quite some distance away from internationally accepted standards of criminal justice. So, the background of Chinese criminal law reform in terms of longlasting isolation and significant political conflicts that have prevailed in the past

has to be taken into account. The generally weak theoretical basis of criminal legislation corresponds with the developing political, social and economic structure of Chinese society. As legal change is dependent on political, economic and social change, there exist – two decades after the cultural revolution came to an end – some obstacles for developing legal structures rapidly and for adjusting criminal law practice to international standards.

Despite the developments so far visible and the amendment of Chinese criminal law and the system of sanctions the death penalty has retained its traditional position. The scope of the death penalty was not restricted much although restrictions have been discussed throughout the process of reform. The new Chinese criminal law provides in Art. 48 that the death penalty – as was provided for by the old criminal law of 1980 – should be reserved for such criminal offenders who have committed extremely serious crimes. Although Art.48 seems to point towards an effort to restrict the scope of the death penalty, a look into the special part of the Chinese Criminal Code Book demonstrates that numerous offence statutes provide for the death penalty. With the new Chinese criminal code the number of offence statutes carrying the death penalty was reduced but the number of death eligible offences still amounts to 68<sup>1</sup>. Besides murder offences, the death penalty can be imposed for serious cases of rape, property offences, drug offences as well as for a range of other criminal offences. It should be noted here that most of those offence statutes mentioned carry the threat of the death penalty besides the threat of life term imprisonment and imprisonment of not less than 10 years. Insofar, the imposition of the death penalty is always at the discretion of the criminal court and not mandatory. Discretion in imposing the death penalty is not restricted nor guided through general sentencing provisions as Art. 61 of the Chinese criminal law states in a very general way only that "punishment shall be meted out on the basis of the facts, nature and circumstances of the crime, the degree of harm done to society and the relevant provisions of this law". While in some offence statutes efforts become visible to legally describe "especially aggravated cases" (eg. Art. 236, 239) deserving the death penalty, in other offence statutes we find only rather vague terms like e.g. „especially aggravated cases“, "serious consequences" or "especially serious circumstances" (see Art. 119, 125, 127, 170 Nr. 3). These offence statutes certainly do not comply with Art. 48 Chinese criminal law which stipulates that the death penalty shall only be applied in "extremely serious cases". With annexing "serious or aggravating circumstances" to a wide range of offence statutes Chinese criminal legislation makes a huge group of offenders in principle eligible for the death penalty. With such a technique the goal of restricting the death penalty to the "most

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<sup>1</sup> Chen Xin-Liang: The Death Penalty. In: The United Nations Standards and China's Legal System of Criminal Justice. Beijing 1998, p. 536.

extreme cases" as demanded also for by international standards is neutralized as there does not exist a common denominator anymore which could be used as a generalizing guideline for parcelling out those "most extreme cases". But, as within any offence category a group of "most extreme cases" can be imagined at the end of the selection process within the offence categories and across the various offence categories we find among the death penalty eligible offences as well as offenders, among those sentenced to death and finally among those who are executed a wide range of offences and offenders that do as a group not comply with the demand of the "most extreme case standard" as expressed in Art. 48 Chinese criminal law. Because ultimately, the selection process initiated within the single offence categories that allow for the death penalty will generate a group of sentenced offenders which will be composed of by individuals having committed a range of offences stretching from comparatively light crimes to the most heinous and cruel murder.

General restrictions of the scope of the death penalty are then introduced through Art.49 of the Chinese criminal law. According to Art.49, the death penalty is not to be applied to juveniles having committed the offence before the age of 18 years <sup>2</sup>. Chinese legislation thus complies with the Convention on the Rights of the Child (Art. 37a) which stipulates that the death penalty shall not be imposed for offences committed by persons below 18 years of age. Moreover, the imposition of the death penalty is not allowed in case of female offenders pregnant at the time of the trial. The death penalty so far is not excluded for mentally retarded criminal offenders or offenders where diminished responsibility has been established as Art.18 of the Chinese Criminal Code Book provides in case of diminished responsibility only a mitigated sentence, whereby mitigation of the sentence remains at the discretion of the criminal court.

The death penalty may be suspended for a period of up to 2 years if the immediate enforcement of the death penalty is not regarded to be necessary (Art.48, 2) <sup>3</sup>. A suspended death sentence is rather unique seen from an international perspective. However, the approach of suspending death sentences seems to be rooted deeply in Chinese criminal law traditions. Every death sentence is to be processed automatically to the Supreme Court which is empowered to control and to confirm the sentence. In case of suspended death penalties, review and confirmation will be done by a superior court.

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<sup>2</sup> Chen Xin-Liang: The Death Penalty. In: The United Nations Standards and China's Legal System of Criminal Justice. Beijing 1998, p. 536.

<sup>3</sup> Whether suspension of the death sentence actually sharply reduces the number of executions as is assumed by Gao Ming Xuan: A Brief Dissertation on the Death Penalty in the Criminal Law of the People's Republic of China. *Revue Internationale de Droit Penal* 1987, pp. 399-405, p. 404 is debatable. The estimates of death sentences imposed and executions carried out point towards a high rate of executions (see graph 1 below).

Procedural as well as enforcement aspects of the death penalty are regulated in the Criminal Procedural Code Book (Art. 34: defence council in death penalty cases; Art. 210 etc.: enforcement of the death penalty; including automatic reviews). In case of the possibility of imposition of the death penalty, the criminal court has to assign a defence council after the case has been submitted to the court by the public prosecutor's office. However, the late assignment of a defence council points to serious problems as regards the implementation of the right to a fair trial. In particular, in case of serious crimes, the defendant is in need of efficient defence already during the investigative and pretrial stage of the procedure.

As regards enforcement of death penalties, it is required that the Supreme Court confirms the sentence and issues an order to enforce the death penalty (Art. 210). The enforcement itself has then to be monitored by local criminal justice authorities. The execution can be done either through lethal injection or through a firing squad (Art. 212).

## *1.2 Policy developments*

Chinese criminal policy insists firmly on retaining the death penalty, although the question of retaining or abolishing the death penalty seems to be a conflictual issue in Chinese law doctrine <sup>4</sup>. Insofar, conflicts and debates are comparable to what can be observed in other countries retaining the death penalty. Chinese official policy, however, has adopted the position that current social, political and economic conditions do not permit the abolition of the death penalty <sup>5</sup>. However, what can be heard so far are voices calling for the restrictive application of the death penalty <sup>6</sup>.

The firm belief in the death penalty is shown also in the reservations that have been introduced when signing the International Covenant on Civil and Political Rights in September 1998. These reservations are comparable to those that have been made by the United States of America when ratifying the International Covenant in 1992 <sup>7</sup>. The People's Republic of China is stating in these reservations that in the current stage of social and economic development the death penalty cannot be abolished and that the

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<sup>4</sup> Chen Xin-Liang: The Death Penalty. In: The United Nations Standards and China's Legal System of Criminal Justice. Beijing 1998, pp. 344, pp. 535.

<sup>5</sup>Gao Ming Xuan: A Brief Dissertation on the Death Penalty in the Criminal Law of the People's Republic of China. *Revue Internationale de Droit Penal* 1987, pp. 399-405, pp. 400.

<sup>6</sup> See Amnesty International: *Die Todesstrafe*. Hamburg 1979, p. 134, 139; the discussion on abolishing the death penalty at a slow but determined pace obviously can be traced back to the fifties; see also Kaminski, G.: *Menschenrechte in China*. Ludwig Boltzmann Institut für China- und Südostasienforschung. Wien 1978, pp. 61-63; Lenz, K.-F., Heuser, R.: *Strafrechtsentwicklung in Japan und der Volksrepublik China*. Freiburg 1995, p.190; Gao Ming Xuan: opus cited 1987, p. 405.

<sup>7</sup> See Hood, R.: *Capital Punishment*. In: Tonry, M. (Ed.): *The Handbook of Crime and Punishment*. New York, Oxford 1998, pp. 739-776.

restrictions mentioned in Art. 7 of the International Covenant regarding the use of cruel, unusual and degrading punishment cannot be understood as prohibiting imposition and enforcement of the death penalty.

In justifying the retention of the death penalty, utilitarian considerations, moral aspects and social attitudes are highlighted<sup>8</sup>. Insofar, a mix of preventive and moral arguments carry the death penalty in China<sup>9</sup> pointing towards the goals of incapacitation, general deterrence, positive general prevention as well as reducing the risk of victim taking the law into their own hands<sup>10</sup>. Official views on consequences of abolishing the death penalty in China associate with abolition an increase in crime, threats for public safety and possible deterioration of the public's belief in the rule of law<sup>11</sup>. Similar reservations of the United States of America<sup>12</sup>, however, were judged to be non-compatible with the goals of the International Covenant by the United Nations Committee of Human Rights<sup>13</sup>.

### *1.3 Capital punishment in practice*

The practice of imposing and enforcing the death penalty in China demonstrates that vast use is made of the death penalty. It is estimated for the mid-90ies that 17 executions are carried out per day<sup>14</sup>. For 1996 alone, some 4,400 executions have been recorded<sup>15</sup> and more than 6100 death sentences have been confirmed<sup>16</sup>. The number of executions obviously has increased significantly since the end of the 80ies with a peak in 1996. After a crime control campaign during 1983-1986<sup>17</sup> that has been accompanied seemingly by some 10,000 confirmed executions, the number of recorded executions has dropped to a all-time low of 132 in the year 1987. Since then we find a heavy increase in the number of executions carried out<sup>18</sup>. The current annual

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<sup>8</sup> Yu Shutong: *Le Systeme de la Peine Capitale Dand le Droit Penal Chinois*. . *Revue Internationale de Droit Penal. La Peine de Mort. The Death Penalty. Travaux de la Conférence Internationale tenue à l' Institut Superieur International de Sciences Criminelles Syracuse – Italie. 17 au 22 mai 1988. 58(1987), pp. 689-698.*

<sup>9</sup> Hood, R.: *The Death Penalty. A World-Wide Perspective. Revised and Updated Edition. Oxford 1996, pp. 38-40.*

<sup>10</sup> Gao Ming Xuan: opus cited 1987, pp. 400-401.

<sup>11</sup> Gao Ming Xuan: opus cited 1987, pp. 400.

<sup>12</sup> See Schabas, W.A. (Ed.): *The International Sourcebook on Capital Punishment. 1997 Edition. Boston 1997, pp. 206-232.*

<sup>13</sup> Hood, R.: *Capital Punishment*. In: Tonry, M. (Ed.): *The Handbook of Crime and Punishment. New York, Oxford 1998, pp. 739-776, p. 743.*

<sup>14</sup> *China Aktuell 8/1997, p. 739; amnesty international: People's Republic of China. The Death Penalty in China: Breaking Records, Breaking Rules. August 1997.*

<sup>15</sup> *China Aktuell 8/1997, p. 739.*

<sup>16</sup> *amnesty international: People's Republic of China. The Death Penalty in China: Breaking Records, Breaking Rules. August 1997, p.1.*

<sup>17</sup> See Guo, J.: *Le crime et son contrôle en Republique Populaire de Chine. Revue Internationale de Criminologie et Police Technique 1992, pp. 150-163.*

<sup>18</sup> Hood, R.: opus cited, 1996, p. 40.

number of executions puts China at the top rank of death penalty retaining countries (at least seen from the absolute number of executions). Some 80% of those executions recorded by amnesty international and documented in United Nations surveys obviously take place in China. As regards relative figures of executions, China remains also – although less markedly – in the top groups of executing countries (0.17/100.000)<sup>19</sup>. China belongs to the group of 3-4 countries where annually more than 100 executions are carried out<sup>20</sup>. The heavy use of the death penalty does not correspond to the comparatively low rate of imprisonment which – according to official information – amounts to some 100 prisoners per 100,000 of the population. The ratio of death penalties/imprisonment certainly demonstrates that the use of the death penalty is not restricted to the "most serious crimes" but extends to offences that – according to international standards - should fall under the scope of imprisonment. Moreover, the practice of imposing and enforcing the death penalty in China remains rather inconsistent as imposition and enforcement is heavily influenced by crime control campaigns<sup>21</sup> with the consequence of significant ups and downs (moving back and forth between the "velvet glove" and the "iron hand", see graph 2) and an obvious strong dependence of the death penalty practice from extralegal and political considerations<sup>22</sup>.

The current Chinese practice reveals also that the death penalty is imposed to some extent in criminal cases which by international standards do not fall under the scope of the most serious or heinous crimes. So, eg. offenders having committed repeat petty offences, theft, breaking into cars, corruption, embezzlement, fraud and other economic crime have been sentenced to death and have been executed<sup>23</sup>. There is moreover evidence available that the death penalty concentrates on the lower strata of

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<sup>19</sup> In the state of Texas though in 1997 the execution rate was as high as 0,2/100.000; see Bureau of Justice Statistics: Bulletin. Capital Punishment 1996. Washington 1997, p. 12.

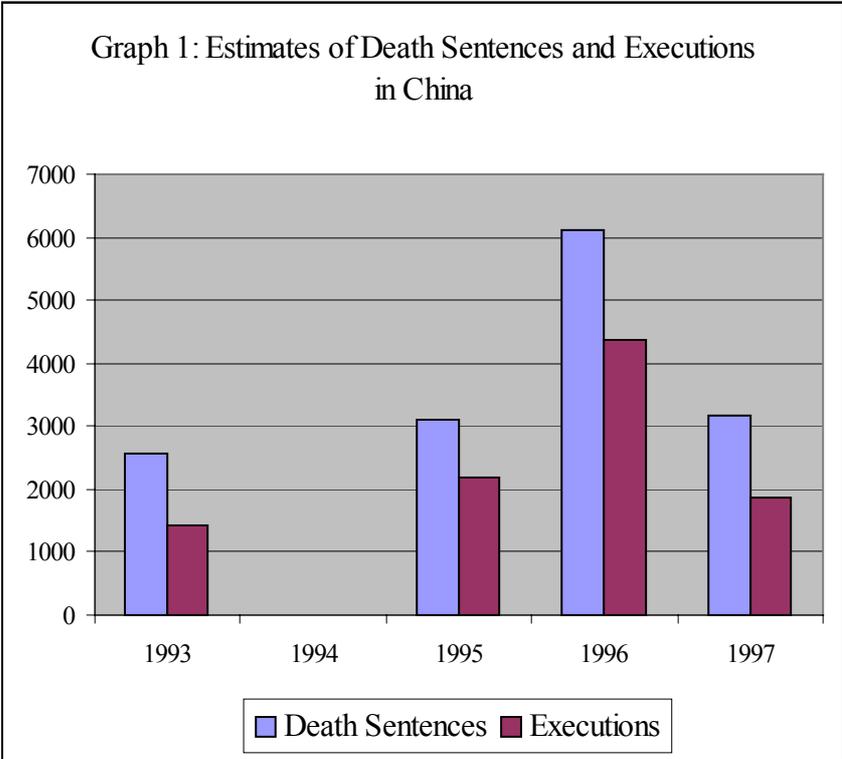
<sup>20</sup> Schabas, W.A.(Ed.): The International Sourcebook on Capital Punishment. 1997 Edition. Boston 1997, p. 245.

<sup>21</sup> See eg. Guo, J.: Le crime et son controle en Republique populaire de Chine. Revue Internationale de Criminologie et Police Technique 1992, pp. 150-166, p. 162-163 with a description of crime control campaigns in the eighties (essentially campaigns against economic crimes and crimes against public safety) triggering the death penalty for "serious crimes" in the areas of economy and public safety; the dramatic increase in executions in 1996 can be explained by launching the "Strike hard" campaign in April 1996; further information is provided in Palmer, M.: The People's Republic of China. In: Hodgkinson, P., Rutherford, A. (Eds.): Capital Punishment. Global Issues and Prospects. Winchester 1996, pp. 105-141; crime control campaigns have been made also responsible for introducing in 1983 a procedural law amendment accelerating and simplifying capital crime procedures. However, this amendment has obviously been put out of force with the new procedural code in 1997.

<sup>22</sup> However, crime control campaigns seem to be a conflictual issue in Chinese doctrine and politics, see Guo, J.: opus cited 1992, p. 163.

<sup>23</sup> amnesty international: People's Republic of China. The Death Penalty in China: Breacing Records, Breaking Rules. August 1997; amnesty international: China. Death Penalty Log 1996, Part I. London 1997; amnesty international: People's Republic of China. The Death Penalty in 1997. Report – ASA 17/28/98, p. 3 with reports on death sentence and execution cases involving eg. theft and resale of items worth US \$ 2400, theft of 61 cattle or the theft of 2 trucks.

Chinese society with offenders sentenced to death and executed having a low educational background and being economically and socially marginalized <sup>24</sup>.

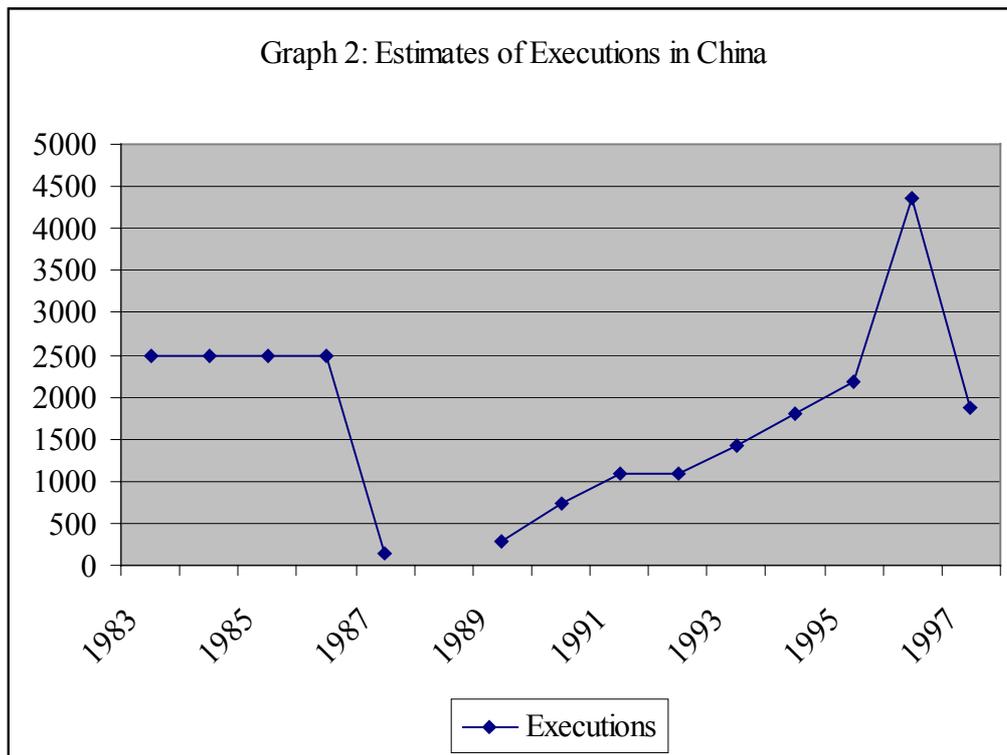


Sources: amnesty international: People’s Republic of China. The Death Penalty in 1997. Report – ASA 17/28/1998.

Seen from the death penalty practice it becomes obvious that the criminal policy of China in this respect is opposed to an international trend which since decades expressed in a continuing process of restricting and finally abolishing the death penalty. Although, the 80ies and 90ies saw in some cases reinstatement and sometimes extension of the scope of the death penalty (in particular as regards drug trafficking), the general trend still is characterized by an increasing acceptance of the abolitionist idea <sup>25</sup>.

<sup>24</sup> amnesty international: People’s Republic of China. The Death Penalty in 1997. Report – ASA 17/28/98, pp. 4, 8.

<sup>25</sup> Hood, R.: opus cited, 1996, pp. 8-9.



Source: Amnesty International Annual Reports on the Death Penalty; Palmer, M.: The People's Republic of China. In: Hodgkinson, P., Rutherford, A. (Eds.): Capital Punishment. Global Issues and Prospects. Winchester 1996, pp. 105-141; amnesty international: People's Republic of China. The Death Penalty in 1997. Report – ASA 17/28/98, p. 1.

The 1983 – 1986 figures have been calculated with 2500 per year as it is estimated that approximately 10.000 executions took place during the Strike Hard campaigns launched during this period<sup>26</sup>.

A major problem arises out of the problem of reliable figures on the use of the death penalty in China. The Amnesty International data provided in its annual reports are based upon observations of publicized death sentences as well as executions confirmed through observations, announcements or reports in newspapers. However, it is clear that not all death sentences and executions are made public in newspapers and through other media although Art. 212 Criminal Procedural Law demands for public announcements of executions<sup>27</sup>. Insofar, data provided by Amnesty International can

<sup>26</sup> Hood, R.: opus cited, 1996, p. 40.

<sup>27</sup> Art. 212 should be interpreted as demanding not only public announcements of single executions of death sentences but also as demanding transparency as regards the use of the death penalty at large. The basic reason of introducing Art. 212 should not be seen alone in the goal to convey messages of deterrence but also in the goal of providing adequate information on how and to what extent the death penalty is used in Chinese society. Full information is essential – not only seen from the perspective of a society based on the rule of law and democracy –, because trust and positive attitudes towards the criminal justice system can develop only if the system itself becomes transparent. With interpreting Art. 212 this way the goal of

be considered to be conservative estimates only. As it was pointed out in the 1997 amnesty international death penalty report Chinese authorities obviously have changed reporting behaviour with increasingly resorting to the announcement of multiple executions and not mentioning exact figures which makes estimates in this field even more difficult <sup>28</sup>. Other estimates put the number of death sentences and executions to the four- to fivefold of the observations based upon publicly announced death sentences and executions <sup>29</sup>. This would amount to some 9000-10.000 executions having taken place in 1997.

## **2. European Policies and the Death Penalty**

The development of the European perspective on the death penalty is first of all visible in the adoption of the 6<sup>th</sup> Protocol to the European Convention on Human Rights in 1982. The 6<sup>th</sup> Protocol provides for the complete abolition of the death penalty in peace time by all the member states of the European Convention. In 1994, the assembly of the Council of Europe recommended adoption of a further protocol to the European Convention on Human Rights which seeks complete abolition of the death penalty also in military laws and during war time. The European position towards the death penalty is characterized by the goal of complete abolition of the death penalty and the establishment of legal standards that preclude reinstatement of the death penalty in Europe. The position is grounded in the conviction that the death penalty is cruel, degrading and inhuman punishment which infringes upon basic human rights as expressed in the European Convention on Human Rights (Art.3) and in the Universal Declaration of Human Rights (Art. 3: right to life). The strong commitment towards an abolitionist policy becomes visible also in requiring from countries becoming a member of the Council of Europe not only a moratorium on executions but legislation abolishing capital punishment. However, rejection of the death penalty as punishment which can be legitimately imposed is not only expressing the need to protect individual citizens from being abused but also the demand for establishing general limits to the state's powers vis-à-vis its citizens at large in a democratic society.

The international development as regards the death penalty reflects also the basic trend towards restriction and ultimately complete abolition of the death penalty. In 1989, the assembly of the United Nations adopted the 2<sup>nd</sup> Optional Protocol to the International Covenant on Civil and Political Rights which states that in those countries which do

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positive general prevention has to be addressed – a goal which seems to be much more important than is the goal of (negative) general deterrence in providing for a maximum of compliance with the law.

<sup>28</sup> amnesty international: People's Republic of China. The Death Penalty in 1997. Report – ASA 17/28/98, p. 5.

<sup>29</sup> Palmer, M.: The People's Republic of China. In: Hodgkinson, P., Rutherford, A. (Eds.): Capital Punishment. Global Issues and Prospects. Winchester 1996, pp. 105-141

sign the 2<sup>nd</sup> Protocol, death penalties may not be enforced anymore. In June 1990, the assembly of the Organization of American States adopted the Protocol to the American Convention on Human Rights on the abolition of the death penalty. In this Protocol, member countries are urged to abolish the death penalty, although an obligation to do so was not introduced. In 1997, the Human Rights Commission of the United Nations adopted a resolution which demands for a moratorium on the death penalty and consideration of complete abolition of the death penalty <sup>30</sup>.

### **3. Problems of Threatening, Imposing and Enforcing the Death Penalty in China from a European Perspective**

#### *3.1 Introduction*

An assessment of the legal framework and practice of the death penalty in China from a European perspective has to consider two levels. First of all, there is a need to discuss basic arguments that must be brought forward in favour of complete abolition of the death penalty. Then, beyond these basic arguments, particulars of imposing and enforcing the death penalty have to be taken into account. The latter have to be considered from a human rights perspective on the process of trial, sentencing and enforcement.

In a principled way, European standards as emerging from the European Convention on Human Rights, the protocols amending the convention as well as the jurisdiction of the European Court of Human Rights exclude the death penalty in total from the system of penal sanctions. The arguments underlying this position are backed up by doctrine, research and the public's opinion (as far as the latter can be observed through surveys). The death penalty is infringing on the right of life, violating the principle of proportionality and is representing cruel, inhumane and unusual punishment therefore infringing on human dignity. All this is related to a common dimension: human suffering, pain and psychological terror invoked through the sentence of death and execution and the consequences of this ultimate form of violence in terms of extinction. Suffering, pain, agony and terror inflicted to an individual who is sentenced to death and executed are excessive because

- there exist other, less drastic and better suited means to convey messages of deterrence and moral disapproval,
- the death sentence cannot be imposed in a consistent and non-arbitrary way,

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<sup>30</sup> For a complete review see Hood, R.: opus cited 1996; Hood, R.: Capital Punishment. In: Tonry, M. (Ed.): The Handbook of Crime and Punishment. New York, Oxford 1998, pp. 739-776.

- the procedure of putting a person to death is associated with additional and illegitimate suffering and terror (death row syndrome),
- permanent exclusion through a violent death is breaking the basic rule which demands for recognition of each person as a subject and the right for not being treated as an object.

Although the European Court of Human Rights until now has not explicitly (Soering <sup>31</sup>) commented on the compatibility of the death penalty with Art.3 of the European Convention on Human Rights, the judgement in the Soering case shows rather clearly that the death penalty is considered to be not compatible with Art.3. As the European Court has stated in the Soering case that lengthy procedures and therefore long stays on death row (death row syndrome) provoke the verdict of an infringement against Art.3 then <sup>32</sup>, there does not seem to exist an acceptable procedure leading to the death penalty and execution. Necessarily, procedures in compliance with the rule of law, adequate provisions of appeal and adequate clemency rules will lead to considerable times spent on the death row <sup>33</sup>.

The principled way of rejecting the death penalty as an acceptable criminal penalty – also in cases of the most serious crimes – can be explained through a mix of normative and empirical arguments which can be traced back to the 18<sup>th</sup> and 19<sup>th</sup> century when – under the influence of the philosophy of enlightenment and the work of Beccaria and Voltaire – the abolitionist movement became an essential part of European criminal law reform <sup>34</sup>. These arguments characterize the death penalty as inhuman and cruel punishment, which is opposed to the basics of a civil and civilized society guided through the goal of continuously reducing institutionalized and legal violence. On the other hand, the death penalty is seen as an unproportional and therefore unacceptable punishment not in compliance with the principle of the rule of law. The consensus as regards objections against the death penalty that can be observed in Western Europe underline the significance of the arguments <sup>35</sup>. The principled way of concluding that

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<sup>31</sup> European Court of Human Rights 7.7.1989, series A Vol. 161.

<sup>32</sup> See also Hermann, J.: Gedanken zur Todesstrafe in Japan. Eine Antwort auf Nishihara. In: Eser, A. (Ed.): Festschrift für Haruo Nishihara zum 70. Geburtstag. Baden-Baden 1998, pp. 401-418, pp. 414.

<sup>33</sup> See Jung, H.: Sanktionensysteme und Menschenrechte. Bern, Stuttgart, Wien 1992, p. 79.

<sup>34</sup> See Jescheck, H.-H.: La Peine de Mort. La Position de l' Association Internationale de Droit Penal. Revue Internationale de Droit Penal. La Peine de Mort. The Death Penalty. Travaux de la Conférence Internationale tenue à l' Institut Supérieur International de Sciences Criminelles Syracuse – Italie. 17 au 22 mai 1988. 58(1987), pp. 331-340, pp. 331-332.

<sup>35</sup> See also the position against the death penalty taken by the major criminal law associations (Association Internationale de Droit Penal; Société Internationale de Défense Sociale; The International Penal and Penitentiary Foundation) as expressed in Revue Internationale de Droit Penal. La Peine de Mort. The Death Penalty. Travaux de la Conférence Internationale tenue à l' Institut Supérieur International de Sciences Criminelles Syracuse – Italie. 17 au 22 mai 1988. 58(1987), pp. 331-360.

the death penalty amounts to inhuman and cruel punishment is derived from a view on criminal penalties which accept only such punishment that acknowledges the position of all criminal defendants as subjects. With that, criminal penalties cannot be accepted which aim at the permanent exclusion of an offender from society. However, with these ideas it is also accepted that attitudes towards criminal penalties and assessments of what amounts to cruel, inhuman or degrading punishment are subject to continuous change (as has outlined the German constitutional court with respect to life term imprisonment <sup>36</sup>). But, today everywhere political, culture and social achievements have been made which make the violent and permanent exclusion of criminal offenders from the community through putting him/her to death superfluous. This position is backed up by the evidence that can be derived from comparative research on the deterrent properties of various criminal penalties. There exist well-developed alternatives that provide adequate protection of the public and that convey deterrent messages as well and even better than does the death penalty. With growing evidence that deterrent benefits may not be drawn from executing offenders infringements on the right of life become clearer and become visible with every unnecessary execution. However, as Schabas pointed out, the death penalty still remains in a legal twilight zone as abolition standards have not yet reached the status of customary international law while on the other hand there exists a growing body of international documents which aim at abolishing and restricting the death penalty <sup>37</sup>.

An assessment of the death penalty is then also dependent on those standards that have been adopted by the United Nations <sup>38</sup> and that are equivalent to those expressed in European standards <sup>39</sup>. These standards should guarantee, that

- the death penalty is applied only in cases of the most serious, intentionally committed crimes which had deadly or other serious consequences (comparable in seriousness to the death of a human being);
- the death penalty is not imposed on juveniles/young people;
- the death penalty is not imposed on offenders judged to lack mens rea or to be mentally retarded;

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<sup>36</sup> BVerfGE (Decisions of the Constitutional Court) Vol. 45, pp.187.

<sup>37</sup> Schabas, W.A.: *The Death Penalty as Cruel Treatment and Torture. Capital Punishment Challenged in the World's Courts.* Boston 1996, p. 4.

<sup>38</sup> UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, approved by the Economic and Social Council through resolution 1984/50 of 25 May 1984.

<sup>39</sup> See also Grahl-Madsen, A.: *The Death Penalty. The Moral, Ethical, and Human Rights Dimensions: The Human Rights Perspective.* *Revue Internationale de Droit Penal. La Peine de Mort. The Death Penalty. Travaux de la Conférence Internationale tenue à l' Institut Supérieur International de Sciences Criminelles Syracuse – Italie. 17 au 22 mai 1988.* 58(1987), pp. 567-582.

- the death penalty is enforced only where the possibility of wrongful judgements is excluded;
- the death penalty is imposed after a fair trial – in particular after a trial during which the possibilities of efficient defence were available for the criminal defendant;
- the death penalty is enforced only after automatic appeal and compulsory clemency proceedings;
- the death penalty is enforced only if appeal procedures are finalized and the verdict became final;
- executions are done with inflicting the least pain possible.

Taking these standards as a point of departure, we are faced with problems inherent in the current legal framework of the death penalty in China as regards the demand to restrict the death penalty to the most serious crimes and to guarantee the principle of equal treatment in meting out punishment as well as the demand for a fair trial.

### *3.2 Equal treatment, arbitrariness and the death penalty*

Death amounts to absolute and irrevocable punishment. Therefore, the death penalty is faced with the problem of selecting those criminal offences which should be eligible for such absolute punishment. The problem is related to the requirement to restrict the death penalty to such criminal offences which exhibit the very same degree of seriousness and, moreover, exhibit a degree of seriousness that excludes any necessity to consider other personal or situational sentencing factors, be they of a mitigating or aggravating nature. The absolute nature of the death penalty requires therefore on the side of criminal offending criminal offences that correspond in terms of seriousness to the absoluteness of death. Furthermore, it must be guaranteed by way of procedural and substantive safeguards that no other factors than the criminal offence itself plays the decisive role in imposing and enforcing the death penalty. Seen from international trends, these problems have led to restrict the death penalty essentially to first degree murder. In doing so, we observe also serious attempts to reduce the discretionary power available for the criminal court in imposing the death penalty in order to reduce problems associated with discretionary justice. Herewith, the goal consists of determining statutorily such criminal offences that are so serious that all other sentencing criteria have to be regarded to be irrelevant seen from theoretical and legal perspectives. Furthermore, the goal consists of the attempt to reduce uncontrolled discretion in imposing and enforcing the death penalty in order to allow for foreseeability of the legal consequences of a criminal offence which is prescribed by the principle of the rule of law. Analyses of decision making as regards imposition and

enforcement of the death penalty have shown - for jurisdictions where such research was possible - that it is possible to restrict death eligible offences statutorily and to issue strong sentencing guidelines in order to reduce unequal and arbitrary imposition of the death penalty, thus also ameliorating foreseeability of type and amount of punishment. However, such attempts until now do not exclude totally that the death penalty is imposed and enforced for a selection only of such offences and criminal offenders who in principle would have been eligible for imposition and enforcement of the death penalty. Selection and choice made – this is shown very clearly in sentencing research – are essentially influenced through extralegal criteria. Sentencing research demonstrates eg. for the United States of America that just 6-15% of those who in principle could have been sentenced to death actually are sentenced to death <sup>40</sup> (as regards the ratio between those who actually are executed and those who could have been sentenced to death, this ratio is even more distorted with 1 out of 100) <sup>41</sup>. Apart from temporal variations in imposing and enforcing the death penalty regional variations have to be considered, too <sup>42</sup>. It is in particular in large territories that this type of disparity may emerge and ultimately lead to grossly differing sentencing policies and sentencing patterns.

In the People's Republic of China, the problems discussed so far can neither be described nor analyzed in detail as in-depth empirical research on the imposition and enforcement of the death penalty is not available nor possible as information on the use of the death penalty remains a state secret. But such research in fact should be carried through and is indeed indispensable if progress is to be made in achieving the goals of equal treatment and the rule of law in sentencing and enforcement of criminal punishment.

However, in any case, mentally retarded offenders should not be eligible for the death penalty at all. The mentally retarded offender – or offenders displaying diminished responsibility – cannot be treated as is treated the fully responsible criminal offender. The mentally retarded offender displays less guilt and culpability and therefore does not fall within the group of those offenders who have committed most serious offences. Otherwise, the criminal justice system would be headed towards a mere result bound criminal law and strict liability neglecting the dimension of individual guilt in establishing the degree of seriousness of criminal offending.

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<sup>40</sup> Baldus, D.C., Woodworth, G., Pulaski, Ch.R.: *Equal Justice and the Death Penalty*. Boston 1990, pp. 235-237.

<sup>41</sup> See Nakell, B., Kenneth, A.H.: *The Arbitrariness of the Death Penalty*. Philadelphia 1987; Baldus, D.C., Woodworth, G., Pulaski, C.A.: *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*. *Stetson Law Review* 1986, pp. 133-261.

<sup>42</sup> See Amnesty International: *Volksrepublik China*. Bonn 1996, p. 135.

### 3.3 *The death penalty and the question of deterrence*

Research on possible deterrent effects of the death penalty may be summarized as follows<sup>43</sup>. Until today there is no convincing evidence that crime trends could be influenced through the threat, imposition or enforcement of the death penalty<sup>44</sup>. Numerous studies based on the comparison of countries and regions with and without the death penalty, analyses of time series interrupted through abolition or (re-)instatement of the death penalty as well as econometric analyses of time series (displaying death penalty eligible crimes and death sentences/executions) rather consistently underline that the death penalty does not have an impact on the general crime rate nor on specific types of crimes such as murder<sup>45</sup>. The studies carried through by Ehrlich in the seventies and exhibiting a rather strong deterrent effect of the death penalty (with estimates that up to 7/8 murders could be prevented by a single execution)<sup>46</sup> have been seriously flawed by the skewed distribution of execution data. In a replication of the Ehrlich study Bowers and Pierce did not find evidence of deterrent effects when excluding the last five years (of the execution time series) from regression analysis<sup>47</sup>. Although, methodological problems embedded in the type of research designs which up to now could be used in deterrence research pose considerable problems of interpretation of data that ultimately could be resolved only by way of implementing controlled experiments, the latter research strategy cannot be used in this type of studies. However, it must be underlined that those legislative bodies which create death penalty laws and empower courts to mete out the death penalty have to bear the burden of proof as regards a deterrent effect of executions<sup>48</sup>. If a deterrent effect of the death penalty cannot be proven – and nothing speaks in favour of the assumption that such effects can ever be proven – then, the threat and imposition as well as enforcement of the death penalty have to be regarded to be unproportional and to infringe therefore unnecessarily upon human life. The development of systems of penal sanctions should be headed towards the goal to minimize pain necessarily

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<sup>43</sup> See also Albrecht, H.-J.: Generalprävention. In: Kaiser, G. et al. (Eds.): Kleines Kriminologisches Wörterbuch. 3<sup>rd</sup> Ed., Heidelberg 1993, pp. 157-164.

<sup>44</sup> For a summary see Hood, R.: The Death Penalty. A World-Wide Perspective. Oxford 1996, pp. 180-212.

<sup>45</sup> See Peterson, R.D., Bailey, W.C.: Is Capital Punishment an Effective Deterrent for Murder? An Examination of Social Science Research. In: Acker, J.R., Bohm, R.M., Lanier, Ch. S. (Eds.): America's Experiment with Capital Punishment. Reflections on the Past, Present, and Future of the Ultimate Penal Sanction. Durham 1998, pp. 157-182.

<sup>46</sup> Ehrlich, I.: The Deterrent Effect of Capital Punishment: A Question of Life and Death. American Economic Review 65(1975), pp. 397-417; Ehrlich, I.: Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence. Journal of Political Economy 85(1977), pp. 74-88.

<sup>47</sup> Bowers, W.L., Pierce, G.L.: The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment. Yale Law Journal 85(1975), pp. 187-208.

<sup>48</sup> Grahl-Madsen, A.: The Death Penalty. The Moral, Ethical, and Human Rights Dimensions: The Human Rights Perspective. Revue Internationale de Droit Penal. La Peine de Mort. The Death Penalty. Travaux de la Conférence Internationale tenue à l' Institut Supérieur International de Sciences Criminelles Syracuse – Italie. 17 au 22 mai 1988. 58(1987), pp. 567-582, p. 579.

associated with punishment at a pace which reflects the developing scientific knowledge on effects of criminal penalties. This guideline - backed up by civilization theory <sup>49</sup> - necessitates permanent monitoring and control of what actually has to be inflicted on criminal offenders in terms of severity of criminal punishment.

### *3.4 The death penalty and public opinion*

Research shows also that public opinion - serving very often to justify retention of the death penalty - represents a rather unsecure and problematic basis. The concept of „public opinion“ is vague and open and therefore accessible for differing interpretation. From an European perspective it must be noted furthermore that a democratic society must not make basic criminal policy decisions dependent on public opinion. After all, the state is also obliged to exert influence on public opinion and the acceptance of systems of criminal penalties. Research has moreover shown that the public opinion depends heavily on the type of question which is introduced in interviews. If respondents are confronted with sufficient information on crime and the person of the offender and if alternatives to the death penalty are presented to interviewees, then voices for severe punishment, in particular the death penalty, become less numerous. Furthermore, it can be argued that criminal law reform would come to a definitive end if its course would be made dependent on the public's demand. It is obvious that abolition of the death penalty in most European countries fell into periods where majorities of the public favoured the death penalty. However, after abolition support for the death penalty fades away and is quite often replaced by strong support for permanent and unconditional abolition of the death penalty. A good example is provided though opinion polls on the death penalty in Germany. While before and shortly after abolition of the death penalty an overwhelming majority of the population voiced support for the death penalty the share of supporters dropped to some 26% in 1980 <sup>50</sup>.

### *3.5 The imposition of the death penalty and the right to have a fair trial*

The right to have a fair trial includes the right to have efficient defence. This right is seriously at risk in Chinese criminal procedure in particular in case of those defendants who have not the means to be represented by their own lawyer. In this case, criminal

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<sup>49</sup> Elias, N.: *Über den Prozeß der Zivilisation*. 2 vol., Frankfurt 1976; Popper, K.R.: *Auf der Suche nach einer besseren Welt*. München 1984, pp.21ff; van Dijk, J.J.M.: *Strafsanktionen und Zivilisationsprozeß*. *Monatsschrift für Kriminologie und Strafrechtsreform* 72(1989), pp.437-450; pp. 445.

<sup>50</sup> Zimring, F.E., Hawkins, G.: *The Path Toward the Abolition of Capital Punishment in the Industrial West*. Grahl-Madsen, A.: *The Death Penalty. The Moral, Ethical, and Human Rights Dimensions: The Human Rights Perspective*. *Revue Internationale de Droit Penal. La Peine de Mort. The Death Penalty*. *Travaux de la Conférence Internationale tenue à l' Institut Supérieur International de Sciences Criminelles Syracuse – Italie*. 17 au 22 mai 1988. 58(1987), pp. 669-688, p. 680.

defendants are dependent on the assignment of a defence counsel by the criminal court; however, official assignment of a defence counsel is located rather late during the criminal procedure and shortly before the trial, which must be regarded to be too late. In particular in case of serious crimes, the very basis for the trial and therefore also for the judgement and the sentence will be established during the investigative stage of the proceedings. Insofar, efficient defence in such cases necessitates that a defence counsel is assigned immediately after arrest. The importance of this is underlined by the low and precarious educational and socio-economic position of those allegedly having committed death penalty eligible criminal offences.

### *3.6 The death penalty and possible errors in judgement*

The history of all criminal justice systems demonstrates very clearly that there is always the possibility of wrongful judgement. Errors and wrongful convictions cannot be avoided. That's why all criminal justice systems based on the rule of law have introduced legislation that provide for opportunities to correct faulty decisions after the judgement became final. In many criminal justice systems the process of abolishing the death penalty was fuelled by debates on wrongful judgements that have led to the execution of innocent people<sup>51</sup>. The irreparability of executions should preclude in all systems which recognize that errors in judgements are in principle possible, imposition and enforcement of death sentences. Recent research in the US has confirmed the significance of the problem of executing the innocent. Between 1977 and 1996 5154 prisoners entered death row in the US death penalty states. Out of this group 358 have been executed<sup>52</sup>. However, between 1977 and 1997 75 individuals convicted and sentenced to death have been freed (after spending up to 10 years on death row) because ultimately evidence could be produced which proved their innocence<sup>53</sup>. This amounts to approximately 1 innocent individual found among 50 persons sentenced to death.

Among the reasons of wrongfulness of death sentences we find wrong confessions (not necessarily obtained through deception or torture), evidence fabricated by police or prosecution (due also to the partially enormous pressure laid on police and prosecution by public or political concerns with certain crimes) as well as mere misinterpretation of evidence by trial courts. All these sources of wrongful decisions are operative in China, too. Several death penalty cases made public in 1997<sup>54</sup> demonstrate that wrongful death sentences are not a neglectable phenomenon at all but that

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<sup>51</sup> Hood, R.: opus cited 1998, pp. 763-764.

<sup>52</sup> Bureau of Justice Statistics: Bulletin. Capital Punishment 1996. Washington 1997, pp.1-2.

<sup>53</sup> USA Today, Friday 13<sup>rd</sup> November 1998, p. 14A.

<sup>54</sup> See eg. the reports in China Youth Daily, 8 May 1998; Oriental Daily 12 September 1997 and 25 September 1997; Xinjiang Legal News 24 October 1997; Xinmin Evening News 17 October 1997.

miscarriages of justice can be traced to the above mentioned causes where they find a fertile ground in face of limited opportunities of defence, appeal as well as control of police which are evidently not reluctant in extracting confessions by way of illegitimate means.

The goal to reduce possible errors in judgement is pursued in China through automatic review of death penalty cases in the Supreme Court. However, in 1983 the Higher Courts have been authorized to review death penalty cases if public security is at risk<sup>55</sup>. With delegation of review powers the defendant is deprived of one appeal/review opportunity as High courts regularly are also courts of appeal in death penalty cases. Furthermore, uniform and equal treatment is jeopardized as regional variation may occur that is not controlled anymore. Here too, North-American experiences should be considered. During those two decades since the reinstatement of death penalty statutes in the US some 10% of convictions underlying the death sentence and almost 20% of the death sentences themselves have been overturned on appeal or through higher courts<sup>56</sup>.

#### 4. Summary

The legal framework and the practice of the death penalty in China are faced with considerable problems as seen from a European perspective:

- the death penalty amounts to cruel and inhuman punishment as the death penalty does not comply with today's standards on criminal penalties; the death penalty infringes on the right of life and the dignity of man;
- in the face of the current social and economic state of development, the threat and enforcement of the death penalty is not necessary anymore; this is underlined by constitutional court jurisdiction as well as legislative moves towards abolition in various countries of transition in Central Europe<sup>57</sup> as well as in Southern Africa<sup>58</sup>.

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<sup>55</sup> Chen Xin-Liang: The Death Penalty. In: The United Nations Standards and China's Legal System of Criminal Justice. Beijing 1998, p. 536.

<sup>56</sup> Bureau of Justice Statistics: Bulletin. Capital Punishment 1996. Washington 1997, p. 13.

<sup>57</sup> For Hungary see the decision of the Hungarian Constitutional Court as of October 30th, 1990; see also Nagy, F.: Arten und Reform punitiver und nicht-punitiver Sanktionen in Ungarn. In: Eser, A., Kaiser, G., Weigend, E. (Eds.): Von totalitärem zu rechtsstaatlichem Strafrecht. Kriminalpolitische Reformtendenzen im Strafrecht osteuropäischer Länder. Freiburg 1993, pp. 313-339, pp. 315-316; for the Tcheque Republic see Musil, J., Valkova, H., Cisarova, D.: Tschecheslowakei. In: Eser, A., Huber, B. (Eds.): Strafrechtsentwicklung in Europa. 4.2 Landesberichte 1989/1992. Freiburg 1994, pp. 1491-1567, p. 1505; for Romania see Walmsley, R.: Prison Systems in Central and Eastern European Countries. Progress, Problems and the International Standards. Helsinki 1996, p. 17.

<sup>58</sup> For a summary see Schabas, W.A.: The Death Penalty as Cruel Treatment and Torture. Capital Punishment Challenged in the World's Courts. Boston 1996, p. 3.

- there is no scientific evidence supporting the assumption of deterrent effects of the death penalty; long prison sentences or life term imprisonment will have at least the same degree of deterrent consequences as has the death penalty; therefore, threat and enforcement of death penalties are unproportional and excessive punishment;
- the threat of the death penalty as available in Chinese criminal law is – seen from the goal to restrict the death penalty to the most serious crimes – far too extensive and includes criminal offences (like e.g. property offences and drug offences) which cannot fall within the range of „most serious crimes“;
- the extension of the death penalty on the retarded offender does evenly not comply with the goal to restrict the death penalty to the most serious crimes;
- the offence statutes which carry in Chinese criminal law the death penalty allow for extensive discretion of the criminal court in the decision of whether to impose the death penalty or other punishment. Extensive discretion brings upon problems in terms of discriminatory selection and equal treatment most probably resulting in disparity across time, across offences as well as offenders and across jurisdictions;
- efficient defence is not possible with assigning a defence council only shortly before commencement of the criminal trial;
- restrictions in the appeal and review procedure add to the problem of wrongful convictions which cannot be ruled out as international experiences with the death penalty demonstrate.