

# A Study on Rationality of Retaining Death Penalty in China at this Stage

Wang Yuanyuan<sup>1,a,\*</sup>

*School of Law, Master of Law Education College of Northwest University of Political Science and Law, Xi'an, China*

*<sup>a</sup>2935186354@qq.com*

*\*Corresponding author*

**Abstract:** *With the development of the international human rights movement and the humanitarian concept, it seems that the abolition of the death penalty has become an inevitable trend of history, however, the author believes that the abstract discussion of whether the death penalty should be abolished has no practical significance. In this paper, the author explores the current situation of China's death penalty system and the theoretical and legislative disputes about the abolition of the death penalty at home and abroad. It is concluded that China's retention of the death penalty at this stage is not only basic on utilitarian, retribution, penalty, humanitarian and other theoretical support but also has a very necessary realistic basis. Based on the above discussion, the author proposes some suggestions for the improvement of China's death penalty system and hopes that those measures could make China's death penalty system more perfect and that the substantive rights and procedural rights of Chinese condemned criminal can be effectively guaranteed.*

**Keywords:** *The Existence and Abolition of Death Penalty, Guarantee of Human Rights, Perfection of Chinese Death Penalty System*

## 1. Introduction

In recent years, the existence and abolition of the death penalty has become a hot issue of concern. Some people advocate that modern countries ruled by law should not have such a cruel punishment. On the contrary, some people also advocate that the death penalty is a fair retribution for criminals with extremely serious crimes, and it is also conducive to deterring those who want to deprive others' lives.<sup>[1]</sup> The law has become a tool for class rule and the death penalty, as the most severe penalty, has also become a powerful weapon to safeguard the rights and interests of rulers. Rooted in a certain economic and social structure, the development of the death penalty and the progress of human society are inseparable.<sup>[2]</sup> In a society, when class contradictions ease, social contradictions do not conflict, the law providing for the death penalty and the execution rate of the death penalty is low, but in a country with sharp social contradictions, the death penalty has become a good medicine for the ruling class to maintain social order, the death penalty charges stipulated in the law will increase, the number of death penalty execution in judicial practice will also be increase. With the development of modern industrial civilization and the wide spread of the concept of human rights protection in the world, people began to realize the harshness of the death penalty and question the rationality and legitimacy of the death penalty, which set off a global abolition of the death penalty boom. According to relevant statistics, as of 2012, 140 countries around the world have abolished or not used the death penalty, of which 97 countries have abolished all the death penalty nationwide, and only 58 countries still retain the death penalty and implement it completely. China, Japan and the United States are typical of them.<sup>[3]</sup> China's death penalty system has a long history, which can be traced back to the first dynasty of China, the Xia Dynasty. According to the historical data recorded in *Zuo Zhuan · Zhao Gong 6 years* "Xia has chaos, and Yu punishment". Among them, "Da Pi" and "Yu punishment" refers to the penalty of deprivation of one's life. Since the death penalty was clearly stipulated in the code of the Xia Dynasty, the death penalty, as the most important penalty in ancient times, has been favored by the rulers of the past dynasties. With the development of social economy and the rise of humanistic thoughts in ancient times, people began to think about the irreversibility and rationality of the application of this cruel penalty, and put forward the concept of life and death against killing without considering. Under the guidance of the concept of "kill less and carefully", the rulers of the past dynasties constantly changed the way of execution of death penalty, abolished the relatively cruel way of execution of death penalty, and limited the scope of

application of death penalty.<sup>[4]</sup> However, in essence, the core position of the death penalty in the ancient Chinese penalty system is unshakable. From the development of China's death penalty system, it can be seen that the death penalty as a kind of penalty design depends on a country's social and economic development, social principal contradiction and social order in a certain historical period. This paper consists of five parts, the first part is introduction; the second part is mainly about the status quo of China's death penalty system, the third part is about academic controversies and juristic disputes over the existence and abolition of the death penalty at home and abroad, the fourth part is analysis of the rationality of retaining the death penalty in China at this stage, the final part is conclusion. Though study, the author concludes that it is meaningless to talk about the abolition of the death penalty in an abstract way, and it is easy to fall into the trap of metaphysics and the key to the existence and abolition of the death penalty lies in the economic, political and cultural development of a country during certain period. The abolition of the death penalty in China is not conducive to the realization of social fairness and justice, but also lacks the basis of public support at this stage.

## 2. The Status Quo of China's Death Penalty System

The death penalty, also known as life penalty, capital punishment, is the most severe penalty for criminals. Its severity is mainly manifested in many aspects.<sup>[5]</sup> First, the death penalty is the most severe penalty for depriving criminals of their lives. Secondly, the death penalty, compared to other penalties, the consequences of its implementation is irreversible. Finally, the death penalty is more deterrent than other penalties. Whether it is for criminals who are about to be executed or for law-abiding citizens, the death penalty has its greatest punitive and deterrent force. Some scholars have divided the death penalty legislation of the People's Republic of China into three stages,<sup>[6]</sup> namely: the initial stage from 1949 to 1979, the expansion stage from 1979 to 1997, and the restriction stage from 1997 to the present. From 1949 to 1979, the Party was leading the people of the whole country to carry out the construction of new China. During this period, the People's life style was simple, and the socialist revolution and construction required a large number of talents. Therefore, the Party and the state adhered to the criminal policy of "keeping the death penalty but killing less and killing carefully." In the first stage, China did not have a unified criminal legal norm for crime and criminal law. There are only a few separate regulations, such as *Regulations on Punishing Counter-Revolutionaries and Regulations on Punishing Corruption*. In 1979, *the Criminal Code of the People's Republic of China* was promulgated, and the death penalty was formally established as the most severe penalty method in New China. During this period, China's crime rate continued to rise, which brought great damage to China's social and economic order and People's normal and peaceful life, *The 1979 Penal Code* provided for 28 death penalty offences, and most of the death penalty offences were counter-revolutionary offences. Article 79 of *the Criminal Code of 1979* clearly stipulates the system of analogical application of guilt. Under this provision, even if some crimes do not stipulate the death penalty, if approved by the Supreme People's Court, the death penalty can still be applied. In the expansion stage from 1979 to 1997, under the background of reform and opening up and the policy of "strike hard", the state increased the punishment for crimes, and the number of death penalty charges was increasing. During this period, in addition to *the criminal code*, China promulgated 25 separate criminal laws, and the death penalty charges increased from 28 to 71. In 1997, China's current criminal code was promulgated. In 1997, *the Criminal Code of the People's Republic of China* adopted a legislative paradigm of strict control of the death penalty, reducing the previous 71 death penalty crimes to 68.<sup>[7]</sup> In addition, the application of the death penalty is limited, and the death penalty is not applicable to crimes committed by persons under the age of 18. Since the promulgation of *the Criminal Code* in 1997, China's control over the death penalty has become more stringent, and a series of measures have been taken based on the concept of "less killing and careful killing." For example, in 2007, the state returned all the approval rights for the death penalty to the Supreme People's Court. *The Criminal Law Amendment (8)* abolished 13 death penalty charges at one time, and *the Criminal Law Criminal Law Amendment (9)* abolished 9 death penalty charges, thus maintaining the current 46 death penalty charges. The legislative norms of China's death penalty system can be divided into substantive law norms and procedural law norms. First of all, the substantive law is also *the Criminal Code of the People's Republic of China*, which stipulates that China's death penalty is only applicable to criminals with extremely serious crimes and cannot be applied to general criminal acts. Secondly, the legal basis for the procedural norms of the current death penalty system in China can be divided into two parts. The first part is the law

---

1 In 1983, China was in the early stage of reform and opening up, there was a high incidence of crime in this social transformation period. All kinds of criminal acts seriously endanger social order and people's personal and property rights. On September 2, 1983, the Standing Committee of the National People's Congress issued a "strike hard" decision, which increased the death penalty for seven common crimes.

promulgated by the National People's Congress and its Standing Committee, the highest legislative body in China. It mainly refers to *the Criminal Procedure Law of the People's Republic of China*, which is the basic law regulating the execution procedure of death penalty. The second part is mainly the *Judicial interpretation* issued by the Supreme People's Court and the Supreme People's Procuratorate, which stipulates in detail the relevant contents and specific details of the death penalty execution procedure.

### 3. Academic Controversies and Juristic Disputes over the Existence and Abolition of the Death Penalty at Home and Abroad

The death penalty has always been a powerful weapon for the ruling class to maintain its own ruling order. People's doubts about the rationality of the death penalty originated from the description of the brutal execution of the death penalty in Beccaria's book *On Crime and Punishment* published in 1764. Since then, more and more scholars have begun to criticize the death penalty because of its cruelty and inhumanity.

#### 3.1 Academic Controversies on the Existence and Abolition of the Death Penalty at Home and Abroad

Scholars at home and abroad who advocate the existence of the death penalty are mainly based on the concept of criminal retribution. They believe that for homicide or other particularly serious violent crimes, social justice can be achieved only if the perpetrators pay the price of their lives. The representatives of foreign scholars who advocate the existence of death penalty are Kant, Hegel, Garofalo and so on. Kant believes that the only basis for a criminal to be sentenced to death is the freedom of one's will and he believes that the death penalty is a fair retribution for criminals. Hegel demonstrated the legitimacy of the existence of the death penalty from the relationship between law and punishment.<sup>2</sup> Garofalo believes that depriving criminals of their social rights is also a powerful measure to eliminate them and only murder for personal gain can be imposed on death penalty.<sup>[8]</sup>

As the first scholar in the world to propose the abolition of the death penalty, Beccaria's reasons for the abolition of the death penalty in his book *On Crime and Punishment* can be summarized as follows:<sup>[9]</sup> First of all, Beccaria, based on the theory of social contract, believes that there is no justification for the state to apply the death penalty to criminals; Secondly, Beccaria believes that the seemingly cruel death penalty, due to its short-term execution, cannot produce a penalty as good as life-long hard labor; In addition, he believes that the death penalty could provoke the most brutal side of people, eventually leading to a vicious cycle of atrocities; finally, Beccaria realized that the execution of the death penalty is irreversible. Bentham demonstrates the rationality of abolishing the death penalty from the perspective of utilitarianism.<sup>[10]</sup> He believes that life imprisonment and the death penalty have almost the same deterrent force, but from the cost point of view, the cost of the death penalty is much higher than the cost of life imprisonment. Feli believes that the death penalty is naturally generated in the development of human society.<sup>[11]</sup>

#### 3.2 Juristic Disputes over the Existence and Abolition of the Death Penalty at Home and Abroad

At present, the world's legislative attitude towards the death penalty is divided into three sides, the first is the full retention of the death penalty and strict implementation of it in countries such as China, the United States; The second is the complete abolition of the death penalty in countries such as Russia, Britain; The third is to restore the death penalty in countries such as Sri Lanka, the Philippines. The legislative attitude of the countries that retain the death penalty can be divided into three kinds: one is to retain the death penalty completely and execute the death penalty strictly in accordance with the provisions of relevant laws; The second is although the death penalty is retained in the legislation but the death penalty is not really implemented in judicial practice; The third is that the death penalty only applies to some crimes, such as crimes that seriously endanger national security and public safety, and strictly restricts the application and execution procedures of the death penalty. The international community's attitude towards the existence and abolition of the death penalty has gone through the following stages:<sup>[12]</sup> the first stage is represented by the 1948 *World Convention on Human Rights*. The second stage is represented by *the International Covenant on Civil and Political Rights*. The third stage is represented by documents such as *the Optional Protocol to the United States Convention on Human Rights* and *the Sixth Optional Protocol to the European Convention on Human Rights on the Abolition of the Death*

<sup>2</sup> Hegel pointed out in his book *the Theory of Philosophy of law*: "Punishment is included in the law of the prisoner himself, so punishing him is to respect him as a rational existence."

*Penalty.* The author believes that a country's attitude towards the death penalty depends on the country's political models, economic development and cultural thoughts in a certain period of time.

#### **4. Analysis of the Rationality of Retaining the Death Penalty in China at this Stage**

As the largest developing country in the world, China has made remarkable achievements since the reform and opening up. However, compared with other developed countries in the world, China is still in the primary stage of socialism, and it still does not have the material conditions to completely abolish the death penalty. There are theoretical support and realistic urgent for China to Retaining the Death Penalty.

##### **4.1 The Theoretical Basis of Retaining the Death Penalty in China at this Stage**

At present, the theoretical support of retaining the death penalty in China mainly includes humanitarian theory, functionalism theory, retributivism theory and penalty functionalism theory. Based on these theories, the proponents of death penalty demonstrate the necessity of retaining and reasonably restricting the death penalty in China from different aspects.

###### **4.1.1. Humanitarian Theory**

The core connotation of humanitarianism is summarized as “people-oriented, affirming human values, safeguarding human rights and dignity,” and the philosophical basis of humanitarianism is humanism. From the perspective of stereotypes, the death penalty and humanitarianism seem to be incompatible and diametrically opposed, but in fact, the retention of the death penalty in China is a good balance between the protection of human rights and the maintenance of social order.<sup>[13]</sup>First of all, humanism emphasizes the supremacy and equality of human life, but whether it is the value of equality, justice and freedom pursued by law or the right to life of human beings should be a relative concept. Because if there is no law to regulate and restrict People's behavior, everyone who has absolute freedom, can do whatever he wants, so it means that everyone can not enjoy any freedom. Everyone 's life is precious and equal and there is no penalty that can be exchanged with the value of other People's life except the death penalty. Secondly, China's current policy of keeping the death penalty and strictly restricting it is fully in line with the international community 's human rights protection concept and it is a result of combining the general principles of human rights protection with China's specific reality and an important part of the road of human rights with Chinese characteristics.<sup>[14]</sup>

###### **4.1.2. Utilitarianism Theory**

The philosophy of utilitarianism is put forward by the British thinker Bentham. The basic idea is that “pursuing happiness and avoiding pain is human nature”. Under this idea, when the happiness brought by an act is greater than the pain, it is good and worthwhile. When an act brings more pain than happiness, it is evil. When an act only brings happiness but not pain, it maximizes happiness.<sup>[15]</sup> Utilitarianism believes that the happiness of most people is the greatest happiness. If sacrificing one person can exchange for the happiness of most people, then this sacrifice is worth and necessary. Sacrificing the life of a heinous murderer can not only maintain the stability of social order, but also bring psychological comfort and satisfaction to the families of victims. Therefore it is necessary to make the criminal 's suffering greater than the benefits that the crime can obtain, so as to give play to the deterrent effect of the penalty. Utilitarianism believes that the death penalty has a comparative advantage over other penalties and can maximize social benefits. The most fundamental reason for China to retain the death penalty at this stage is to protect the life and safety interests of the people to realize the happiness interests of the broad masses of the people and maximize the overall happiness interests of socialism.

###### **4.1.3. Retributivism Theory**

Retributivism is also known as the theory of retribution penalty. Its basic proposition is that “crime is an evil act that harms others, and the death penalty is a fair retribution for it.” Kant, the founder of modern retributive punishment thought, proposed and strongly demonstrated the absolute retributive punishment thought based on metaphysics. Kant believes that the only basis for the punishment of the offender is his freedom of will. Since the offender has absolute freedom of consciousness when committing the crime and can correctly understand and control his own behavior, he should also be responsible for the consequences of his own behavior. Hegel is also an advocate of retributive punishment. He mainly uses dialectical thought to demonstrate that punishment is equal retaliation for criminal acts in law and believes that the significance of punishment is not only to make criminals suffer from pain, but also to

reflect the respect of the law for criminals. He emphasizes that the value of punishment should be equivalent to the value of infringement.<sup>[16]</sup> The idea of retribution has a long history and far-reaching influence in China and It is public expectation that the death penalty should be imposed on criminals who have done extremely severe crimes.

#### ***4.2 The Realistic Basis of Retaining the Death Penalty in China at Current Stage***

Standing on the height of the development of human civilization, with the continuous development of social productivity and the continuous improvement of People's ideological thoughts, perhaps the death penalty will be abolished one day. However, the author believes that abstract the discussion of whether the death penalty should be abolished has no practical significance. Chinese retention of the death penalty at this stage not only has sufficient theoretical support, but also has urgent practical needs.

##### ***4.2.1 The Scarcity of the Material Conditions for Abolition of the Death Penalty***

According to the viewpoint of Historical Materialism, the economic foundation determines the upper level. As an important means of punishing and preventing crimes, the death penalty is ultimately determined by the economic basis at that time.<sup>[17]</sup> When a country's material civilization is higher, generally speaking, People's legal literacy, cultural level, legal consciousness are relatively high. On the contrary, in a country with poor material civilization, most people's legal consciousness is weak and the crime rate is high. Although great achievements have been made in recent years since the reform and opening up, China is still in and will be in the primary stage of socialism for a long time. If the death penalty is abolished, it is necessary to replace the death penalty with other long-term freedom penalties such as life imprisonment, which means that more supervision institutes need to be established and more law enforcement manpower needs to be trained, which is obviously not in line with China's current economic development level. Therefore, it is necessary to retain the death penalty at this stage. In the primary stage of socialism in China where the condition of social living facilities is imperfect, so the death penalty has played the irreplaceable deterrent role in punishing extremely serious crimes and preventing such crimes.

##### ***4.2.2 Lack of the Public Basis for Abolition of the Death Penalty***

Public opinion is an important factor affecting judicial justice. Generally speaking, only the judicial policy that conforms to the People's hearts will be implemented in a longer term, and only the judicial judgment that conforms to the public opinion can truly achieve social justice. Public opinion, that is, the sum of the simple justice views and emotions of most citizens with conscience on specific policies or events, is a factor that policy makers and rulers must consider. The traditional Chinese legal culture has a long history. The legal concepts such as "severe punishment" are more deeply rooted in the hearts of the people. When ordinary people hear an appalling homicide, their instinctive reaction is to immediately execute the murderer. On the other hand, from the perspective of cultural beliefs, the core of Western culture is individual freedom, advocating respect for individual freedom, while Chinese culture has advocated collective interests since ancient times. National interests are higher than personal interests. It is advocated that there is a country first and then individual. Therefore, when the life of a criminal can be exchanged for the peace of the whole society, this is in line with social justice. The death penalty for murderers is the best compensation for innocent victims, the greatest comfort for the families of the victims, and the confession of most good citizens in society. It can enhance everyone's psychological security and maintain the national social order. Therefore, China's current retention of the death penalty has a profound public opinion foundation.

##### ***4.2.3 The Retention of the Death Penalty in China at this Stage is a Good Medicine to Maintain Social Order***

As the most deterrent punishment, the death penalty plays an important role in social security. Since ancient times, China has a legal culture concept of "governing the world with light punishment, and governing the chaos with heavy punishment." At present, China is facing unprecedented changes in the world, and the domestic and international situation is complex. With the development of the socialist market economy, the criminal desire of some potential criminals is expanding.<sup>[18]</sup> In addition, the development of high-tech such as the Internet and artificial intelligence has provided greater convenience for criminals to commit crimes. In recent years, China's criminal crime rate has been rising. For example, major criminal cases such as "Guangxi Lingshan Baishanguo Girl Case" in 2018, "Sun Wenbin's Medical Killing Case" in 2019, "Wang Shujin's Rape and Murder Case" in 2020, and "Miss Hangzhou Lai Missing Case" in 2020 have great social harm. The subjective viciousness of the perpetrators is extremely deep, and the social influence of the crime is extremely bad. If these inhumane and inhuman

murderers are not sentenced to death, how to reassure the people, and how to make up for a loss of the victims and their families. At present, China's public security situation does not allow the abolition of the death penalty. Imagine that the criminal crime rate is on the rise under the current retention of the death penalty, what if the death penalty is completely abolished. China's serious violent crimes and major criminal cases may increase significantly, which will seriously affect China's social security and economic development order. Therefore, China's retention of the death penalty at this stage is a powerful measure to build a safe China. Hegel once said that existence is reasonable. As long as the things that exist in reality are rational, the same reason is put on the death penalty. It can be found that the retention of the death penalty has its value of existence. For some criminals who kill innocent people by cruel means, the application of the death penalty can adapt to the crime and conform to the connotation of fairness and justice. To a certain extent, retaining the death penalty can deter some criminals from committing more serious crimes. According to the current legal situation in China, it is necessary to retain the death penalty in China, and it also plays a great role in preventing extremely bad crimes.

## 5. Conclusion

To sum up, China's retention of the death penalty has sufficient theoretical basis and urgent practical needs. In the case that China cannot abolish the death penalty, the author puts forward some suggestions to make China's death penalty system more humanitarian, so that the procedural rights and substantive rights of Chinese death penalty offenders can be better protected.<sup>[19]</sup>First of all, the death penalty review process should be improved. The death penalty review system is established to prevent the abuse of the death penalty and the arbitrary deprivation of the life of criminals. The organ for the review of death penalty stipulated in China's criminal law is the Supreme People's Court. Death penalty cases should be approved by the Supreme People's Court before they can be executed except those tried by the Supreme People's Court according to law. The author believes that it is necessary to ensure the full coverage of defense lawyers for the defendant and it is also necessary to ensure the realization of the rights of defense lawyers. Secondly, according to China's current law, the People's court is responsible for the execution of death penalty cases so that the rights of the condemned criminal are not effectively protected. Therefore the author suggests that the execution subject of death penalty in China should be changed, and it is more reasonable to execute the death penalty by the detention organ of the executed. Third, the author hopes that the judicial organs and the relevant bar associations can effectively guarantee the legal aid of the condemned criminal at this stage. Finally, it is necessary to strengthen the procedural rights of the condemned criminal in the execution stage, such as the right to meet relatives and identity rights.

## References

- [1] Chen Xinyu, Zhang Xiao. *The History and Prospect of Judicial Application of Death Penalty in China [J]. Legal System and Society*, 2021(09):187-188.
- [2] Wang Yuying, *Research on the Existence and Abolition of Death Penalty for Serious Violent Crimes in China-From the Perspective of Criminal Economics [J]. Journal of China People's Police University*, 2022,38 (01):72-78.
- [3] Tan Mingxing, *Study on the Existence and Abolition of the Death Penalty [D]. Henan Normal University*, 2015.
- [4] Zhao Xi. *On the Rationality of the Existence of Death Penalty in China [J]. Legal system and society*, 2020 (34):178-179.
- [5] Mao Chuanjiang. *Debate on the Existence and Abolition of the Death Penalty and the Death Penalty System in China [D]. Jilin University*, 2007.
- [6] LI Ruihong, *Study on the Death Penalty legislation of the Criminal law Amendment [D]. Hebei Normal University*, 2020. DOI : 10.27110.
- [7] Zhao Bingzhi, *Reflections on the Cautious Use of Death Penalty in China [J]. Chinese law*, 2011(06):7.
- [8] Garofalo: *Criminology*, China Encyclopedia Press, 1996 edition, p. 201.
- [9] Beccaria, *On Crime and Punishment*, translated by Huang Feng, China Encyclopedia Press, 1993 edition, pp.46-47.
- [10] Bentham, *Legislative Theory-Principles of the Criminal Code*, translated by Sun Li et al, Chinese People's Public Security University Press, 1993, p. 91.
- [11] Philip, *Sociology of Crime*, translated by Guo Jian, People's Public Security University of China Press, 1990 Edition, p162.
- [12] Li Jing, *Debate on the Existence and Abolition of the Death Penalty and China's Rational Choice*

[D].Northwest University, 2011.

[13] Liang Meng, *On the Theoretical Basis of the Existence and Abolition of the Death Penalty* [D]. Jilin University, 2006.

[14] Yin Jianfeng, Zhou Kai. *The implication and Manifestation of Human Rights in China's Death Penalty Policy* [J].*Human rights*, 2022 (05) : 65-86.

[15] Xing Manyuan.*Rational Thinking on the Existence and Abolition of Death Penalty - From the Perspective of Utilitarianism* [J].*Shanxi University Journal of Social Sciences*, 2005 (10) : 81-83.

[16] [Germany] Hegel. *Principles of Philosophy of Law* , Commercial Press, 1st edition, 1961, p. 45.

[17] Zhuge Peng. *Relevant Research on the Application of the Death Penalty in Criminal law* [J]. *The Rule of law and Society*, 2020 (3):176-177.

[18] Guo Enze. *Reflections on the Existence and Abolition of the Death Penalty* [J]. *Modern Business Industry*, 2020,41 (01):130-134.

[19] Zhang Chaoyun. *Research on the Effective Restriction of the Application of Death Penalty in China* [D].Guangxi Normal University, 2021.