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RESEARCH ARTICLE

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Outline of reforming China's penal system

Abstract China's penal system has to be reformed systemically on the basis of achievements in recent years. In terms of the penalty types and the penal system, it is necessary to further restrict death penalties through the legislative and judicial measures, improve or enrich liberal punishment, property punishment and identity punishment, and adjust the penal system as a whole. In terms of the sentencing system, the principle shall be expressly narrated and the standard for sentencing shall be explicitly specified and certain discretion for sentencing shall be legalized. With respect to the penalty execution system, the idea of open execution of punishment shall be established and the community correction system shall be established. With respect to the penalty elimination system, supplementation shall be taken for the time period of execution and corporate crimes, and the activation for prerogative of mercy. As for application of penalties to special groups, the penalties for juvenile offenders shall be fully relieved and reformed on purpose, and the penalties shall be mitigated for elderly offenders.

Keywords penal system, penalty system, penal system reform

摘要 当今中国的刑罚制度需要在近年来已有进步的基础上进行系统改革和完善。在刑种和刑罚体系方面，需要通过立法和司法进一步严格限制死刑，完善或充实自由刑、财产刑、资格刑，并对刑罚体系和结构作整体调整；在刑罚裁量制度方面，应当将量刑原则明确化，量刑标准具体化，某些重要的酌定量刑情节法定化；在行刑制度方面，应当确立开放性行刑的理念，并建立、健全社区矫正制度；在刑罚消灭制度方面，应当考虑增补行刑时效和单位犯罪的时效制度，激活赦免制度；在特殊人群的刑罚适用方面，应对未成年犯罪人的刑罚适用予以全面的宽缓和

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有针对性的改革，并对老年犯罪人贯彻刑罚适用的宽恤。

关键词 刑罚制度，刑罚体系，刑罚制度改革

1 Foreword

At the beginning of the 21st century, China stands at a critically historical point in transformation of traditional society to modern one, when it is taking an increasingly rapid pace to economic prosperity and civilization. In such background, Chinese decision-making leaders have properly and timely made a development proposition for building a harmonious society in an all-round way. Centering on such proposition, China is undertaking reforms and adjustments in political, economic, legal and cultural fields. Rule of law in criminal justice is always an important part of rule-of-law civilization. The reform and perfection of the criminal law system and the improvement of criminal legislation and justice are indispensable links for China to carry out the scientific outlook on development and build a harmonious society comprehensively. Under joint efforts of criminal law scholars and practitioners in recent years, eye-catching achievements have been made in the rule of law in criminal justice in China. However, with increasing development of the rule of law in the world nowadays, new issues and situations are emerging in the transformational period of China, and the defects and unreasonable factors existing in China's criminal system have obviously become the factors that constrain the development of the rule of law in criminal justice. It may be said that improvement of the rule of law in criminal justice and reform of criminal law system are urgent and imperative.

Undoubtedly, the penal system is an important issue in criminal legislation and justice. The development history of criminal law of thousands of years has proved that the upgrading and transformation of the penal system are the centralized reflection of the progress of human society and civilization, and the improvement of the rule of law in the criminal law system. Thus, in the general background of ongoing development of rule-of-law civilization in China today, it is urgent and important to assimilate contemporary theoretical achievements in criminal law science, to draw lessons from international communities and follow international trends and make systematic reform and perfection of the penal system. In this regard, this paper attempts to make an overall review on the defects and unreasonableness of Chinese penal system from the perspective of reform and provides constructive opinions on improving the existing system and

establishing a scientific penal system.

2 Perfection of penalty types and adjustment of the penal system

In China's Criminal Code, penalty types are divided into principal penalties and accessory penalties. The former includes five penalties: Public surveillance, criminal detention, fixed-term imprisonment, life imprisonment and death penalty, and the latter includes three penalties: Fines, deprivation of political rights and confiscation of property. In addition, a special accessory penalty — deportation is applicable to foreign offenders. Those penalties currently remain to be improved and the connection of their relationships and the design of the penalty system are required to be adjusted.

2.1 Strict restriction on the death penalty

Considering a series of unconquerable material defects of the death penalty, strict restriction on it has become the common understanding of international communities and the efforts to abolish the death penalty have become a strong international trend. The academic circle of Chinese criminal law has also made in-depth researches and hot discussions on the death penalty in recent years and reached a common ground: Though it is immature to completely abolish the death penalty in China at present, its application shall be strictly restricted and steps shall be taken to abolish it.

In the reform on the penal system, the urgent task at present is to follow the international trend, and strictly restrict and make efforts to reduce the application of the death penalty in multiple perspectives and through multiple channels by reference to a series of UN human right conventions. Specifically, restriction on application of the death penalty may be conducted mainly by legislative and judicial methods. In terms of legislative control, a pretty number of crimes by the death penalty, especially non-violent crimes by the death penalty, shall be legally reduced in criminal law, and the standards on application of the death penalty to crimes shall be raised. In terms of restriction on the death penalty by judicial measures, it is required to establish the idea of prudential application of the death penalty in practice, improve the substantive rules and the rules of evidence for capital cases, reform the proceedings and way of trial for capital cases, so as to reduce the application of the death penalty, particularly immediate execution of the death penalty.

Judicial restriction on the death penalty is of the most direct and practical significance. The Supreme Court has completely taken back the review right of

death sentences from Jan. 1, 2007, which marks an important step toward the justification of procedures for the death penalty. At present, death sentences have been reduced substantially in the judicial practice of China. In such background, judicial restriction on death penalties shall further promote the legislative control on death penalties at an appropriate time, among which the most critical and practical measure for legislative reform is to consider abolishing a large part of non-violent crimes punishable by the death penalty in the criminal law in a timely manner. China's criminal law has set up 68 crimes punishable by the death penalty, 44 of which are non-violent crimes. Since non-violent crimes do not involve the right of life, there is no intensive appeal from the public to deprive the life of offenders, and moreover, as the causes of those crimes are complicated, the deterrence effect of the death penalty is limited. Hence death sentencing of such crimes is inconsistent with the requirements of the principle in measuring the value of the death penalty. What's more, international human right conventions have explicitly excluded non-violent crimes from the scope of application of the death penalty (Zhao, 2005), and thus, in the reform of Chinese penal system, consideration may be given to the judicial announcement on stop of the application of the death penalty to non-violent crimes, and then as conditions become mature, death penalties to such crimes may be abolished in legislation. On the other hand, compared with the judicial restriction on death penalty, the legislative control on death penalty is naturally more rudimental, and of declarative significance and milestone value. Thus, legislative control on the death penalty shall currently be the fundamental direction for the reform on the death penalty system and even the penal system in China.

In addition, it should be noted especially that the system of probation of the death penalty plays an important role in the restriction on the death penalty in China. As an effective alternative of immediate execution of the death sentence, probation of the death sentence has played an important role in reducing the number of actual execution of death sentences. Nevertheless, attention shall be given to the excessive relaxation over commutation for offenders of death sentencing with probation in terms of the provision in the criminal law and practice. According to the relevant judicial interpretation, after commutation once or for several times, the actual term of imprisonment for the offenders of death sentencing with probation shall be no less than 12 years (exclusive of the two years of probation),[1] and in practice, the term for deprivation of freedom of

[1] Paragraph 2 of Article 9 of the Provisions on Several Issues Concerning Specific Application of Law in Handling of Cases Relating to Commutation and Parole of the Supreme Court dated Nov. 8, 1997 provides: "After commutation once or for several times, the actual term of imprisonment of the offenders of death sentence with probation shall be no less than 12 years (exclusive of the 2-year probation)."

the offenders of a death sentence with probation generally averages 17–18 years, which renders obvious insufficiency of the severity of death sentence with probation as the alternative of immediate execution of a death sentence and such disparity is too big to appease the emotion of the victim and effectively punish offenders. Thus, the system of death sentence with probation shall be adjusted to be stricter, and consideration may be given to the provision on establishing the more stricter terms of parole and commutation than general life imprisonment for the offenders of a death sentence with probation that has been reduced to life imprisonment upon expiry of the probation period at modification of law in future.

2.2 Adjustment and perfection of liberal punishment

Liberal punishment in Chinese criminal law includes life imprisonment, fixed-term imprisonment, criminal detention and public surveillance. Among the four penalty types, liberal punishment may be categorized into three types: Long-term liberal punishment (life imprisonment and imprisonment over 10 years), medium-term liberal punishment (imprisonment of 3–10 years) and short-term liberal punishment (imprisonment less than 3 years, criminal detention and public surveillance) according to the time of deprivation of freedom. The problems in the provisions on liberal punishment are upper limit of the long-term liberal punishment and broad application scope of the short-term liberal punishment.

With respect to life imprisonment in the long-term liberal punishment, the actual execution of life imprisonment is from 22 to 10 years, generally 15–16 years in practice according to the relevant judicial interpretations.[2] In the reform on the penal system in future, if death penalties may be legislatively terminated or abolished for some crimes, life imprisonment may only be sentenced for serious circumstances of such crimes, where life imprisonment shall be of certain

[2] Article 6 of the Provisions on Several Issues Concerning Specific Application of Law in Handling of Cases Relating to Commutation and Parole of the Supreme Court dated Nov. 8, 1997 provides: "If an offender sentenced to life imprisonment has repentant performance or meritorious services in his service of sentence, commutation may be granted after two-year imprisonment. The extent of commutation is as follows: For those who have repentant performance or meritorious services, their term of imprisonment may generally be reduced to 18–20 years; and for those who have material meritorious services, their term of imprisonment may be reduced to 13–18 years." Since "repentant performance" is common in practice, the upper limit of life imprisonment is generally 22 years (20 years plus two years). Moreover, since commutation may be conducted more than once, after several commutations, the actual execution of imprisonment shall be no less than 10 years according to Article 78 of the Criminal Law.

severity. Thus, the author conceives that life imprisonment may be reformed, which may be divided into two types: Strict life imprisonment and general life imprisonment. Stricter conditions for commutation and parole and a comparatively longer term of actual execution shall be established for strict life imprisonment than general life imprisonment, hence taking strict life imprisonment as a feasible alternative for which death penalties have been abolished.

With respect to short-term liberal punishment, its shortcomings are well recognized by international academic circles of criminal law. In the judicial practice of China, however, the application of short-term liberal punishment is very popular. To avoid its passive role, the reform on the penal system in future shall be guided by the criminal policies combining strict punishment and leniency, and legislation may adopt the system of non-imprisonment commutation of short-term liberal punishment for minor crimes, including commutation to fines, community services and identity punishment. Then, the system of probation of short-term liberal punishment shall be improved and the announcement on short-term liberal punishment shall be reduced as much as possible in justice. The means of execution of short-term liberal punishment shall be reformed. (Zhao, Chen, 2003)

2.3 Legislative solutions to the difficulty in execution of property punishment

Property punishment in Chinese criminal law includes criminal fine and confiscation of property. In the growing tendency of non-imprisonment and overall relaxed punishment and probation in international penal system reform, property punishment, especially criminal fine, is becoming more and more important in the penalty system with its unique advantages. Property punishment is also taking an increasingly important position in Chinese criminal law in recent years. In the overall revision of the criminal code in 1997, Chinese legislators substantially increased the proportion of property punishment in the sub-provisions of the criminal law. In general, however, the application of property punishment nowadays is not satisfactory and the problem is the difficulty in execution of property punishment, which is tough in practice. Therefore, in the reform on the penal system in future, it is necessary to improve property punishment and to solve the difficulty of execution of property punishment as much as possible. Specifically, as far as criminal fine is concerned, efforts may be made to further scientifically prescribe the amount of criminal fine, change the common practice of "combined punishment" of criminal fine to "selective punishment", devise multiple means for execution of criminal fine as much as possible; and set up the system of alternative execution of criminal fine.

With regard to confiscation of property, it shall be clarified that due to the difficulty in defining the scope of property and excessive severity, confiscation of property is a kind of punishment of relatively big adverse effects (Li, 2002), and hence it is not appropriate to take a dominant position in property punishment. In the reform on the penal system in future, the accessory punishment of confiscation of property may be cancelled after full discussion and argumentation. Even if the confiscation of property is not abolished, preservation measures shall be designed for the property of the defendant, including seizure, freezing, detainment and security, a special execution agency shall be established in the court, multiple channels shall be set up concerning the procedures and measures for executing the confiscation of property, hence solving the problem of difficult execution of the punishment for confiscation of property. (Liu, 2006)

2.4 Enrichment of identity punishment

Identity punishment is a penalty to deprive offenders of their qualifications for enjoying or exercising certain rights. The typical identity punishment in Chinese criminal law is deprivation of political rights. According to the provision of Article 54 of the Criminal Law, the deprivation of political rights covers four respects: (1) Suffrage and the right to be elected; (2) rights to freedom of speech, press, assembly, association, procession and demonstration; (3) rights to hold a position in state organs; and (4) rights to hold a leading position in a state-owned company, enterprise, or institution and organization. Since identity punishment is functional of restricting or eliminating repeated commitment of certain crimes by offenders by imposing negative assessment on them politically, consistent with international tendency of non-imprisonment and relaxed punishment and probation in the penal system reform, it will surely take certain position in the penal system of China in future. The main unreasonableness for deprivation of political rights prescribed in China's criminal law is less scientific design of its content and excessively strong political color, and hence it is necessary to make adjustment by adding or deleting the content of identity punishment and dilute their political color, gearing it to the requirements of contemporary social development. Specifically, among the four items of rights covered by deprivation of political rights prescribed in Article 54 of the Criminal Law, the suffrage and the right to be elected in the first item are the core of punishment, which shall be reserved. The core of the rights to "freedom of speech, press, assembly, association, procession and demonstration" in the second item is the right of press, but even the right of press shall be limited to the publication of political works, and it is unnecessary to deprive one of the rights to publish his

works of pure scientific and technological achievements. In addition, the rights to freedom of speech and association shall also be limited to release of political speeches and participation in political associations. Thus, after revision, the item may be changed to cover deprivation of the rights to "freedom of release of political speeches, publication of political works, participation in political associations, as well as assembly, procession and demonstration". Based on revision to the content of the existing identity punishment and by reference to foreign experiences, such contents as "deprivation of the right to engage in specific professions" and "deprivation of the right of specific honors" may be added in identity punishment. Finally, it is improper to adopt a uniform provision on the way of application of identity punishment, and consideration shall be given to a separation system, whereby "separate provisions should be made on the contents of the rights that shall be deprived according to identity punishment, which shall be applied separately without joint and several relationships". (Ma, 2001) The name of identity punishment may be properly changed to "deprivation of specific qualifications" or "deprivation of public rights".

2.5 Overall adjustment to the penalty system

Based on improvement of various types of punishment, further discussion may be on the combination of various types of punishment and the adjustment of the overall penal system. With respect to combination of punishments, Professor Chu Weizhi once put forward the concept of "penalty structure", which, he held, was the form of combination of punishment in the penalty system, or specifically, the proportion of the types of punishment. The overall penalty structure in the criminal law manifests an obvious tendency of heavy punishment, specifically showing an excessive number of death penalties, insufficient attentions to criminal fines as an alternative punishment, unscientific combination of identity punishment and other punishment, and excessively large scale of statutory sentences for specific crimes. (Chu, 1997) Such view is insightful. In the reform on Chinese penal system in future, with further strict restriction on death penalty, adjustment and perfection of liberal punishment, expanded application of criminal fines and due emphasis on non-imprisonment punishments, the overall structure of punishments will be further relaxed. We conceive that such penalty structure is in the form of "acute triangle", i.e., (1) the death penalty shall occupy a smallest part at the vertex of the triangle; (2) the long-term liberal punishment, as an alternative of death penalties or the measure for punishment of severe crimes, shall occupy a small part in the upper of the triangle; (3) the medium-term liberal punishment and the criminal fine as a principal

punishment will be adopted as the most important punishments at the bottom of the triangle; and (4) the identity punishment shall still be as accessory punishment in addition to specific crimes. In overall thinking, further considerations may be given to the combination, dovetailing and coordination of death penalty, life imprisonment, fixed-term imprisonment, criminal fine and identity punishment in the sub-provisions on specific crimes. In general, the penal system of China in future shall further realize proper punishment, reasonable structure and scientific contents.

3 Form of the sentencing system

Generally, determination of criminal penalties, i.e., criminal sentencing, refers to the trial activity whereby the court decides whether to sentence an offender, which punishment and to which degree the punishment shall be imposed and whether the punishment shall be executed immediately based on conviction. (Gao, 1998) Sentencing is a very complicated issue. US criminal law scholar Andrew von Hirsch once said "Criminal sentencing is a puzzling and often frustrating subject". (Von Hirsch, 1976) Meanwhile, since sentencing is extremely important, whether the sentencing system is scientific is not only directly related to the reasonableness of the degree of punishments on offenders, but also demonstrates the most pointedly whether the penal system of a country is advanced and whether the research level of criminal jurisprudence is insightful.

The academic circle of criminal law in China has made in-depth researches on criminal sentencing in recent years with a large number of works and papers published. It is regretful, however, that the criminal legislation has not fully assimilated and transferred academic achievements. At present, the provision on sentencing in the criminal law is still in a relatively extensive state, collectively embodied by lack of explicit announcement of sentencing principles and relatively general standards on sentencing and insufficiency of statutory sentencing circumstances. The coming reform on the sentencing system shall focus on three aspects.

3.1 Clarification of sentencing principles

Sentencing principles refer to the rules that shall be generally observed in sentencing. Many countries, such as Germany in the continental law system, explicitly provide for sentencing principles in their criminal codes (German

Criminal Code, 2000),[3] and "Article 7 Authority of the Court in Sentencing" of the US Model Penal Code also includes many similar sentencing principles. (Model Penal Code of the US and Notes, 2005) However, there is no clear provision on sentencing principles in Chinese Criminal Law, and what may serve as the sentencing principles is Article 61 only, which provides: "When deciding the punishment of a criminal element, the sentence shall be imposed on the basis of the facts of the crime, the nature and circumstances of the crime, and the degree of harm to society, in accordance with the relevant stipulations of this Law." Considering specific statement, however, it is improper to take such article as the legal ground for sentencing principles as it is neither comprehensive nor sufficient in terms of generality and guidance. The lack of explicit contents concerning sentencing principles in legislation leads to intensively theoretical arguments on the sentencing principles for a long time[4] and loss of guidance in practice. Thus, the author believes that to solve the disorder of sentencing principles in the rule of law in criminal justice of China and make the sentencing system more scientific, fine and accurate, it is necessary to add explicit provisions on sentencing principles in revision to the criminal law in future. Specifically, the most important sentencing principles of the criminal law shall include the principle of sentencing according to law and the principle of responsibility. The former is the direct reflection of the principle of a legally prescribed punishment for a specific crime in sentencing, and the provision of such principle is of great significance of demonstration. The latter, learning from the doctrine of responsibility in German and Japanese criminal laws, reflects the scientific principle of sentencing, which is also the direct requirement of the basic principle of adaptability of crime, responsibility and penalty in sentencing. The principle of responsibility shall have the following two connotations: First, the severity of punishment shall be restricted by the upper limit of the "responsibility for a crime", i.e. the degree of severity of a crime and damage to the society, where no heavier punishment may be imposed on the offender

[3] The title of Article 46 of German Criminal Code is "Basic Sentencing Principles", which points out that the accusing acts are the basis of sentencing. Consideration shall be given to the expected effects of punishments on the accused in the society in the future. Refer to German Criminal Code, p. 20.

[4] For instance, according to Article 61 of Chinese Criminal Law, Prof. Gao Mingxuan has early generalized the sentencing principles in criminal law as the "principle of seeking truth based on facts of offences" and the "legal principle based on criminal law". Refer to Gao Mingxuan (1981). However, Prof. Ma Kechang held that the general sentencing principles shall be "adaptability of punishment and responsibilities", "individualization of punishments" and "sentencing according to criminal policies". Refer to Ma Kechang ed (2001), pp. 264–281. Besides, some other scholars also proposed such sentencing principles as adaptability of crimes and punishments, legalization of penalties and sentencing according to law.

beyond his crime. Second, the severity of punishment shall adapt to the criminal responsibility of an offender, which is decided by China's theoretical system of criminal law based on crime — responsibility — punishment. In the penal theories of China, the degrees of a crime, responsibility and punishment are in a successive and consequential relationship, where the criminal responsibility of a crime is based on his crime, which will be modified by combining with the personal situation of the offender and the circumstances before and after his offence and the degree of the modified responsibility shall become the direct reference for sentencing.

3.2 Specification of sentencing standards

Imbalance of sentencing is one of the toughest issues in penalty decision. The ideal state of sentencing shall be roughly the same sentencing to the crimes of the same nature and the same circumstances. In judicial practice, however, it is common in the world that different punishments are imposed on the same crime due to impacts of various uncertain factors including the professional level and personal preferences of judges, fluctuation of state criminal policies, changes of social situations and public opinions on crimes.

To solve such a hard issue, the US has implemented the system of sentencing guidelines the earliest in the world. In 1977, the State of California formulated the Uniform Determinate Sentencing Act, and consequently, the states of Minnesota, Washington and Pennsylvania formulated the Sentencing Guidelines successively and set up special agencies such as sentencing commissions to guide sentencing. In 1980, the American Bar Association (ABA) prepared the Revised Sentencing Standards, on the basis of which, the US ultimately formulated the detailed Federal Sentencing Guidelines in 1987. The Federal Sentencing Guidelines categorizes the federal crimes into 43 levels, provides for corresponding punishments, and requires judges to make sentencing according to uniform standards. The judge who believes a heavier or lighter punishment shall be imposed for a crime shall submit a written report stating his grounds for such decision.[5] During the inspection by the author in the US from April to May in 2007, according to the introduction by experts from US Vera Institute of Justice, the judicial systems over 20 states of the US have formulated their own sentencing standards so far.

[5] Michael Edmund O. Neill, Linda, Drazga Maxfield, Judicial Perspectives on the Federal Sentencing Guidelines and the Goals of Sentencing: Debunking the Myths, Alabama Law Review, Fau, 2004; Kirby D. Behre, A. Jeff Ifrah: Perspectives on the Federal Sentencing Guidelines and Mandatory Sentencing Forward: You Be the Judge: The Success of Fifteen Years of Sentencing under the United State's Sentencing Guidelines, American Criminal Law Review, Winter, 2003.

The practice of the US to promote the specification of sentencing standards is of certain exemplary significance for China. The author believes, though the Federal Sentencing Guidelines may have many defects,[6] the initial intent of their formulation is to provide for a relatively clear sentencing standard for different crimes and different circumstances of the same crimes in form of digital tables so as to effectively guide the fair sentencing by judges. In the situation of excessively large scale of statutory penalties for the crimes in the sub-provisions of China's criminal law and unsatisfactory qualities of judges as a whole, such legislative intent and even some specific contents are worth learning by China. In the reform on the penal system of China in future, the relatively specific sentencing standards, if established legislatively, are sure to provide an effective guidance for judges to exercise their discretions and offer a very good solution to the problems of imbalance of sentencing and realizing the adaptability of crime, responsibility and punishment. Therefore, it is necessary to properly draw reference and learn from the state and federal sentencing guidelines of the US and combine specific Chinese circumstances and existing experiences in practice[7] to work out scientific sentencing standards with Chinese characteristics in the reform on Chinese sentencing system in future. Such reform may start with some special penal systems, such as the death penalty, probation, or some popular crimes. The specific standards on the crimes punishable by the death penalty and punishments with probation may be further specified and clarified in the sentencing standards. Moreover, with respect to the crimes that are most likely to be punished by the death penalty with excessively large scale of sentencing such as intentional homicide, intentional injury, robbery and drug crimes, the sentencing circumstances popular in practice may be standardized and the likely impact of sentencing circumstances shall be determined in legislation. In such way, it is of critical guiding significance for the justice of sentencing and on the other hand, it may effectively restrict the application of death penalties.

3.3 Legalization of sentencing circumstances

[6] In fact, the Sentencing Guidelines has suffered many criticisms since its formulation. The judicial circle of the US holds the Guidelines is not so certain, and it is likely that it is inconsistent with the Constitution, difficult to implement and stricter compared with judicial practice, and its adoption even results in bigger differences from when there is no such Guidelines. Due to criticisms from various parties, the US Sentencing Guidelines has been under revision since its birth. Refer to the research report of Dr. Wang Yutian, p.18.

[7] It should be noted that some local courts in China have drawn up and implemented sentencing standards similar to sentencing guidelines. For example, the Higher Court of Jiangsu Province promulgated the Rules on Sentencing Guidelines (Trial) on 9 May 2004 for implementation by the courts at all levels of the province.

The process of criminal sentencing is, in essence, a process of application of sentencing circumstances after the nature of crime is determined. Thus, sentencing circumstances play a paramount role in the sentencing system. The circumstances in Chinese criminal law consist of statutory sentencing circumstances and discretionary sentencing circumstances. The former refers to the circumstances prescribed by legal provisions that shall be considered in sentencing, such as discontinued offense, attempted offense, voluntary surrender, meritorious service, cumulative offense and juvenile crimes. Contrast to statutory sentencing circumstances, discretionary sentencing circumstances generally refer to the "factual circumstances of impacts on the social harmfulness of criminal behaviors and the degree of personal dangers by the actor as recognized by criminal law and summarized from the practice and experience of trial, which shall be flexibly grasped and properly applied at sentencing". (Ma, 2001)

Just as a legal axiom says: "Law is limited while feelings are unlimited", in the countries adopting statutory laws, the specific and complicated criminal circumstances are beyond the coverage of abstract and general statutes, and thus, discretionary sentencing circumstances are necessarily reasonable to act as the sentencing circumstances for adjustment of discretionary power of judges subject to the flexible grasp and specific application by judges. However, considering the excessively large scale of statutory penalties for the crimes in the sub-provisions of China's criminal law and different qualities of judges, the excessive broadness of discretionary sentencing circumstances will undoubtedly lay potentials for the abuse of discretionary power by judges, easy to lead to the intentional or unintentional negligence of some circumstances which should have affected sentencing, and ultimately rendering deviation of sentencing. Thus, as far as the reform of sentencing system is concerned, the urgent task of China is to legalize some popularly existing discretionary sentencing circumstances which importantly impact on the nature of crimes and the personal situations of offenders.

The author holds that the popular discretionary sentencing circumstances in practice are mainly: Criminal motive and objectives, object of crime, means of crime, time and place of crime, consistent performance of the offender before commitment of crime, attitude of the offender after commitment of crime, first offence, casual offence, and faults of the victim. In the reform on the penal system in future, some typical and common discretionary sentencing circumstances among the above-mentioned discretionary circumstances may be converted to statutory sentencing circumstances by reference to the provisions of

other countries,[8] and explicitly prescribed by legislation for mandatory consideration in justice.

4 Reform of the penalty execution system

The execution of penalties in the rule of law in criminal justice in China refers to the criminal judicial activities by state judicial and administrative authorities according to law for implementing the punishments determined by effective criminal ruling. The execution of punishment is the last link of the overall operation of criminal penalties, which is of great importance to the final implementation of the ruling of the court and the achievement of the objectives of the state for punishing and reforming offenders. In a broad sense, the execution of penalties generally refers to the execution of all types of punishments including death penalty, liberal punishment, property punishment and identity punishment, while, in a narrow sense, it specifically refers to the execution of liberal punishment. This paper will not discuss the execution of death penalty, property punishment or identity punishment, but only focus on the execution of liberal punishment. The Chinese penalty execution system, especially the execution of liberal punishment, lays too much stress on the traditional penalty execution mode of imprisonment and seclusion of offenders but fails to attach sufficient attention to the open execution mode and community correction mode internationally popular in recent years, and hence it shall be reformed and perfected in many aspects.

4.1 Establishment of the concept of open execution of punishments

In the history of criminal law, the classical school of criminal law emphasizes that punishments shall be painful retribution to the offender and deterrence to the public. Such emphasis on the affliction of punishments suffered failure at the beginning of the 20th century when capitalism witnessed rapid development. It is proved by practice that partial emphasis on retribution and general deterrence is

[8] For example, Article 46 of German Criminal Law provides that the court shall consider the motive and intent, past experiences and after-crime activities of the actor, especially his efforts to compensate for damages and reconcile with the victim. Article 57 of the Criminal Law of Taiwan prescribes that: All circumstances shall be considered in sentencing, especially the following issues, as the standards for sentencing: (1) Criminal motive, (2) criminal intent, (3) stimulus suffered during commitment of crime, (4) means of offences, (5) living situations of the offender, (6) morality of the offender, (7) literacy of the offender, (8) routine relationship between the offender and the victim, (9) perils or harms caused by the crime, and (10) attitude of the offender after commitment of crime.

of no help to calm down the wave of crimes. In such dilemma, the positive school of criminal law has emerged, which alleges that penalties shall not be mainly used to punish offenders but correct and reform them. The modern trend of thoughts on criminal law is undoubtedly the compromise and conciliation of the classical school and the positive school of criminal law. Under the dominance of the concept of correction and reform of the positive school of criminal law, it is found in criminal practice that the deprivation of personal liberty of offenders in an excessively closed and partial way not only is of no help in eliminating the viciousness of offenders, but leaves great negative psychological impacts on prisoners, causing them hard to socialize or return to the society upon release. For such considerations, international community has attached high importance to the concept of open execution of punishments and socialization in recent years. The Standard Minimum Rules for the Treatment of Prisoners (SMR) adopted by the UN in 1955 has consistently abided by such concept. For instance, Article 61 of the SMR provides: "The treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it." Article 65 provides: "The treatment of persons sentenced to imprisonment or a similar measure shall have as its purpose, so far as the length of the sentence permits, to establish in them the will to lead law-abiding and self-supporting lives after their release and to fit them to do so. The treatment will encourage their self-respect and develop their sense of responsibility." (Yang, Yang, 2003) In addition, developed western countries including the UK, the US, Australia and Japan and Russia have taken a series of measures in recent years to promote open and socialized execution of liberal punishment. For example, the US has adopted many measures for advancing socialized execution of punishment, such as probation, parole, diversion, home confinement, halfway house, intermittent imprisonment and community corrections.[9]

In the reform on the penalty execution system, it is necessary for China to follow the international trend and learn from foreign experiences, hence taking steps to change the practice of mere closed imprisonment adopted in the traditional execution of liberal punishment and establish the concept of open execution. Additionally, specific implementation may currently start from the establishment of open or half-open prisons, improvement of the system of outgoing, return and release of offenders, establishment of the semi-liberal punishment system and improvement of the classified punishment and treatment system. (Feng, 2003)

[9] Robert M. Carter, Daniel Glaser, Leslie T. Wilkins: Probation, Parole and Community Corrections (3rd edition), Library of Congress Cataloging, 1984.

4.2 Establishment of the community correction system

As a system that embodies in the most concentrated way the concept of open execution, community corrections have drawn attention in the reform of Chinese rule of law in criminal justice. The so-called community corrections refer to a means of execution opposite to imprisonment correction. Generally, community corrections are regarded as the activities for execution of non-imprisonment punishment where an offender qualified for community corrections is arranged in a community to correct his criminal psychology and vicious habits by a special state agency under the assistance of social communities and nongovernmental organizations as well as social volunteers within the time limit decided by judgment, ruling or decision, hence facilitating the offender to successfully return to the society. The US has implemented community corrections earlier. The State of Massachusetts formulated an act in 1879, authorizing the City of Boston to set up full-time specialists for community corrections. In 1925, the US Congress adopted the Federal Care Act, hence forming the community correction system nationwide. (Kleiman, 1999) Community corrections have enjoyed a rapid development after the World War II, and some European countries, Japan and Australia have established their community correction systems through legislation in succession.

Compared with the traditional mode of imprisonment execution, the community correction system is conducive to the return of offenders to the society, which is capable for saving the cost of penalty execution to a large extent, and hence it has a great influence in the practical circle of criminal law once introduced and put into pilot practice in China and drawn high attention from the theoretical circle of criminal law. The Circular Concerning Conduct of Pilot Works of Community Corrections (hereinafter referred to as the Circular) promulgated by the Supreme Court, the Supreme Procuratorate, the Ministry of Public Security and the Ministry of Justice on July 10, 2003 is of a milestone significance, which prescribes detailed provisions on the concept, significance, scope, tasks and specific work arrangements of community corrections. According to the definitions of the Circular, the applicable objects of community corrections are mainly offenders of five categories: Those who are sentenced to (1) public surveillance, (2) probation, (3) execution of sentence outside prison under surveillance, (4) parole and (5) deprivation of political rights. Moreover, the major objects of community corrections are juvenile offenders with minor crimes and without severe subjective viciousness, elder, sick and disabled offenders, and those who commit first or negligent offense with minor circumstances. According to the latest statistic data, from July 2003, there are 102 cities (prefectures), 507 counties (districts and

county-level cities) and 4085 communities (towns) in 24 provinces (autonomous regions and municipalities directly under the central government) that have conducted the community corrections to different extents, and the accumulative number of offenders involved reaches 100,923, among which 37,779 have been released and 63,153 are currently subject to community corrections. (Wang, 2007)

Thus, it can be seen that there are some preliminary thoughts and specific arrangements for community corrections in the practice of criminal justice in China, based on which China may, in its reform on the penalty execution system in future, distill its experience and learn from international practices to further clarify the position of community corrections in criminal law or other special laws, define the objects, conditions and execution agency of community corrections and embody the linkage between community corrections and other means of punishments and the means of execution of sentence inside prison in legislation.

5 Reform of the penalty elimination system

The elimination of penalties refers to the elimination of the state power of punishment on offenders due to certain legal or factual causes. It is the last link in the operation of state power of punishment, and the establishment of the penalty elimination system may effectively save judicial resources, promote social harmony and stability and manifest the value of leniency and humanitarianism. Hence, the perfection of such system is of an important significance in the overall reform of the penal system.

In view of the legislation of nations, the legal causes for the elimination of penalties mainly include exceeding of limitation for prosecution, exemption of punishment by the decree of special pardon, crimes handled only upon complaint, failure of complaint or withdrawal of complaint. The issues existing and what remains to be improved in Chinese penal system are mainly the limitation system and the pardon system.

5.1 Perfection of the limitation system

The limitation refers to the system whereby no prosecution of a crime or execution of punishments may be made after a certain limited period. The limitation system is an important part of the penalty elimination system. Articles 87–89 in the General Provisions of the Criminal Law of China mainly prescribe the limitation, among which Article 87 provides for the limitation of prosecution;

Article 88, the extension of the limitation of prosecution; and Article 89, the calculation and suspension of the limitation of prosecution.

As far as the provisions of the criminal law are concerned, the defects of the provisions on limitations in Chinese criminal law are firstly reflected by the lack of the limitation of execution. A complete limitation system shall include two indispensable parts of the limitation of prosecution and the limitation of execution. The former refers to the system whereby the judicial authority shall no longer prosecute a crime that has not been prosecuted beyond the legally prescribed limited period for prosecution upon occurrence. Comparatively, the latter refers to the system whereby a punishment that has not been executed shall no longer be executed beyond the legally prescribed limited period for execution upon determination by ruling. The 22nd version of Chinese Criminal Code drafted in 1957 had provided for the limitation of execution, but in the consequential discussions, due to the view that "the failure of execution of a judgment has never happened in judicial practice in China", and that "such article is of no practical significance, which may, on the contrary, even encourage the evasion of offenders upon sentencing, with more demerits than merits", "it was cancelled" finally. (Gao, 1981) Such understanding is obviously partial as viewed today, since it is possible that a punishment fails to be executed upon declaration of the ruling, especially property punishment and accessory punishment due to different causes. In fact, there are cases in practice where failure to execute the punishment of fix-term imprisonment has occurred upon declaration of ruling.[10] Therefore, based on either theoretical analysis or practical experience, for the purpose of improving the limitation system, criminal legislation shall provide for the execution limitation system.

Additionally, another defect of the limitation system in the criminal law is that the relevant provisions on the limitation of prosecution are based on the crime of a natural person, which is obviously applicable to the crimes of a natural person. In the new criminal law revised in 1997, as an independent subject of crimes, units are listed in parallel with natural persons, and hence the application of the limitation system to corporate crimes becomes an urgent issue. In view of present situation of legislation, there are over 100 provisions relating corporate crimes with over 100 crimes, and moreover, the means of punishment for corporate crimes is different from that for a natural person, as in many circumstances, not

[10] The Program of CCTV Social Spectrum in 2000 disclosed a case of omission and resumption of execution of a punishment in Lingbi County, Anhui Province: A person surnamed Li who was sentenced to 7-year imprisonment for crime of corruption went back home immediately upon sentencing when no judicial functionary paid attention to him. Upon expiry of the limitation of execution, it was found that he has not served his sentence, and then he was put into prison for execution of the original ruling. Refer to Lai Deliang (2003).

only a unit shall be sentenced to criminal fines, but also the principals and other persons directly responsible for it shall be sentenced to other punishments. Thus, the limitation for corporate crimes shall differ from that for natural persons. To this end, the author holds that in the reform on the limitation system in future, supplementary provisions may be prescribed on the limitation system for corporate crimes and in general, the limitation of prosecution for the unit that has committed a crime may be decided according to the statutory penalties of the principals and other persons directly responsible for the unit.

5.2 Activation of the pardon system

Similar to the limitation system, the pardon system is also one of the important means for elimination of penalties. The so-called pardon refers to the legal system whereby the head of a state or the highest authority announces the immunity of the crime of an offender, or if no crime may be exempted, the punishment imposed on an offender will be exempted or mitigated, consequently eliminating the rights of criminal prosecution, adjudication of punishment or execution of punishment. (Yin, 2006) In history, the pardon system has popularly existed both in China and foreign countries. In western countries, early in 403 B.C., Aharasybulus of Ancient Greece enacted a pardon act, which had been of important influence on Europe. (Chen, 2004) Later, Germany, France and Japan in the continental law and the UK and the US in the Anglo-American law have adopted various forms of pardon systems. China also had a unique pardon system in ancient times. Under the influence of traditional Confucian thoughts on prudential punishment and the doctrines of Yin-Yang and Five Elements, Chinese emperors would extend their benevolence to their subjects and grant amnesty to offenders with a view of praying for blessing or in case of special events including marriage and death of emperors' families, natural disasters and epidemic diseases, good harvests and rituals and ceremonies.

In contemporary criminal law systems, US clemency system is unique. Clemency is a critical link in the death relief procedures in the US. US scholars hold that the so-called clemency includes three parts: Reprieve, commutation and pardon or the combination thereof. (Burnett, 2002) In the US, clemency is an administrative system beyond the criminal judicial system and the right of clemency is held by administrative governors. The President enjoys the complete right of pardon to the offenders sentenced to death within the federal judicial system; and governors of states enjoy, completely or under the suggestion of pardon commissions, the administrative right of pardon to the offenders sentenced to death within their jurisdiction. The reasons for clemency may be the actual innocence of the offender or obvious impropriety of execution of the death

penalty against certain offenders (such as those losing mental capacity or with metal disorder or minorities). (Chen, 2004)

Though the pardon system popularly existed in China and foreign countries in history, and up to now, almost all the countries that keep the death penalty have established the relief procedures for pardon of death penalties, and international human right acts including the United Nations International Covenant on Civil and Political Rights points out that amnesty, pardon or commutation of the sentence of death may be granted in all cases, but regretfully, there is no practice of amnesty in China despite the provision on amnesty in the first Constitution 1954 of the People's Republic of China. Pardon was only implemented for war criminals, offenders of counterrevolutionary crimes and general criminal offenders seven times between 1957 and 1975, and in the next more than 30 years till today, there has not been any practice of pardon, and no legislation concerning pardon has been made over 20 years since the opening-up and reforms of China. Currently in the entire legal system of China, the criminal law does not contain any specific provisions on pardon, except for the general provisions on pardon prescribed in Item 17 of Article 67 and Item 4 of Article 80 of the Constitution. (Zhao, 2007) Therefore, it is necessary to initiate the pardon system so as to improve the penal system of China. Specifically, starting with death pardon as a breakthrough, China may initiate the whole pardon system by improving the relevant legislation on death pardon in the criminal law and implement special pardons for some offenders sentenced to death in special circumstances at a proper time. As far as legislation is concerned, China may learn from the US death relief measures and add the following provisions in criminal legislation: In special circumstances (such as obvious mistake of the effective death sentence, serious mental disease of the offender sentenced to death after the effectiveness of sentencing, or considerations of state diplomatic or political factors), the President of the country may at the application of the offender or his/her near relatives or guardians, grant the decree of special pardon to the offender sentenced to death after review of such application by the Supreme Court and according to the decision on pardon by the NPC Standing Committee.

6 Perfection of the application of penalties to special groups

Outside the operation process of penalties, as far as the applicable objects of penalties are concerned, there is room for improvement of Chinese criminal law in terms of the application of penalties to certain special groups, which is mainly

manifested in the application of penalties to the offences by the juvenile and the elder.

6.1 Perfection of application of penalties to the offences by the juvenile

Considering the special physical and psychological features of the juvenile (under the age of 18), special criminal policies shall be implemented for juvenile offenders and the corresponding criminal punishment measures shall be different from those for adults, which is not only the requirements of the criminal policies that focus on education supplemented by punishment" for juvenile offenders, but also the common understanding of international communities and the clear attitude embodied in international human right acts. Under the guidance of the criminal policies that "focus on education supplemented by punishment, it can be seen by reference to the specific provisions of international human right acts that the Chinese penal system shall be further improved in the following aspects:

Firstly, it shall be clarified that life imprisonment is not applicable to juvenile offenders. The China's criminal law obviously provides for prohibition of application of the death penalty to juvenile offenders, while it fails to provide for the applicability of life imprisonment to them. Article 13 of the Interpretation of the Supreme Court on Some Issues Concerning Specific Application of Laws to Trial of Juvenile Criminal Cases passed on Dec. 12, 2005 provides: "Life imprisonment applies to juvenile offenders only when they have committed extremely grave crimes, and no offenders over fourteen and below sixteen years of age may be sentenced to life imprisonment generally". Thus, it can be seen that though there are strict restrictions on the application of life imprisonment to juvenile offenders in practice, such punishment is applicable. In the opinions of the author, such situation shall be reformed as soon as possible and life imprisonment is absolutely not applicable to juvenile offenders, because according to the provisions of Paragraph 3 of Article 17 of the Criminal Law, "a lighter or mitigated punishment shall be imposed" on juvenile offenders in judicial practice. Provided the application of death penalties to juvenile offenders is absolutely prohibited, life imprisonment without different scales of imprisonment fails to embody the imposition of a mitigated punishment on juvenile offenders, and thus life imprisonment imposed on juvenile offenders is inconsistent with the explicit provisions of Article 17 of the Criminal Law and the relevant jurisprudence. Furthermore, from the perspective of international human right acts, Article 37 of the United Nations Convention on the Rights of the Child approved by China clearly points out that contractual countries shall ensure that no life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age. A conclusion

may be drawn from the above discussions in two aspects that the application of life imprisonment on juvenile offenders shall be further prohibited in Chinese penal system.

In addition, in terms of the application of other types of criminal penalties, since generally the juvenile neither have the qualifications for exercise of political rights, nor possess sufficient property, the application of identity punishment or property punishment to juvenile offenders shall be strictly restricted as possible, or even prohibited.

Besides criminal punishments, non-criminal punishments are of natural advantages in terms of juvenile offenders, which may better meet the requirements of their physical and psychological development and eliminate the adverse impacts of criminal measures. International human right acts have been consistent in encouraging and supporting non-criminal punishments for juvenile offenders, and hence, non-criminal punishment measures are of a special significance in offences committed by the juvenile. However, there are many defects in China's criminal law, including scattered provisions, insufficient measures and weak system in terms of the provisions on non-criminal punishments against the offences of the juvenile; and thus, the application of non-criminal punishments shall be expanded to the offences of the juvenile so as to perfect the punishment measures against juvenile offenders. China may, in proper time, add the contents concerning non-criminal punishments against juvenile offenders in the criminal law in the form of a special article or section through legislative revision, set up the non-criminal punishment system with punishments of various, orderly and escalated forms, and enhance the application of non-criminal punishments against the offences by the juvenile. (Gao, Zhang, 2007)

6.2 Leniency in application of penalties to the offences of elder people

For the offences committed by persons below the age of 18, the criminal law has clarified that the criminal punishments shall be different from those against adults. Additionally, however, for an offender whose age is beyond upper limit (such as 70 years of age), or an elder person, the criminal punishments against him shall also be lenient, which, nevertheless, has not been prescribed in China's criminal law yet. Thus, provisions in this regard shall be supplemented.

Firstly, the leniency and humanism provided for the application of penalties to offences committed by elder persons are decided by Chinese traditional culture of respect and solicitude for the elder. There were provisions on leniency in application of penalties to the elder in criminal laws of dynasties in ancient China. As early as in the reign of Emperor Wen of Han Dynasty, there was a provision

that for an elder offender above the age of 80 sentenced to wearing instruments of torture, such instruments might be exempted. In the criminal law of Tang Dynasty, there were provisions that "An offender above the age of 80 sentenced to death may submit an application for pardon" and "No torture may be imposed on an offender above the age of 90, though sentenced to death". The New Criminal Law of Qing Dynasty promulgated at the end of Qing Dynasty in 1911 and the Criminal Law of the Republic of China issued by Kuomintang Government in 1935 also had similar provisions. Secondly, leniency of punishment against elder offenders is also the requirement for building a harmonious society today. As the elder have made many contributions to the society and their families, in their late years, they shall be the group to whom the most respects and cares shall be given, and even for the elder who have committed offence, lenient treatment shall be given considering either the need for prevention of offences or humanitarianism of criminal punishments. Moreover, as far as international communities are concerned, nowadays many countries or regions including Greece, Spain and Taiwan have adopted provisions on lenient treatment for offences committed by the elder.

Based on the above-mentioned reasons, in order to show leniency and humanitarianism in application of penalties for elder offenders, the Chinese penal system shall be perfected through reforms in the following two aspects: (1) The provisions on non-application of the death penalty to elder offenders above 70 years of age shall be added. In the reform on the penal system in future, elder offenders over 70 years of age at trial may, together with juvenile offenders below 18 years of age when committing offences and pregnant women at trial, be excluded from the death penalty in the restrictive clauses concerning the death penalty. (2) The leniency shall be given, especially parole, to elder offenders. In the reform on the penal system in future, the requirements for the actual execution of the term of imprisonment at parole may be reduced for the elder offenders above 70 years of age sentenced to fixed-term or life imprisonment who earnestly abide by the rules of prisons, accept education and reform, have repentant performance and will no longer do harm to the society upon parole. (Zhao, 1989)

7 Conclusion

The general discussion on the reform of Chinese penal system herein and many suggestions are tentative, and it remains to be further tested by practice whether some thoughts herein are feasible or not. Due to this paper, the demonstrations on many ideas herein are not sufficient enough. Anyway, the author believes that

reform is the inherent requirement of institutional development, and only through reform, either radical or gradual, can human society continuously get rid of the old and keep innovative toward perfection and civilization. In the field of the rule of law in criminal justice, it is also the appeals and efforts of generations of criminal law experts and scholars that promote the criminal law system to meet the requirements of the time toward increasing perfection. Thus, in the background where China is building a harmonious society in an all-round way, the promotion of the comprehensive reform on Chinese penal system under the guidance of the basic criminal policies combining leniency and severity and following international trend is not necessary for self-perfection of the criminal law but more for the requirement of the society, may criminal law scholars take initiatives of guiding and promoting the reform on Chinese penal system.

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