Front. Law China 2010, 5(1): 56–76
DOI 10.1007/s11463-010-0003-6

RESEARCH ARTICLE

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Study of Issues over Public Hearing in Death Penalty Cases*

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Abstract The death penalty is involved in the most severe criminal offenses. Holding public hearing in these cases seems to be the best way to guarantee judicial fairness. A public hearing in death penalty cases is of important significance in safeguarding judicial fairness and protecting human rights, which has attracted a high level of attention domestically and internationally. This paper interprets the requirements of the United Nations' related agencies for the public hearing of death penalty cases, defines the nature of public hearing in the aspects of rights and obligations, analyzes the special nature of the requirements for the public hearing of death penalty cases, introduces some practices and issues of the public hearing of death penalty cases in foreign countries, analyzes China's present practice of the pubic hearing of death penalty cases and puts forward some suggestions and channels to realize it.

Keywords death penalty cases, public hearing, international standard, China's practice

A public hearing is the basic principle of modern judicature and the general practice for hearings among nations. Though there are some different practices or issues in the interpretations and judicial practices of public hearing in different countries, the basic principle and requirements are relatively consistent. There are

* This paper is a part of the outputs supported by the MOE (Ministry of Education) Project (No. 2006 JDXM 252) of key research institute of humanities and social sciences at Chinese universities.

Translated from *Zhongguo Faxue* 中国法学 (China Legal Science), 2008, (3): 27–36

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provisions for public hearing in international standards on human rights and criminal justice. Article 14 of the International Covenant on Civil and Political Rights (hereinafter referred to as the "Covenant on Rights") adopted by the UN General Assembly in 1966[1] explicitly provides: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children." It can be seen from the above-mentioned provision that except for very few occasions the public hearing shall apply to all criminal cases, which certainly include death penalty cases.[2] Death penalty cases are special in nature and shall implement various requirements of the public hearing more strictly.

The hearing in death penalty cases involves a person's right to life. If used appropriately, it can effectively combat crimes and safeguard judicial fairness, but if the judgment is erroneous, it will dramatically affect the fairness and authority of judicature, punishing a non guilty party to a permanent state of death. The hearing of death penalty cases shall strictly follow the requirements of legal provisions and shall be tried publicly except for situations afforded within the law

On May 25, 1984, at the 8th session of the UN Committee on Crime Prevention and Control, the UN Economic and Social Council adopted the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (hereinafter referred to as the "Safeguards")[3]. Article 5 of the Safeguards provides that "capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings."

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[1] The government of the People's Republic of China signed the Covenant on October 5, 1998.

[2] In China "death penalty cases" referred to the cases in which defendants may be or have been sentenced to death according the provisions of Article 20.2 and Article 34.3 of China's *Criminal Law*; in foreign countries they refer to cases in which defendants may be or have been sentenced to death according to the UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.

[3] See the addendum of Resolution 1984/50 of the UN Economic and Social Council.

The hearing of death penalty cases shall strictly follow the international standards of criminal justice, especially relevant UN provisions regarding the public hearing. The public hearing includes public trial and public judgment, each of which consists of several aspects. The author intends to share some understandings of issues relating public trial and public judgment of death penalty cases in relation to the relevant UN documents.

1 Meanings and Requirements of Public Hearing

1.1 Rationale of Public Hearing in the Aspects of Rights and Obligations

The public hearing consists of a public trial and a public judgment. The public trial refers to a series of activities in court, i.e. examining the witnesses, processing the facts of the case, and admission of the evidence in the presence of the interested parties and other participants. The core of the public trial is the conducting of trial activities, which are comprised of presenting public prosecution bill and defense statement, questioning witnesses, verifying evidence and making last statement in courts. There are two requirements for the public trial in form: First, information shall be made public in advance including the name of the case, the criminal offense charged, the identity of the accused, the time and place of the court trial and the composition of the court members; and second, sufficient convenience shall be provided for the public to attend the hearing; any individuals shall be allowed to visit the court on the hearing and journalists shall be allowed to report the hearing. Participation in the public trial shall not be limited to certain types of people; with some exceptions prescribed by laws and regulations such as court deliberation,[4] anyone that wishes to attend the hearing shall not be rejected; all the trial activities, especially the process of examining witnesses and examining evidence shall be made public and allow access for people to attend.

The requirements of public judgment are also composed of two parts: (i) One is the public pronouncement of judgment. This means that the court must make a public pronouncement on whether the accused is guilty after the facts of the case have been confirmed. If the accused is guilty, sentencing will be made based on the conviction. The pronouncement can be made right after the court trial or at a later time. (ii) The other is to publicize the documents and basis of the judgment, especially the bill of prosecution, the verdict and reasons for the judgment. This is done so that anyone can have the information of the case within a period of

[4] The criminal cases involving state secrets, private affairs or crimes committed by juvenile persons normally are not tried in public. In addition, in order not to be affected by various kinds of information during the trial, witnesses are not allowed to sit in on the trial.

time after the pronouncement. Such publicity can be done by publishing cases on a yearly basis or through the Internet or other means.

Public hearing is an important right of the accused in criminal case and is recognized by the international law of human rights and criminal procedure laws of various nations. Safeguarding the rights entitled to the accused is an obligation of the state judicial.

Appearing in the court for public hearing is a responsibility of the accused in criminal justice but legal provisions give state judicial organs the power to take various measures to summon the accused to appear in the court for the hearing.

For the public and the media, public hearing may satisfy the right of the public to know whether the accused is guilty or not, while the judgment fulfills the right of public to know what happened to the accused. The state has the responsibility to safeguard the public's right to know about the cases through public trial, while at the same time letting society know whether judicature is fair or not.

Some of the rights guaranteed to the accused may be waived. Rights that can not be given up or of which the way to exercise can not be chosen are not genuine rights but obligations. When the individuals give up rights, a series of legal consequences will be resulted depending on the nature of the rights waived. Normally obligations can not be waived, for waiving obligations may involve the consequences of violation of law or the rights of others.

As far as the public trial is concerned, the accused may waive some rights but can not waive the obligation to be present to the trial. In some western countries like the US, the accused of criminal case can place a guilty plea before the trial, making it unnecessary to have a trial of facts, and the court can directly reach a judgment without trial. In such case, the accused gives up the right to a public trial, the procurator is released from the responsibility of proving that the accused is guilty, and the court is released from the responsibility of presiding examination and cross-examination. Such practice reduces the judicial burden and improves the judicial efficiency, and at the same time it does not deprive the public of their rights to know. The fact that the accused makes a guilty plea without trial has satisfied the public's right to know whether he is "guilty or not", so the public do not need to hold a public trial.

As for judgment, unless otherwise specified by law, judgment of any criminal cases shall be made public. It is the right of the accused to receive document of judgment, the accused can not waive or reject the state judicial organ's pronouncement of the result of the case to the public. If the accused does not agree with the judgment, he can appeal or complain, but he can not stop the state judicial organ from making the judgment public. Public judgments not only safeguard the right of the accused to the judgment, but also reflect the fairness of the state judicature and fulfill the society's right to know about the situation of the case. For

this reason, the state's responsibility of making judgments public can not be released because the accused gives up the right.

1.2 The Special Nature of Public Hearing of Death Penalty Cases

Death penalty cases are different from ordinary criminal cases, because the life of the accused is involved. In some western countries, the accused of ordinary criminal cases can waive the right to trial. While in death penalty cases, even if the accused expresses his will to plea guilty, the public trial can not be exempted. Giving up the right of freedom and the right of property can release the relevant people from their responsibility, and those rights can be recovered under certain conditions. However, in criminal case no one may waive the rights of life, even he is willing to do so. The desire of the accused can not constitute a reason for the judicial organ or anyone to deprive him of his life; the due process of law, inter alia, a public hearing shall still be followed. This is based on the importance and the irrecoverable nature of the right of life, and it reflects state judicial organs' prudence when it comes to the right of life. As a result, in the processing of death penalty cases, even if the accused wishes to give up the right to a public hearing, as long as the sentence is likely to be death penalty, the court can not make judgment directly but must conduct a public hearing.

In order to ensure the public hearing of death penalty cases, before the trial starts, the accused and the defense lawyer have the right to know about the time, the place, the trial panel and the charges, and to know about their own rights and obligations so as to better exercise their rights to question the qualification of the court, the right to challenge court members and the right to defense. In addition, the families of the defendant(s), victim(s) and their relatives, friends as well as all the interested parties need to receive the information of the trial in advance so that they can attend the trial, contact the accused in time or even make preparation for the individual affairs such as taking care of the maintenances of his dependents, managing his funeral affairs and deciding the inheritance of the accused. Meanwhile, the cases that are likely to be sentenced to death penalty are normally major or important cases which attract the attention of all sectors of the society. The public needs to know about the personal information of the accused, the charge, the time and place of the trial. Allowing the public to sit in on the hearing can enable them to know whether the court has a public and fair trial, and it serves as good opportunity for public to understand the knowledge of law. If the provisions on public trial are not complied with, the right of the accused a specific procedure is not safeguarded, the trial will be affected, and it is also possible that this will contradict with the provisions on respecting the right of life in the international law on human rights. Furthermore, there are also detrimental effects on the state legal system and the people's right to know. If death penalty cases do

not go through public hearings or key information is missing, the public can hardly be informed observers of the death penalty, and thus the state shall publish the detailed information relating to death penalty.

The public hearing of death penalty cases can best demonstrate all the requirements of the due process involved within any criminal cases. As death penalty cases involve the "most serious crimes", the most stringent examination shall be conducted. In criminal justice, trial procedure for ordinary criminal cases can be simplified, but a summary procedure does not apply to death penalty cases, for which a public hearing must be conducted strictly in accordance with various requirements. At the start of the trial, the identity of all the members of the court, judge, jurors, court clerk and interpreter should be made known giving the accused an opportunity to challenge. In the countries with jury system, the procurator and the accused can ask questions about various factors to the juror candidates to see if somebody may have some situation which could possibly impose negative affect on the fairness of the verdict of the case, including the background, education level, state of mind and habits of each juror, and both parties have the right to challenge jurors who may not be favorable to them.[5] During the trial various rights of the accused must be guaranteed, especially the right to confront the witnesses in the court and identifying various material evidence according to the rule of hearsay and exclusionary rules.

In death penalty cases the accused, his relatives and friends, and the general public pay more attention to the trial, hence the information disclosed shall be more detailed, including the basic information of the death row prisoner, the details of the case, and the grounds and reasons for the judgment. Except for individual cases, the total number, the commutation and the execution of death penalty cases of the nation and each local area shall be disclosed so that the public can understand state death penalty policy and various reasons for the fair management of cases.

2 Analysis of Issues over Public Hearing of Death Penalty Cases at the International Level

At the international level, the issues over public hearings of death penalty cases are mainly related to the disclosure of the case information and the execution of the judgment. Relevant UN organizations point out that "official statistics of death penalty judgments and executions are not disclosed in many countries of the world."[6] In many countries, public pronouncement of the judgment of death

[5] The author visited a complete trial of a murder case while in the US. It took as long as two weeks (10 working days) for the process of voir dire only.

[6] See paragraph 44 of the UN Economic and Social Council Document E/2005/3.

penalty cases does not contain information as detailed as that of an ordinary criminal cases. Countries normally disclose information about ordinary criminal cases, but some countries do not disclose or completely disclose the judgment and execution of death penalty cases. Such special practice with respect to the judgment of death penalty cases goes against the requirements of the public hearing.

It is provided in paragraph 1 of Article 14 of the Covenant on Rights that "… any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children." The judgment of death penalty cases shall be made public because most death penalty cases can not be categorized among the above exceptions.

In its resolution 1989/64 the UN Economic and Social Council urged its member states to publish, for each category of offence for which death penalty is possibly applied and information about the use of the death penalty, including "the number of persons sentenced to death, the number of executions actually carried out, the number of persons under sentence of death, the number of death sentences reversed or commuted on appeal and the number of instances in which clemency has been granted." The UN needs this information in order to oversee its compliance with the human rights laws relevant to capital punishment, e.g. the death penalty.

Currently some countries in the world do not publish the relevant data on death penalty. For example, in Japan the public is not provided with the information on individual executions, but detailed aggregated statistics are provided. The UN Economic and Social Council has requested that the Secretary-General survey member states on their use of capital punishment at five-year intervals since 1973,[7] but the response rate has been very low. In a survey on 62 countries that retain the death penalty, 87% did not respond at all, and only 4 countries reported on the offences upon which the death penalty may be imposed and on the total number of executions.[8]

In some countries that did not respond to the UN Secretary-General's survey, the data was not made public domestically or great inconsistencies excited in the released information. For example, on October 5, 2004, an official of the Belarusian Ministry of the Interior Kovchur claimed that "there have been no executions this year, and nobody is even on death row." However, the Interior Minister of Belarus Uladzimir Navumaw stated that in 2004 there were 104 people

[7] See Resolution 1754 of the UN Economic and Social Council, May 16, 1973.
[8] See Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, report of the Secretary-General to the UN Economic and Social Council, Document E/2005/3.

on death row and 5 people had been sentenced to death and executed. Singapore does not normally publish statistics on death sentences passed or executions carried out, and executions are not announced ahead of time and rarely reported. The Vietnamese Government declared in January 2004 that reports and statistics on the use of death penalty to be "state secrets", and the government refuses to disclose any statistical information on capital punishment.[9]

Some countries declare information on the death penalty to be a state secret. This is not necessary, the purpose of safeguarding state secrets is to maintain national security and public order, and there is no evidence indicating that transparency of information on the death penalty would imperil national security and public order. If the facts of death penalty cases involve national secrets, the relevant national secrets need not to be mentioned in the judgment. Thus the public judgment and the disclosure of other statistical data about the death penalty should not be affected.

Perhaps the reason that some countries do not publicize the number of death penalty cases is to prevent social instability. However, there is no evidence showing that the disclosure of the number of death penalty cases would jeopardize social stability. According to the views of the UN Human Rights Committee, derogation from transparency rights is never permitted in death penalty cases even during a state of emergency. The permissible scope of derogation from due process rights is always tightly circumscribed, and measures taken in derogation must always be limited "to the extent strictly required by the emergencies of the situation." Furthermore, the provision on the public hearing set forth in Paragraph 1 of Article 14 of the Covenant on Rights is not listed among derogative rights even in the case of emergency, and derogations from due process may never go so far as to eviscerate the rule of law. The UN Human Rights Committee points out that "the provisions of the International Covenant on Civil and Political Rights relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogative rights. In quoting Article 4[10], its approach shall not cause the derogation of non-derogative rights. During a state of emergency, any trial leading to the imposition of the death penalty must conform to the provisions of the Covenant on Rights, including all the requirements of Articles 14 and 15."[11]

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[9] See Part II of Questions of Transparency and Execution of the Death Penalty by Philip Alston, Item 11(b) of the provisional agenda of the 62nd session of the Commission on Human Rights of the UN Economic and Social Council.

[10] Refer to Article 4 of International Covenant on Civil and Political Rights regarding derogation.

[11] See Para. 15 of the General Comment of the Human Rights Committee No. 29, Article 4: Derogations during a state of emergency.

Some countries rational for retaining capital punishment is that capital punishment conforms to the national conditions, including the will of the people.[12] It is of course a point of consideration whether the public are in favor of or want to retain death penalty or not. Before considering the will of the people, we should give the people information on death penalty. If the data of death penalty is not made known to the people, how can the necessity of death penalty be implemented based on it being the will of the people? Only by publishing the data of death penalty can the public possibly have the right understanding of death penalty; people can only put forward their opinions after knowing about the truth, and then can the government know the true will of the people. There is an obvious inconsistency when a state invokes the public opinions on one hand; while on the other hand deliberately withholds relevant information on the use of the death penalty from the public. If public opinions are really an important consideration for a country, it seems the government shall facilitate the access to the relevant information so as to make such public opinions more informed. It is unreasonable for a country to use the will of the people as an important reason to retain the death penalty but refuse to disclose to its own people the extent of death penalty, and the reasons for which, it is being applied.

One reason the countries may choose not to disclose data relating to the use of the death penalty within their country may be that the number is relatively large in comparison. This country may fear criticism domestically as well as abroad. There is no need to have such concern. At present, it is within the jurisdiction of various countries to decide whether to retain the death penalty and on the number of death penalty sentences. Criticism about the number of death penalty judgments may be unavoidable, but it does not prevent the disclosure of the number of death penalty judgment. The number of death penalty judgments depends on many factors like the number and nature of crimes and the total population of a country. The relatively big number of a country's death penalty judgments itself does not mean that some death penalty judgments are wrong. If a country is worried that it may incur criticism for excessive death penalty judgments, it can reduce the number of death penalty judgments instead of keeping the data confidential. Non-disclosure of the number of death penalty judgments can not keep away criticism; on the contrary, it can lead to groundless guess, inside and outside the country, of the number of death penalty judgments, which may generate more adverse impact.

The most reliable safeguard of fairness as well as a fundamental principle in the exercise of fairness is that of openness. Public oversight and due process are

[12] For example, the Japanese Government responded to a survey by the Secretary-General that "the majority of people in Japan recognize the death penalty as a necessary punishment for grievous crimes. Considering the number of serious crimes… it is inevitable to impose the death penalty on offenders who commit such crimes." See the Report of the Secretary–General to the UN Economic and Social Council, Document E/2005/3.

necessary to prevent wrong death penalty judgment. Due process is also the mechanism through which society ensures that the punishments imposed are just. Due process requires public hearing for death penalty, and even if the trial can not be made public for exceptional situations, the relevant data of the judgment shall be open. The administration of justice must remain open in order for every organ of the government and every member of the public to have at least the opportunity to consider whether punishment is being imposed in a fair and non-discriminatory manner. Hiding relevant data of the death penalty or keeping it a secret is harmful to due process.

The open information on the judgment and the execution of death penalty cases is of special and important significance to a person who faces the death penalty and his family. A person who has been convicted of a crime and sentenced to death still enjoys the due process rights and other safeguards on his rights before execution of the sentence. For example, the prisoner under death sentence "shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law"[13], and "shall have the right to seek pardon or commutation of the sentence"[14]. Failure to promptly provide the death row prisoner and his family information on the case may hinder their ability to exercise these rights, hence placing due process at risk.

For the prisoner and his family, lack of notification of the relevant information on death penalty cases can result in "inhuman or degrading treatment or punishment" within the meaning of Article 7 of the Covenant on Rights. The views of the Human Rights Committee illustrate the scope of this right within the following two examples. In responding to an individual complaint of the mother of an executed Byelorussian prisoner, the Committee found that "The complete secrecy surrounding the date of execution, and the place of burial and the refusal to hand over the body for burial have the effect of intimidating and punishing families by intentionally leaving them in a state of uncertainty and mental distress." This amounted to inhuman treatment in violation of Article 7 of the Covenant on Rights.[15] In Pratt and Morgan v. Jamaica, the Committee found that a delay of approximately 20 hours before communicating a reprieve to the accused just 45 minutes prior to his scheduled execution constituted a violation of Article 7.[16]

Refusal to provide convicted persons and their family members with prior notices on the date and time of execution may violate their rights. In some cases,

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[13] See Para. 5 of Article 14 of the Covenant on Rights.
[14] See Para. 4 of Article 6 of the Covenant on Rights.
[15] See the views on the Belarusian Cases, Human Rights Committee, No. 886/1999 Communication: Belarus. Para. 10.2.
[16] See the views on Pratt and Morgan v. Jamaica, Human Rights Committee, 35th session, Para. 13.7, CCPR/C/35/D/210/1986, April 7, 1989.

prisoners have learned of their impending executions only moments before execution of death, and families have been informed even later, sometimes by coincidence rather than design. These practices are considered inhuman and degrading and undermine the procedural safeguards surrounding the right to life.

In some cases prior notice is provided, but only belatedly. For example, it was reported in Singapore prisoners and their families were generally given one week's prior notice, in Egypt they might be provided a two to three days' prior notice, and in Japan it appeared that they were provided even less time in advance. In cases of some countries, no prior notice had been provided at all. As noted above, in the case of Belarus, the government did not provide full information to the relatives of executed prisoners about the dates and places of execution and burial; did not ensure that relatives of a prisoner under sentence of death be informed of the prisoner's place of imprisonment; did not permit regular and private meetings with the prisoner; did not even to allowed them to say goodbye if the petition for clemency was rejected; and, did not allow family members to collect the executed prisoner's remains or personal effects. The secrecy that Japan maintained around its death row and executions was a matter of openly held and official policy. Thus, in 2004 two people were executed in Japan without prior notice to their families or lawyers, and the prisoners themselves were informed only a few hours before the executions. The Japanese government refused to confirm or deny the execution of any particular person.[17]

Philip Alston, the UN's special rapporteur on extrajudicial, summary or arbitrary executions, pointed out, in his report Civil and Political Rights, Including the Questions of Disappearances and Summary Executions,[18] that "In a considerable number of countries information concerning the death penalty is cloaked in secrecy. No statistics are available as to executions, or as to the numbers or identities of those detained on death row, and little if any information is provided to those who are to be executed or to their families. Such secrecy is incompatible with human rights standards in various respects. It undermines many of the safeguards which might operate to prevent errors or abuses and to ensure fair and just procedures at all stages. It denies the human dignity of those sentenced, many of whom are still eligible to appeal, and it denies the rights of family members to know the fate of their closest relatives."

In order to safeguard the prisoners' right on death row and their families' right to know, relevant information on the conviction process and the timing of executions shall be provided to death row prisoners themselves and their families.

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[17] See Civil and Political Rights, including the Questions of Disappearances and Summary Executions by the Special Rapporteur, the UN Economic and Social Council Document E/CN. 4/2006/53/Add.3.

[18] See the UN Economic and Social Council Document E/CN4/2005/7.

This should include timely and reliable information, i.e. the charges, evidence the judgment, the decision, the right to appeal and clemency petition, as well as the procedure and timing of the execution.

The execution of death penalty cases shall also be made known to the public to protect the public's right to know. The publishing of the judgment and execution of death penalty cases; allow victims of criminal cases and their relatives and friends to know that justice has been done and the criminals have been executed; allow the public to know the execution of specific cases and the overall situation of the state's death penalty policy; and show some people who are likely to commit crimes the power and force of laws thus deterring serious crimes.[19]

3 Exploration of the Relevant Issues over Public Hearing in Death Penalty Cases in China

Public hearing is the basic principle of China's criminal justice system. Article 125 of China's Constitution provides that "except in special circumstances as specified by law, all cases in the courts are heard in public." Article 11 of China's Criminal Law provides that "cases in the courts shall be heard in public, unless otherwise provided by this Law". The Law also stipulates exceptions of public hearing of the Article 152, "Cases of first instance in a court shall be heard in public. However, cases involving state secrets or private affairs of individuals shall not be heard in public. No cases involving crimes committed by minors who have reached the age of 14 but not the age of 16 shall be heard in public. Generally, cases involving crimes committed by minors who have reached the age of 16 below the age of 18 shall also not be heard in public." The above-mentioned principles apply to all the cases heard in the courts of China, and certainly to death penalty cases. China is a country that retains death penalty at present. The government of China observed that "it is an inevitable result of historical development that death sentence will be abolished eventually in the world," and at the same time it pointed out that "each country should decide whether to retain or abolish the death sentence on the basis of its own actual circumstances and the aspirations of its people."[20]

China's handling of death penalty cases is more stringent than that of ordinary criminal cases. On March 9, 2007, China's Supreme Court, the Supreme

[19] The deterrent effect of the death penalty to a country's total number of crimes has not been proven, but the deterrence of the death penalty to individuals exists in varying degrees.

[20] The reply of the government of China to the special rapporteur of the UN on the death penalty dated December 9, 2002. See Document on Item 11(b) of the Provisional Agenda of the 62nd Session of the Human Rights Committee of the UN Economic and Social Council, Para. 14, E/CN4/2006/53/Add.3.

Procuratorate, the Ministry of Public Security and the Ministry of Justice jointly promulgated the Opinions on Strengthening Handling Cases in Strict Accordance with Law and Guaranteeing the Quality of Handling Death Penalty Cases. In the third paragraph of the Opinions, it is explicitly required that while handling death penalty cases, the courts, the procuratorates and public security authorities must "adhere to both procedural fairness and substantive fairness, guarantee the legal rights of criminal suspects and the accused, and ensure both the correctness of the substantive handling of the cases and the legitimacy of criminal procedure. At various stages of investigation, prosecution and trial, they must stick to handling the case according to law, overcome the wrong concepts such as placing more emphasis on the substantive factors than the procedural issues and caring more about the crackdown than the protection. They must respect the rights of the criminal suspects and the accused, solidly guarantee that criminal suspects and the accused can fully exercise their procedural rights; including the right to defense, and prevent the occurrence of misjudged and wrong cases resulting from the deprival of or restriction on the legal rights of criminal suspects and the accused."

The existing provisions regarding the public hearing of criminal cases of China's legal and judicial authorities basically conform to the international criminal judicial standard, especially the requirements of public hearing in the UN documents. As death penalty cases are major ones, involving people's life; it is worthwhile to explore whether the requirements for the public hearing of death penalty cases shall be more stringent than those for ordinary criminal cases as well as how to hold public hearings of death penalty cases with higher standards.

3.1 Make Preparations for the Public Hearing of Death Penalty Cases

Article 151 of China's Criminal Law provides that when a court has decided to open a court session, it shall proceed with the following work: "(1) To determine the members of the collegial panel; (2) to deliver to the accused a copy of the bill of prosecution of the procuratorate no later than ten days before the opening of the court session. If the accused has not retained a defender, he shall be informed that he may retain a defender or, when necessary, a legal aid lawyer may be appointed to serve as a defender for him; (3) to notify the procuratorate of the time and place of the court session three days before the opening of the session; (4) to summon the parties and notify the defenders, agents ad litem, witnesses, expert witnesses and interpreters, and deliver the summons and notices no later than three days before the opening of the court session; and (5) to announce, three days before the opening of the session, the subject matter of the case to be heard in public, the name of the accused and the time and place of the court session."

The aforementioned provision is the specific provision and basis for China's public hearing which applies to criminal cases including death penalty cases. This

provision plays a huge role in the public hearing of cases, but it also has some problems. These problems may not impact ordinary criminal cases to much, but it may have great effect on the hearing of death penalty cases:

The first item of the provision is "to determine the members of the collegial panel", as the suggested change to this provision reads "to select the members of the collegial panel and advise participants", for the existing provision might neglect the accused's right to challenge some candidate members of the panel. The word "determine" has the meaning of "decided" in context of Chinese language, and the members of the collegial panel have critical influence on whether the accused will be sentenced to death. In order to guarantee the accused's right to challenge in the public hearing, the members of the collegial panel can only be up for selection before the accused exercises his right to challenge. The list of selection shall be presented to both parties ahead of time, especially the accused. The prosecutor of the procuratorate often works with the court's judges and jurors and may know about them in advance. While it is usually the first contact between the accused and judges and jurors, and the accused generally do not know about the judges and jurors. Therefore, the trial panel shall not be "determined" before and the judges' names and juror candidates are given, so that the accused can effectively exercise the right to challenge in the public hearing.

The second item provides that a copy of the bill of prosecution of the procuratorate shall be delivered no later than ten days before the opening of the court session, but does not need to mention the time and place of the court session. It can be understood from the fourth step that the notice of the session will be delivered no later than three days before the opening of the session. The aforesaid time may be sufficient for ordinary criminal cases, but three days' notice may not be enough for death penalty cases which are more serious and complex, so it is necessary to extend it to a notice no less than 20 days before the opening of the session for the accused. If the accused of death penalty case has not retained a defense lawyer, the court shall designate a lawyer to provide legal aid for him. The accused shall be given time to research the lawyer that has been designated to provide legal aid for him, and the lawyer also needs time to understand the case and prepare defense for the accused. Ten days may not be enough to complete these work of death penalty cases. Consequently it is suggested to deliver the copy of the bill of prosecution of the procuratorate to the accused no later than twenty days before the opening of the court session, and to designate a lawyer who will provide legal aid for the accused who has not retained a defense lawyer.

The fifth item requires openness to the society. But the Law does not specify the mode of publishing the prior notice. The traditional mode is to post a bulletin at the door of the court, which has extremely limited effect. Residents living in the neighborhood of the court may see the bulletin, but they may turn a blind eye to it, and it is not easy and convenient for people who are interested in the case to see the

bulletin at the door of the court everyday. Nowadays the internet provides great convenience. If information such as the time and place of the trial, the name of the accused and the main points of the case can be published in the internet, the transparency of the public hearing will be greatly enhanced. From the perspective of equipment and technology, this has no problem, and there are cases like this in practice. The author logged in the web of China's court and found that there was "announcement of selected forecast of court sessions". Since it is "selected", it may not include all the cases, and the author did not see any information about the hearing of death penalty cases. If the approach of network publicity is adopted, cases that are heard publicly shall all be published ahead of time, and information on the time, place and court of public hearings of death penalty cases shall all the more be publicized in advance so that relatives and friends of the accused and people from all sectors of the society can visit the court conducting.

No provision is made that the family of the accused shall be notified. Death penalty cases are different from ordinary cases; they involve not only the life and other interests of the accused, but also the interests of the family of the accused, such as the issues of maintenance of his dependants, the disposal of his assets and the issue of inheritance. Hence, the immediate family of the accused needs to be present at the hearing to know what is going on.

3.2 Attend the Hearing of Death Penalty Cases

The most prominent manifestation of public hearings is to allow the public to visit the court of hearing. There are some constraints in attending court trials in China. For example, the capacity of the court room is generally limited and it may be not large enough for the people to sit in on hearings of death penalty cases. As a result, some can not attend court hearings, which affects the effect of public hearings. Some courts select visitors beforehand. Thus those who are interested in the case may not be allowed to enter the court room. In the countries which the author has visited, their courts, from local courts to the supreme courts, are open to the public during working hours. This means anyone can sit in on any public hearing that is being conducted without the need for any limitation. Of course, the visitors shall follow the court rules. In order to improve the effect of public hearings, courts at various levels in China shall open further to the public. There shall not be other restrictions except for the necessary security measures and court rules. The frequent restriction on the number of visitors due to the limited space of the court shall be changed. If there is no enough room for all the visitors, it indicates the importance of the case and the level of attention of the public. Therefore, the case shall be heard in a larger room.

Due to the severity of death penalty cases, there may be more visitors than for ordinary criminal cases. The court can try to arrange more seats for visitors. Of

course there is always limitation in the space of the court. If it is not possible to satisfy all the visitors, registration shall be made in advance to calculate the number of the visitors and then decision on who to attend the hearing can be made by drawing lots. It is not appropriate to restrict or refuse the attendance of certain kinds of people to the court.

3.3 Open Court Records and Other Documents

After all, only a limited number of people can attend court trials and some people can not arrive at the court on time for various reasons, and the visitors may not hear everything nor understand it correctly. For cases that have public hearings, it will improve the effect of public hearings if the court can publicize court trial records (transcript) through certain channels. Not every member of the public needs to read the complete court record of a certain case. People or organs that are obligated to supervise the case, the defense lawyer, people who are related to the case, news agencies that are interested in the case and scholars who study the case are the ones who will desire a full transcript of a given case. As a result, the publicity of court records differs from that of the judgment and can be made available only to those who have a need to it. As providing court records involve some cost, the court may charge those who need the records. Since public hearings can be attended and reported, people may know whether court trials are fair.

3.4 Modes of Public Judgment

The transparency of the bill of prosecution and the judgment of death penalty cases, especially the reasons for judgment and law applied, not only reflects the public handling of the accused, but also plays the role of legal propagation and education. By observing the cases handled, people who have the similar cases can understand what the outcome might be for their criminal behaviors. Through comparison and study of the cases, the public can also know whether the state judicial power is applied within the bounds of law, whether the dignity and the basic legal rights of the interested parties are respected and protected, whether interested parties under the same circumstances have the same treatment, and whether there is miscarriage of justice or even corruption by the judges. Publishing the judgment can also provide future reference for similar cases for the court and other courts, leading to a relatively stable state of fair and justified judicature within a certain period of time.

Traditionally the judgment is publicized through posting a bulletin at the door of the court or public places, or publishing part of the content in the press, or publishing the collection of cases on the yearly basis. All three ways are used in China. However, there are limitations imposed by these types of posting in the

time and place when publishing the judgment of death penalty. By posting bulletins, as only limited number of people can access the bulletins, hence the influence of publishing the judgment is limited. Reporting on death penalty cases in the press is not a formal way of publicity, which normally selectively publishes some cases from the angle of news reporting and does not include the complete judgment; compilation of cases has not been systemized in China, and the compilation is not structured and can not completely reflect death penalty cases. With the popularization of the internet, publishing the judgment of death cases in the internet can avoid the disadvantages of the traditional modes mentioned above. Of course publicity of relevant information of death penalty cases through periodically publishing compilation of cases by relevant courts can still be carried on.

3.5 Open Hearing of Second Instance of Death Penalty Cases

There is a fundamental difference between China's court of second instance and that of foreign countries. The court of second instance in criminal cases of foreign countries normally does not deal with factual issues of the case but its legal issues, especially whether the procedure and evidence collection is legal. China's second instance extensively reviews the issues of facts and law of the case and is not restricted to the issues raised in the appeal or counter-appeal. Consequently there is not much difference in the trial mode of the second instance comparing to the trial, which can be considered as the extension of the trial, and various stipulations of public hearings applicable to the trial shall also be applicable to the appeal session (second instance).

The second instance of death penalty cases is extremely critical in the outcome of death penalty cases. This is because before the end of the first instance, the accused has not been convicted or sentenced to death. Thus, it is uncertain whether the accused will be sentenced to death at this stage. While in the second instance of death penalty cases, the accused has been sentenced to death in the first instance and has become "a person facing the danger of death penalty", therefore more caution shall be taken towards the accused in the second instance and safeguards must be provided to him strictly according to various requirements of public hearings. Article 1(a) of the UN Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty (Resolution 1989/64) provides that "special protection shall be afforded to persons facing charges for which the death penalty is provided by allowing time and facilities for the preparation of their defense, including the adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases." For this reason, in the second instance of death penalty cases more attention shall be paid to the inherent requirements of

public hearings, such as adequate defense by the lawyer and witnesses testifying in the court.

There are some more issues that can be studied in China's court of second instance for death penalty cases, whether or not the court of second instance is "mandatory" or required. Appealing is a right of the accused, and is also a guarantee for the judicial transparency established by the state. For ordinary cases, the accused can choose to appeal or not to appeal. In death penalty cases, if the accused chooses not to appeal, one guarantee for the trial quality of death penalty cases will be lost. Therefore for cases in which the accused is sentenced to death in the first instance, mandatory appeal or automatic second instance shall be considered. This also aligns with the UN requirements regarding death penalty cases.[21] Currently in China, appeal of cases in which the accused is sentenced to death in the first instance is still optional, and it is necessary to have further study on the reforms in this respect.

3.6 Transparency of the Review of Death Penalty Cases

Starting from January 1, 2007, the review and approval power of death penalty has been taken back by the Supreme Court of China. This puts an end to the history of 26 years of partial delegation of the power of death penalty review. The Supreme Court's centralized exercise of the review and approval of death penalty is of significance in guaranteeing the quality of death cases handling, safeguarding human rights, deploying the policy of less and more cautious death sentencing and unifying the applicable standards for the death penalty. After taking back the review and approval power of the death penalty, the Supreme Court promulgated some documents standardizing the review process of the death penalty. These documents included Provisions of the Supreme Court on Several Issues Concerning the Review of Death Penalty Cases, which establishes the procedures of interrogating the accused, investigating and verifying evidence and adopting the opinions of the defense lawyer, and improves the review process of death penalty. Remarkable achievements have been made in the review work of the death penalty.

In over one year since the Supreme Court took back the review and approval power of the death penalty, much progress has been made and experience accumulated. However, there is still room for improvement in some areas, such as the nature and mode of the review process of the death penalty in public hearings.

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[21] Article 1(b) of the UN Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty: "Providing for mandatory appeals or review with the provisions for clemency or pardon in all cases of capital offence."

The nature of China's review process of death penalty is not clearly defined. The operation of the existing review process of the death penalty of the Supreme Court is basically a unilateral behavior of the court and it is considered as an administrative adjudication process in nature. This means neither the procurator nor the accused's defense attorney can participate in the review. In the review process the interrogation of the accused and the investigation and verification of the evidence are done by the court alone. Both the procurator and the accused are not able to question about the evidence obtained, the accused are not able to confront with witnesses. As there is no provision for the court session, the procurator of the Supreme Procuratorate and defense lawyers can not support their case in the court. Even if the Chief Procurator and the Deputy Chief Procurator of the Supreme Procuratorate do not know much about the death penalty review, although they may attend the Review Committee of the Supreme Court meetings. The administrative approval procedure falls under the system where the leading carder assumes overall responsibility, while the trial procedure belongs to the independent trial of the court. Under the current circumstance where the review of the death penalty has the administrative nature, leaders at all levels that are responsible for the review of the death penalty in China's Supreme Court. The result is heavy workload and huge responsibility for every death penalty case must be reviewed by all. This needs to be improved from the perspective of both the quality of cases and personal endurance capacity.

It is not difficult to see that various drawbacks of the existing review process of the death penalty come from its administrative nature. Therefore it is necessary to reform the review process of the death penalty. Generally speaking, such reform is to change the unilateral and administrative nature of the review process of the death penalty, to use the court session in the review process of the death penalty as supplement to the existing mechanism granting the procurator and the accused defense lawyers' participation in court sessions, and specifying the conditions for exercising the right to application. For cases where issues in factual evidence and litigation procedure may affect the correct application of the death penalty, the procurator and the accused have the right to apply for court trial, and the Supreme Court will open a court session for the review so that both parties can present evidence, conduct examination, put forward opinions, make statements and have debate with respect to whether the death penalty shall be applied at the public court.

According to the structure of China's present Criminal Procedural Law, the review process of the death penalty is under "Part 3—Trial". This implies that the law makers consider that the review process of the death penalty as a stage of the trial process. For this reason, after the Supreme Court took back the review and approval power of the death penalty, it shall further improve China's review process of the

death penalty according to the law. Therefore, a series of principles of public hearing requirement and method for criminal trial should be observed in the death penalty review process, and the court should allow the prosecutors and defense lawyers participate the process. Thus, both parties' procedural rights, especially that of the accused, can guarantee and the defendants may exercise the right to defense at the final stage of criminal procedure. Changing the administrative nature of China's death penalty review process, according to the standards of due process, would improve every stage of the death penalty case.

4 Conclusion

Various countries in the world have different opinions and practices with regards to retaining or abolishing death penalty. At present various countries shall make their own decisions according to their own situations. In the countries where death penalty is retained, death penalty cases shall be handled according to the principle of public hearing, established by international laws and domestic laws. If the domestic legislation and judicial practice of public hearings do not conform to the criteria of international human rights law and criminal justice or are not compatible to the public hearings of death penalty cases, relevant countries shall take measures to reform domestic legislation and practice. There are still discrepancies between China's legislation on public hearings of death penalty cases and the requirements of international laws.

Though there are still many difficulties in reforming all the problems in China's public hearing of death penalty cases, these difficulties are not insuperable. They can be solved gradually through carefully studying and revising laws and policies and improving the practice. The key to improve the public hearing of death penalty cases is the change of people's beliefs. Therefore we need to further study the significance of improving the public hearing of death penalty cases, study the improvement of the preparation work of the public hearing of death penalty cases, study how to guarantee the implementation of various rules of criminal procedure and evidence, and establish various ways of publishing the information of the death penalty cases.

The improvement of the public hearing of death penalty cases is necessary for the fair and public trial. A fair and public trial is conducive to the improvement of the overall criminal procedure system, to the further improvement of China's legal system construction, to the implementation of provisions on safeguarding human rights in China's constitution, and to the implementation of the international human rights and criminal justice standard.

Acknowledgement Special thanks to Isabel Del Vecchio, J.D. candidate from the University of Connecticut School of Law, Hartford, CT, USA, who revised this article in detail.

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