 https://doi.org/10.6092/issn.25316133/8150

On Recent Changes to Life Imprisonment in the Context of the Gradual Reduction in the Use of the Death Penalty in China

HUANG GUI †

TABLE OF CONTENTS: 1. Introduction; 2. Life Imprisonment for Crimes no Longer Subject to the Death Penalty: its Upgrading to the Maximum Punishment and the Reasons for this Development; 2.1. Upgrading Life Imprisonment to the Maximum Punishment; 2.2. Reasons for Upgrading Life Imprisonment to the Maximum Punishment; 2.2.1. The Proportionality Principle: Concerns regarding the Balance between the Punishment and the Crime; 2.2. The Severe Penalty Doctrine: Concerns Regarding Penalties; 2.3. LWOR for the Crimes of Embezzlement and Bribery: Political Concerns; 3. Reforms to Life Imprisonment in the Context of Reducing the Use of the Death Penalty: Applicable Conditions and Amending the Termination Mechanisms; 3.1. Conditions for Passing a Sentence of Life Imprisonment; 3.2. Reforming the Termination Mechanisms for Life Imprisonment: Increasing its Severity; 3.2.1. L.W.P.R.: Commutation; 3.2.2. L.W.P.R.: parole; 3.2.3. L.W.O.R.: Crimes of Embezzlement and Bribery; 4. Further Reform Proposals for the Life Imprisonment System; 4.1. Reducing the Number of Crimes Punishable by Life Imprisonment; 4.2. Opposing LWOR for the Crimes of Embezzlement and Bribery; 4.3. The Applicable Conditions should be explicitly provided by the General Provisions of the Criminal Law; 5. Conclusion.

ABSTRACT: China is improving its criminal law to gradually reduce the use of the death penalty, particularly in the Eighth and Ninth Amendments, and the law relating to the use of life imprisonment has also been changed in these two amendments, including upgrading it to the maximum punishment for those crimes from which h the death penalty has been removed and reforming its termination mechanisms which include life imprisonment with possibility of release (LWPR) and without release (LWOR). In the light of this, following the introductory section, this paper will explore the upgrading of life imprisonment to the maximum punishment in these two amendments and analyze the reasons for this, which include the requirements of the proportionality principle, and the influence of the severe penalty doctrine, as well as political considerations. The paper will then examine the reforms carried out by the two amendments and relative judicial interpretations for the termination mechanism of life imprisonment on the basis of the conditions for its use as a sentence, and its prevalence. Finally, the paper will make proposals for improving the current situation. These proposals include reducing the number of crimes punishable by life imprisonment and removing LWOR from the law, as well as explicitly defining applicable conditions.

KEYWORDS: *Life Imprisonment*; *Death Penalty*; *The Eighth Amendment*; *The Ninth Amendment*; *China*

https://doi.org/10.6092/issn.2531-6133/8150

I would like to thank China's Scholarship Council (CSC No. 201500500019) and the Stipendium Hungaricum Programme (Reference number: 2015-SH-14036) for their sponsorship. Best thanks the Editor in-Chief, Mr. Antonio Alderuccio, and his professional Editorial Team for their excellent editing works on my paper. If there is any mistake, it belongs to me.

1. INTRODUCTION

In terms of the death penalty, China is one of the retentionist states, keeping company with other states like the United States, the United Arab Emirates, Japan, India, Iran, Pakistan and fifty-two others.[1] In accordance with the White Paper on Judicial Reform in China, published by the Information Office of the State Council in 2012, it is emphasized that "China retains the death penalty, but strictly controls and prudently applies it".[2] However, the Decisions of the Central Committee of the Communist Party of China (hereinafter C.P.C.), launched by the Third Plenary Session of the 18th Central Committee of the C.P.C. in 2013, to a great extent, "softens" this death policy and promises that China is implementing the policy of "gradually reducing the use of the death penalty." [3] Therefore, we can see that, in terms of legislation, China is making progress to improve its national law to reduce the possibility of the use of death penalty in judicial practice. This is clear from the fact that the use of the death penalty for twenty-two crimes was repealed by the Eighth Amendment to the Criminal Law of People Republic of China (hereinafter Criminal Law) (the Eighth Amendment)[4] and the Ninth Amendment to the Criminal Law (the Ninth Amendment)[5], in 2011 and 2015, respectively, so that the total number of crimes punishable by death has been reduced from sixty-eight before 2011 to forty-six nowadays. Meanwhile, in terms of judicial practice, under the death policy of the C.P.C., the Supreme People's Court (hereinafter S.P.C) insists on a

---

† Ph.D. Candidate of the University of Debrecen Géza Marton Doctoral School of Legal Studies. Email: huanggui598@gmail.com/hg_0125@ 126.com.

[1] *See* Amnesty International, *Death Sentences and Executions in 2015*, AI Index ACT 50/3487/2016 (April 6, 2016).

[2] GUÓ WÙ YUÀN XĪN WÉN BÀN GŌNG SHÌ (国务院新闻办公室) [THE INFORMATION OFFICE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA], *zhōng guó dí sī fǎ gǎi gé bái pí shū <(*中国的司法改革>白皮书*) [The White Paper on Judicial Reform in China*] (Oct. 9, 2012), Zhōng yāng zhèng fǔ mén hù wǎng zhàn (中央政府门户网站) [THE CENTRAL PEOPLE'S GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA], http://www.gov.cn/jrzg/2012-10/09/content_2239771.htm.

[3] DECISION OF THE CENTRAL COMMITTEE OF THE COMMUNIST PARTY OF CHINA ON SOME MAJOR ISSUES CONCERNING COMPREHENSIVELY DEEPENING THE REFORM (NOV. 12, 2013).

[4] Zhōng huá rén mín gòng hé guó xíng fǎ xiū zhèng àn (bā)(中华人民共和国刑法修正案（八)) [The Eighth Amendment to the Criminal Law of the People's Republic of China], (adopted by the Standing Comm.Nat'l People's Cong., Feb.25, 2011, effective May 1, 2011).

[5] Zhōng huá rén mín gòng hé guó xíng fǎ xiū zhèng àn (jiǔ) (中华人民共和国刑法修正案（九)) [The Ninth Amendment to the Criminal Law of the People's Republic of China], (adopted by the Standing Comm.Nat'l People's Cong., Aug. 29, 2015, effective Nov.1, 2015).

https://doi.org/10.6092/issn.2531-6133/8150

policy of retaining the death penalty and also emphasizes the judicial policy of "strictly controlling and prudently applying it, and making sure that the death penalty is only imposed on a very few offenders who commit the most heinous crimes."[6] However, China's courts have been able to impose the death penalty for these forty-six crimes on a large number of convicted criminals, according to an Amnesty International Report.[7] In this sense, the great number of crimes punishable by death makes the whole penalty system become a strict one,[8] in which, however, as some scholars have argued, "strategies to abolish the death penalty are only one step on the road to the reformation of the elimination of extreme sentences."[9] Obviously, with the developing reduction in the use of the death penalty, life imprisonment (in Chinese, Wuqi Tuxing) will become the next "extreme sentence", i.e., "a kind of punishment that deprives the convicts' of their rights to freedom and keeps them in prison for the rest of their lives, under which they are generally asked to accept education and reform through labor if they are able to work."[10] It can take two forms, i.e., life imprisonment with the possibility of release (hereinafter L.W.P.R.) and without release (hereinafter L.W.O.R.). De jure, life imprisonment is one of the principle punishments in China's penal system and the second heaviest punishment after execution in terms of its severity; and it has also been reformed by the

---

[6] Cui Jia, *Zhōu qiáng, yào jiān chí yán gé kòng zhì hé shèn zhòng shì yòng sǐ xíng dí zhèng cè，fáng zhǐ sǐ xíng shì yòng chū xiàn dà fú bō dòng*
(周强：要坚持严格控制和慎重适用死刑的政策，防止死刑适用出现大幅波动)[*Zhou Qiang: to Insist on the Policy of Strictly Controlling and Prudently Applying the Death Penalty; To Prevent the Number of Uses of the Death Penalty Having Sharp Fluctuations*], zhōng guó rì bào (中国日报) [CHINADAILY.COM.CN] (Jan. 1, 2017), http://www.chinadaily.com.cn/interface/toutiaonew/53002523/2017-01-14/cd_27955754.html. Here, I have to point out that under China's special regime, most important criminal policies, like the death policy, are launched by the C.P.C., and the judicial authorities, including the S.P.C. and Supreme People's Procuratorate, have to implement these policies without giving any other different opinions on them, although they can interpret these policies. For example, regarding the death policy, one of the former Vice presidents of the Supreme People's Court, Huang Ermei, pointed out that, "China will not completely repeal the death penalty within a quite long period due to China's lacking the required conditions for repealing the death penalty de facto and de jure." *See also Huáng ěr méi fǎ guān: zhōng guó zài xiāng dāng shí qī nèi bù néng fèi chú sǐ xíng (*黄尔梅法官：中国在相当时期内不能废除死刑*)* [*The Judge, Huang Ermei: China will not completely repeal the death penalty within a quite long period*], Wǎng yì xīn wén (网易新闻) [WANGYI NEWS] (Mar. 7, 2008), http://news.163.com/08/0307/14/46EJDA5G0001124J.html.

[7] Amnesty International, *supra* note 1, at 2.

[8] *See* Chen Xingliang (陈兴良), *Fàn zuì fàn wéi dí kuò zhāng yǔ xíng fá jié gòu dí diào zhěng — — 《xíng fǎ xiū zhèng àn (jiǔ)》 shù píng》(*《犯罪范围的扩张与刑罚结构的调整——《刑法修正案(九)》述评*) [On the Expansion of the Scope of the Crime and the Adjustment of the Penalty Structure: Comment on the Ninth Amendment]*, Fǎ lǜ kē xué (xī běi zhèng fǎ dà xué xué bào) (*法律科学(西北政法大学学报*)) [SCIENCE OF LAW (JOURNAL OF NORTHWEST UNIVERSITY OF POLITICAL SCIENCE AND LAW)], 2016(04), at 179, 184.

[9] Ashley Nellis, *Tinkering with Life: A Look at the Inappropriateness of Life without Parole as an Alternative to the Death Penalty*, 67 UNIVERSITY OF MIAMI LAW REVIEW 439, 440 (2013).

[10] GĀO MÍNG XUĀN & MǍ KÈ CHĀNG (高铭暄，马克昌), XÍNG FǍ XUÉ (刑法学) [THE CRIMINAL LAW] 252 (2005).

https://doi.org/10.6092/issn.2531-6133/8150

aforesaid two amendments, as well as other judicial interpretations, with the aim of compensating for the deficiencies in the punishment system resulting from the reduction in the use of the death penalty. In judicial practice, when selecting a criminal punishment, life imprisonment is always an optional penal measure alongside the death penalty for lethal, violent crimes, and other serious crimes, such as embezzlement and bribery, and it is the legally prescribed maximum punishment for certain crimes. Focusing on the legislative facts regarding the changes in the use of life imprisonment, therefore, this paper will examine the fact that life imprisonment has been upgraded to the maximum punishment for certain crimes in these two amendments and analyze the reasons for this in the second section, before exploring the applicable conditions for life imprisonment and its reform carried out by the two amendments and various judicial interpretations in the third section. In the final section, further proposals for reform will be offered.

2. LIFE IMPRISONMENT FOR CRIMES NO LONGER SUBJECT TO THE DEATH PENALTY: ITS UPGRADING TO THE MAXIMUM PUNISHMENT AND THE REASONS FOR THIS DEVELOPMENT

2.1. UPGRADING LIFE IMPRISONMENT TO THE MAXIMUM PUNISHMENT

Life imprisonment has been upgraded to the maximum punishment for the crimes that should have led to the death penalty under the 1997 Criminal Law, as the Eighth and Ninth Amendments have removed the death penalty as an option for thirteen crimes and nine crimes, respectively, including seven types of crimes involving smuggling, seven types of financial crime, two types of crimes involving control of cultural relics, two types of crimes related to prostitution, two types of military crimes, one crime of teaching criminal methods and the crime of larceny. These crimes were punishable by the death penalty and life imprisonment under the 1997 Criminal Law, i.e. for these crimes life imprisonment was an optional penal measure provided alongside the death penalty. For example, the crime of teaching methods of crime was punishable by the death penalty or life imprisonment under Article 295 of the 1997 Criminal Law, and the applicable conditions of the death penalty or life

https://doi.org/10.6092/issn.2531-6133/8150

imprisonment for this crime were the same, i.e. "if the circumstance is especially serious."[11] Life imprisonment became the maximum punishment for this crime when the Eighth Amendment abolished the death penalty for it; in accordance with the 1997 Criminal Law, the death penalty and life imprisonment could also be imposed on an offender who commits larceny in the same circumstances, i.e., if the offender steals from a banking institution and the amount involved is especially large, or steals precious cultural relics and the circumstances are serious.[12] However, in the light of Article 152 of the 1979 Criminal Law, the maximum punishment for larceny was life imprisonment rather than the death penalty,[13] and it was amended by the National People's Congress (hereinafter N.P.C.) Decision on Severely Punishing Criminals Who Seriously Undermine the Economy (March 8, 1982). In accordance with this Decision, if the circumstances are especially serious, the offender shall be sentenced to death or life imprisonment.[14] Currently, the maximum punishment for larceny has become life imprisonment, again. In accordance with the 1997 Criminal Law, a person who commits the crime of smuggling legally proscribed goods shall, if the circumstances are especially serious, be sentenced to life imprisonment or death.[15] The death penalty for this crime was stipulated by the Supplementary Provisions on Cracking Down on the Crime of Smuggling (21 January 1988).[16] All in all, by examining these twenty-two crimes in the 1997 Criminal Law, we can see that the applicable conditions in the Specific Provisions of the Criminal Law for life imprisonment and the death penalty for these crimes were almost the same, the only difference being that the "death penalty shall only be applied to criminals who

[11] Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法) [Criminal Law of People Republic of China], (adopted by the Standing Comm.Nat'l People's Cong., Jul. 1, 1979, effective as amended Mar. 14, 1997), art. 295.
[12] *Id.* art 264.
[13] Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法) [Criminal Law of People Republic of China], 1997, *supra* note 11, art. 152.
[14] Standing Committee of the National People's Congress of the P.R.C. Decision on Severely Punishing Criminals Who Seriously Undermine the Economy, 8 Mar. 1982, art 1.
[15] Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法) [Criminal Law of People Republic of China],1997, *supra* note 11, art. 151.
[16] Quán guó rén mín dài biǎo dà huì cháng wù wěi yuán huì guān yú yán chěng yán zhòng pò huài jīng jì dí zuì fàn dí jué dìng (全国人民代表大会常务委员会关于严惩严重破坏经济的罪犯的决定) [Standing Committee of the National People's Congress of the P.R.C. Decision on Cracking Down on the Crime of Smuggling], Order no.62, 21 Jan. 1988.

https://doi.org/10.6092/issn.2531-6133/8150

have committed extremely serious crimes"[17] as provided by Article 48; in addition, Articles 49, 50 and 51 stipulated the use of the death penalty. In these cases, life imprisonment has developed to become the legally prescribed maximum penalty without any change in the provisions. Furthermore, it must be pointed out that the L.W.O.R. is newly provided for the crime of embezzlement and bribery by the Ninth Amendment even though the death penalty still remains an available sentence for this crime. L.W.O.R. thus constitutes a severe punishment, just like the death penalty and is even "worse than a death sentence",[18] because it keeps convicts in prison for the rest of their lives. Given that "immediate execution for corruption crimes is rarely used in recent years in judicial practice,"[19] L.W.O.R. can be considered the maximum punishment for corruption crimes in judicial practice.

2.2. REASONS FOR UPGRADING LIFE IMPRISONMENT TO THE MAXIMUM PUNISHMENT

It would appear that the most important reason for life imprisonment being upgraded to the maximum punishment for those crimes from which the death penalty is removed in the Eighth and Ninth Amendments is the criminal punishment structure. Life imprisonment is the second heaviest punishment after the death penalty; consequently, it is first in line after removing the death penalty for these twenty-two crimes. However, this is only the ostensible justification and is not sufficient to explain the substantial reasons why life imprisonment - rather than punishments such as long-term fixed-term imprisonment – has been upgraded to the maximum punishment. The deep-rooted reasons for this, in accordance with the analysis of the Eighth and Ninth Amendments, may be classified as follows: concerns regarding the proportionality principle, the influence of the severe penalty doctrine, and political concerns. These three reasons are related to the problems of how to

[17] Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法) [Criminal Law of People Republic of China], 1997, *supra* note 11, art. 48.
[18] William W. Berry III, *Life-with-Hope Sentencing: The Argument for Replacing Life-Without-Parole Sentences with Presumptive Life Sentences*, 76 OHIO STATE LAW JOURNAL 1051, 1054 (2015).
[19] Zhào bǐng zhì (赵秉志), *Lùn zhōng guó tān wū shòu huì fàn zuì sǐ xíng dí lì fǎ kòng zhì jí qí fèi zhǐ — — yǐ < xíng fǎ xiū zhèng àn (jiǔ) > wéi shì jiǎo* (论中国贪污受贿犯罪死刑的立法控制及其废止——以<刑法修正案(九)>为视角) *[On Legislatively Controlling the Death Penalty for the Crimes of Embezzlement and Bribery and its Abolition: From the Perspective of the Ninth Amendment to the Criminal Law]*, 38 XIÀN DÀI FǍ XUÉ (现代法学) [MOD. L. SCI.], no. 1, 2016, at 8.

https://doi.org/10.6092/issn.2531-6133/8150

determine the nature and gravity of the crime, the traditional punishment concept, and the influence of the special political regime in China.

2.2.1. THE PROPORTIONALITY PRINCIPLE: CONCERNS REGARDING THE BALANCE BETWEEN THE PUNISHMENT AND THE CRIME

The proportionality principle is provided by Article 5 of the Criminal Law: "the degree of punishment shall be commensurate with the crime committed and the criminal responsibility to be borne by the offender".[20] This principle must be observed in the whole process of establishing and applying criminal law, and it reveals the basic rule of the paradoxical movement between crimes and their punishments; the degree of punishment is decided by the seriousness of the crime; only serious crimes should be punished severely, while less serious crimes should receive lighter sentences, i.e., the change in punishment is caused by the severity of the offence.[21] In accordance with this principle, the Criminal Law "stipulates various punishment ranges for the different qualities of crimes, but also provides different degrees of punishment for crimes which are of the same quality but have different circumstances."[22] To measure the severity of a crime, China advocates considering two factors together, i.e., the consequences of the offence in terms of how it endangers society and the personal danger the offender represents to others.[23] Consequently, proportionally punishing the corresponding gravity of an offence emphasizes two aspects, i.e., punishing the crime which has already been committed and preventing the potential crime in line with the personal danger related to the possibility of re-offending. Both the death penalty and life imprisonment serve a function: to remove the slightest possibility of re-offending. This is why they are always used for the heinous crimes under the Criminal Law.

---

[20] Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法) [Criminal Law of People Republic of China], 1997, *supra* note 11, art. 5.

[21] *See* GĀO MÍNG XUĀN & ZHÀO BĪNG ZHÌ (高铭暄, 赵秉志), ZHŌNG GUÓ XÍNG FǍ LÌ FǍ ZHĪ YǍN JÌN (中国刑法立法之演进) [THE EVOLUTIONS OF CHINESE CRIMINAL LEGISLATION] 111 (2007).

[22] Lǐ yǒng shēng (李永升) , *Zuì xíng xiāng shì yīng yuán zé zài wǒ guó xíng shì lì fǎ zhōng dí tǐ xiàn (罪刑相适应原则在我国刑事立法中的体现) [Principles of Appropriate Sentencing Applied in China's Criminal Legislation]*, GUÌ ZHŌU MÍN ZÚ XUÉ YUÀN XUÉ BÀO: ZHÉ XUÉ SHÈ HUÌ KĒ XUÉ BǍN (贵州民族学院学报：哲学社会科学版) [JOURNAL OF GUIZHOU UNIVERSITY FOR ETHNIC MINORITIES (PHILOSOPHY AND SOCIAL SCIENCE)], No.5, 2009, at 85.

[23] *See* Lǐ Yǒng Shēng (李永升), *Zuì xíng xiāng shì yīng yuán zé dí nèi hán jiě dú (罪刑相适应原则的内涵解读) [Unscrambling the Intention of the Principle of Suitable Punishment for Crime]*, GĀN SÙ SHÈ HUÌ KĒ XUÉ (甘肃社会科学) [GANSU SOC. SCI.], no.4, 2005, at 71, 73.

https://doi.org/10.6092/issn.2531-6133/8150

Analyzing the twenty-two crimes for which the death penalty was repealed, fourteen of them involve disrupting the order of the socialist market economy stipulated in Chapter 3, five are crimes of obstructing the administrative order provided in Chapter 6, one is the crime of property violation provided in Chapter 5, and two are military crimes. "Undoubtedly, the crimes punishable by death provided by the criminal law are all felonies",[24] and they should be provided with a correspondingly heavy punishment. As to these twenty-two crimes, a suitable punishment should be stipulated for them where the death penalty is repealed. Here, as examples for analysis, we will consider crimes of disrupting the order of the socialist market economy and of arranging for, or forcing, another person to engage in prostitution, provided in the Chapter 6. Specifically, as of the present moment, "the death penalty for economic crimes has already been repealed completely, except for the crimes of producing and selling quack medicine and the crimes of producing and selling toxic and hazardous food."[25] The latter two crimes can be punishable by death under the Criminal Law if death is caused to another person or especially serious harm is done to human health. Following this reasoning, the chief reason why these two economic crimes are still punishable by death is that they can result in the death of others, and thus bring full ethical accountability and - under the influence of the "traditional concept of retributive punishment of a life for life"[26] - the death penalty is the universal value proposition of the entire society for these economic crimes. "Economic crimes are statutory and administrative offenses legislated with the aim of prohibiting evil."[27] "In previous judicial experience, a severe punishment policy for economic crimes has always been adopted so as to ensure the steady development of the social

[24] Chén Xīng Liáng (陈兴良), *Jiǎn shǎo sǐ xíng dí lì fǎ lù xiàn tú (减少死刑的立法路线图)[Reduction of the Legislation Road Map for the Death Penalty]*, ZHÈNG ZHÌ YǓ FǍ LǙ (政治与法律) [POL. SCI. & L.], no.7, 2015, at 71, 73.

[25] Yè liáng fāng, ān péng míng (叶良芳，安鹏鸣) , *Zhōng guó fèi zhǐ sǐ xíng dí lì fǎ lù jìng jí qí fāng àn —— yǐ 《 xíng fǎ xiū zhèng àn （ jiǔ ）（ cǎo àn ） 》 dí guī dìng wéi shì jiǎo (中国废止死刑的立法路径及其方案——以《刑法修正案（九）（草案）》的规定为视角) [The Legislative Road to Death Penalty Abolition in China and its Solutions: From a Perspective of the Provisions of the Ninth Amendment to Criminal Law (Draft)]*, XUÉ XÍ LÙN TÁN (学习论坛) [TRIB. STUDY], no.3, 2015, at 73.

[26] Wáng Lián Hé (王联合), *Guān niàn xíng lùn gāng (观念刑论纲) [Introduction of the Penalty Concept]*, FǍ XUÉ PÍNG LÙN (法学评论) [L. REV.], no.1, 2013, at 33, 34.

[27] Gāo Míng Xuān, Sū Huìy & Yú Zhìgāng (高铭暄，苏惠渔，于志刚), *cóng cǐ tà shàng fèi zhǐ sǐ xíng dí zhēng tú —— 《 xíng fǎ xiū zhèng àn （ bā ） cǎo àn 》 sǐ xíng wèn tí sān rén tán (从此踏上废止死刑的征途——《刑法修正案（八）草案》死刑问题三人谈) [Setting Out on the Journey to the Abolition of the Death Penalty: The Trialogue on the Issues of the Death Penalty of the 'The Eighth Amendment to the Criminal Law (Draft)]*, FǍ XUÉ (法学) [L. SCI.], no.9, 2010, at 3, 6.

https://doi.org/10.6092/issn.2531-6133/8150

economic order"[28] because, "from the legislators' and politicians' perspective, the harmful consequence[s] caused by economic crime to the whole economic system is more severe and accountable than other property crimes",[29] especially because, in "a state power society" like China, "crimes undermining economic policy are not just deemed "economic crimes", but are viewed as a "crime against the state power"; defined as the most serious crimes, they should be subject to the most severe punishment."[30] From this perspective, life imprisonment is the most suitable punishment for these kinds of economic crimes, and where the death penalty is repealed, the punishment should be upgraded to the maximum allowable, in accordance with the proportionality principle, as its degree of severity is greater than that of fixed-term imprisonment. As for the crimes of arranging for, or forcing, another person to engage in prostitution (Article 358), they break the administrative order; to be precise, "they are crimes that jeopardize social decency (Fang Ai Shehui Fenghua)."[31] Some members of the Standing Committee of the N.P.C. of China argued that the death penalty for these crimes should not be repealed due to the fact that the subjective culpability of the mind of the perpetrator is very greatand they also have the opportunity to commit this crime again. In everyday life these crimes occur frequently and cause great concerns among the people and also have a great social impact, and so for these crimes, the perpetrator has to be executed to assuage the people's anger.[32] A famous case

[28] Yóu Wěi & Zhào Yùn Fēng (游伟，赵运锋), *Wǒ guó jīng jì fàn zuì biàn huà yǔ lì fǎ gǎi gé yán jiū (我国经济犯罪变化与立法改革研究) [Changes in Economic Crimes and Legislative Reform in China]*, DŌNG FĀNG FĂ XUÉ (东方法学) [ORIENTAL LAW], no.2, 2010, at 91, 101.

[29] Liú Yuǎn (刘远), *Jīng jì fàn zuì sǐ xíng lì fǎ dí duō wéi jiě xī (经济犯罪死刑立法的多维解析) [A Multidimensional Analysis of Legislation Imposing the Death Penalty for Economic Crime]*, XIÀN DÀI FĂ XUÉ (现代法学) [MODERN LAW SCIENCE], no.6, 2007, at 176, 179.

[30] Wang Yunhai, *The Death Penalty and Society in East-Asia - How to Understand and Compare the Death Penalty in China, Japan and South Korea*, 40 HITOTSUBASHI J. L. POL. 1, 3-4 (2012).

[31] Chén Xīng Liáng (陈兴良), *supra* note 24, at 76.

[32] *See* Chén Lì Píng (陈丽平)], Yī xiē cháng wěi wěi yuán jiàn yì rèn zhēn yán jiū jiǎn shǎo sǐ xíng zuì míng yuán zé — — zǒu sī hé cái liào zuì děng bù yīng qǔ xiāo sǐ xíng (一些常委委员建议认真研究减少死刑罪名原则——走私核材料罪等不应 取消死刑) [*Some standing committee members recommend examining carefully the principle of reducing the death penalty: the crime of smuggling nuclear materials and other crimes should not be exempt from the death penalty*] Quán guó rén mín dài biǎo dà huì (全国人民代表大会) [THE NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA] (Dec. 17, 2014), http://www.npc.gov.cn/npc/cwhhy/12jcwh/2014-12/17/content_1889148.htm.

https://doi.org/10.6092/issn.2531-6133/8150

took place several years ago, called the "Tanghui",[33] which caused a national debate over the issue of the abolition of the death penalty for the crime of arranging for, or forcing, another person to engage in prostitution.[34] In this case, the pros and cons of imposing the death penalty for these two crimes were balanced. The S.P.C, as China's highest court, finally rejected the death sentences because the circumstances of the crimes committed by the two perpetrators are not enough to be imposed on the death penalty. However, the opposing voices regarding the abolition of the death penalty for these two crimes continued to be heard until the discussion of the Draft to the Ninth Amendment. Some women's welfare organizations sent an advice letter to N.P.C. to express their strong feelings against the abolition of the death penalty for these two crimes as they violate the victim's rights to health, to life and to sexual autonomy, as well as disturbing the social order, and also because they are serious crimes of sexual violence; if the death penalty for them is removed, the potential perpetrator will become encouraged to continue because of the reduced cost of crime and the weakened legal deterrent, and the attraction of an exorbitant profit.[35] Although the Ninth Amendment did not adopt their suggestion, severe punishment is still provided for these two crimes just like the Explanations for the Draft of the Ninth Amendment to Criminal Law states

> These 9 crimes, which are no longer subject to the death penalty, which is rarely imposed on the convict who commits them, can be punished by the highest punishment, life imprisonment, after the abolition of death penalty… For these crimes should be punished heavily under the law if they deserve to be and, in order to guarantee

[33] In this case, Tanghui (唐慧) was the mother of the victim, an eleven-year-old girl who was forced to engage in prostitution by the perpetrators, Zhou Junhui (周军辉), Qin Xing (秦星) and others. Zhou and Qin were sentenced to death at the first trial and at the retrial, and at the second and final retrial they were sentenced to life imprisonment. *See generally*, Táng huì(唐慧)], *360BĀI KĒ (360百科) [360ENCYCLOPEDIA]*, http://baike.so.com/doc/1050580-1111313.html; *see also* Chái Huì Qún (柴会群)], *Shí me zào jiù liǎo táng huì? (什么造就了唐慧?) [What made Tanghui?]*, Nán fāng zhōu mò (南方周末) [SOUTHERN WEEKLY] (Aug. 1, 2013) , http://www.infzm.com/content/93030.

[34] *See* Zhào Bǐng Zhì (赵秉志), *Zhōng guó sǐ xíng lì fǎ gǎi gé xīn sī kǎo — — yǐ《xíng fǎ xiū zhèng àn（jiǔ）（cǎo àn）》 wéi zhǔ yào shì jiǎo (中国死刑立法改革新思考——以《刑法修正案（九）（草案）》为主要视角)* [*New Thinking on Death Penalty in China: With the Perspective of Amendment IX (Draft) to Criminal Law*], JÍ LÍN DÀ XUÉ SHÈ HUÌ KĒ XUÉ XUÉ BÀO (吉林大学社会科学学报) 55 [JILIN U. J. SOC. SCI. EDITION] no.1 2015, at 5, 6.

[35] *See* 9jiā jī gòu jiàn yì xiū gǎi xíng fǎ: jiāng xìng qīn nán xìng nà rù qiáng jiān zuì (9家机构建议修改刑法：将性侵男性纳入强奸罪) *[Nine Organizations Advise Amending the Criminal Law: Interpreting Sexual Assaults on Males as the Crime of Rape]* Xīn huá wǎng (新华网) [XINHUA NET] (Aug. 7, 2015), http://news.xinhuanet.com/legal/2015-08/07/c_128102881.htm.

https://doi.org/10.6092/issn.2531-6133/8150

> the overall stability of public security, it is certain that the whole range of stricter punishments should not be restricted.[36]

In accordance with this explanation, for the sake of maintaining a tough stance on these crimes, life imprisonment is the appropriate punishment, from the perspective of both legislators and politicians. Just as the former Vice Director of the N.P.C. Law Committee, Huang Taiyun, remarked, ". . . . after removing the death penalty from these crimes, life imprisonment is still retained for them. And it [the upgrading of life imprisonment] is appropriate, in accordance with the proportionality principle, and it may make the penalty fit the crime."[37]

2.2. THE SEVERE PENALTY DOCTRINE: CONCERNS REGARDING PENALTIES

The severe penalty doctrine, which took root in the mentalities of the rulers of the different states which have emerged throughout China's history, has been transmitted through successive generations, and has had a deep influence on legislation in different eras. "The concept of 'penal severity is for chaotic times, lenient punishment is for peaceful times' has always been regarded as the Chinese people's essential concept of ruling the state and giving peace to the world for thousands of years."[38] In the long term and under the highly feudal regime, the thinking regarding punishment was strongly influenced and marked by a culture which takes nationalism as its premise and criminal instrumentalism as its basis, integrated with a retribution and deterrence theory of punishment.[39] This thinking regarding punishment was incisively and vividly demonstrated in the legal utilitarianism period, which extended

---

[36] Guān yú <zhōng huá rén mín gòng hé guó xíng fǎ xiū zhèng àn (jiǔ) (cǎo àn) > dí shuō míng (关于<中华人民共和国刑法修正案（九）（草案）>的说明) [THE EXPLANATIONS FOR THE DRAFT OF THE NINTH AMENDMENT TO CRIMINAL LAW OF PEOPLE REPUBLIC OF CHINA] quán guó rén mín dài biǎo dà huì (全国人民代表大会) [NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA] (NOV. 3, 2014), http://www.npc.gov.cn/npc/lfzt/rlys/2014-11/03/content_1885123.htm.

[37] Huáng Tàiyún (黄太云), *xíng fǎ xiū zhèng àn bā > jiě dú (yī)* (*<刑法修正案八>解读(一))[Eighth Amendment of Penal Law (First Explanation)]*, RÉN MÍN JIǍN CHÁ (*人民检察*) [PEOPLE'S PROCURATORIAL SEMIMONTHLY], no. 6, 2011, at 1, 7.

[38] Hú Xué Xiāng, Zhōu Tíng Tíng (胡学相，周婷婷)], *duì wǒ guó zhòng xíng zhǔ yì dí fǎn sī (对我国重刑主义的反思) [Rethinking the Severity of Penalty in China]*, FǍ LÜ SHÌ YÒNG (法律适用) [J.L. APPLICATION], no. 8, 2015, at 71.

[39] *See* Yù Wěi, Jiǎng Yǔ Yáng (喻伟，蒋羽扬)], *duì xīn shí qī zhòng xíng zhǔ yì dí fǎn sī (对新时期重刑主义的反思)[Rethinking the Severity Penalty Doctrine in the New Age]*, GUÓ JIĀ JIǍN CHÁ GUĀN XUÉ YUÀN XUÉ BÀO (国家检察官学院学报) [J. NAT'L PROSECUTORS C.], no. 2, 1997, at 3, 12.

https://doi.org/10.6092/issn.2531-6133/8150

from 1978 to 1997.[40] During this period, "the criminal law was . . . . considered the tool and means of ruling the state",[41] and criminal punishment was deemed the most effective deterrent sanction, which best reflects the will of the national rulers.[42] In order to manage society, the ruler is expected to contain crime and restore social order through criminal penalties.[43] To illustrate this point, we can consider a speech delivered by Deng Xiaoping, who was the national leader at that time:

> The number of crimes, including serious ones, has increased substantially, and the people are very disturbed about this. Over the past few years, far from being checked, the tendency has grown. Why is that? Chiefly because we have hesitated to take prompt and stern actions to combat criminals and have given them very light sentences . . . . Serious offenders . . . . should be severely punished according to law. A number of criminals should be executed according to law . . . . The only way to stop crime is to be tough about it.[44]

Based on this speech, on 25 August 1983 the Communist Party of China C.P.C. launched the Decision on Cracking Down Severely on Crimes, which claimed that "cracking down severely on crimes is as serious a struggle of opposites as that between us and the enemy in the political areas."[45] Thus, the imposition of the death penalty upon the so-called enemy was arguably justifiable at that time. In 1986 Deng emphasized that:

---

[40] *See* CuīZìlì (崔自立), *cóng rén zhì zǒu xiàng fǎ zhì — — xīn zhōng guó fǎ zhì jiàn shè zhōng fǎ zhì lǐ niàn dí biàn qiān (从人治走向法治——新中国法治建设中法治理念的变迁)[From Rule by Man to Rule of Law: the Evolution of the Concept of the Rule of Law during the Construction of New China]*, GǍI GÉ YǓ KĀI FÀNG (*改革与开放*) [REFORM & OPENING], no. 6, 2009, at 8. In this paper, the author argues that in the process of constructing the rule of law in China, the country has experienced four stages in different eras, namely, legal instrumentalism, legal nihilism in the Mao Zedong era, legal utilitarianism in the period from 1979 to 1997, and legal supremacy in the period from 1997 till now.

[41] Wèi Chāng Dōng (魏昌东), *Xīn xíng fǎ gōng jù zhǔ yì dí pī pàn yǔ fǎn sī (新刑法工具主义的批判与反思) [A New Instrumentalism in Criminal Law: Criticism and Rectification]*, *法学* [L. SCI.], no. 2, 2016, at 86.

[42] *See* Dèng Xiǎogāng (邓小刚)], *Lùn shè huì guǎn lǐ chuàng xīn shì yù xià dí lǐ xìng xíng fá guān (论社会管理创新视阈下的理性刑罚观)[On the Rational Concept of Criminal Punishment under the Vision of Social Management Innovation]*, KĒ XUÉ SHÈ HUÌ ZHǓ YÌ (科学社会主义) [SCI. SOCIALISM], no. 4, 2013, at 84.

[43] *Id.*

[44] Deng Xiaoping, "The Selected Works of Deng Xiaoping: vol.3', The Selected Works of Deng Xiaoping: Modern Day Contributions to Marxism--Leninism".

[45] CPC, *Decision On Cracking Down Severely On Crimes,* NEWS OF THE COMMUNIST PARTY OF CHINA (Sept. 31, 2016), http://cpc.people.com.cn/GB/64162/64165/68640/68665/4739396.html.

https://doi.org/10.6092/issn.2531-6133/8150

> The death penalty cannot be abolished, and some criminals must be sentenced to death . . . . Some criminals must be executed, but of course we have to be very careful in such matters. Some of the perpetrators of serious economic or other crimes must be executed as required by law. As a matter of fact, execution is one of the indispensable means of education . . . . "Executing some of them can help save many cadres. As the saying goes, execute one as a warning to a hundred."[46]

In this regard, a Chinese scholar has argued that "the death penalty was considered as the chief means to achieve the "strike hard (*Yanda*)" effect, and its utilitarian effect was taken seriously; its deterrence effect, to a great extent, was recommended by the ruler."[47] Therefore, after launching the Decision on Cracking Down Severely on Crimes in 1983, the N.P.C. Standing Committee had successively adopted twenty-five Special Criminal Laws by the time the current Criminal Law was passed in 1997. To a great extent, the death penalty system, as the product of utilitarianism, is based primarily on these special criminal laws, and on the 1979 Criminal Law. The death penalty was repealed by the Eighth and Ninth Amendments, which originated from these Special Criminal Laws.

Even though the country is now moving towards the era of legal supremacy and is in the process of constructing a state based on the rule of law, the concept of the severe penalty still has a great influence on policy makers and legislators. As for specific policies an obvious example is that the Chinese government has periodically instituted national crack downs against crime. Referred to as "strike hard (*Yanda*)" anti-crime campaigns,[48] in which "harsher punishments were imposed on criminals, usually at a faster pace and sometimes based on violations of normal procedures",[49] these are always the preferred measure adopted by the policymakers to curb crime. As for the legislation, on the one hand, the traditional concept of "execute one as a

[46] Dèng Xiǎogāng (邓小刚), *supra* note 42.
[47] Chén Xīngliáng (陈兴良)], *Sǐ xíng zhèng cè zhī fǎ lǐ jiě dú (死刑政策之法理解读)[Death Penalty Policies: A Jurisprudential Perception]*, ZHŌNG GUÓ RÉN MÍN DÀ XUÉ XUÉ BÀO (中国人民大学学报) [J. OF RENMIN U. OF CHINA], no. 6, 2013, at 2, 4.
[48] Since 1983, China has launched five rounds of national "strike hard" campaigns, the first in 1983, with others following in 1996, 2001, 2010 and 2014.
[49] Liang Bin, *The Severe Strike Campaign in Transitional China*, 33 J. OF CRIM. JUST., 301, 387 (2005).

https://doi.org/10.6092/issn.2531-6133/8150

warning to a hundred" still has great influence on some legislators; for example, some legislators, while discussing the Ninth Amendment, pointed out that "a serious crime which has caused great harm to society must be given severe punishment, so that the potential perpetrators may receive the signal that a severe penalty shall be imposed on them if they commit these crimes."[50] On the other hand, according to the requirement that "China carries out judicial reform based on its national conditions",[51] stipulating severe punishments for serious crimes has its own realistic rationale and legitimacy, due to the fact that China's reality is always construed by the ruler and legislator as the real foundation of the severe penalty doctrine in existence at any given time. For example, the then Vice Director of the N.P.C. Law Committee, Huang Taiyun, while interpreting the Eighth Amendment, said:

> China is now in a situation where conflict is spreading between people, with serious criminal cases and complicated struggles with the enemy, [and is] facing a heavy and arduous task of maintaining social harmony and stability; it therefore must firmly and correctly use the punishment tool of execution to effectively curb the rampant rise of crimes.[52]

Even though these two amendments removed the death penalty from twenty-two crimes, and some scholars commented positively that the criminal punishment system is now moving towards a lightening of penalties, mainly due to the abolition of the death penalty,[53] some scholars were critical and pointed out that the punishment system has not changed and has, if anything, become stricter.[54] An obvious example of this is that the Ninth Amendment

[50] Chén Lì Píng (陈丽平), *supra* note 32.
[51] Zhōng guó dí sī fǎ gǎi gé bái pí shū <(中国的司法改革>白皮书) [The White Paper on Judicial Reform in China], *supra* note 2.
[52] Huáng Tàiyún (黄太云), *supra* note 37, at 6.
[53] *See* Liú Yàn Hóng (刘艳红), *xíng fá qīng huǎn, rén quán bǎo zhàng yǔ < xíng fǎ xiū zhèng àn bā> (刑罚轻缓, 人权保障与<刑法修正案（八）>) [Leniency of Punishment, Protection of Human Rights and the Eighth Amendment to Criminal Law]*, FĂ XUÉ JIĀ (法学家) [THE JURIST], no. 3, 2011, at 36.; Zhào bǐng zhì & Jīn yì xiáng (赵秉志，金翼翔), *Xíng fá qīng huǎn huà dí shì jiè bèi jǐng yǔ zhōng guó shí jiàn (刑罚轻缓化的世界背景与中国实践) [On the Leniency of Punishment in the Context of the World and the Practice in China]*, FĂ LÜ SHÌ YÒNG (法律适用) [J. L. APPLICATION], no.6, 2012, at 7; Sū Yǒngshēng (苏永生), *biàn dòng zhōng dí xíng fá jié gòu — — xíng (jiǔ duì xíng fá jié gòu yǐng xiǎng (变动中的刑罚结构——<刑（九）>对 刑罚结构影响) [The Changing Punishment Structure: The Influences of the Ninth Amendment on the Criminal Law]*, ZHŌNG GUÓ SHÈ HUÌ KĒ XUÉ WĂNG (中国社会科学网) [CHINA'S SOCIAL SCIENCE NET] (Mar. 1, 2016),
http://www.cssn.cn/fx/fx_xfx_984/201603/t20160301_2891951_1.shtml.
[54] *See* Jiǎ Jiàn & Liú Yuǎn (贾健，刘远), *xíng fá jié gòu diào zhěng dí lǐ xìng sī kǎo — — yǐ <xíng fǎ xiū*

https://doi.org/10.6092/issn.2531-6133/8150

provides for L.W.O.R. for the serious crimes of embezzlement and bribery. One Chinese scholar remarked that "LWOR reflects the policy of severely punishing corruption, and for the potential offender who commits corruption, it can function as a deterrent and containment."[55] Consequently, the thinking behind using severe punishment to control and deter crime still has a profound effect on legislators and other Chinese people.

2.3. LWOR FOR THE CRIMES OF EMBEZZLEMENT AND BRIBERY: POLITICAL CONCERNS

As regards the relationship between law and politics, there are three characteristics of this relationship, namely politics as a goal, as a means or as an obstacle.[56] As a goal, politics defines certain predominantly legal values or institutions as its goal, and they are also the same as the values or institutions of the law; as a means, the law exists merely to fulfill certain political interests; as an obstacle, law is deemed an obstacle on the way toward the realization of certain political goals.[57] In the light of the legal development of contemporary China, the law, to a great extent, plays a key role as a means to fulfill political interests; this is particularly true for the criminal law, which, as a consequence, is determined by the country's special political regime.

According to the Preamble of the Constitution of China, the country is a one-party state, and the system is one of multiparty cooperation and political consultation led by the C.P.C.[58] The C.P.C. does not only play a political leadership role, but also directs legislation and law enforcement, and its view or standpoint is considered the national will and so becomes law.[59] Party-led

---

zhèng àn (bā)> wéi qiē rù diǎn (刑罚结构调整的理性思考——以<刑法修正案（八）>为切入点) [Rationally Thinking on The Adjustment of the Punishment Structure: from the Perspective of the Eighth Amendment], SHAN DŌNG JǏNG CHÁ XUÉ YUÀN XUÉ BÀO (山东警察学院学报) [J. SHANGDONG POLICE C.], no.4, 2011, at 11.; *see also* Wèi Dōng (魏东), *xíng fǎ xiū zhèng àn guān chá yǔ jiǎn tǎo (刑法修正案观察与检讨) [Watching and Criticizing the Amendments to the Criminal Law]*, FǍ ZHÌ YÁN JIŪ (法治研究) [RES. ON THE RULE L.], no.2, 2013, at 17.

[55] *《Zhuān jiā tán xíng fǎ xiū zhèng àn: zhōng shēn jiān jīn ràng jù tān bǎ láo dǐ zuò chuān (专家谈刑法修正案（九）：终身监禁让巨贪把牢底坐穿) [Experts Discussing the Ninth Amendment to the Criminal Law: Life Imprisonment without Possibility of Release: Let the Arch Corrupt Official Rot in Detention]* Zhōng guó xīn wén wǎng (中国新闻网) [CHINA NEWS SERVICE WEBSITE](Sept. 8, 2015), http://www.chinanews.com/ll/2015/09-08/7510951.shtml.

[56] *See* Miro Cerar, *The Relationship between Law and Politics*, 15 ANN. SURV. INT'L & COMP. L. 19, 19-401 (2009).

[57] *Id.*

[58] Xianfa, (1982, last amended 2004).

[59] *See Zhōng gòng zhōng yāng guān yú quán miàn tuī jìn yī fǎ zhì guó ruò gān zhòng dà wèn tí dí jué dìng*

https://doi.org/10.6092/issn.2531-6133/8150

legislation is a system with Chinese characteristics. In accordance with the Constitution of the C.P.C., "leadership by the Party means mainly political, ideological and organizational leadership".[60] As an important branch of the law, with the characteristics of the most compulsory, the criminal law, "serving as a political tool, is always highly praised,"[61] and is led by the Party and implements the Party's ruling policies and will. The penalty system, playing an important role in this, is the embodiment of this kind of mandatory nature, and is also the result of political expediency; in particular, the death penalty system "is mainly caused by the excessive politicization of the criminal law."[62] In a situation in which the crime of embezzlement and bribery is still punishable by death under Article 383 (3) of Criminal Law, stipulating L.W.O.R. for this crime is another result of political considerations. [63] On one hand, the anti-corruption initiative is now a serious political campaign in China.[64] Upon taking office in late 2012, China's President, Xi Jinping, "vowed to crack down

---

(*中共中央关于全面推进依法治国若干重大问题的决定*)*[Major Questions of Communist Party of China in Comprehensively Moving the Government of the Country According to the Law Forward]*(Oct.30, 2014) Zhōng guó shè huì kē xué wǎng (中国社会科学网) [CHINA SOCIAL SCIENCE NET], (Oct. 30 2014), http://www.cssn.cn/fx/fx_ttxw/201410/t20141030_1381703.shtml; Liú Jiāzhēng (刘家征), *dǎng dí lǐng dǎo hé yī fǎ zhì guó gāo dù tǒng yī (党的领导和依法治国高度统一) [On the High Unity of the Party's Leadership and Rule by Law]*, qiú shì wǎng (求是网)[QIU SHI NET])(Feb. 10, 2015) http://www.chinadaily.com.cn/interface/toutiaonew/53002523/2017-01-14/cd_27955754.html.

60 Zhōngguó gòngchǎndǎng zhāngchéng(中国共产党章程)[Constitution of the Communist Party of China], 2012.

61 Liú Yuǎn (刘远), *xíng fǎ dí dào dé xìng yǔ zhèng zhì xìng (刑法的道德性与政治性)[On the Morality of the Criminal Law and its Politic]*, HUÁ DŌNG ZHÈNG FǍ DÀ XUÉ XUÉ BÀO (华东政法大学学报) [J. EAST CHINA U. POL. SCI. & L.], no.5, 2007, at 54-55.

62 *Id.* , at 54.

63 In this regard, many Chinese scholars have criticized the fact that life imprisonment without release for the crime is a political option, or emotional legislation. *See* RÈN ZHÒNG YUAN (任重远), *xíng fǎ xiū zhèng àn jiǔ: piáo sù yòu nǚ zuì méi liǎo, zhōng shēn jiān jīn lái liǎo (刑法修正案九：嫖宿幼女罪没了，终身监禁来了) The Ninth Amendment to Criminal Law: the Crime of Prostitution Involving a Girl under the Age of 14 is Abolished and Life Imprisonment without Possibility of Release is Provided*, nán fāng zhōu mò (南方周末) [SOUTHERN WEEKLY] (Aug. 27, 2015), http://www.infzm.com/content/111506. In this interview, Professor Chu Huaizhi said that "it (life imprisonment without release) chiefly reflects political attitudes." *See also* Liú xiàn quán (刘宪权), *Xíng shì lì fǎ yīng lì jiè qíng xù — yǐ < xíng fǎ xiū zhèng àn （jiǔ） > wéi shì jiǎo (刑事立法应力戒情绪—以<刑法修正案（九）>为视角) [Criminal Legislation Should Strictly Avoid Emotion: From the Perspective of the Ninth Amendment]*, 法学评论 [L. REV.], no.1, 2016, at 86. In this paper, the author pointed out that "it [the government] may be 'forced' by the people to enact legislation inappropriately and emotionally in order to severely punish corruption officers.".

64 WÚ JIÀNXIÓNG (吴建雄), *Zěn yàng kàn dài jìn jī nián dí "gāo yā fǎn fǔ" (怎样看待近几年的"高压反腐") How to View the 'Heavy Anti- corruption' of Recent Years*, zhōng guó gòng chǎn dǎng xīn wén wǎng (中国共产党新闻网) [COMMUNIST PARTY OF CHINA'S NEWS NET] (Feb. 25, 2016), http://theory.people.com.cn/n1/2016/0225/c143844-28150603.html; *See also* ZHÈNG YONGNIÁN (郑永年) [Zheng Yongnian], *yùn dòng shì fǎn fǔ bài fú hé zhèng zhì lǐ xìng (运动式反腐败符合政治理性) [The Campaign-style of Anti-corruption is Appropriate to Political Rationality]*, fèng huáng wǎng (凤凰网) [IFENG NET] (Aug. 13,2014),
http://news.ifeng.com/exclusive/lecture/special/zhengyongnian2/.

https://doi.org/10.6092/issn.2531-6133/8150

on both "tigers and flies" -powerful leaders and lowly bureaucrats - in his campaign against corruption and petty officialdom"[65], "with a determination to inflict heavy punishment for them in this special time".[66] In this political context, L.W.O.R. thus has political reasons for its existence. The Deputy Director of the Criminal Law Office of the N.P.C. Standing Committee, Zang Tiewei, also noted that "it [L.W.O.R.] is primarily designed for the present situation of anti-corruption, [based] upon the Mass's requirements… and to implement the relative requirements of the central government."[67] The S.P.C.'s executive vice-president, Shen Deyong, also notedd that "it fully reflects the Party Central Committee's distinct attitude toward, and steadfast determination to severely punish, corruption crimes according to the law."[68] On the other hand, The *White Paper of Judicial Reform in China* emphasizes that "[i]t (judicial reform) sticks to the line of relying on the people, strives to meet their expectations, tackles problems of particular concern to the people, and subjects itself to their supervision and examination";[69] L.W.O.R. meets the people's requirements regarding the anti-corruption initiative. One of the legislators, while discussing the Ninth Amendment (draft) said that the fact that a corrupt official can be released early "is one of the basic reasons why the people are not satisfied with the results of anti-corruption, and it also gives these corruption officials a chance of "escape from prison.""[70] All in all, the relationship between politics and law has always existed since the founding of New China in 1949, and the instrumentalism of criminal law, serving as the

---

[65] *"Xi Jinping Vows to Fight 'Tigers' and 'Flies' in Anti-Corruption Drive", The Guardian (Jan. 22, 2013),* https://www.theguardian.com/world/2013/jan/22/xi-jinping-tigers-flies-corruption.

[66] Wú Jiànxióng (吴建雄), *supra* note 64.

[67] Lǐ jìng & Liú róng (李婧, 刘茸), *Zāng tiě wěi: zhōng shēn jiān jīn bù shì xīn xíng zhǒng shì yòng yú zhòng tè dà tān wū shòu huì fàn zuì (臧铁伟：终身监禁不是新刑种 适用于重特大贪污受贿犯罪) [Zang Tiewei: Life Imprisonment without Possibility of Release is not a New Penalty Type, and it is Imposed for the Serious Crime of Embezzlement and Bribery]*(Aug. 29, 2015) Rén mín wǎng - zhōng guó rén dà xīn wén wǎng (人民网-中国人大新闻网) [People Net and National People's Congress Net], http://npc.people.com.cn/n/2015/0829/c14576-27531201.html.

[68] *Zuì gāo fǎ tán duì tān guān zēng shè zhōng shēn jiān jīn: gǎi biàn wú qī míng bù fù shí xiàn xiàng (最高法谈对贪官增设终身监禁：改变无期名不副实现象) [The Supreme People's Court Talking about Adding Life Imprisonment without Possibility of Release for Corrupt Officers: Changes in the Phenomenon of Life Imprisonment are Changes in Name rather than in Reality]*(Nov. 5,2015) Rén mín wǎng (人民网) [People's Net] http://politics.people.com.cn/n/2015/1105/c70731-27782403.html.

[69] Zhōng guó dí sī fǎ gǎi gé bái pí shū <(中国的司法改革>白皮书) [The White Paper on Judicial Reform in China], *supra* note 2.

[70] Zhuān jiā tán xíng fǎ xiū zhèng àn (jiǔ) zhōng shēn jiān jīn ràng jù tān bǎ láo dǐ zuò chuān (专家谈刑法修正案（九）：终身监禁让巨贪把牢底坐穿) [Experts Discussing the Ninth Amendment to the Criminal Law: Life Imprisonment without Possibility of Release: Let the Arch Corrupt Official Rot in Detention], *supra* note 55.

https://doi.org/10.6092/issn.2531-6133/8150

regulatory tool of politics, is simply manifested in a new form. L.W.O.R. is an obvious consequence of the new instrumentalism.

3. REFORMS TO LIFE IMPRISONMENT IN THE CONTEXT OF REDUCING THE USE OF THE DEATH PENALTY: APPLICABLE CONDITIONS AND AMENDING THE TERMINATION MECHANISMS

There are currently 102 crimes punishable by life imprisonment in the present Specific Provisions, accounting for 21.79% of a total of 468 crimes.[71] Almost all of these 102 crimes are provided with a fixed-term imprisonment of not less than ten years, forty-six of them are stipulated together with the death penalty, five are provided with a fixed-term imprisonment of not less than seven years, [72] and one is provided with a fixed-term imprisonment of not less than fifteen years.[73] The distribution of crimes punishable by life imprisonment is shown in Table 1 below. Based on the distribution, this section intends to examine the life imprisonment system in the Criminal Law of China and the reforms conducted by the Eighth and Ninth Amendments, together with its relative judicial interpretations.

See table in the next page

[71] *See Xíng fǎ zuì xīn zuì míng yī lǎn biǎo (刑法最新罪名一览表)[Chart Showing the New Crimes in the Criminal Law]*, zuì míng wǎng (罪名网) [CRIMINAL NET] (Apr. 9, 2016), http://www.zuiming.net/51.html.

[72] These crimes include crimes involving the producing or selling food that is not up to safety standards (Article 143), producing fake pesticides, fake animal pharmaceuticals or fake chemical fertilizers, or selling pesticides, animal pharmaceuticals, chemical fertilizers or seeds (Article 147), forming or using superstitious sects or secret societies or 'unusual' religious organizations or using superstition to undermine the implementation of laws and administrative rules and regulations (Article 300), making arrangements for another person to illegally cross the national border (Article 318), and illegally possessing narcotic drugs (Article 348). *See* Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法)[Criminal Law of People Republic of China], amended 2015. This is the newest Criminal Law which is amended by the Ninth Amendment. In order to differ from 1997 Criminal Law, it is hereinafter referred to as "the Criminal Law, 2015".

[73] *Id.* This is the crime of smuggling, trafficking in, transporting or manufacturing narcotic drugs, provided by Article 347 (1).

https://doi.org/10.6092/issn.2531-6133/8150

Table 1:[74] The distribution of crimes punishable by life imprisonment.

Crimes and chapters in the Specific Provisions of the Criminal Law	**Number of crimes punishable with life imprisonment**
Crimes of endangering national security (Chapter I)	8
Crimes of endangering public security (Chapter II)	17
Crimes of disrupting the order of the socialist market economy (Chapter III)	34
Crimes of infringing upon citizens' personal and democratic rights (Chapter IV)	5
Crimes of property violation (Chapter V)	4
Crimes obstructing the administration of public order (Chapter VI)	14
Crimes of impairing the interests of national defence (Chapter VII)	3
Crimes of embezzlement and bribery (Chapter VIII)	4
Crimes of dereliction of duty (Chapter IX)	0
Crimes of servicemen's transgression of duties (Chapter X)	13
Total	102

From Table 1, we can see that the greatest number of crimes involve disrupting the order of the socialist market economy provided by Chapter III (thirty-four crimes), followed by crimes of endangering public security in Chapter II, (seventeen crimes); there is no crime punishable by life imprisonment in Chapter IX.

[74] *Id.*

https://doi.org/10.6092/issn.2531-6133/8150

3.1. CONDITIONS FOR PASSING A SENTENCE OF LIFE IMPRISONMENT

In the General Provisions of the Criminal Law, there is no special provision to stipulate directly the applicable condition for life imprisonment, such as is provided for the use of the death penalty in some articles.[75] However, in the light of Article 17, a criminal punishment, including life imprisonment, cannot be imposed on a person who had not reached the age of fourteen-years-old when he or she committed the crime. A person who was over sixteen at the time he or she committed the crime shall be given a criminal punishment, including life imprisonment; but a person who has reached the age of fourteen but not the age of sixteen, and has committed intentional homicide, intentionally hurts another person so as to cause serious injury or death, or commits rape, robbery, drug-trafficking, arson, explosion or poisoning, has criminal liability,[76] although generally, he or she is not sentenced to life imprisonment according to relative judicial interpretation.[77] In addition, under the present Criminal Law, a person who has reached the age of seventy-five may also be sentenced to life imprisonment if he/she has committed a crime punishable by life imprisonment and/or death, even though Article 17-1, which was added by the Eighth Amendment,[78] provides that a person who has reached the age of seventy-five may be given a lighter or mitigated penalty if he/she commits an intentional crime.[79] When considering other states, we can see that their provisions for the use of life imprisonment are stricter than China's. For example, in accordance with Article 57 of the Romanian Penal Code, life imprisonment shall not be imposed on an offender who has turned sixty-five years of age at the date when the judgment to convict is returned, but shall be replaced by a prison term of thirty years and a ban on the exercise of certain rights for the maximum duration of the prison sentence[80] and "life

[75] *Id.* These articles include Articles 48, 49, 50 and 51.
[76] *Id.* art 17.
[77] *See* Zuì gāo rén mín fǎ yuàn guān yú shěn lǐ wèi chéng nián rén xíng shì àn jiàn jù tǐ yīng yòng fǎ lǜ ruò gān wèn tí dí jiě shì (最高人民法院关于审理未成年人刑事案件具体应用法律若干问题的解释) [The SPC's Interpretation on Several Legal Issues concerning the Specific Application of the Law in Handling the Criminal Cases of Juveniles], Fǎ shì (法释) [2006]1 Hào (号) [Legal Interpretation no.1, 2006], art 13.
[78] Zhōng huá rén mín gòng hé guó xíng fǎ xiū zhèng àn (bā) (中华人民共和国刑法修正案（八）) [The Eighth Amendment to the Criminal Law of the People's Republic of China], *supra* note 4, art. 1.
[79] Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法)[Criminal Law of People Republic of China], 2015, *supra* note 72, art 17-1.
[80] Criminal Code of the Republic of Romania, LAW # 286 of 17 July 2009, art 57.

https://doi.org/10.6092/issn.2531-6133/8150

imprisonment is also not going to be applied for the minor offender".[81] Under the Hungarian Criminal Code, only persons over the age of twenty at the time of the commission of the crime shall be sentenced to life imprisonment.[82] Except for these considerations relating to age, in the Criminal Law of China, there is no specific general provision referring to the applicable conditions for life imprisonment. However, conditions are provided by the Specific Provisions in all kinds of crimes punishable by life imprisonment, and they include the following types:

1) Life imprisonment for "action crimes" (行为犯, *xingweifan*). The actus reus of action crimes here is simply an act or behavior which is proved to have already been committed, the consequences of which are immaterial, and which is an important type of crime; most of these crimes are generally relatively serious and are provided with a correspondingly heavy penalty, such as the death penalty and life imprisonment. In the Criminal Law, life imprisonment is normally provided for action crimes without any consideration of circumstances or any other conditions; it is normally a mandatory sentence, and in some crimes, it is the maximum legally prescribed penalty. These action crimes include treason (Article 102), aiding the enemy (Article 112), forming or leading a terrorist organization (Article 120), aircraft hijacking (Article 121), intentional homicide (Article 232) and stealing, spying into or buying military secrets for, or illegally offering such secrets to agencies, organizations or individuals outside the territory of China (Article 431 (2)). All of these six crimes are very serious crimes and all of them can be punishable by death.

2) Life imprisonment may only be imposed on a perpetrator under certain legally-prescribed circumstances according to the law. These circumstances include the crime scene, the object of the crime, the criminal consequences, the means of the crime, and the position of the perpetrator in a criminal organization, and so on. The crime scene is a significant legally prescribed circumstance for passing sentence in the Criminal Law of China; for

[81] Viorica-Mihaela Frîntu, *Pedeapsa Detenţiunii Pe Viaţă [Life Imprisonment Penalty]*, 4 ANNALS CONSTANTIN BRANCUSI U. – JURID. SCI. SERIES 93, 97 (2013). According to Article 113 of the Criminal Code of the Republic of Romania, a juvenile includes a person who is younger than sixteen years old.
[82] Criminal Code of the Republic of Hungary, ACT C of 2012, sec 41.

https://doi.org/10.6092/issn.2531-6133/8150

example, robbing public or private property by violence, coercion or other methods carries a fixed-term imprisonment of not less than three but not more than ten years, but if the criminal intrudes into another person's residence to rob, robs on board a means of public transportation, or rapes a woman in a public place, he may be sentenced to life imprisonment or death.[83] The object of the crime is also an important sentencing factor; for example, anyone robbing a bank or any other banking institution,[84] or stealing or forcibly seizing guns, ammunition or explosives from state organs, members of the armed forces, the police or the people's militia,[85] may be sentenced to life imprisonment or death. Criminal consequence is another important sentencing factor in a majority of provisions in the Specific Provisions. Some provisions directly stipulate the consequence of crimes, with the amount of property or illegal property involved in the crime serving as the applicable condition for life imprisonment; for example, for economic crimes in Chapter 3, the amount of property or othergoods involved in the crime serves as a sentencing factor,[86] and some provisions stipulate "causing death or serious injury, or causing heavy losses of public or private property" as the applicable condition for life imprisonment. For example, Article 236 (3) provides that anyone raping a woman and causing serious injury or death to the victim may be sentenced to life imprisonment or the death penalty.[87] However, a majority of provisions, i.e. around fifty-three provisions, include the terms "commit major crimes" or "serious circumstance" or "especially serious circumstance"

[83] Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法)[Criminal Law of People Republic of China], 2015, *supra* note 72, art. 263.
[84] *Id.*
[85] *Id.* art 127 (2).
[86] In the Specific Provisions, only the crimes of manufacturing or selling counterfeit or inferior products, which are punishable by life imprisonment, are stipulated explicitly with the amount of property involved in the crime, i.e., "if the amount of earnings from sales is more than 2 million Yuan, he shall be sentenced to a fixed-term imprisonment of 15 years or life imprisonment" (See *See* Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法)[Criminal Law of People Republic of China], 2015, *supra* note 72, art 140); most of the other provisions use the phrase "the amount involved is large or especially large" as the applicable condition for life imprisonment; see, for example, Articles 152(3), 170, 178, 192, 194, 195, 196, 197, 200, 204, 206, 207, 224, 264, 267, 382(3) and 384. Based on the specific crime, the S.P.C. makes different judicial interpretations of these vague terms. In addition, the crime of illegal drug-possession is provided with the term "quantity" as the condition for sentencing to life imprisonment, namely, illegally possessing not less than one kilogram of opium, or not less than fifty grams of heroin or methyl-aniline, or any other large quantities of narcotic drugs". See Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法)[Criminal Law of People Republic of China], 2015, *supra* note 72, art. 384.
[87] *See* Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法)[Criminal Law of People Republic of China], 2015, *supra* note 72, arts 115, 141, 144, 147, 234, 263, 236(3), 390, 421, 422, 423 and 424.

https://doi.org/10.6092/issn.2531-6133/8150

which serves as the applicable condition for life imprisonment. Generally, these kinds of terms in the provision are normally regarded as "miscellaneous provisions" (兜底条款，DoudiTiaokuan), and are in practice interpreted by the S.P.C. accordance with the characteristics of different crimes, or according to mandate, by the local High People's Court, who make this kind of interpretation according to the local economic and social situation. The means of the crime is also a sentencing element; for example, robbing with a gun,[88] or, by resorting to especially cruel means, causing severe injury to another person, or reducing the person to complete disability, [89] and using arms to protect the smuggling, trafficking in, transporting or manufacturing of narcotic drugs[90] all may bring a sentence of life imprisonment or death. The position of the perpetrator in a criminal organization is also an important applicable condition for life imprisonment; for example, anyone who is a ringleader of a gang engaged in abducting and trafficking in women and children may be sentenced to life imprisonment.[91] Meanwhile, there are other applicable conditions for life imprisonment such as the perpetrator's attitude towards an admission of guilt, the perpetrator's criminal record and so on.

All in all, the applicable conditions for life imprisonment are not stipulated directly by the General Provisions, except for the object of the punishment itself, but rather by the provisions providing concrete crimes in the Specific Provisions. Furthermore, life imprisonment in some crimes is stipulated together with the death penalty, which serves as an alternative option to the latter; the applicable conditions for both penalties are, in most provisions, the same.[92] In this case, the Supreme People's Court S.P.C. generally makes the judicial interpretation or produces other kinds of judicial documents to guide the judge in choosing between the death penalty and life imprisonment. However, a fact which should not be ignored is that these judicial interpretations and documents cannot completely cover all the situations and circumstances in all capital crimes. In this case, in judicial

[88] *Id.* art 263.
[89] *Id.* art 234(2).
[90] *Id.* art 247(2).
[91] *Id.* arts 103,104,105, 170, 240, 317,318, 328 and 347.
[92] *Id.* arts. 115, 119, 125, 127, 141, 232, 234, 236, 239, 263, 347, 369, 370, 383, 421, 422, 423, 424, 430, 431, 438, 439, 446.

https://doi.org/10.6092/issn.2531-6133/8150

practice, on one hand, the judge can decide to choose between the death penalty and life imprisonment according to the Articles 48 and 49, which provide applicable conditions for the death penalty and limits for its use, as well as details regarding the Criminal Law and its relevant judicial interpretation. On the other hand, if the judge cannot decide how to choose between the death penalty and life imprisonment in the first stage, he or she is generally granted discretion. Regarding this discretion on the choice between the death penalty and life imprisonment, the reality is that to a great extent, as some scholars point out that, "in a case [which involves a decision on] whether or not the convict should receive the death penalty with reprieve, it absolutely depends on the judge's inner conviction."[93] Unlike the characteristics and requirements of the judicial adjunctive documents, the judge generally does not explicitly explain the reasoning in the sentencing decision. In the court's criminal judgement, therefore, it is almost impossible to find the reasoning behind the choice between the death penalty and life imprisonment when the judge uses his or her inner conviction to make the decision.[94] However, in some cases, we can find some circumstances that lead the judge to use life imprisonment rather than the death penalty. For example, in the case of "Zhou Junhui and Qin Xing" forcing other persons to engage in prostitution,[95] in which the crimes committed by these two perpetrators caused serious consequences (social harm), and the perpetrator's potential to commit offences and his or her subjective mens rea are very obvious, they were sentenced to

[93] Chén Xīngliáng (陈兴良), *sǐ xíng shì yòng dí sī fǎ kòng zhì: yǐ shǒu pī xíng shì zhǐ dǎo àn lì wéi shì jiǎo (死刑适用的司法控制：以首批刑事指导案例为视角)[Judicially Controlling the Use of the Death Penalty: From the Perspective of the First Criminal Guiding Cases],* Fǎ (法) [L. SCI.], no.2, 2013, at 44.

[94] Regarding this, I have already carried out research into criminal sentencing in China, and published my research paper, On the Problems of the Just Sentence in China. In this paper, I pointed out that in most criminal judgments the reasons for the final sentencing and the reasoning procedures behind it are very simple; some of the decisions contain simply a short sentence without any reasoning, and even if the judge cites the relevant provision, they declare whether "the social harm is great or not". This serves as the justification of sentencing decisions, without any explanation of the meaning of 'social harm' and without exploring the responsibility aspects of the crime. Gui Huang ,*On the Problems of Just Sentencing in China*, 56 HUNGARIAN J. L. STUD. 177, 181 (2015).

[95] *See* Zhōu Jūn Huī, Qín Xīng (周军辉，秦星) [2010] Yong the First Criminal Court First Trial. no. 55 ((2010) Yǒng zhōng xíng yī chū zì dì 55 hào (永中刑一初字第55号); [2012] Xiang High Court Third Criminal Trial. no. 31. ((2012) Xiāng gāo fǎ xíng sān zhōng zì dì 31 hào (湘高法刑三终字第31号); [2014] Xiang High Court Criminal Retrial. no.5. ((2014) Xiāng gāo fǎ xíng zhòng zì dì 5 hào (湘高法刑重字第5号). The judgement of this case can be found in the website "China Judgements Online"http://wenshu.court.gov.cn/content/content?DocID=3a471b1c-dfa8-4ea0-b53f-edf0a40d5ac5&KeyWord=%E5%91%A8%E5%86%9B%E8%BE%89%7C%E5%91%A8%E5%86%9B%E8%BE%89%EF%BC%8C%E7%A7%A6%E6%98%9F.

https://doi.org/10.6092/issn.2531-6133/8150

death in the first and second instances. However, in the retrial instance, the sentencing results were reduced to life imprisonment because the criminal effects were not considered especially serious, although the judge did not give any further reasons for this in the judgement.[96] Actually, in China's judicial practice, when the judge has to make decision using his or her inner conviction, he or she has to consider all kinds of relevant crime factors and other external influence factors, but generally does not explicitly explain them, nor lay out his or her reasoning for the sentencing in the judgement. Except for most of the provisions previously mentioned, there are a few provisions in which the applicable conditions for the death penalty are provided which are explicitly stricter than that of life imprisonment; for instance, Article 113 provides that if the crime provided by Paragraph 2 of Article 103 and in Articles 105, 107 and 109, causes particularly grave harm to the State and the people, or if the circumstances are especially serious, the offender may be sentenced to death. In this case, the judge normally makes the sentencing decision according to the criminal law and other relevant judicial interpretations.

3.2. REFORMING THE TERMINATION MECHANISMS FOR LIFE IMPRISONMENT: INCREASING ITS SEVERITY

The termination mechanisms make life imprisonment and its severity different from fixed-term imprisonment and other punishment measures in China's punishment system. According to the present Criminal Law, a twin-track approach is adopted to terminate life imprisonment, i.e. L.W.P.R. and L.W.O.R. The Eighth and Ninth Amendments have also amended these termination mechanisms to increase the severity of life imprisonment so as to remedy the potential problems caused by the reduction of the death penalty. This section will examine the termination mechanisms and their reform.

[96] In this case, theS.P.C. gave a special press interview and answered some questions about the case. *See* Zuì gāo fǎ wèn dá: zhōu jūn huī, qín xīng wéi hé wèi bèi hé zhǔn sǐ xíng (最高法问答：周军辉、秦星 为何未被核准死刑)[THE SUPREME PEOPLE'S COURT PRESS INTERVIEW: WHY DID THE SUPREME PEOPLE'S COURT NOT APPROVE THE DEATH SENTENCE IMPOSED ON ZHOU JUNHUI AND QINXING](Jun. 13, 2014) Zhōng huá rén mín gòng hé guó zuì gāo rén mín fǎ yuàn (中华人民共和国最高人民法院) [THE SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA], http://www.court.gov.cn/zixun-xiangqing-6469.html.

https://doi.org/10.6092/issn.2531-6133/8150

3.2.1. L.W.P.R.: COMMUTATION

Considering the special penalty elimination system in China, release from prison can generally come through the commutation of punishment and parole, both of which are normally applied at the same time. According to Article 78, commutation operates in two situations; namely, discretionary commutation (酌定减刑，zhuodingjianxing) and mandatory or legally provided commutation (法定减刑，fading jiangxing). Discretionary commutation of life imprisonment refers to a situation in which the penalty "may" be commutated if the offender "conscientiously observes prison regulations, accepts education and reform through labor and shows true repentance or performs meritorious services while serving his sentence,[97] but it is not certain whether the commutation will granted or no and its likelihood is lower than with mandatory commutation, which is a situation in which the penalty "shall" be commutated, and this will certainly be granted by law if the perpetrator performs any of the major meritorious services provided in the Criminal Law as detailed below:

1) Preventing another person from conducting major criminal activities;

2) Informing against major criminal activities conducted inside or outside prison and verified through investigation;

3) Assisting judiciary authorities to arrest another major suspect/offender, including a joint offender;

4) Having inventions or important technical innovations to his credit;

5) Coming to the rescue of another in everyday life and activities, at the risk of losing his own life;

6) Performing remarkable services in fighting against natural disasters or curbing major accidents; or

7) Making other major contributions to the country and society.[98]

For the offender sentenced to life imprisonment, if his performances meet the conditions for discretionary commutation, the penalty may be commuted to a

[97] *Id.* art 78.
[98] *Id.* art 78.

https://doi.org/10.6092/issn.2531-6133/8150

fixed-term imprisonment of twenty-two years after serving two years of the sentence, if the offender shows true repentance or performs meritorious services; it may be commuted to a fixed-term imprisonment of twenty-one to twenty-two years if he or she shows true repentance *and* performs meritorious services;[99] by contrast, if the offender serving life imprisonment performs major meritorious service, the sentence may be commuted to a fixed-term imprisonment of twenty to twenty-one years; it may be commuted to a fixed-term imprisonment of nineteen to twenty years if the offender shows true repentance *and* performs major meritorious service.[100] These provisions have been changed significantly by the Eighth Amendment and relative judicial interpretation and are stricter than those of the 1997 Criminal Law. In accordance with the 1997 Criminal Law and its judicial interpretations, if the offender shows true repentance or performs meritorious services, his sentence might be commuted to a fixed-term imprisonment of eighteen to twenty years, and if the offender performs major meritorious service, it might be commuted to a fixed-term imprisonment of thirteen to eighteen years.[101]

Compared with discretionary commutation, mandatory commutation seems much more merciful. While serving his sentence, the offender may be granted many commutations, but the interval between two commutations shall not be less than two years, and after one or multiple commutations, the actual term of the sentence served by an offender sentenced to life imprisonment shall not be less than thirteen years, which was also increased from the ten years provided by the 1997 Criminal Law.[102] The commencement date is calculated from the date when the life imprisonment judgment is announced.[103]

---

[99] *See* Zuì gāo rén mín fǎ yuàn guān yú bàn lǐ jiǎn xíng, jiǎ shì àn jiàn jù tǐ yīng yòng fǎ lǜ wèn tí dí guī dìng (最高人民法院关于办理减刑、假释案件具体应用法律问题的规定) [Supreme People Court's Provisions on Several Legal Issues concerning the Specific Application of the Law in Handling Commutation and Parole Cases](People's Republic of China) Supreme People Court Fǎ shì (法释) (2016)23 Hào(号) [Legal Interpretation No.23, 2016]), arts. 7 and 8.

[100] *Id.* art 7.

[101] *See* Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法) [Criminal Law of People Republic of China], 1997, *supra* note 11, art. 78, and Zuì gāo rén mín fǎ yuàn guān yú bàn lǐ jiǎn xíng, jiǎ shì àn jiàn jù tǐ yīng yòng fǎ lǜ wèn tí dí guī ding
(最高人民法院关于办理减刑、假释案件具体应用法律问题的规定)[Supreme People Court's Provisions on Several Legal Issues concerning the Specific Application of the Law in Handling Commutation and Parole Cases](People's Republic of China) Supreme People Court Fǎ shì (法释) (1997)6 Hào(号) [Legal Interpretation No.6, 1997]), art. 6.

[102] Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法) [Criminal Law of People Republic of China], 1997, *supra* note 11, art. 78(2).

[103] Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法) [Criminal Law of People Republic

https://doi.org/10.6092/issn.2531-6133/8150

The commutation per instance for the offender who shows true repentance or performs major meritorious service shall be no more than nine months; for the offender who shows true repentance and performs major meritorious service it shall be no more than one year; for those who perform major meritorious service it shall be no more than one and half years; for those who perform major meritorious service and show true repentance, it shall be no more than two years.[104] In order to truly prevent people engaging in malpractices for personal gain, power or corrupt financial dealings,[105] on 21 January 2014 the C.P.C.'s Central Political and Legal Affairs Commission (中共中央政法委, ZhonggongZhongyangZhengfawei) promulgated a document to strictly regulate and improve the conditions of commutation and parole for the offenders who commit any crime which involves taking advantage of a duty, disrupting the order of financial administration, or forming, leading, taking an active part in, harboring, or conniving in an organization of a criminal syndicate nature. Based on this document, in the new Provisions on Several Legal Issues concerning the Specific Application of the Law in Handling Commutation and Parole Cases, the S.P.C. extended the commencement date for the commutation of life imprisonment imposed on the offenders who commit any of the above mentioned crimes, i.e., it may be commuted to fixed term imprisonment after the offender has served three years of the sentence, although the actual executive terms after the commutation shall not be less than twenty years. The interval between two commutations shall be two years or more, and the commutation per instance shall be no more than one year, although these requirements are not applied to the mandatory commutation;

---

of China], 2015, *supra* note 11, art. 78(2) and Zuì gāo rén mín fǎ yuàn guān yú bàn lǐ jiǎn xíng, jiǎ shì àn jiàn jù tǐ yīng yòng fǎ lǜ wèn tí dí guī ding
(最高人民法院关于办理减刑、假释案件具体应用法律问题的规定) [Supreme People Court's Provisions on Several Legal Issues concerning the Specific Application of the Law in Handling Commutation and Parole Cases], *supra* note 99, art. 8.

[104] Zuì gāo rén mín fǎ yuàn guān yú bàn lǐ jiǎn xíng, jiǎ shì àn jiàn jù tǐ yīng yòng fǎ lǜ wèn tí dí guī ding (最高人民法院关于办理减刑、假释案件具体应用法律问题的规定) [Supreme People Court's Provisions on Several Legal Issues concerning the Specific Application of the Law in Handling Commutation and Parole Cases], *supra* note 99, art. 6.

[105] *See* Zhōng gòng zhōng yāng zhèng fǎ wěi guān yú yán gé guī fàn jiǎn xíng, jiǎ shì, zàn yú jiān wài zhí xíng qiē shí fáng zhǐ sī fǎ fǔ bài dí yì jiàn
(中共中央政法委关于严格规范减刑、假释、暂予监外执行切实防止司法腐败的意见) [The Opinions of the Central Political and Legal Affairs Commission of the Communist Party of China (CPLACCPC) on Effectively Preventing Judicial Corruption by Strictly Regulating the Commutation, Parole and the Temporary Service of Sentences Outside Prison] (People's Republic of China) Central Political and Legal Affairs Commission of the Communist Party of China, Zhōng zhèng wěi (中政委) (2014) 5 Hào (号) [No. 5, 2014, Central Political Commission], art. 1(3).

https://doi.org/10.6092/issn.2531-6133/8150

in other words, there is no limitation on the commencement date and interval for mandatory commutation.[106] These same restrictions on commutations are also applied to the offenders who commit the crimes of endangering national security, or terrorism, or is a ringleader of a gang engaged in drug-related crimes or recidivism of drug crimes, and the offender who is a recidivist or convicted of murder, rape, robbery, abduction, arson, explosion, dissemination of hazardous substances or organized violence who is sentenced to death with reprieve.[107] There were no provisions with the same restrictions in the 1997 Criminal Law.

In addition, life imprisonment reduced from the death penalty with reprieve may be reduced to a fixed-term imprisonment of twenty-five years after the offender has served two years of the sentence if he/she shows true repentance or performs meritorious services. If he/she genuinely performs any major meritorious services, the sentence may be commuted to a fixed term imprisonment of twenty-three to twenty-five years after serving two years of the sentence. Under the 1997 Criminal Law, in this case, it may be commuted to a fixed-term imprisonment of fifteen to twenty years.[108] After one or multiple commutations, the actual term of the sentence served by an offender sentenced to the death penalty with reprieve shall not be less than fifteen years, which is three years more than that provided by the 1997 Criminal Law,[109] excluding the probation period for suspension of execution; and it may be commuted to a fixed term imprisonment after the offender has served three years of the sentence.[110] In addition, for a recidivist or someone convicted of murder, rape, robbery, abduction, arson, explosion, dissemination of

[106] Zuì gāo rén mín fǎ yuàn guān yú bàn lǐ jiǎn xíng, jiǎ shì àn jiàn jù tǐ yīng yòng fǎ lǜ wèn tí dí guī dìng (最高人民法院关于办理减刑、假释案件具体应用法律问题的规定)[Supreme People Court's Provisions on Several Legal Issues concerning the Specific Application of the Law in Handling Commutation and Parole Cases], *supra* note 99, art. 9.

[107] *Id.*

[108] Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法) [Criminal Law of People Republic of China], 1997, *supra* note 11, art. 50; and Zuì gāo rén mín fǎ yuàn guān yú bàn lǐ jiǎn xíng, jiǎ shì àn jiàn jù tǐ yīng yòng fǎ lǜ wèn tí dí guī ding
(最高人民法院关于办理减刑、假释案件具体应用法律问题的规定)[Supreme People Court's Provisions on Several Legal Issues concerning the Specific Application of the Law in Handling Commutation and Parole Cases], *supra* note 99, art. 9.

[109] *Id.*

[110] Zuì gāo rén mín fǎ yuàn guān yú bàn lǐ jiǎn xíng, jiǎ shì àn jiàn jù tǐ yīng yòng fǎ lǜ wèn tí dí guī ding (最高人民法院关于办理减刑、假释案件具体应用法律问题的规定) [Supreme People Court's Provisions on Several Legal Issues concerning the Specific Application of the Law in Handling Commutation and Parole Cases], *supra* note 99, art. 9.

https://doi.org/10.6092/issn.2531-6133/8150

hazardous substances or organized violence who is sentenced to death with reprieve, the court may, when sentencing, decide to put restrictions on the commutation of his sentence in the light of the circumstances of the crime committed; if he/she is granted a commutation while serving the sentence of life imprisonment commuted from the death penalty with reprieve, the court should strictly apply the conditions of the commencement date, the time interval and the commutation range.[111] Namely, the life imprisonment commutated from the death penalty with reprieve may only be commuted to fixed-term imprisonment after the offender has served five years of the sentence, and the commutation per instance shall be no more than six months; for the offender who performs meritorious services, it shall be no more than one year.[112] In fact, the restrictions on commutation have been newly provided by the Eighth Amendment and the judicial interpretation.

"The commutation of punishment provided by the Criminal Law is a kind of universal penalty implementation system with distinct characteristics, and it is unique … in the world."[113] In general terms, it is even a significant condition for the convict serving life imprisonment to be granted parole because "the conditions of parole are stricter than those of commutation."[114] Furthermore, in practice, the application rate of commutation is always higher than that of parole;[115] for example, in accordance with the S.P.C.'s report, the number of commutation cases from January to September 2014 amounted to 370,998, while only 26,904 parole cases.[116] Even though it is impossible to

---

111 *Id.* art. 10, and see also Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法)[Criminal Law of People Republic of China], 2015, *supra* note 72, art. 50(2).

112 Zuì gāo rén mín fǎ yuàn guān yú bàn lǐ jiǎn xíng, jiǎ shì àn jiàn jù tǐ yīng yòng fǎ lǜ wèn tí dí guī dìng (最高人民法院关于办理减刑、假释案件具体应用法律问题的规定) [Supreme People Court's Provisions on Several Legal Issues concerning the Specific Application of the Law in Handling Commutation and Parole Cases], *supra* note 99, arts. 13 and 14.

113 Xú Jìngcūn (徐静村), *Jiǎn xíng, jiǎ shì zhì dù gǎi gé ruò gān wèn tí yán jiū (减刑、假释制度改革若干问题研究) [On Several Issues on the Reform of Commutation of Punishment and Parole]*,FǍ ZHÌ YÁN JIŪ (*法治研究*) [RES. ON RULE LAW], no.2, 2010, at 3.

114 Liú Qiáng (刘强), *Zài wǒ guó jiàn lì yǐ jiǎ shì wéi zhǔ, jiǎn xíng wéi fǔ " dí zuì fàn chū yù xīn mó shì (在我国建立以"假释为主、减刑为辅"的罪犯出狱新模式) [Establishing the New Model of Criminals Being Released from Prison - 'Parole Principally, Reduction of Penalty Secondly' - in China]*, FǍ XUÉ ZÁ ZHÌ (*法学杂志*) [L. SCI. MAG], no.1, 2012, at 45.

115 Liǔ Yuán (柳原), *Kuò dà jiǎ shì, suō xiǎo jiǎn xíng dí shí zhèng yán jiū (扩大假释、缩小减刑的实证研究) [Empirical Research on Expanding the Application of Parole and Limiting Commutation]*, ZHŌNG GUÓ SĪ FǍ (中国司法) [JUSTICE OF CHINA], no.11, 2014, at 67.

116 Zuì gāo rén mín fǎ yuàn (最高人民法院) [SUPREME PEOPLE'S COURT], 《2014年1-9 Yuè rén mín fǎ yuàn bàn lǐ jiǎn xíng jiǎ shì àn jiàn qíng kuàng (月人民法院办理减刑假释案件情况) [REPORT ON THE COMMUTATION AND PAROLE CASES HANDLED BY THE PEOPLE'S COURT FROM JANUARY TO SEPTEMBER

https://doi.org/10.6092/issn.2531-6133/8150

discover the exact number of cases of commutation of life imprisonment, the statistical data above show that the possibility of commutation is much greater than that of parole. One of the important reasons for this might be that most enforcement authorities have to take supervisory responsibility if the convict commits any other crime while serving his sentence outside of prison when he is granted parole, so most enforcement authorities are against parole.[117]

3.2.2. L.W.P.R.: PAROLE

Parole is another significant method of early release from prison. In accordance with Article 81 of the Criminal Law, an offender sentenced to life imprisonment who has actually served not less than thirteen years of imprisonment may be granted parole if he/she conscientiously observes the prison regulations, accepts education and reform through labor, shows true repentance and is not likely to commit any crime again. Actually, the limitations for parole are almost the same as those provided by the 1997 Criminal Law, except that the term of punishment actually to be served is longer than that provided by the 1997 Criminal Law, which was not less than ten years.[118] If special circumstances exist, upon the verification and approval of the S.P.C., parole may be granted without regard to the above restrictions on the term served.[119] Here we can see that the condition of "he conscientiously observes the prison regulations, accepts education and reform through labor, and shows true repentance" and the minimum term to be served in prison, which is not less than thirteen years, are the same as the basic condition for commutation, but the conditions of parole are higher and stricter than those of commutation because of the assessed risk of committing a crime again. Regarding this risk, it should be comprehensively evaluated based on the concrete circumstances of the crime committed by the convict, the facts of the

2014](Apr. 1, 2015) Zhōng huá rén mín gòng hé guó zuì gāo rén mín fǎ yuàn (中华人民共和国最高人民法院)[SUPREME PEOPLE'S COURT OF PEOPLE'S REPUBLIC OF CHINA]. http://www.court.gov.cn/fabu-xiangqing-14014.html.

117 *See generally*, Láng Shèng (郎胜), *Xíng fǎ xiū zhèng àn jiě dú (<刑法修正案（八）>解读)[Interpreting "the Eighth Amendment to the Criminal Law]*, GUÓ JIĀ JIĀN CHÁ GUĀN XUÉ YUÀN XUÉ BÀO (国家检察官学院学报) [J. THE NAT'L PROSECUTORS C.], no.2 (2011), at 149, 157.

118 Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法) [Criminal Law of People Republic of China], 1997, *supra* note 11, art. 81.

119 Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法)[Criminal Law of People Republic of China], 2015, *supra* note 72, art. 81.

https://doi.org/10.6092/issn.2531-6133/8150

original sentence, the convict's consistent performance while serving his/her sentence, the convict's age, physical condition, personality characteristics, and his/her source of livelihood after release from prison, as well as the supervision measures and conditions.[120] In addition, "when a parole decision is made on a convict, the impact of his/her release on parole on the community where he lives shall be considered,"[121] a provision which was added by Article 16 (3) of the Eighth Amendment. Article 81 (3) provides for an exception where a "special circumstance exists"; but what exactly is this circumstance? In accordance with judicial interpretation, it is a "circumstance . . . . significantly related to the whole social and state interest",[122] but this interpretation is still not clear, and some scholars have pointed out that "the concept and scope of the specific circumstance defined by judicial interpretation is ambiguous and it results in theoretical diversity and abuse in judicial practice."[123] In addition, there is a prohibiting provision on parole for some special convicts, including "the recidivist or a convict sentenced to life imprisonment for murder, rape, robbery, abduction, arson, explosion, dissemination of hazardous substances, or organized violent crime."[124] It was amended by Article 16 (2) of the Eighth Amendment. Even though those convicts falling into the categories above cannot be granted parole, they can be released early on commutation, in accordance with the present law. However, the convict who is sentenced to life imprisonment and released on parole is still supervised under the judicial authorities for a certain probation period.[125] During this probation period, the offender granted parole should observe the following requirements: 1) observing laws and administrative rules and

120 Zuì gāo rén mín fǎ yuàn guān yú bàn lǐ jiǎn xíng, jiǎ shì àn jiàn jù tǐ yīng yòng fǎ lǜ wèn tí dí guī dìng (最高人民法院关于办理减刑、假释案件具体应用法律问题的规定) [Supreme People Court's Provisions on Several Legal Issues concerning the Specific Application of the Law in Handling Commutation and Parole Cases], *supra* note 99, art. 15.

121 Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法)[Criminal Law of People Republic of China], 2015, *supra* note 72, art. 81(3).

122 Zuì gāo rén mín fǎ yuàn guān yú bàn lǐ jiǎn xíng, jiǎ shì àn jiàn jù tǐ yīng yòng fǎ lǜ wèn tí dí guī dìng (最高人民法院关于办理减刑、假释案件具体应用法律问题的规定) [Supreme People Court's Provisions on Several Legal Issues concerning the Specific Application of the Law in Handling Commutation and Parole Cases], *supra* note 99, art 17.

123 Liǔ Zhōngwèi (柳忠卫), *Duì jiǎ shì shì yòng dí lì wài xìng guī dìng hé jīn zhǐ xìng guī dìng dí lǐ xìng fēn xī (对假释适用的例外性规定和禁止性规定的理性分析) [Rational Analysis of the Exception Stipulations and Prohibiting Stipulations of Parole Application]*, ZHÈNG FǍ LÙN CÓNG (政法论丛)[J. POL. SCI. & L.], no.1, 2006, at 58.

124 Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法)[Criminal Law of People Republic of China],2015, *supra* note 72, art. 81(2).

125 *Id.* art 83.

https://doi.org/10.6092/issn.2531-6133/8150

regulations, and submitting to supervision; 2) reporting on his own activities as required by the supervising organ; 3) observing the regulations for receiving visitors stipulated by the supervising organ; and 4) reporting to obtain approval from the supervising organ for any departure from the city or country he lives in or for any change in residence.[126] Furthermore, he/she shall be subjected to community correction during parole.[127] The community correction system is newly established by the Eighth Amendment.[128] If he/she commits another crime during the probation period for parole, or is discovered to have committed, before the judgment is pronounced, other crimes for which no punishment has been imposed, or he/she violates any provision of the laws, administrative regulations or the relevant department of the State Council on parole supervision and management if the above do not constitute a new crime, his parole shall be revoked.[129]

3.2.3. L.W.O.R.: CRIMES OF EMBEZZLEMENT AND BRIBERY

In fact, the convict who is not sentenced to immediate execution may be released early on parole or commutation, regardless of the crime he/she committed, if the release conditions have been satisfied, even though he/she was restricted to commutation and prohibited parole before the Ninth Amendment. However, this situation was changed by the Ninth Amendment. According to Article 44(4) of the Ninth Amendment, for a convict who commits the crimes of embezzlement or bribery and is sentenced to the death penalty with reprieve, the court may, depending on the circumstances of the crime, at the same time decide, after commuting the suspension of execution to life imprisonment on the expiry of the two year period, to imprison him for life, without commutation or parole.[130] In accordance with the judicial interpretation made by the S.P.C. and the Supreme People's Procuratorate (hereinafter: S.P.P.) on 28 March 2016, a convict who has embezzled or taken

[126] *Id.* art 84.
[127] *Id.* art 85.
[128] Zhōng huá rén mín gòng hé guó xíng fǎ xiū zhèng àn (bā)(中华人民共和国刑法修正案（八)) [The Eighth Amendment to the Criminal Law of the People's Republic of China] , *supra* note 4, art. 17.
[129] Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法)[Criminal Law of People Republic of China], 2015, *supra* note 72, art. 86.
[130] Zhōng huá rén mín gòng hé guó xíng fǎ xiū zhèng àn (中华人民共和国刑法修正案（九)) [The Ninth Amendment to the Criminal Law of the People's Republic of China], *supra* note 5, art. 44(4).

https://doi.org/10.6092/issn.2531-6133/8150

bribes of not less than three million Yuan (C.N.Y.), may, in a case where the circumstances are especially serious, the social impact is especially severe and heavy losses are caused to the state and people, be sentenced to the death penalty. However, if he/she surrenders voluntarily, performs any meritorious service, confesses the crime and so on, and if the immediate execution is not deemed necessary, a two year suspension of execution may be pronounced simultaneously with the imposition of the death sentence, and at the same time a decision taken to prohibit commutation and parole, according to the circumstances of the case.[131] This decision should be made at the first and second trial, respectively, rather than upon the expiry of the two-year period, and therefore it emphasizes that once the decision to impose L.W.O.R. has been made, it will not be affected by the offender's performance during the period of suspension and it shall be enforced without any condition. Consequently, this is termed the systemic rigidity of L.W.O.R.[132]

The L.W.O.R. system was first established by the Ninth Amendment after the first criminal law was passed in 1979 and was "a brand new punishment measure".[133] Thus far, it has already been applied to three convicts.[134] The Chief Editor of the S.P.P.'s Research Office of Legal Policies,

---

131 Zuì gāo rén mín fǎ yuàn, zuì gāo rén mín jiǎn chá yuàn guān yú bàn lǐ tān wū huì lù xíng shì àn jiàn shì yòng fǎ lǜ ruò gān wèn tí dí jiě shì (最高人民法院、最高人民检察院关于办理贪污贿赂刑事案件适用法律若干问题的解释) [The Supreme People's Court's and Supreme People's Procuratorate's Interpretation of Several Legal Issues Concerning the Specific Application of the Law in Handling Criminal Cases of Embezzlement and Bribery]](the People's Republic of China) Supreme People's Court's and Supreme People's Procuratorate's, 法释 (2016) 9号 [Legal Interpretation No.9, 2016]), arts. 3 and 4.

132 Liǎng gāo fā bù bàn lǐ tān wū huì lù xíng shì àn jiàn sī fǎ jiě shì ("两高"发布办理贪污贿赂刑事案件司法解释) [Interpretations Concerning the Specific Application of the Law in Handling Criminal Cases of Embezzlement and Bribery Issued by the 'Two Supreme Judicial Authorities (Supreme People's Court and Supreme Peoples' Procuratorate)'](Apr. 18, 2016) Supreme People's Court of People's Republic of China, http://www.court.gov.cn/zixun-xiangqing-19562.html.

133 "jù tān" jiāng bǎ láo dǐ zuò chuān ？— — jù jiāo xíng fǎ xiū zhèng àn （ jiǔ ） cǎo àn ： duì zhòng tè dà tān wū fàn zuì zēng shè " zhōng shēn jiān jīn ("巨贪"将把牢底坐穿？——聚焦刑法修正案（九）草案：对重特大贪污犯罪增设"终身 监禁") ['WILL THE 'CORRUPT OFFICIAL' CONTINUE TO ROT IN DETENTION? FOCUS ON THE NINTH AMENDMENT TO THE CRIMINAL LAW (DRAFT): STIPULATING LIFE IMPRISONMENT WITHOUT POSSIBILITY OF RELEASE FOR SERIOUS CRIMES OF EMBEZZLEMENT AND BRIBERY](Aug. 25, 2015) Zhōng yāng zhèng fǔ wǎng (中央政府网) [CENTRAL PEOPLE'S GOVERNMENT], http://www.gov.cn/xinwen/2015-08/25/content_2919673.htm.

134 These three convicts are Bai Enpei, Wei Pengyuan and Yu Tieyi. All of them are sentenced to the death penalty with reprieve for having committed corruption crimes, and are not allowed to be granted commutation and parole after the death penalty with reprieve is reduced to life imprisonment. *See Bái ēn péi děng sān jù tān bèi pàn chǔ zhōng shēn jiān jīn, shì fàng chū shí me xìn hào? (白恩培等三巨贪被判处终身监禁，释放出什么信号？) [Such Bai Enpei as Three Arch Corrupt officials Are Sentenced to Life Imprisonment without Release, what Kinds of Signals Are Released]* Péng pài xīn wén wǎng (澎湃新闻网) [PENGPAI NEWS] (Dec.14, 2016), http://www.szxinghan.cn/Social/13972494.html.

https://doi.org/10.6092/issn.2531-6133/8150

Wan Chun, said that "it is a new enforcement measure of the death penalty, which is in between the death penalty with immediate execution and the general death penalty with reprieve."[135] Even though it exists only for the crimes of embezzlement and bribery, it sends a significant signal about the alternative penalties to execution in the context of gradually reducing the death penalty. Some scholars positively affirmed L.W.O.R. and said that "according to the principle of suitable punishment for a crime, trying to impose LWOR on the convict who should have been sentenced to death for the serious crime of embezzlemnt or bribery is a positive and prudent option."[136] "Compared with the immediate execution of the death penalty, LWOR has its own humanitarian aspect."[137]

4. FURTHER REFORM PROPOSALS FOR THE LIFE IMPRISONMENT SYSTEM

According to aforesaid analysis, life imprisonment is, substantially, a long term sentence where the convict who is sentenced to life imprisonment may be released on parole or commutation, unless he/she commits a serious crime of embezzlement or bribery and is sentenced to L.W.O.R. To a great extent, this seems to be in line with the international trend of penal reform, and this long term sentence is actually shorter than in some other states, such as the Czech Republic, Finland, Romania and Turkey, and tallies with the guarantee of human rights. However, there are still some problems with life imprisonment in China should be further reformed as follows.

---

135 *Zuì gāo jiǎn wàn chūn zhǔ rèn děng zhuān jiā jiě dú tān wū huì lù sī fǎ jiě shì (*"*最高检万春主任等专家解读贪污贿赂司法解释*)*[The Chief Editor of the Research Office of the Legal Policies of the Supreme People's Procurator of the P.R.C, Wan Chun and Other Experts Explaining the Judicial Interpretations of the Anti-crime of Embezzlement and Bribery]*, Jīn rì tóu tiáo (今日头条) [DAILY NEWS] (May 24, 2016), http://www.toutiao.com/i6288100038123979265/.

136 *Id.*

137 RUǍN QÍ LÍN (阮齐林)[Ruan Qilin], *Yī fǎ cóng yán chěng zhì tān wū huì lù fàn zuì — — jiě dú < guān yú bàn lǐ tān wū huì lù xíng shì àn jiàn shì yòng fǎ lǜ ruò gān wèn tí dí jiě shì (依法从严惩治贪污贿赂犯罪——解读<关于办理贪污贿赂刑事案件适用法 律若干问题的解释>)* [*Severely Punishing Crimes of Embezzlement and Bribery by the Law: Analyzing 'Interpretation on Several Legal Issues Concerning the Specific Application of the Law in Handling Criminal Cases of Embezzlement and Bribery'*] [LEGAL DAILY] (Apr. 18, 2016),http://www.legaldaily.com.cn/index/content/201604/18/content_6591201.htm?node=20908.

https://doi.org/10.6092/issn.2531-6133/8150

4.1. REDUCING THE NUMBER OF CRIMES PUNISHABLE BY LIFE IMPRISONMENT

After the death penalty, life imprisonment is the second heaviest penalty in a punishment system which "is consistently deemed to be a severe penal system by Chinese academic circles."[138] Some scholars point out that "relying on the death penalty is one of the tendencies in a criminal punishment system which is becoming severe".[139] This is one important contributory factor to this severe penal system, but the distribution of life imprisonment in the Specific Provisions of the Criminal Law is another major reason. According to Table1, there are now 102 crimes punishable by life imprisonment, including the forty-six crimes punishable by death, accounting for 21.79% of all crimes which is also now the maximum legal punishment for 56 crimes. In these cases, when the death penalty was removed gradually from the Criminal Law, having life imprisonment as the maximum legal punishment for around 102 crimes still means that "the penalty system in the Specific Provisions is excessively heavy",[140] an appraisal, which applies to the penal system as a whole. In this sense, some scholars point out that "it runs counter to the efficiency of criminal punishment and deviates from the penal goal."[141] "The number of crimes punishable by life imprisonment is so high that the disadvantage to its seriousness and deterrence is fairly obvious."[142] The number of crimes punishable by life imprisonment needs to be reduced, particularly the number of economic crimes. Economic crime is a kind of crime of greed, with the aim of illegally acquiring profit; therefore, "the focus of preventing the economic crime should be on improving the regulatory system, rather than relying too

---

138 Sòng WěIwèi & Hán Méi (宋伟卫，韩玫), *Zhěng tǐ qū qīng, dān jí fā zhǎn: wǒ guó xíng fá jié gòu gǎi gé dí jī běn fāng xiàng ("整体趋轻、单极发展"：我国刑罚结构改革的基本方向) [The Tendency to Move Towards Generally Light Penalties, and Unipolar Development': The Basic Direction of Our Penalty Structure Reform]*, HÉ BĚI FǍ XUÉ (河北法学) [HEIBEI L. SCI.], Vol.32, no.3 , 2014, at 75, 79.

139 Péng Wénhuá (彭文华), *Wǒ guó xíng fá tǐ xì dí gǎi gé yǔ wán shàn (我国刑罚体系的改革与完善) [Reforming and Improving the Criminal Punishment System in China]*, SŪ ZHŌU DÀ XUÉ XUÉ BÀO (ZHÉ XUÉ SHÈ HUÌ KĒ XUÉ BǍN (苏州大学学报(哲学社会科学版) [J. SOOCHOW U., PHILOSOPHY & SOC. SCI. EDITION], no.1, 2015, at 100, 101.

140 Gāo míng xuān, sū huì yú, yú zhì gāng (高铭暄，苏惠渔，于志刚) , *supra* note 27, at 8.

141 Lǐ Xiǎo ōu (李晓欧), *Zhōng guó zhòng xíng huà bì duān jí qí xiàn zhì lù jìng — — yǐ < zhōng huá rén mín gòng hé guó xíng fǎ xiū zhèng àn （bā） > wéi guān zhào (中国重刑化弊端及其限制路径——以<中华人民共和国刑法修正案（八）> 为观照)[The Drawbacks of Heavy Punishment in China and the Road to Limit them: Based on the Eighth Amendment to the Criminal Law of the P.R.C.]*, DĀNG DÀI FǍ XUÉ (当代法学) [CONTEMP. L. REV.],no.6 , 2010, at 38, 40.

142 Zēng Yà Jié (曾亚杰), *wǒ guó wú qī tú xíng zhì dù gǎi gé tàn xī (我国无期徒刑制度改革探析)[On the Reformation of the Life Imprisonment System in China]*, SHÍ DÀI FǍ XUÉ (时代法学)[PRESENTDAY L. SCI.], Vol.6, no.2 , 2008, at 68, 68 - 74.

https://doi.org/10.6092/issn.2531-6133/8150

much on criminal punishment", [143] and it is impossible to rely on such heavy punishments as life imprisonment.

4.2. OPPOSING LWOR FOR THE CRIMES OF EMBEZZLEMENT AND BRIBERY

As regards L.W.O.R., first provided by the Ninth Amendment for the crime of corruption, different scholars have different opinions, both pro and contra. A few scholars offer positive comments, arguing, for example, that it is an "anti-corruption edged tool", [144] that "it can effectively remit the difficult situation in which the criminal punishment of "the death penalty is overheavy but custodial penalty is too light", and it combines the function of abolishing and limiting the death penalty"; [145] or that "it is a new punishment measure integrating both leniency and severity for the serious crime of embezzlement and bribery."[146] However, most scholars criticize it. Some scholars, for example, doubt the legislation's procedural legitimacy because it was only reviewed once by the N.P.C. Standing Committee under Article 29(1) of the Legislative Code, rather than the required three times;[147] some scholars point out that "LWOR has distanced the offender from rehabilitation and his right to hope is deprived and it seriously violates the punishment aim, which is education and reform",[148] while others argue that "it may violate the principle of equality (also limiting the legislator) provided by the Constitution".[149]

---

[143] Gāo Míngxuān, Sū Huìyú, Yú Zhìgāng (高铭暄，苏惠渔，于志刚), *supra* note 27, at 6.

[144] Huáng Jīngpíng (黄京平), *zhōng shēn jiān jìn dí fǎ lǜ dìng wèi yǔ sī fǎ shì yòng (终身监禁的法律定位与司法适用)[Legislative Role and Judicial Application of Life Imprisonment without Parole],* BEIJING LIÁN HÉ DÀ XUÉ XUÉ BÀO (RÉN WÉN SHÈ HUÌ KĒ XUÉ BAN) (北京联合大学学报（人文社会科学版）)[J. BEIJING UNION U. (HUMAN. & SOC. SCI.)], NO. 4, 2015, at 98.

[145] Huáng Yǒng Wéi & Yuán Dēng Míng (黄永维，袁登明), *< xíng fǎ xiū zhèng àn （jiǔ） > zhōng dí zhōng shēn jiān jìn (<刑法修正案（九）>中的终身监禁) [On Life Imprisonment without Possibility of Release Provided by the Ninth Amendment to the Criminal Law]*, FǍ LǙ SHÌ YÒNG (法律适用)3 [J. L. APPLICATION] 35, 35 (2016).

[146] Zhào bǐng zhì (赵秉志), *supra* note 19, at 8.

[147] Ou Yáng Běnqí (欧阳本祺), *lùn < xíng fǎ > dì 383 tiáo zhī xiū zhèng (论<刑法>第383条之修正)[On the Amendment of Article 383 of the Criminal Law],* DĀNG DÀI FǍ XUÉ (当代法学)[CONTEMP. L. REV.], NO.1, 2016 at 18.

[148] Qián Yèliù (钱叶六), *tān huì fàn zuì lì fǎ xiū zhèng shì píng jí zhǎn wàng — — yǐ < xíng fǎ xiū zhèng àn （jiǔ） > wéi shì jiǎo (贪贿犯罪立法修正释评及展望——以<刑法修正案（九）>为视角) [Reviewing the Amendment to the Crimes of Corruption and Bribery Legislation and Its Prospects: From the Perspective of the Ninth Amendment to the Criminal Law],* SŪ ZHŌU DÀ XUÉ XUÉ BÀO (ZHÉ XUÉ SHÈ HUÌ KĒ XUÉ BAN) (苏州大学学报（哲学社会科学版) [J. SOOCHOW U. (PHIL. & SOC. SCI. EDITION)], no. 6, 2015, at 99.

[149] Chē Hào (车浩), *xíng shì lì fǎ dí fǎ jiào yì xué fǎn sī — — jī yú 《xíng fǎ xiū zhèng àn （jiǔ） dí fēn xī》(刑事立法的法教义学反思——基于《刑法修正案（九）的分析》)[Reflecting on Criminal Legislation From the Perspective of Legal Dogma: Based on the Analysis of the Ninth Amendment to the Criminal Law]*, FǍ XUÉ (法学) [LAW SCI.], no.10, 2015, at 9.

https://doi.org/10.6092/issn.2531-6133/8150

Obviously, L.W.O.R. does not conform to the relevant international standards. Nowadays, "Europe is setting against the imposition of very lengthy terms of imprisonment that are irreducible",[150] and the E.C.t.H.R. has already clarified its attitude towards life imprisonment by case law; life imprisonment without reduction violates Article 3 of the E.C.H.R., and the courts in Germany, France, Italy and Namibia have recognized that those subject to life sentences have a right to be considered for release.[151] Professor Michael M. O'Hear asserts that "it is possible that life imprisonment without parole will enter a period of slow decline that echoes the recent history of the death penalty."[152] In the context of this international tide and in accordance with some other international standards, under the background of reduction of the death penalty, the Chinese legislator has introduced L.W.O.R. for political reasons as if it were euphemistically introducing a new death penalty; consequently, it will reduce the criminal protection of human rights in China, and will not conform to international trends, nor to the development of human rights. L.W.O.R. therefore should be removed from the Criminal Law.

4.3. THE APPLICABLE CONDITIONS SHOULD BE EXPLICITLY PROVIDED BY THE GENERAL PROVISIONS OF THE CRIMINAL LAW

As with the analysis in the third section, no explicit provisions regarding the applicable conditions for life imprisonment are provided by the General Provisions, which means that "life imprisonment is inappropriately abused in judicial practice",[153] and even violates human rights; for example, life imprisonment may be imposed on a juvenile who has reached the age of sixteen but not the age of eighteen when committing a crime,[154] on a convict who has reached the age of seventy-five, and even on women who are pregnant at the time of trial. In this situation, even disregarding the death

[150] Dirk Van Zyl Smit, *Outlawing Irreducible Life Sentences: Europe on the Brink*, 23 FED. SENT'G REP. 39, 39 (2010).
[151] *See* Dirk Van Zyl Smit, *Life Imprisonment: Recent Issues in National and International Law*, 29 INT'L J. L. & PSYCHIATRY 405, 405 (2006).
[152] Michael M. O'Hear, *The Beginning of the End for Life without Parole*, 23 FED. SENT'G REP. 1,7 (2010).
[153] Lǐ Xiǎo ōu (李晓欧), *supra* note 141, at 40.
[154] It obviously violates Art. 37a of the G.A. Res. 44/25, Convention on the Rights of the Child, U.N. Doc. A/RES/44/25 (Nov. 20, 1989), which provides that no child (who is younger than 18 years old) shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

https://doi.org/10.6092/issn.2531-6133/8150

penalty, life imprisonment increases the severity of the present punishment system and is not in conformity with the relevant international conventions or treaties on the protection of human rights. With the aim of protecting an offender's human rights, the General Provisions should provide explicitly the applicable conditions for life imprisonment; specifically, it should not be imposed on a juvenile, nor on a person who has attained the age of 65, nor on women who are pregnant at the time of trial.

5. CONCLUSION

In the last century, and even stretching back over several centuries before that, liberal utilitarian and humanistic ideas pushed for the abolition of the death penalty across Europe,[155] and they now continue to outlaw irreducible life imprisonment, and have seen the E.C.t.H.R. putting this into practice through their case law.[156] The influence of these two important values has been sweeping through China over the past few decades; however, most Chinese scholars and legislators still focus on death penalty reform, debating how the death penalty can be removed de jure and de facto, but give less attention to the second heaviest punishment which lacks human rights protection - life imprisonment. In the context of gradually reducing the use of the death penalty, life imprisonment has already been upgraded to the maximum punishment by the Eighth and Ninth Amendments after the death penalty was removed as a possible sentence from twenty-two crimes. This is in line with the developments in most abolitionist states, where a convict who is sentenced to life imprisonment for most general crimes may be released; however, only for serious corruption crimes, a convict who is given L.W.O.R. cannot be released. These developments relating to L.W.O.R. may be attributable to the

[155] *See* Carolyn Hoyle, *"Review Essay: The Death Penalty in Japan: Will the Public Tolerate Abolition?, by Mai Sato"* THE DEATH PENALTY IN JAPAN, (Springer Press, 2013) https://www.law.ox.ac.uk/centres-institutes/centre-criminology/blog/2014/01/death-penalty-japan.

[156] *See generally*, Vinter and Others v. the United Kingdom, App. Nos. 66069/09, 130/10 and 3896/10, Eur. Ct. H.R (2013); Öcalan v. Turkey, App. No. 46221/99, 2005-IV Eur. Ct. H.R (2005); László Magyar v. Hungary, App. No. 73593/10 (2014); Harakchiev and Tolumov v. Bulgaria, App. Nos. 15018/11 and 61199/12, Eur. Ct. H.R (2014). In all of these cases, the ECtHR held that "whole life" sentences with no possibility of review and no prospect of release were inhuman and degrading treatment in breach of Article 3 of the European Convention on Human Rights.

https://doi.org/10.6092/issn.2531-6133/8150

present anti-corruption campaign and to political concerns. Considering the potential problems caused by the reduction in the use of the death penalty, the recent two amendments have already reformed the termination mechanism of life imprisonment to increase its severity so as to be commensurate with the punishments for crimes from which the death penalty was removed. However, the number of crimes punishable by life imprisonment is too great, the applicable conditions are not provided clearly and certain provisions limiting its use are lacking. Consequently, the punishment of life imprisonment as it operates at present should be further improved for the sake of human rights protection.