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Judicial Control of Death Penalty: Inspection of Three Modes

As the birthplace of theories of abolition of death penalty, Europe had started its experiment of abolition of death penalty in legislation since the last years of the 18th century. The basic requirement of admission to EU is the abolition of death penalty, had promulgated the abolition throughout the Continent and rendered it the forerunners in the campaign of abolishing death penalty. However, in comparison with the EU's abolition death penalty through legislation, it is difficult for countries like the US, Japan and India to accomplish it in the same way. Therefore "A Second Path" was brought forward, which is to restrict the application of death penalty by setting up higher judicial standards. These three countries differed vastly the in the content of their judicial standards and formed three different modes of judicial control of death penalty.

I. The U.S Mode

The peculiarity of the U.S mode is its emphasis on interaction of procedural and substantial law. Since the 70s of the 20th century, with the beginning of the case of Furman v. Georgia, the US had gradually established a strategy to abolish death penalty through judicial control. The 8th Amendment of the Constitution which put a prohibition to cruel and unusual punishments is interpreted as an evolving ethical standard, has founded a judicial system which is characterized in dual rank procedural standards and adoption of restriction on aggravating circumstances in substantial law. With a rigorous standard on the application of death penalty and the interaction between legislation and justice, a modern mode of controlling death penalty which takes judicial intervention as its core finally emerged in the US. Its main content is as followed.

1. Substantial Standards and Principle of Application

In Furman v. Georgia, the Supreme Court reached a conclusion that the legislation should restrict types of crimes which could lead to death penalty and it was the worst criminals that deserved death penalty.[1] This conclusion was the first attempt to define a common standard on the subjects of death penalty and it was confirmed and reinforced in cases thereafter. In Gregg v. Georgia, though the court admitted the constitutionality of death penalty on murder, it laid more emphasis on the restriction effect of the 8th Amendment which was reiterated by the Supreme Court that death penalty could only used against the worst of worst.[2] In Zant v. Stephens in 1983, the Supreme Court made a further move that to meet the concept in the Furman case the legislation should set up series of rational and objective standards to "genuinely narrow" types of death penalty to judges' discretion.[3] Since then the word "narrowing" became the key words in the reform of death penalty in the US.

2. Circumstances and Subjects to Death Penalty

In Thompson v. Oklahoma in 1988, the Supreme Court considered that it was extraordinary cruel and abnormal to use death penalty against juveniles under the age of 15 when the criminal act was committed.[4] In Atkins v. Virginia in 2002, the Supreme Court ruled that no death penalty should be used against mentally retarded persons.[5] In Roper v. Simmons in 2005, the Supreme Court pointed out that it was a violation of the 8th Amendment and against ideals of modern society to use death penalty against adolescents under the age of 18 when the criminal act was committed.[6]

3. Types of Crimes and Standards subjected to Death Penalty

In the US the types of crimes subjected to death penalty differed from state to state as they took dif-

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ferent standards. As a result it was critical to define the scope and standards of death penalty unanimously to control the use of death penalty by substantial law. In Coker v. Georgia Arizona in 1977 the Supreme Court considered that it was excessive and against the 8th Amendment to use death penalty against cases of rape in which no victims were caused to death and thus crime of rape should be excluded from the scope of death penalty. [7] In Enmund v. Florida the Supreme Court considered that it was against the 8th Amendment to punish criminals who assisted the carry out of felony only and who had no intention to kill anyone nor implemented the actual murder act.[8] In Kennedy v. Louisiana in 2008 the Supreme Court ruled that it was against the 8th Amendment to use death penalty against rapes against children and in a broader sense to cases in which no victims were caused to death.[9] After decades of judicial reform, criminal law in most states established the basic principles that death penalty could only used against crimes of murder and it was common sense between legislation and justice that first class murder of life deprivation should be subjected to death penalty. In 1994 the Violent Crime Control and Law Enforcement Act was passed and the types of crimes of death penalty expanded to 50 in which 46 were connected with murder.[10] At present besides non-murder crimes like treason, drug related crimes with large quantity which were stipulated in federal laws, the types of crimes subjected to death penalty concentrated on crimes of murder, especially first class murder, murder with aggravation circumstances and felony murder.

4. Quantitative Criteria of Death Penalty eligibility

It is an inevitable question of US justice mode how to narrow the scope of death penalty based to a further step based on the definition of substantial standard. To accomplish this goal the Supreme Court gradually set up average standards by case ruling. In the Gregg case, the Supreme Court concluded that according to the principle set up in the Furman case that the discretion of jury should be subjected to necessity restriction, it was in the conformity of the 8th Amendment that the court of State of Arizona, based on new rules stipulated in the Model Criminal Code, require the judge to inform the jury that in case of a verdict of death penalty at least one circumstance of statutory aggravation should be included in the reason of such verdict. [11] The requirement could be deemed as a definite and objective standard and provided the jury with abundant guidance which could help preventing random decision and identifying the specific worst murder. In the Zant case in 1983 the Supreme Court reiterated that death penalty could not be used without at least one circumstance of statutory aggravation was convicted which later became the basic requirement of death penalty and drew the most attention from the prosecution and defense parties. In the Ring case in 2002 the Supreme Court ruled that the jury had to found at least one circumstance beyond doubt before a verdict of death penalty.[12] Therefore the statutory aggravation circumstance played a positive role in the narrowing of death penalty.

II. The Japan Mode

The characteristic of Japan mode is to define standard of death penalty by case ruling. Japan is one of the western countries that put the doctrine at stake that completely developed democratic countries are prone to abolish death penalty.[13] The current system of death penalty of Japan was formed in the Meiji Restoration in the early of 20th century when the new criminal law of Japan was initiated and developed. It was a product of profound influence of continental criminal law especially the influence from the German Criminal Code of 1871. There was a short period of abolition of death penalty in German history.[14] After the reunion of German in 1870 by the Prussia, during the era of the "blood and iron" Prime Minister Bismarck, the council of Germany passed the act of maintaining death penalty which hindered the development of the movement of abolition of death penalty. However the types of crimes subjected to death penalty were reduced to a substantial extent. Under the influence of Germany, the Japan criminal code of 1908 stipulated only 12 types of crimes subjected to death penalty.[15] In the latter 19 times of amendment to the criminal code the quantity of death penalty remained the same. The reform of death penalty of Japan was not directly inflicted from the European movement since the latter of the 20th century as the leading events were all concentrated in the most developed European countries and countries which received essential influence from European countries. The tide of abolition of death penalty from 1945 to 1981 was mainly centered in Europe and the most developed countries of the English union.[16] Nevertheless the ideals and concepts derived from European's abolition of death penalty were widely accepted among Japanese academic circles and even among average citizens. Based on the maintenance of current criminal law, the Japanese choose judicial oriented reform mode.

1. The Limited Scope of Actual Death Penalty

Although there were 17 types of crimes subjected to death penalty in Japan criminal code, the types were rather concentrated. Considering the situations of death penalty used after World War II, the actual types of crimes were arson to inhabitant architectures, overthrow of train and trolley resulted in death,

murder, murder against elder relatives (which was ruled as against constitution and amend to common murder), robbery resulted in death, robbery and rape resulted in death, illegal usage of exploders. Most of them could be categorized into ferocious murder and robbery murder.[17] The reasons that the judicial department restricted the application of death penalty with the background of sustaining types of crimes subjected to death penalty in criminal law were the outcry for the abolition of the academic circle and the acceptance of abolition among citizens. The actual effect of application of death penalty guaranteed that there was no arise in the quantity with the hold on to the types of crimes subjected to death penalty in criminal law.

2. Infringement to Life is the Priority of Application of Death Penalty

It is the basic principle of Japanese criminal law to apply death penalty to crimes which infringe anyone's life. As a result though there is no principle guiding the application of death penalty in the criminal code, the courts usually take the standard of infringing people's lives as the standard of death penalty which to a vast extent restricted the application of death penalty. Judging from the current operation of justice, the coordinating relationship between death penalty and victims' loss has been established and the standard becomes more rigorous as the changes of social situations. In the early times after World War II death penalty may be inflicted if one person is killed. However in the period of rapid growth of economy death penalty may not be inflicted if one person is killed unless the crimes are extremely evil. In case of average crimes the criminal will not get death penalty even two persons are killed. In most situations a life imprisonment will be sentenced.[18]

3. The Modeling Effect of Rulings of Supreme Court

Although there is no difference in the criminal law about the application of death penalty, the Japanese courts take very discreet attitudes towards the use of death penalty. And such attitudes are conveyed through the judicial practice which set definite standards applying death penalty. In the ideas of Japanese scholars, the biggest advantage of defining standards of death penalty through case rulings is that it avoids the possibility of imbalance of application of death penalty. In the form of death penalty standards in Japan, it started with the categorization and analysis of valid rules of death penalty by scholars. And later the Supreme Court stepped in and made official statement on these classical cases which secured the stability and prestige of judicial standards regarding death penalty. As a milestone in the history of death penalty in Japan, the Supreme Court concluded its generic attitudes in the first appeal instance about the event of Norio Nagayama that in the background of pertaining death penalty in the current criminal law, based on the comprehensive consideration on the essence, motive, configuration the court could sentence death penalty considering the absolute evil of the crimes both from the view of balance of punishment and generic prevention of crimes, especially on the facts of cruelty of methods and measures, the seriousness of the results of the crimes, namely the number of victims, the feelings of the relatives of the victims, social influences, age of the criminals, criminal records, circumstances after the commission of the crimes and so on.[19] Since the ruling of the case of Norio Nagayama, the standard of Norio Nagayama had been the decisive standards concerning the justice of death penalty and had played an important role in guiding and restricting the use of death penalty. Moreover the judicial standard of Japan became another model besides the US model.

III. The Indian Mode

The characteristic of Indian mode is its emphasis on the reasoning duty of judges to accomplish the goal. Compared to Japan, India's reform of death penalty had also gone through setback in the legislation and judicial restriction was its last choice. However the modes of Japan and India were different and the latter one was also intriguing. The modern system of death penalty of India was configured in the 1860s when being a colony of the Great Britain. It took tremendous influences from English laws. The current system of death penalty was stipulated in the India Criminal Code in 1861 and the India Criminal Procedural Law in 1898. In the criminal code there were 10 articles containing death penalty which ranged from national crimes, crimes infringing lives, crimes infringing freedom to crimes infringing property.[20] The criminal procedural law stipulated the ranks of instances of death penalty, appealing and standards of evidence.

As for the legitimacy of death penalty, there had been no abundant discussion in the domestic. Even during the fight of independence, the execution of death penalty was never questioned. Although the demand of abolition of death penalty had been one of the many goals of the Indian national council in the fight of colonialism, the death penalty successfully transited to the legal systems after independence. The Indian Constitution in 1950 admitted the legitimacy of death penalty and it became the favorable way to punish murderers. The first amendment to the criminal code which started in 1956 allowed the judges to choose between life imprisonment and death penalty against convicted murderers. Since the 1960s, the legislation of death penalty had two big re-

forms, but the purpose and result were contrast. The first legislation reform started in 1970s and its goal was narrowing the scope of death penalty which was a strategic adjustment to the effort made in the 1960s to abolish death penalty. It intended to restricted death penalty as the alternative punishment to intentional murder. According to the proposal of the standing committee of the united council, the bill new criminal law in 1978 and the new criminal procedural law in 1978 was introduced to the council which restricted death penalty to certain murders. However due to the dismiss of House of Commons, the bill was terminated. Although the effort didn't work out, the proposal of restriction on death penalty was welcomed by many judges of the Supreme Court. The second legislation reform started in the 1980s. Its goal was to broaden the use of death penalty. In the 1950s to 1960s the death penalty was stipulated in the military law besides criminal code. Due to the need of international terrorism and the requirement of following western tide the scope of death penalty expanded from murder to crimes of terrorism focusing on the military law and national safety law.[21] The reform directly leads to the expansion of death penalty.

As the effort of restricting death penalty by legislation was in vain, India began to use judicial measures to control death penalty and achieved great success. The judicial control of death penalty had direct connection with the amendment of the criminal procedural law. The criminal procedural law in 1898 made special regulations on the sentencing of death penalty. According to subsection 5 of section 367 in cases regarding death penalty the court should illustrate on its reasons of why death penalty was not used if the court didn't sentence death penalty. However according to subsection 3 of section 354 of India Criminal Procedural Law the court should illustrate its special reasons if it decided a death penalty. The system of special reasons began to play a positive role in the judicial control of death penalty and became the core of the principle of the rarest of rare formula. In the view of criminal justice history, since April 1st 1974 it is a necessity of special reasons as the new law became valid. However the recognition of special reasons experienced a limited to broad change. It is confined to elements related to crimes at the beginning and later expanded to criminal related requirements, namely a death penalty could only be sentenced on the conviction that the criminal had hopeless special reasons. Similar to the Norio Nagayama event, the case of Bachan Singh was a milestone in the Indian death penalty history which explained special reasons in both ways of criminal and crime.[22] It also stated that unless the crime and its circumstances showed that the existence of criminal was a continual threat to the society and the punishment of life imprisonment was inadequate could death penalty be inflicted. The court should take other punishment as priority. The criminal should not be considered as hopeless unless the state court had proof to prove otherwise. Most court had the opinion that the true compassion towards human dignity required resistance against legal weapons depriving people's lives and death penalty could only be used against the rarest of the rare.[23]

IV. A Brief Conclusion: Where's the Road of Abolition Death Penalty in China?

Since the 1990s under the influences of worldwide movement of death penalty reform and academic research both domestic and abroad, death penalty reform in China gradually developed in the following ways. In the field of criminal policy China emphasized a less and discreet policy which rigorously control the use of death penalty. In the field of criminal procedural law, the Supreme Court took back the review power on cases of death penalty in 2007 and in 2010 the judicial interpretation of regulations on scrutinizing and evaluation of evidence of cases of death penalty unified the standard of death penalty which actually reduced the number of death penalty. In the field of substantial law the 8th amendment to the criminal code repealed 13 types of non-violent crimes which stood a ratio of 19.1% in the whole number of death penalty. The amendment also added that persons over the age of 75 should not be subjected to death penalty generally. However, it was still a long way to go regarding China's reform, especially because the legislation abolition was obstructed by legal culture, public opinions and public safety. A report by the law department of the Max Plank Institute showed that 57.8% people supported death penalty while only 14% people were against it which meant that 86% people considered death penalty acceptable.[24] Therefore the judicial control of death penalty became the main road of reform of death penalty in China. The outstanding problems of judicial control were the huge distinction among standards regarding specific crimes, the administrative essence of the death penalty reviewing procedure and the mixture of conviction and sentencing standards. The three modes above could provide with solutions in areas of emphasizing standards of death penalty, the restriction of substantial control and statutory aggravation requirements, the reasoning duty of judges and case guidance. ■

[1] Furman v. Georgia 408 U.S. at 238 313.
[2] Gregg v. Georgia 428 U.S.at 153.
[3] Zant v. Stephens 462 U.S.876-877.
[4] Thompson v. Oklahoma 487 U.S.
[5] Atkins v. Virginia 536 U.S.
[6] Roper v. Simmons 543 U.S.
[7] Coker v. Georgia Arizona 433 U.S.

[8] Enmund v. Florida 438 U.S.
[9] Kennedy v. Louisiana 554 U.S.
[10] Robert M. Bohm, *Deathquest(2nd),* (New York: Anderson publishing co,2003), p. 37.
[11] Gregg v. Georgia 428 U.S at196-198.
[12] Ring v. Arizona 536 U.S at 584 597.
[13] Franklin E. Zimring, David T. Johnson, "*The Law, Society and Death Penalty in Asia*", *Criminal Law Review,* ed. Chen Xingliang (Beijing: Beijing University Press, 2007),Vol 16, p. 113.
[14] Early in the 1840, Professor Carl Joseph Anton Mittermaier of University of Heidelberg pointed out that there was no deterrence of death penalty on crimes based on the positive results of 8 European countries and the US. In 1840 Professor Mittermaier successfully persuaded the Council of Frankford to abolish death penalty from 1848 to 1850. Joachim Whaley, *The History of the Death Penalty in Germany* in Hayley R. Mitchell ed. The Complete History of the Death Penalty (2001).
[15] The current death penalties stipulated in Japan Criminal Code included Overthrow of Constitution (Subsection 1 of Section 77), Instigation of Foreign Interference (Section 81), Assistance to Foreign Interference (Section 82), Arson to Inhabitant Architectures (Section 108), Crimes with Explosions (Section 117), Sabotage to Inhabitant Architectures (Section 119), Overthrow of Trains Resulted in Death (Subsection 3 of Section 126), Threat to Safety of Traffic with Aggravated Circumstances (Section 127), Poison in Water Tunnel Resulted in Death (Section 146), Murder (Section 199), Robbery Resulted in Death (Section 240), Robbery and Rape Resulted in Death (Section 241). In the special criminal law there were 5 more, namely Illegal Use of Explosives, Duel Resulted in Death, Hijacking of Aircraft Resulted in Death, Crash of Aircraft Resulted in Death and Murder of Hostage. See Liu Mingxiang, *Current Situation of Death Penalty of Japan and Prospect of China*, JiangHai Journal, 2004(5).
[16] Franklin E.Zimring, David T. Johnson, p. 115.
[17] Li Hong, "*The Inspect on Discretion Standard of Death Penalty in Japanese,* http://www.criminallawbnu.cn/criminal/Info/showpage.asp?pkID=780.
[18] Ibid.
[19] Ibid.
[20] Bikram Jeet Batra, "*Death Penalty in India-Question and Angle of View*",*Criminal Law Review,* ed. Zhao Bingzhi (Beijing: Law Press, 2008) ,Vol 13, pp. 61–62.
[21] Cai Guisheng,"*Death Penalty in India" Criminal Law Review,* ed. Chen Xinliang (Beijing: Beijing University Press, 2008),Vol 23, p. 269.
[22] Bikram Jeet Batra, p. 68.
[23] Cai Guisheng, p. 274.
[24] Yang Ming, *Destiny of Death Penalty-Why Death Penalty be supported strongly by Chinese*,Oriental Weekly, vol 46, 2010.