

Analysis of the exception of the rule that the death penalty does not apply to the elder——take China for example

Zhang Min-na

Law School Beijing Normal University, Beijing, China

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Corresponding Author

Zhang Min-na

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Abstract

China has gradually entered an ageing society and crimes committed by the elderly have become a social problem that cannot be ignored. The *Criminal Law Amendment (VIII)* therefore provides for the application of the death penalty to the elderly that the death penalty is not applicable to the elderly in principle, but may be applied in exceptional circumstances. However, there are imperfections in this article, such as the unclear definition of “at the time of trial” and “causing death by particularly cruel means”, the inappropriate setting of the starting point of “at the time of trial”, and the lack of a definition of whether the death penalty is applicable to the elderly and whether it should be imposed. These issues need to be resolved in order to better apply this law. The act such as replacing “at the time of trial” with “at the time of the commission of the offence”, lowering the definition of the age of the elderly to 70 years old, and giving priority to the application of suspended sentences to elderly people sentenced to death can be considered. This will help to better protect the rights and interests of the elderly, protect human rights and uphold social justice.

1. Introduction

1.1 legislative background

“Respect the old and love the young” has always been one of Chinese traditional virtues, as early as a thousand years ago, our country has a special application of criminal law to the elderly to make leniency and remission, the king had decreed: “people over 70 years old when guilty of the punishment are deemed innocent”(Pan & Yang, 2022). Now, our country's laws still inherit this tradition, and the criminal law stipulates broad criminal measures specifically for the elderly to better protect the rights and interests of the elderly. With the development of economy, the progress of science and technology and the progress of medical means, our country gradually entered the ageing society. At the same time, the frequency and proportion of crimes committed by the elderly in all crimes have gradually increased in line with this trend, becoming a social problem that cannot be ignored. Therefore, China's legislature has formulated relevant provisions for the application of death penalty to the elderly. Previously, the Office of the National Aging Commission pointed out that in the following period of time, China's elderly population will grow faster, and the proportion will gradually rise, it is expected that by 2050, the elderly population will reach 400 million, the aging level of more than 30%(Fan, 2011). Therefore, more and more

people pay attention to the regulation and restriction of crimes committed by the elderly, and the *Criminal Law Amendment (VIII)* on the restriction of the application of death penalty for the elderly and the exception of the application of death penalty under special circumstances came into being.

1.2 Necessity of legislation

1.2.1 The requirements of the principle of compatibility of crime, responsibility and punishment.

As a result of aging and the decline of body organs and functions, older people have weakened their ability to recognize and control their own behavior compared with the general population. Therefore, in the case of the same or similar crimes, the criminal law will give the elderly a lighter punishment than the general group. However, since the elderly who have reached the age of 75 have not completely lost their capacity for criminal responsibility after all, and compared with minors and mental patients, they have richer social experience and more stable and mature views on the personal notion, so when they commit acts that endanger society as same as minors and mental patients, the elderly should bear greater criminal responsibility than minors and mental patients (Sun, 2011). This is also the reason why the *Criminal Law Amendment (VIII)* stipulates that the death penalty may be applied if an elderly person who has reached the age of 75 at the time of trial causes death by particularly cruel means.

1.2.2 The need to achieve the purpose of punishment.

From the point of view of general prevention, the provisions of *Criminal Law Amendment (VIII)* can have a deterrent effect on potential elderly criminals in society, so that they do not dare to commit crimes. From the perspective of special prevention, it can also strengthen the education and reform of the elderly, combining deprivation with punishment, education and reform, so that the elderly who commit crimes can become useful to the society again, so as to ultimately achieve the purpose of crime prevention.

1.2.3 The need for a criminal policy that combines leniency with severity.

Criminal policy if too much emphasis on the tolerant aspect of criminal law will cause the loss of authority and seriousness of the law. And if too much emphasis on the strict aspect of criminal law will lose the human side of the law, is not conducive to the protection of human rights, is not conducive to the real prevention and control of crime. And will even let our criminal laws become stricter while crime rates continue to rise, which is really strange. The *Criminal Law Amendment (VIII)* for the elderly to apply the death penalty provisions, not only reflects the “leniency”, that is, for the elderly over the age of 75, the death penalty is not applied in principle, which is different from the general subject of leniency; It also reflects the “strict”, that is, except for the death of people by special cruel means, to show that the elderly criminals are not blindly indulging and protecting the bottom line (Fan, 2011). Therefore, from this perspective, this regulation can effectively maintain the balance between the two sides.

2. Literature Review

The Zhou Dynasty and the Warring States period provided for the pardon of crimes committed by the elderly. In the Han Dynasty, the elderly could be punished, and “the elderly aged 80 and above shall not be punished for any other crime except the crime of false accusation and murder.” The Tang, Song, Ming and Qing dynasties divided the elderly into three classes, those over 70, those over 80 and those over 90. The death penalty is applied to those over 90 years old only if

they commit the crime of treason(Ye, 2016). From the perspective of China's ancient provisions, the criminal behavior of the elderly is established as a crime, only because of the limited ability to adapt to punishment, so it can not be punished. However, from the perspective of the provisions of various dynasties and generations, there is no complete exemption for the elderly. In the modern international community, as of 31 December 2010, 96 out of 197 countries had abolished the death penalty for all crimes(Wan, 2024). In countries where the death penalty has not been completely abolished, strict restrictions on death penalty application have gradually been used, although the situation is not comparable. Some of them restrict the application of the death penalty to a small number of crimes of an extremely serious nature; some countries restrict the object of death penalty in legislation. In the application of death penalty restrictions, there are not only minors, pregnant women and other special groups, but also elderly people who meet certain age conditions. The Article 59 of the Criminal Code of the Russian Federation states that the death penalty shall not be imposed on women or men who have reached the age of 65 at the time of the court's decision. Article 53, paragraph 4, of the Penal Code of Mongolia, revised in 2002, states: "The death penalty shall not be applied to persons over sixty years of age." The Philippines and the Sudan provide for the exemption of criminal penalties for those who have reached the age of 70, while Guatemala and Mexico provide for the exemption of criminal penalties for those who have reached the age of 60. Kazakhstan does not allow the death penalty to be carried out on persons aged 65(Tang, 2023). As we can see from the above legislative examples, countries that have not completely abolished the death penalty exempt persons who meet certain age from 60 to 80 years old. In addition, the non-application of the death penalty to older persons who commit crimes is also confirmed in a number of international documents. Article 4, paragraph 5, of the American Convention on Human Rights provides that the death penalty shall not be applied to a person who was seventy years of age or older at the time of the commission of the crime(Tang, 2023).

3. Legal doctrinal analysis of the exception of the rule that the death penalty does not apply to the elder in Amendment (VIII) of Criminal Law

3.1 What is "At trial"?

In the *Criminal Law Amendment (VIII)*, the legislator made a prefix qualifier for "reaching the age of 75", that is, "at the time of trial". However, after the regulation came into force, there was no clear demarcation of the scope of "at trial". This is not conducive to the practical application of the provisions restricting the application of the death penalty to older persons, and therefore needs to be specified.

3.1.1 The definition of "at trial".

Scholars generally believe that if there is no special reason or other explicit provisions, then "the time of trial" in a literal sense, should include the entire criminal trial procedure. Some scholars think that "the time of trial" should be understood as "before the announcement of the first instance judgment" or "before the announcement of the second instance judgment"(Huang & Li, 2022). The author thinks that this view is inappropriate because the original purpose of this clause is to protect the rights and interests of the elderly, if the scope of "trial" is limited to the first instance or the second instance, then there will be a situation that a person may be sentenced to death if he or she is under 75 years of age during the second trial, but may still be executed if he or she reaches 75 years of age during the retrial or death penalty review process, which is clearly contrary to the original intention of the provision.

In the entire criminal law system, the expression “at the time of trial” also appears in the provision of pregnant women do not apply the death penalty, specifically expressed as: pregnant women at the time of trial, do not apply the death penalty. However, the author believes that although both of them are expressed as “trial”, their specific connotations are different. In the relevant documents, it was clearly pointed out that “women who are pregnant at the time of trial shall not be subjected to the death penalty” and that the “time of trial” should include the time of trial and the period of detention before trial (Ye, 2019). Obviously, this is not consistent with the scope of “at trial” in the provisions of the *Criminal Law Amendment (VIII)* restricting the application of the death penalty to the elderly, the scope of “at trial” is wider than that of “at trial”, which does not include the pre-trial detention period. This difference is due to the different objective factual characteristics of older persons over the age of 75 and women who become pregnant. A woman's pregnancy status is dynamic and can change at any time. It is possible women pregnant in custody but not pregnant at trial; it is also possible that women do not pregnant at the time of detention but pregnant at the time of the trial. Therefore, in order to protect the rights and interests of women and prevent the occurrence of intentional miscarriage of women before trial in order to increase the penalty borne by women, the judiciary has extended the interpretation of “trial time”. As for the age of the elderly, once the elderly reach the age of 75, they will always be in this state, and there will be no situation that they do not reach the age of 75 again, so if the “trial time” is also stipulated to include trial and pre-trial detention, it is more redundant (Wang, 2015).

3.1.2 Comparison between “at the time of trial” and “at the time of crime”.

Looking at the entire criminal law system, the starting point of age restriction is not only “at the time of trial”, but also “at the time of crime”. For example, China's criminal law stipulates that people under the age of 18 at the time of crime do not apply the death penalty. “The time of the crime” refers to the date on which the crime is established, or the date on which the act conforms to the constitution of the crime. For a crime where the criminal act has a continuous or continuing state, the date on which the crime is established is the date on which the criminal act ends. Obviously, “at the time of the crime” and “at the time of trial” are two concepts with different coverage.

According to the *Criminal Law Amendment (VIII)*, the application of death exemption for the elderly must be based on the age of the elderly at the time of trial. The author believes that there are certain loopholes in this provision, and it should be changed to the age at the time of crime as the applicable standard, that is, the death penalty should not be applied to people under the age of 75 at the time of crime. If the age at the time of trial is taken as the application condition of the elderly death exemption system, there may be situations where elderly criminals intentionally delay time to escape criminal investigation, that is, criminal suspects commit crimes when they are less than 75 years old, and in order to avoid bearing criminal responsibility, they take various actions to disrupt the trial and litigation process and deliberately delay the trial time. So that they can not be tried or punished until they reach the age of 75. This kind of loophole will destroy the system and authority of China's criminal law, so it may be more appropriate to change the “trial time” to “crime time” here.

3.2 The analysis of “causing the death of a person by particularly cruel means”

3.2.1 The use of particularly cruel means.

The word “cruel” has existed since ancient times, and the word “special cruel means” has

appeared many times in our criminal law system, but there is no clear judicial or legislative interpretation of this word. In the academic world, some scholars have made explanations, such as according to Professor Hu Yunteng(1995), “using fire, snake and animal bites and other frightening methods to kill victims; Using a non-lethal instrument, striking the victim several or dozens of times causing multiple serious injuries before killing him; Or holding a sharp blade, stabbing the victim dozens of times, causing the death of the victim, etc.” However, the author believes that this interpretation has limitations, because with the development of the times, various tools and means emerge endlessly, and human activities are complicated, it is difficult to completely divide them with simple criteria. In addition, there are ways to reveal the essence, such as according to Professor Che Hao(2019), Cruel means is a normative concept based on the general concept of society, and its focus is not only for specific victims, but also a serious violation of good customs and an extreme challenge to human compassion. The author believes that this way also has limitations, because “good customs” and “compassion” do not have a unified standard, the public can not unify the view, it is difficult to get an exact answer.

Through the analysis of the cases in which the acts of the perpetrators in the judgment documents published online by the Supreme People's Court in China were identified as “special cruel means”, the author believes that “special cruel means” can be divided into the following types:

Type 1: Killing or injuring multiple people. For example, the Supreme People's Court made Zeng Chunliang intentional murder, robbery, theft death penalty review criminal verdict found that Zeng Chunliang entered the house to rob, bear the case during the escape because of the victim's police and hatred, in order to vent anger revenge caused three deaths, the circumstances are particularly bad, the means of establishment is particularly cruel(Supreme People's Court, 2021).

Type 2: Repeated aggression is used in the killing process. For example, in the criminal verdict of the Supreme People's Court on the review of the death penalty for intentional murder of Zhao Liuhua, it was determined that a sharp knife placed in Zhao Liuhua's car repeatedly stabbed Zhu Yi, causing him to die of massive blood loss. The court found that the act constituted particularly cruel means(Supreme People's Court, 2021).

Type 3: Use special tools in the killing process. For example, in the Supreme People's Court's verdict on the review of the death penalty for intentional murder of Chen Weibin, it was determined that Chen Weibin attacked with a baton and a wallpaper knife, resulting in the death of Fan Jia, Fan Yi and Chen Jia on the spot. The court said it could amount to extraordinary cruelty(Supreme People's Court, 2021).

Type 4: Multiple body parts of the victim during the killing process. For example, in the criminal verdict of the Supreme People's Court on the review of the death penalty for intentional murder of Liu Hongzuan, it was determined that Liu Hongzuan took a single-blade knife from the kitchen and stabbed Huang seven times in the back, two times in the left chest and two times in the neck, resulting in Huang's death on the spot. The court found it to be particularly cruel(Supreme People's Court, 2021).

Type 5: Committing other crimes in the process of killing. For example, in the Supreme People's Court's verdict of intentional murder and arson death penalty review, Sun Yijie found that after the murder, Sun Yijie used a lighter to light sheets, clothes and other things in the bedroom, resulting in a fire, causing some of the property of Li Jia's home to be burned, and his

neighbors also suffered property losses. The court held that it constituted intentional homicide and arson, which constituted cruel means(Supreme People's Court, 2021).

3.2.2 The causal relationship between “particularly cruel means” and the result of “death”.

The principle of self-responsibility for crime is one of the basic principles of criminal law, and causality is the necessary prerequisite for a person to bear criminal responsibility. The author believes that the causal relationship here should be interpreted more broadly, even if the special cruel means did not directly cause the death of the victim, but the subsequent behavior caused the death of people, it should be understood that the two have a causal relationship. The reason is that the perpetrator of special cruel means obviously has great personal danger and subjective malignity, objectively, special cruel means also cause the victim's pain or extremely bad social impact, which is a serious infringement on the interests protected by the criminal law, and its objective impact is no different from that of special cruel means when they directly cause the death of the victim. If you have to make a distinction, it doesn't make much sense(Cheng, 2012).

4. Discussion

4.1 Discussion of whether the death penalty may be applied to old persons

Because of its cruelty and irreversibility, the question of the death penalty's existence or abolishment has been controversial for a long time. Although our country has not completely abolished the death penalty, but the criminal law has been very cautious about the application of the death penalty. Therefore, in the process of revising the *Criminal Law Amendment (VIII)*, the question of whether the possibility of applying the death penalty to the elderly who have reached the age of 75 at the time of trial should be completely excluded has also aroused great controversy.

Some scholars believe that the death penalty should not be applied to the elderly even if they use particularly cruel means to cause death, that is, the elderly group is completely free from the possibility of being subjected to life punishment(Wang, 2011). The reasons of this view is as follows: First of all, from a practical point of view, due to the degradation of their physiological functions, the elderly aged 75 or older are much less likely to commit serious crimes that cause death by special cruel means, and even less likely to do so in judicial practice, thus reducing the probability and opportunity of using this provision in *Criminal Law Amendment (VIII)* in practice. It may cause incoherence and redundancy of criminal law provisions. Second, an elderly person over 75 years of age who has committed a serious crime causing death by special cruelty and has received the corresponding penalty is highly unlikely to commit another serious crime causing death by special cruelty because of his advanced age. Thirdly, the application of the death penalty to older persons is not conducive to the protection of human rights and does not conform to the worldwide trend towards abolition of the death penalty. For example, the Mongolian criminal Code stipulates that “the death penalty shall not be applied to men and women over the age of 60”; the criminal law of Kazakhstan stipulates that “no person over the age of 65 shall be executed”(Li & Liu, 2021). The age standard of the elderly stipulated in the criminal law of our country is much higher than that of other countries, and the average life expectancy is lower than that of other developed countries. Therefore, if we made the exception of stipulation that the death penalty can not applied to crimes committed by the elderly, it is difficult to achieve the humanitarian legislative effect pursued by the legislation.

The opponents point out that equality before the law is the basic principle of China's criminal

law, for the elderly crime, no matter how bad the nature of the crime, how serious the social harm, can not apply the death penalty, seemingly “humane”, in fact, is inhuman to the victim. Therefore, from the perspective of social stability and criminal justice, it seems inappropriate to make such special provisions(Yang, 2011). The author agrees with this view.

First of all, for the elderly, although they do not have full capacity for criminal responsibility due to their advanced age and the deterioration of their physiological functions and mental conditions, their capacity for criminal responsibility is obviously higher than that of minors and mental patients who are completely unable to apply the death penalty. They have richer social experience, more mature thinking, and with the improvement of living standards and medical standards, their physical and mental health is not weak, but has the basic conditions to carry out basic crimes. If, in this case, they are provided with exactly the same treatment as minors and mental patients, it clearly violates the basic principle of equality before the law. Thirdly, from the perspective of preserving the discretion of local judges, the provision that the death penalty can be applied to the elderly under certain conditions should also be retained to prevent the rigidity of the judgment. If the law uniformly stipulates that the death penalty is not allowed to be applied to elderly people who have reached the age of 75 regardless of the specific circumstances of the crime, it is difficult to say that it is not a one-size-fits-all approach at another level. In practice, the death penalty is rarely applied to people over the age of 75, and it should be left to the judicial authorities to exercise flexibility within the scope of criminal policy rather than abolishing it completely(Wang, 2013). Finally, the complete abolition of the death penalty for the elderly is not in line with the current expectations of our society and is difficult to be accepted by our people. Although the abolition of death penalty is the trend of the development of criminal law legislation in the world, it is also the inevitable result of criminal law following humanism, however as a legislator, we should also take into account the actual situation of our national conditions, including the current situation of the management of criminal environment in our country, as well as the degree of forgiveness of criminal behavior and the acceptance of lenient punishment(Ye, 2019). Therefore, the author thinks it is reasonable to apply the death penalty to the old people.

4.2 Discussion of the age setting for the elderly in the amendment

Those who are positive about setting the age threshold for the elderly at 75 believe that legislation should pay attention to long-term interests because the law is stable and cannot be changed at will(Wang, 2013). Even if the age division of 75 years old is relatively high compared with the current average life expectancy in China, but with the improvement of China's medical level in the future and the development of economic science and technology, China's average life expectancy will continue to increase, so it is considered that the age division of 75 years old is appropriate in the long run and is in line with the current national conditions.

Some authors believe that the age limit should not be set at 75 years old, the reason is that the word “elderly” is not a professional legal term, and there are some differences in the age limit division of the elderly in the different provisions that have been issued in China. For example, the Law on the Protection of the Rights and Interests of the Elderly stipulates that the elderly are citizens over the age of 60; the elderly under the Law on Public Security Administration Penalties are citizens over 70 years old. However, although various provisions are different, it can still be seen that the age definition of the elderly in the *Criminal Law Amendment (VIII)* is relatively high. Since the original intention of the provisions in *Criminal Law Amendment (VIII)* on restricting the application of the death penalty to the elderly is to safeguard the rights and interests of the elderly and protect human rights, the lower the age is set, the more likely it is that more elderly people

will be protected and human rights will be better protected. From the perspective of maintaining the system of law, the age definition of the elderly in *Criminal Law Amendment (VIII)* should be consistent with other laws as far as possible.

5. Conclusion and Suggestions

5.1 Conclusion

From the above discussion, it can be seen that the legal provisions on the application of death penalty to the elderly in the current criminal law are not perfect, because the starting point for identifying the elderly is improper, that is, the setting of “trial” is improper; the age of the elderly is set too high; the death penalty procedure for the elderly is not perfect. Therefore, the subsequent criminal law should improve these problems.

5.2 Suggestions

5.2.1 Modify the starting age of the elderly

According to the above discussion, the author thinks that the rule that the criterion for judging the application of the death exemption system to the elderly stipulated in the *Criminal Law Amendment (VIII)* is based on the age at the time of trial rather than the age at the time of crime is somewhat inappropriate. If the starting point of the system is set to the age at the time of trial, there is a possibility that elderly criminals will deliberately delay time to avoid criminal prosecution. Compared with the age at the time of trial, the physical, mental and thinking conditions reflected by the age of the elderly at the time of crime, combined with the criminal behavior at that time, can better reveal the subjective malignancy, personal danger and social harm of the elderly at the time of crime, and is more conducive to the judicial organ to make a fair judgment.

5.2.2 Lower the age limit for the application of the death penalty to older persons

In the current relevant laws and regulations promulgated in China, the age of the elderly is generally defined as 70 years old, and the provision of 75 years old in the *Criminal Law Amendment (VIII)* may cause incoherence and confusion in the legal system of our country. In accordance with the average life expectancy of 75.4 years in China in 2020, it is also slightly inappropriate to set the age of 75 years for the elderly to be restricted from applying the death penalty in *Criminal Law Amendment (VIII)*. Although China has not abolished the death penalty at present, lowering the age limit for the elderly to apply the death penalty is also a cater to the trend of “abolishing death”. Of course, China's criminal law for the elderly criminal forgiveness system, is not to condone their continued crime, but from the moral aspect to let them voluntarily restrain their own behavior, self-love and self-respect, so that they feel the state's concern and care for them, more conducive to the realization of the purpose of criminal law. On the whole, the author believes that it is more appropriate to lower the age for the elderly to apply the death penalty to 70 years old. 70 years of age is slightly lower than the average life expectancy in our country, corresponding to other domestic regulations and also easier to be accepted by the public, so the scope of the elderly who can be radiated by this provision can be expanded as much as possible.

5.2.3 Improve the death penalty system for the elderly

As a life sentence, the execution of death penalty includes two ways, the first is the immediate execution of death penalty, and the second is the execution of death penalty with a two-year

reprieve. In the amendment, the law only stipulates that the death penalty should not be applied to the elderly who have reached the age of 75 in principle, and does not clearly state which specific execution methods should be applied to the death penalty here, or the priority of the two execution methods, the author believes that this is not perfect.

In the author's opinion, considering the objective risk of the elderly themselves and from the perspective of protecting human rights, priority can be given to the execution of the death penalty with a two-year reprieve. The specific reasons are as follows:

Firstly, giving priority to the execution of the death penalty with a two-year suspension does not violate the requirement that the death penalty may be applied to the elderly, but also reflects the concern for the elderly and is conducive to safeguarding human rights. Although the death sentence is also classified as the death penalty, it does not deprive the offender of life, so it is much milder than the immediate execution of the death penalty. However, compared with other punishments in the main penalty, the detention time is longer and more severe, so there is no situation of condoning the crime. It can be said that the suspension of the death penalty can strike a balance between the punishment of crime and the protection of human rights. Secondly, older offenders are less likely to reoffend. Due to the poor physical condition of the elderly themselves, organs and tissues will gradually degrade with age. After serving the original sentence, they are likely to reach the age of 80 years old, and the probability of committing a serious crime that can endanger the life and health of others is less. After the death penalty expires, it is either reduced to life or 25 years in prison, and the probability of the elderly criminals committing crimes after serving a longer sentence is even more remote. Therefore, the preferential application of the death penalty generally does not bring security risks to society. Thirdly, the preferential application of a reprieve does not completely exclude the possibility to apply the death penalty being carried out immediately.

As for the problems arising after the two-year suspension of death penalty is converted to life imprisonment or 25 years imprisonment, the author believes that the problems can be solved by means of commutation of sentence and parole. For example, if the elderly sincerely repent, perform well in prison, and objectively have no conditions to commit dangerous crimes again, they can be leniently applied to sentence reduction and parole. It is also possible to improve the management system of prisons, centralize the management of elderly prisoners, and establish special prisons, wards or units(Zhang, 2021). For example, some states in the United States have “sanatorium prisons”, hospice care facilities, and special needs units. In order to better protect the rights and interests of the elderly, and better reflect the criminal policy of combining leniency with severity.

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