

# The Death Penalty and Legal Reform in the PRC

The comprehensive reform of China's criminal law constitutes a key component of the Chinese Communist Party's plan for legal development.<sup>1</sup> Since 1979, lawmakers in China have defined criminal acts and sanctions with increasing sophistication to prevent arbitrariness in arrest and prosecution. The Chinese also have codified criminal procedures to enhance predictability and provide some protection for the accused, and have increased the number of criminal courts, lawyers, and judges to handle this new reliance on an organized criminal justice system.<sup>2</sup>

As the Chinese leadership has attempted to regularize the system of criminal punishment, it has also adopted a very severe policy toward criminals.<sup>3</sup> Campaigns against crime have become a hallmark of China's criminal justice system during the past decade.<sup>4</sup> This

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1. The Eleventh Central Committee of the Party held its Third Plenary Session in December 1978 at which it decided to strengthen the Chinese legal system in order to promote stability, economic modernization and international cooperation. An eight year plan for "legalization" (*fazhihua*) was adopted to develop law, legal institutions and legal education. See S. LENG & H. CHIU, *CRIMINAL JUSTICE IN POST-MAO CHINA* 39 (1986) [hereinafter LENG & CHIU]; Edwards, *An Overview of Chinese Law and Legal Education*, 476 *THE ANNALS OF THE AMERICAN SOCIETY OF SOCIAL AND POLITICAL SCIENCE* 52 (Nov. 1984) [hereinafter Edwards]. See also *China's Socialist Legal System*, BEIJING REV., Jan. 12, 1979, at 25, 30.

Subsequent legislation has produced an impressive array of economic, civil, administrative and procedural laws and regulations. Between 1979 and 1983, the National People's Congress and its Standing Committee, along with the State Council and its ministries and commissions, have enacted or issued approximately 700 laws, decrees and regulations. Leng & Chiu, *supra*, at 58, n.51. See Gellhorn, *China's Quest for Legal Modernity*, 1 *J. CHINESE L.* 1, 8-20 (1987). Virtually every target contained in the eight-year plan for legal development adopted in 1978 has been met on schedule, unlike the delays experienced in similar plans for industrial development. Edwards, *supra*, at 52. The Socialist legal system is to become a "sharp weapon" to safeguard the Four Modernizations because it will maintain and strengthen the stability and unity of the socialist order. Chen Weidian & Zhou Xinming, *Jiaqiang Fazhi Baozhang Anding Tuanjie* (Strengthen the Legal System, Ensure Stability and Unity), 1 *FAXUE YANJIU* (Studies in Law) 35-36 (1980).

2. See generally Peng Zhen, *Explanation on Seven Laws*, BEIJING REV., July 13, 1979, at 3, 8-16 [hereinafter Peng Zhen]; LENG & CHIU, *supra* note 1, at 85-112; Cohen, *Foreword—China's Criminal Code*, 73 *J. CRIM. L. & CRIMINOLOGY* 135, 135-37 (1982). See also *infra* notes 55-94 and accompanying text.

3. See, e.g., Wren, *Crime and Punishment in China*, N.Y. Times, Nov. 20, 1983, at E9, col. 1; Campbell, *China Suddenly Taking a Tougher Line on Crime*, N.Y. Times, Sept. 13, 1983, at A2, col. 3; Sommer, *Chinese Execute 5000 Since Start of Crime Crackdown*, Boston Globe, Nov. 24, 1983, at A42, col. 1.

4. There have been periodic efforts to crack down on various types of criminal activity. In 1981 a campaign against violent crimes was initiated, followed by a drive against economic

severity is also reflected in the increase in the number of capital offenses since 1979<sup>5</sup>; moreover, certain procedures which protected defendants charged with capital crimes have been weakened.<sup>6</sup> Capital punishment appears to be widely used in China today<sup>7</sup> and is generally regarded by the Chinese leadership and people as an effective means to promote stability and, in turn, modernization.<sup>8</sup>

This note illustrates how the widespread use of the death penalty<sup>9</sup> in China today in fact undermines the important objectives of fairness and predictability which have been central to most legal reforms in recent years. The policy of "quickly and severely punishing criminals"<sup>10</sup> runs counter to the spirit of the new criminal laws designed to enhance regularized adjudication and protect against

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crime and corruption in Spring 1982. Note, *Concepts of Law in the Chinese Anti-Crime Campaign*, 98 HARV. L. REV. 1890, 1894-97 (1985) [hereinafter *Concepts of Law*]. The most notable and sustained campaign against crime began in August 1983. See *infra* notes 95-114 and accompanying text.

5. The number of capital offenses under national laws has increased from approximately 15 in 1979 to at least 29 in 1985. See LENG & CHIU, *supra* note 1, at 136. Such numbers are difficult to ascertain, for the legislative acts empowering use of the death penalty are phrased in loose terms. For instance, the death penalty is currently allowed for "[t]hose who intentionally injure the persons of others, causing the person serious injury or death, when the circumstances are odious, or those who commit violence and do injury to state personnel and citizens who accuse, expose or arrest criminal elements and stop criminal conduct." Decision of the Standing Committee of the National People's Congress Regarding the Severe Punishment of Criminal Elements Who Seriously Endanger Public Security (adopted Sept. 2, 1983) (Foreign Language Press trans. 1984) [hereinafter *Decision Regarding Severe Punishment*]. See also *infra* notes 59-72, 104-05 and accompanying text.

6. The appellate review process has been expedited, the time limit for requesting appeal has been shortened, and public exhibitions of convicted capital criminals have been more frequently reported. See *infra* notes 91-94 and 100-02.

7. While no official numbers are available, estimates of the number of executions in China between 1983 and 1986 range from 7,000 to 30,000. See *infra* note 107 and accompanying text.

8. See *Use the Weapon of Law to Crackdown on Criminal Activities*, Renmin Ribao [hereinafter RMRB], June 22, 1981 (Foreign Broadcast Information Service - Daily Report: China [hereinafter FBIS] trans. June 23, 1981, at K-2).

9. Discussion is limited to those executions carried out by the state under statutory authority. According to human rights analyses of China, there is little evidence of unofficial executions or disappearances. See, e.g., DEPARTMENT OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1985, 738 (1986) [hereinafter DEPARTMENT OF STATE REPORT, 1986]; DEPARTMENT OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1986, 684 (1987) [hereinafter DEPARTMENT OF STATE REPORT, 1987]; AMNESTY INTERNATIONAL, CHINA: VIOLATIONS OF HUMAN RIGHTS, 1-2 (1984) [hereinafter AI-1984]; J. SEYMOUR, I CHINA RIGHTS ANNALS (1985) [hereinafter SEYMOUR]. Such issues are outside the scope of this note.

10. *Cong kuai cong yan*, from DENG XIAOPING, SELECTED WORKS 358 (1983) [hereinafter DENG XIAOPING]. While quickly and severely punishing criminals has been endorsed, the authorities have repeatedly insisted that the policy should be applied strictly according to law. See *Deal Heavy and Quick Blows to Serious Criminal Offenders According to Law*, RMRB, June 25, 1981 (FBIS trans. June 30, 1981, at K-21-25) [hereinafter *Deal Heavy Blows*].

erroneous judgments. This note does not argue for the abolition of the death penalty in China. Rather, it details the scope of capital punishment in China and highlights issues which must be explored if the death penalty is to comport rationally with other current legal reforms.

The first section of this note reviews both the historical and current use of the death penalty in China. The second section examines the legal and political justifications for the use of capital punishment in China today. The final section analyzes the widespread use of the death penalty in the context of China's current legal reforms.

Methodological qualifications must first be noted. No comprehensive public PRC government report concerning the death penalty in China is available,<sup>11</sup> nor are criminal proceedings recorded in a manner that facilitates gathering such information.<sup>12</sup> Therefore, reports of executions and estimates of the scope of the practice have been gleaned from Chinese and foreign press reports.<sup>13</sup> More statistics and information on capital punishment will hopefully become available in the future.

## I. BACKGROUND: CAPITAL PUNISHMENT IN CHINA

Capital punishment in contemporary China must be viewed in the light of three historical forces: (1) the legacy of the imperial period, (2) the impact of foreign legal concepts imported over the past century, and (3) the ideology of Maoism.<sup>14</sup>

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11. Occasionally officials provide local statistics on the scope of the practice. See LENG & CHIU, *supra* note 1, at 131-41. Most of the available research on the death penalty in China is the work of foreign observers. See, e.g., Department of State, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1983, 741-42 (1984), and AMNESTY INTERNATIONAL, THE DEATH PENALTY (1979) [hereinafter AI-1979]. Amnesty International's data and scholarship must be seen in light of one of the organization's three primary goals: the abolition of the death penalty. *Id.* at 2. Amnesty International criticizes the death penalty on three grounds: (1) for the inherent unacceptability of killing humans; (2) as a cruel, inhuman, and degrading punishment; and (3) for the procedural abuses which often accompany executions. *Id.*

12. China has only recently instituted a haphazard system of reporting some judicial cases in higher-level courts. At present, no systematic reporting service is publicly available for Intermediate-level People's Courts, where most capital cases are heard.

13. The press reports cited in this note have been either dispatched by Western language reporting services or translated from the Chinese Press by FBIS. See, e.g., *supra* note 8. Reports directly from the Chinese press are used only occasionally.

It is difficult to establish a pattern among these reports of executions to distinguish which death sentences merited publicity, other than to note the extensive press coverage of cases involving well-known defendants or important questions of Party or state policy.

14. See Edwards, *supra* note 1, at 49; LENG & CHIU, *supra* note 1, at 7-9. Leng & Chiu conclude that the contemporary Chinese derive their basic concepts of law and justice from Marxist-Leninist ideology and the Soviet system, rather than from traditional Chinese attitudes.

### A. Imperial China

Throughout imperial China, the death penalty was statutorily authorized for heinous crimes and was frequently used.<sup>15</sup> While the frequency of application of the death penalty in imperial times is not generally ascertainable,<sup>16</sup> three aspects of the imperial death penalty have enduring relevance for an analysis of the contemporary practice: (1) the codes of each dynasty carefully defined capital crimes and procedures for their adjudication; (2) the repercussions of the death penalty on social and religious harmony weighed heavily in the determination of the time, place and method of punishment; and (3) procedural limitations placed on the employment of the death penalty reduced the general severity of the codes and provided some protection for defendants.

The various dynastic codes sanctioned capital punishment for many crimes.<sup>17</sup> Furthermore, the codes included elaborate formulae to calculate mitigating or incriminating circumstances which could alter the penalties imposed.<sup>18</sup> This gradation was premised on the notion that punishment should correspond to the seriousness of the offense, as determined by its repercussions on universal harmony;<sup>19</sup> it

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15. While the Confucians advocated *li* (social righteousness) over *fa* (law) and felt that ideally no criminal sanctions should be necessary, severe penalties were still applied to those who proved unresponsive to *li*. J. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA: 1949-1963*, 5 (1968) [hereinafter *CRIMINAL PROCESS*]. Tradition dates the first public execution in a Chinese State as early as B.C. 2601. E. ALABASTER, *NOTES AND COMMENTARIES ON CHINESE CRIMINAL LAW* 52 (1899) [hereinafter *NOTES AND COMMENTARIES*]. However, no authorization for capital punishment was evident in the earliest recorded criminal law in China, inscribed in the State of Zheng in B.C. 1536. D. BODDE & C. MORRIS, *LAW IN IMPERIAL CHINA* 16 (1967) [hereinafter *BODDE & MORRIS*]. By the time of the Han Dynasty (B.C. 206 - 220 A.D.), the death penalty had been codified as one of the *wu xing*, the five major categories of criminal punishment. *NOTES AND COMMENTARIES*, *supra*, at 54.

16. Some estimates for specific historical periods are available. For example, Ichisada Miyazaki estimates that approximately 2000 people were executed each year during the Sung Dynasty (960 - 1279). Miyazaki, *The Administration of Justice During the Sung Dynasty*, in *ESSAYS ON CHINA'S LEGAL TRADITION* 56, 69 (J. Cohen, R. Edwards, and F. Chen eds. 1980) [hereinafter *Cohen, Edwards & Chen*].

17. Recorded cases indicate that homicide, bribery, sexual offenses and treason were among the offenses punished by death. See Chen, *The Influence of Shen Chih-ch'i's Chi-chu Commentary Upon Ch'ing Judicial Decisions* in Cohen, Edwards & Chen, *supra* note 16, at 174, 196. See also *THE T'ANG CODE* 59-61 (W. Johnson trans. and ed. 1979) [hereinafter *THE T'ANG CODE*].

Shen Chia-pen, *Ssu-hsing Chih Shu* (The Figures for the Death Penalty) from *Bequeathed Writings* at 532-33, in BODDE & MORRIS, *supra* note 15, at 102, enumerates the offenses punishable by death in various dynastic codes: Tang - 233, Song - 293, Yuan - 135, Ming - 282, and Qing - 813. Bodde & Morris conclude that the Qing lawmakers must have categorized crimes more narrowly than the drafters of other dynastic codes.

18. See BODDE & MORRIS, *supra* note 15, at 100-02.

19. M. MEIJER, *THE INTRODUCTION OF MODERN CRIMINAL LAW IN CHINA* 5-6 (1949) [hereinafter *MEIJER*].

had the effect of infusing some fairness and predictability into criminal adjudications.

Fundamental cultural values were considered in the adjudication of criminal cases.<sup>20</sup> The method of execution — decapitation, strangulation, or slicing — was determined not primarily with reference to the amount of pain the convict would suffer, but rather with reference to its impact on the criminal's "soul" after death.<sup>21</sup> Reflecting prevailing social mores, the imperial codes generally prohibited the death penalty for the mentally or physically disabled, minors and the elderly, "sole representatives" (only sons), and criminals in other special categories.<sup>22</sup>

The frequent review of cases at higher levels provided some safeguards for the individual defendant. There were generally two categories of death penalties: those for which the death sentence was carried out immediately,<sup>23</sup> and those subject to approval at a higher level.<sup>24</sup> The reviewable cases were memorialized to either the Emperor or the Board of Punishment. The reviewing authorities weighed the circumstances of the crime and characteristics of the criminal according to criteria established by codes and practice.<sup>25</sup>

Generally, the imperial codes were less concerned with the defendant's individual rights than with imperial interests, such as maintaining social stability and enhancing the power of the ruling class and ideology. Therefore, a significant goal of sentencing in early criminal codes was punishment. Some concern for criminal defendants — at least their right to have cases reviewed to prevent erroneous judgments — is also well-rooted in Chinese criminal justice.<sup>26</sup>

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20. For instance, since all law was considered subordinate to the movements of nature, executions were generally restricted to autumn and winter, the time of cold and darkness, and prohibited during spring and summer, the periods of heat and light. See BODDE & MORRIS, *supra* note 15, at 44. See also THE T'ANG CODE, *supra* note 17, at 14.

21. For instance, strangulation, while more painful than decapitation, was appropriate for less severe crimes. Confucianism taught that one's body was a bequest from one's parents; therefore, mutilation of the body was unfilial. Furthermore, if execution left the executed man's body destroyed, his spirit was also no longer intact and could not be disruptive in the future. This idea was taken to great lengths in the punishment of slicing, often applied after a convict's death. Since the defendant's body was no longer identifiable, slicing destroyed the future as well as the present life of the defendant. BODDE & MORRIS, *supra* note 15, at 92.

22. E. ALABASTER, NOTES ON CHINESE LAW, LAW AND PRACTICE PRECEDING REVISION 39, 40 (1906) [hereinafter NOTES ON CHINESE LAW].

23. Generally, for "serious crimes" punishable by strangulation or decapitation, and for all crimes punishable by death by slicing. BODDE & MORRIS, *supra* note 15, at 134.

24. For "less serious crimes" punishable by strangulation or decapitation. *Id.*

25. *Id.* at 131-143; MEIJER, *supra* note 19, at 28-31. The defendant, however, had no independent representation; only state authorities participated in the adjudication process. See CRIMINAL PROCESS, *supra* note 15, at 7.

26. For a detailed discussion of how the pervasive Confucian ethic invoked humanitari-

Furthermore, the dynastic codes themselves recognized the severity of the death penalty and made various exceptions to its application. Though this highly regularized imperial system has never been duplicated, its influence is evident in post-imperial China's use of capital punishment.

## B. 1911-1949

In the turbulent years between the fall of the Qing Dynasty in 1911 and the founding of the PRC in 1949, competing forces in China controlled different regions of the country at different times, each attempting to enforce its own system of criminal justice. The use of the death penalty during this period is therefore difficult to uniformly describe. It was undoubtedly used by the various factions for political purposes, in order to consolidate and enhance the power of their authority and to insure compliance with their policies.<sup>27</sup> The criminal justice systems of the Nationalists (1912-1949) and the Communists (1927-1949) are touched upon below. Despite their differences, both Parties looked outside traditional China for legal models for their new governments.

### 1. The Nationalists

Even before the fall of the Qing Dynasty in 1911, reformers were attempting to restructure China's criminal law, including the use of the death penalty.<sup>28</sup> After the Nationalists consolidated a measure of power in the late 1920s, the authorities followed Japan's lead in emulating European criminal justice systems.<sup>29</sup> The Nationalist government succeeded in creating a system of modern legal codes, procedural codes, and law courts.<sup>30</sup>

The application of the new criminal procedures was never fully realized. Often courts were inaccessible and judges incompetent; in addition, authorities outside the judiciary frequently interfered.<sup>31</sup> For

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anism into the Chinese use of the death penalty, see Kim & LeBlang, *The Death Penalty in Traditional China*, 5 GA. J. INT'L & COMP. L. 77 (1975).

27. CRIMINAL PROCESS, *supra* note 15, at 7.

28. A Law Codification Commission was established in 1902 to modernize the Qing Code. These efforts at codification continued into the 1930s. See Michael, *The Role of Law in Traditional, Nationalist and Communist China*, 9 CHINA Q. 133 (1962) [hereinafter Michael]. The Commission recommended more uniform application of the death penalty and that executions not be public. For the Commission's report, see MEIJER, *supra* note 19, at 193-95.

29. CRIMINAL PROCESS, *supra* note 15, at 7.

30. Michael, *supra* note 28, at 133. In the early 1930s, the Nationalist government promulgated a complete set of new laws based on European models known as the Six Codes. Among these six codes was a Criminal Code and a Criminal Code of Procedure. See S. LENG, JUSTICE IN COMMUNIST CHINA i, xv (1967) [hereinafter LENG].

31. CH'EN TUAN-SHENG, THE GOVERNMENT AND POLITICS OF CHINA 249 (1950).

instance, the Nationalist Minister of Public Security wielded broad powers of arrest, detention, and sentencing,<sup>32</sup> and the actions of the military were often outside legal order.<sup>33</sup> Even in times of relative stability when martial law was not in force, Chinese newspapers frequently reported arrests and executions without any reference to formal court procedure.<sup>34</sup> The extent of such executions and the degree to which formal procedures regulated them is unascertainable, particularly due to the complete disarray of the Nationalists' criminal justice system during the war against Japan and the civil war.

## 2. The Pre-PRC Communists

In their earliest days, the Chinese Communists also struggled to find an appropriate model of criminal law, borrowing heavily from the Soviet Union.<sup>35</sup> The Communists' ability to experiment with judicial process, however, was severely limited by their own internal weaknesses and their security needs vis-à-vis the Nationalists, the Japanese and foreign powers unsympathetic with their cause. It was not until the early 1940s that the Communists' criminal justice system really began to operate.

The pre-PRC Communist criminal justice system fluctuated between a regularized process with courts and procuracies attempting fairly to mete out justice in a new society, and a revolutionary judicial system characterized by informal mediation, mass trials, retributive justice, and frequent summary executions.<sup>36</sup> During the turbulent 1940s, the Communists leaned heavily toward the latter, more populist and flexible, method for social control as they worked to bring about rapid political, economic and social transformation at every level of Chinese life.<sup>37</sup> One illustration of this situation is that the Public Security Bureau coordinated much of the judicial activities and

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32. LENG, *supra* note 30, at xv. See Michael, *supra* note 28, at 134.

33. Michael, *supra* note 28, at 134.

34. *Id.*

35. CRIMINAL PROCESS, *supra* note 15, at 7; LENG, *supra* note 30, at 2-5; Michael, *supra* note 28, at 135.

36. LENG & CHIU, *supra* note 1, at 11. The course and degree of this fluctuation were generally determined by the intensity of revolutionary struggle at a given time. *Id.*

Victor Li describes a similar bifurcated framework for the larger Maoist legal system between the "external," more formalized legal process, and the "internal" system, in which continuing education strives to internalize socially accepted values and norms. See V. LI, CHINA: MANAGEMENT OF A REVOLUTIONARY SOCIETY 219-224 (1971). See also Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CAL. L. REV. 1284, 1325-37 (1968).

37. In guerilla areas judicial organs often did not exist; instead, "law" was determined by the current political demands of the leadership. Mao Zedong favored this informal and flexible approach to criminal justice. LENG & CHIU, *supra* note 1, at 11.

carried out many of the sentences.<sup>38</sup> The policies of eliminating counterrevolutionaries and improving the security of Chinese Communist rule therefore resulted in numerous executions.<sup>39</sup>

### C. PRC: 1949 - 1978

Capital punishment has been used regularly since the founding of the PRC. Although Mao Zedong advocated cautious application of the death penalty,<sup>40</sup> thousands of executions took place in the 1950s and 1960s.<sup>41</sup>

Under Mao, the Communist government abolished all of the Nationalist laws and judicial organs, but never enacted comprehensive codes of substantive and procedural criminal law. Instead, criminal sanctions were authorized by hundreds of overlapping laws, regulations, and decrees of various kinds, many in experimental or provisional form, promulgated by a variety of legislative and administrative bodies.<sup>42</sup> For example, the General Rules for the Organization of People's Tribunals promulgated in July 1950 set forth rules for approving the death penalty for local despots, bandits, secret agents,

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38. *Id.*

39. P. GRIFFIN, *THE CHINESE COMMUNIST TREATMENT OF COUNTERREVOLUTIONARIES, 1924-1949*, 15 (1976).

40. In his famous address, "The Ten Major Relationships," delivered on April 25, 1956, Mao Zedong stated: "Once a head is chopped off, history shows it cannot be restored, nor can it grow again as chives do, after being cut." MAO ZEDONG, 5 *SELECTED WORKS OF MAO ZEDONG* 299-300 (1977). This comment was in particular reference to the danger of false arrests in the campaigns to suppress counterrevolutionaries in Party and government organs, schools and army units, and was not addressed to common criminals in society at large. See J. STARR, *CONTINUING THE REVOLUTION: THE POLITICAL THOUGHT OF MAO* 243 (1979) [hereinafter STARR]; AI-1984, *supra* note 9, at 76. For a discussion on Maoist ideology and its relationship to the death penalty, see *infra* notes 128-31 and accompanying text.

In his report to the Party Congress in 1956, Liu Shaoqi also urged sparing use of the death penalty and called for its gradual abolition in China. See *The Political Report of the Central Committee of the Communist Party of China to the Eighth National Congress of the Party*, I EIGHTH NATIONAL CONGRESS OF THE COMMUNIST PARTY OF CHINA 83-84 (1956), in LENG, *supra* note 30, at 167.

41. CRIMINAL PROCESS, *supra* note 15, at 10. No count of the total number of executions from 1949 to 1979 is available. According to unofficial excerpts of Mao's February 27, 1957 speech on "Problems Relating to the Correct Handling of Contradictions Among the People," "the total number of those [enemies of the people] who were liquidated by our own security forces numbers 800,000. This is the figure up to 1954." N.Y. Times, June 13, 1957, at 8. The official and amended Chinese text of the speech which was later published mentions that "some" counterrevolutionaries were sentenced to death. CRIMINAL PROCESS, *supra* note 15, at 10, n.17.

But see LENG, *supra* note 30, at 167 stating in 1967 that the number of executions appeared relatively small compared to earlier years of the PRC; he cites E. SNOW, *THE OTHER SIDE OF THE RIVER* 353 (1960), estimating that executions in 1960 ranged from eight to twelve per month.

42. 1488 such laws, regulations and decrees were promulgated from 1949 to 1963. LENG & CHIU, *supra* note 1, at 21.



counterrevolutionaries and criminals who resisted land reform laws and decrees.<sup>43</sup> In 1952, the Instructions Relating to the Suppression of Counterrevolutionary Activity prescribed authority to approve the death penalty for criminals found guilty of counterrevolution, crimes of corruption, or theft.<sup>44</sup>

As the Party struggled during the mid-1950s to determine the correct model of political organization and revolution, some attempts were made to regularize criminal procedures and provide limited protection for defendants.<sup>45</sup> "Legal advisor's offices" were established and legal advisors or lawyers began to play a role in the society.<sup>46</sup> Efforts to codify a comprehensive criminal law were notable in this period; by 1957 more than twenty drafts had been produced.<sup>47</sup>

Despite these serious attempts to establish a systematic socialist legal order, the PRC's first three decades were generally characterized by a lack of stability in legal matters. The Party sponsored numerous "mass mobilization campaigns" designed to eradicate social problems and to progress toward revolutionary goals.<sup>48</sup> These campaigns eschewed formal criminal adjudication procedures, organs and defenses, and instead of primarily relying on law, emphasized revolutionary justice and "mass-line" populism. A mob mentality often led to spontaneous violence and unauthorized executions.<sup>49</sup>

For example, during the Anti-Rightist Campaign of 1957 many of the formal aspects of the legal system were disregarded. Criminal sanctions were generally determined and enforced by Party committees and the Public Security organs.<sup>50</sup> The Cultural Revolution of

43. CRIMINAL PROCESS, *supra* note 15, at 536.

44. *Id.* Other acts authorizing capital punishment include the 1951 States Secret Act and the 1951 Act for the Punishment of Counterrevolutionaries. On the basis of this latter Act, almost daily mass executions were reported to have taken place in the first stage after its publication. Michael, *supra* note 28, at 142.

45. In discussing the tension between institutionalized and revolutionary criminal law, Leng & Chiu use the terms "jural" and "societal" models. While the jural model was in the ascendancy briefly in the 1950s, the societal model of justice prevailed during most of the 1949-1976 period. LENG & CHIU, *supra* note 1, at 13, 16-20.

46. Edwards, *Preface*, 1 J. CHINESE L. i, ii (1987). See Leung, *The Re-emergence of the Legal Profession in the People's Republic of China*, 6 N.Y.L. SCH. J. INT'L & COMP. L. 275, 276 (1985).

47. LENG & CHIU, *supra* note 1, at 15. The efforts in the mid-1950s in many ways parallel the legal reform underway in China today.

48. Examples of these *yundong*, mass mobilization campaigns, include the Land Reform Movement, Five Antis, Three Antis, Socialist Education Movement, and the numerous campaigns comprising the ten-year Great Proletarian Cultural Revolution. For a general discussion of campaign methodology and impact, see G. BENNETT, *YUNDONG: MASS CAMPAIGNS IN COMMUNIST CHINESE LEADERSHIP* (1976).

49. See, e.g., HONG YONG LEE, *THE POLITICS OF THE CULTURAL REVOLUTION* (1978).

50. LENG, *supra* note 30, at 122-23. See GRIFFIN, *supra* note 39, at 20-30.

1966-1976 continued the ascendancy of class justice, party rule, and the discretionary nature of criminal sentencing; virtually no safeguards were available for those accused of crimes or inappropriate political activities.<sup>51</sup>

Unpredictability was a central feature of the Chinese criminal justice system throughout the 1960s and 1970s. Campaigns and formal criminal justice were used in tandem, but the former often overwhelmed the latter. Capital punishment was widely used to control political and social life through its use for both political and non-political crimes.<sup>52</sup> Harsh criminal sanctions were often rationalized as "killing a chicken to scare monkeys,"<sup>53</sup> or in official vernacular, "frighten the enemy and support the class struggle of the masses."<sup>54</sup> The chaos of the era prevents any systematic understanding of the use of capital punishment at that time, but the number of executions was undoubtedly large and the safeguards minimal. The havoc in Mao's criminal justice system set the stage for reform in the late 1970s.

#### D. 1978 - the Present

##### 1. Criminal Law and Criminal Procedure Law

Following the mandate of the 1978 Third Plenary Session of the Eleventh Party Congress to achieve greater stability in society through the law, the National People's Congress adopted a comprehensive criminal law<sup>55</sup> and criminal procedure law.<sup>56</sup> These acts codified a hybrid of new provisions and existing criminal laws;<sup>57</sup> they significantly enhanced the predictability and fairness of the PRC's criminal justice system.<sup>58</sup>

51. HONG YONG LEE, *supra* note 49, at 290-93. See Wu Jianfan, *Building New China's Legal System*, CHINA'S LEGAL DEVELOPMENT 13-14, 25-28 (J. Oldham ed. 1986).

52. AI-1979, *supra* note 11, at 73-77. See Douglas, *Death Penalty Chinese Style*, TRIAL, Feb. 1977, at 44-46 [hereinafter Douglas].

53. LENG & CHIU, *supra* note 1, at 25.

54. Hsieh Chueh-tsai's report on the work of the Supreme People's Court in RMRB, Jan. 1, 1965, in LENG, *supra* note 30, at 168, n.80.

55. The Criminal Law of the People's Republic of China (promulgated July 1, 1979) (Foreign Languages Press trans. 1984) [hereinafter Criminal Law].

56. The Criminal Procedure Law of the People's Republic of China (promulgated July 1, 1979) (Foreign Languages Press trans. 1984) [hereinafter Criminal Procedure Law].

57. Most crimes codified in the Criminal Code were punishable under earlier acts, regulations or decrees. See *supra* notes 42-44 and accompanying text.

58. For discussion of these laws, see Peng Zhen, *supra* note 2; *The New Criminal Law and the Law of Criminal Procedure*, BEIJING REV., Aug. 17, 1979, at 16-22 [hereinafter *The New Criminal Law*]; Koeltl, *Civil Rights and Liberties in China* 46 ALBANY L. REV. 746 (1982); Epp, *The New Code of Criminal Procedure in the People's Republic of China*, 8 INT'L J. COMP. & APPLIED CRIM. JUST. 43 (1984); Fox, *Structure of the Criminal Prosecution and Trial Process in the People's Republic of China*, 16 AUST. & N.Z. J. CRIMINOLOGY 133 (1983).

The Criminal Law provides for the death penalty by firing squad<sup>59</sup> for "criminal elements who commit the most heinous crimes."<sup>60</sup> The law also allows the imposition of the death penalty for certain "crimes of counterrevolution . . . when the harm to the state and the people is especially serious and the circumstances especially odious."<sup>61</sup> These counterrevolutionary crimes include colluding with foreigners to jeopardize China's sovereignty or security,<sup>62</sup> plotting to subvert the government,<sup>63</sup> bribing the police or armed forces,<sup>64</sup> committing treason,<sup>65</sup> gathering a mob to storm prisons or organize jail-breaks,<sup>66</sup> and committing espionage.<sup>67</sup> Other provisions of the criminal code permit the death penalty for serious violations of public security, which include setting fires or breaching dikes,<sup>68</sup> and sabotaging transportation or utility installations, thereby causing serious consequences.<sup>69</sup> In addition, the Criminal Code provides for the death penalty for such crimes as homicide,<sup>70</sup> rape "when the circumstances are especially serious or a person's injury or death is caused,"<sup>71</sup> and robbery resulting in death or serious injury.<sup>72</sup> The Criminal Procedure Law also contains provisions relevant to the death penalty. The law mandates that the court of first instance for capital crimes be an Intermediate-level People's Court or higher.<sup>73</sup>

In general, the two laws introduced greater predictability and fairness into criminal sentencing by regularizing the proceedings for capital crimes and by providing limited procedural protection to safeguard the rights of the defendant.<sup>74</sup> This note highlights four features of this legislation which have significant impact on capital punishment: (1) the suspended death sentence; (2) the limitations on the death sentence; (3) the right to and procedures for appeal; and (4) the prohibition of public humiliation of convicted criminals.

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59. Criminal Law, *supra* note 55, art. 45. Shooting the kneeling convict through the back of the head has been the method of execution used throughout the history of the PRC.

60. *Id.* art. 43.

61. *Id.* art. 103.

62. *Id.* art. 91.

63. *Id.* art. 92.

64. *Id.* art. 93.

65. *Id.* art. 94.

66. *Id.* art. 96.

67. *Id.* art. 97.

68. *Id.* art. 106.

69. *Id.* art. 110.

70. *Id.* art. 132.

71. *Id.* art. 139.

72. *Id.* art. 150.

73. Criminal Procedure Law, *supra* note 56, art. 15.

74. See Peng Zhen, *supra* note 2.

### a. *Suspended Death Sentence*

Since the earliest days of the PRC, the *sihuan zhidu*, "death sentence with a reprieve," has been granted in some capital cases<sup>75</sup> and is now codified in the Criminal Law and Criminal Procedure Law.<sup>76</sup> Capital offenders receiving a suspended death sentence have their execution suspended for two years to be served at hard labor. If the prisoner demonstrates evidence of reform over the two years, the sentence may be commuted to life or fixed-term imprisonment.

The standards for evaluating the behavior of a prisoner under a two-year reprieve are not statutorily defined. Generally prison officials make recommendations to the appropriate Intermediate-level or Supreme People's Court, which then makes the final determination.<sup>77</sup> The majority of sentences of death with a two-year suspension are later commuted to life or lesser terms of imprisonment.<sup>78</sup>

Some Chinese consider the suspended death sentence a unique feature of their criminal justice system as well as evidence of China's efforts to reform convicts.<sup>79</sup> Others have criticized the procedure: the possibility of execution may torment the convict for many years because the two-year suspension can be indefinitely renewed,<sup>80</sup> and the execution of criminals who have waited two or more years with hope of reprieve may be considered inhumane.<sup>81</sup>

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75. The policy of "suspension of death for two years" was first explained in RMRB on June 1, 1951. The first legal provision mentioning the two-year suspended death sentence was in the Regulations for Dealing with Cases of Corruption, Waste and Bureaucracy (promulgated March 8, 1952). LENG, *supra* note 30, at 167, n.78. See CRIMINAL PROCESS, *supra* note 15, at 537.

76. Criminal Law, *supra* note 55, art. 46; Criminal Procedure Law, *supra* note 56, art. 153.

77. See AI-1984, *supra* note 9, at 64; CRIMINAL PROCESS, *supra* note 15, at 537.

78. *A Talk on Capital Punishment*, RMRB, Feb. 25, 1980 (FBIS trans. Feb. 29, 1980, at L-13). The article claims the criminals had been successfully remolded into "new men and women."

The best known recipients of the two-year reprieve have been Jiang Qing (Mao's widow) and Zhang Chunqiao, both members of the "Gang of Four." After a widely-publicized trial for counterrevolutionary offenses, they were given suspended death sentences in 1981. Their sentences were commuted to life imprisonment by the Supreme People's Court in 1983. See A GREAT TRIAL IN CHINESE HISTORY (New World Press ed. 1981); D. BONAVIA, VERDICT IN BEIJING (1984); Cheng, *Robes of Justice Sit Uneasily on Gang of Four Judges*, Asian W.S.J., Nov. 28, 1980, at 4.

79. *Lun Woguode Sihuan Zhidu* (Discussion of Death Sentence with Reprieve), 4 FAXUE YANJIU 59 (1986).

80. For instance, a group of Western visitors to a Chinese prison in 1979 interviewed a randomly selected prisoner who was sentenced to death with a two-year reprieve at age 16 for gang homicide, and was on his third such reprieve. Interview with participants of the Columbia Law School Faculty Study Tour, June 1979, which visited three Chinese prisons.

81. AI-1984, *supra* note 9, at 64. The Chinese have been sensitive to such criticism. As early as 1958, Lu Riuqing, Minister of Public Security, stated: "Imperialists have denounced

*b. Limitations for Pregnant Women and Minors*

Article 44 of the current Criminal Law prohibits capital punishment for pregnant women and children under eighteen years of age. These restrictions constitute the only statutory exemptions from capital punishment based on group affiliation. This rule has existed since the 1950s or earlier,<sup>82</sup> and there is no evidence suggesting that these provisions have been violated. An exception, however, provides that "a person between 16 and 18 years of age who has committed a particularly serious offense may be sentenced to death with a two-year reprieve."<sup>83</sup>

*c. Appellate Review*

The Criminal Procedure Law, as it was first enacted,<sup>84</sup> allowed convicted defendants one appeal to a higher-level court within ten days of the conviction.<sup>85</sup> Appeals of criminal sanctions have become quite frequent.<sup>86</sup> Article 137 of the Criminal Procedure Law provides that the reviewing court may not increase the penalty in adjudicating cases appealed by a defendant. If the prosecutor also appeals, however, then the appellate court can impose a more severe sanction. There is no evidence in recent years of an appellate court applying the

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this [two-year suspended death penalty] as the greatest cruelty. We say that this is the greatest humaneness." RMRB, Sept. 28, 1959, at 3, in *CRIMINAL PROCESS*, *supra* note 15, at 539.

82. See *Tan Sixing* (A Talk on the Death Penalty), 1 FAXUE YANJIU 30 (1980) [hereinafter *Talk on the Death Penalty*]. The Ministry of Justice approved the reply of the Department of Justice of the former East China Military Government Council to the People's County of Fujian Province Relating to the Methods for Sentencing Pregnant Women to Death for Pronouncement of Execution of Sentence. See *CRIMINAL PROCESS*, *supra* note 15, at 538.

This prohibition is far more limited than the group-based exemptions from capital punishment afforded by the imperial codes. See *supra* note 22 and accompanying text.

This limitation is consistent with Article 6(5) of the International Covenant on Civil and Political Rights, to which the PRC is not a signatory. See *infra* notes 184-86 and accompanying text. See also AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE DEATH PENALTY 74 (1987) [hereinafter *AI-US*]; Hartman, *The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655 (1986) [hereinafter *Hartman*].

For a discussion of the treatment of juvenile offenders, see Feinerman, *The Disposition of Cases Involving Juvenile Delinquents in the People's Republic of China*, 4 PAC. BASIN L. J. 1 (1985).

83. Criminal Law, *supra* note 55, art. 44.

84. Subsequent amendments have significantly changed this process. See *infra* notes 100-05 and accompanying text.

85. Criminal Procedure Law, *supra* note 56, art. 129.

86. In his report to the National People's Congress in December 1981, Jiang Hua, then President of the Supreme People's Court, claimed that the courts at all levels handled more than 240,000 appeals of criminal cases from October 1980 to September 1981. RMRB, Dec. 12, 1981, at 3, in *LENG & CHIU*, *supra* note 1, at 108.

death sentence in the case of an appeal of a less-severe punishment.<sup>87</sup>

The Criminal Procedure Law also provided that if the defendant did not appeal, a death sentence passed by an Intermediate-level People's Court would be automatically reviewed and approved by the Supreme People's Court.<sup>88</sup> This provision was designed to protect against erroneous or unfair judgments.<sup>89</sup> The degree to which automatic review by a higher court results in the reduction or reversal of the death penalty is unknown.<sup>90</sup>

#### *d. Public Rallies*

The Criminal Procedure Law also provides, "Execution of sentences of death shall be publicly announced but shall not take place in public view."<sup>91</sup> This provision has had no impact on the practice of holding public rallies during which sentences are announced and criminals are paraded through the streets or in public stadiums, often immediately prior to their executions. For example, on September 14, 1986, over 10,000 people were reported to have gathered at a rally in Lhasa where an Intermediate-level Court reiter-

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87. See LENG & CHIU, *supra* note 1, at 108.

88. Criminal Procedure Law, *supra* note 56, arts. 144-46. These provisions have been amended by subsequent National People's Congress Standing Committee decisions. See *infra* notes 100-05 and accompanying text.

Originally, art. 144 stated that the death sentence shall be approved by the Supreme People's Court.

Art. 145 stated that if an Intermediate-level People's Court as the court of first instance renders a death sentence and the defendant does not appeal, then the case should, after review by a higher people's court, be reported to the Supreme People's Court for approval. If in the course of review the higher people's court does not approve the death sentence, it may transfer the case to the higher people's court for adjudication or remand the case for retrial.

If a higher people's court as the court of first instance renders a death sentence and the defendant does not appeal or if it renders a death sentence as a court of second instance, the case should be reported to the Supreme People's Court for approval.

Art. 146 stated that an automatic review and approval by a higher court is also mandated for a death sentence after a two year reprieve.

The high-level review of death sentences dates to imperial times. See *supra* notes 23-25 and accompanying text. Review of death sentences by the Supreme People's Court in the PRC was originally adopted in a National People's Congress resolution on July 15, 1957. LENG & CHIU, *supra* note 1, at 157, n.22.

89. See LENG & CHIU, *supra* note 1, at 108. Press coverage of capital cases during the first two years following the promulgation of the Criminal Procedure Law indicates appellate review usually occurred.

90. No court recording system is available to indicate the number of reversals on appeal. Amnesty International claims that reversals of death sentences are rare. AI-1984, *supra* note 9, at 68.

91. Criminal Procedure Law, *supra* note 56, art. 155. It must be noted, however, that this provision has also been translated as follows: "[T]he execution of a death sentence should be announced, but the condemned should not be exposed to the public." LENG & CHIU, *supra* note 1, at 232. If this translation is interpreted literally, this provision has been frequently violated in recent years during the numerous public sentencing rallies discussed *infra*.

ated the sentences imposed on fourteen criminals for crimes ranging from murder to possession of firearms. One of the criminals was executed the same day.<sup>92</sup> In January 1986, over 200,000 people at 150 assembly sites in Shenyang were reported to have listened to the live relay of a rally at the provincial stadium where the death sentences of fourteen criminals were announced.<sup>93</sup> It is important to note, however, that there have been no substantiated reports of public executions since the new Criminal Law went into effect.<sup>94</sup>

## 2. Anti-Crime Campaigns

In the 1980s, the Chinese leadership initiated numerous campaigns to combat crime.<sup>95</sup> A drive against violent crimes and crimes committed by unemployed youths was initiated in 1981; economic crimes were highlighted during a crackdown in 1982; and the most comprehensive, harsh, and enduring drive, the Anti-Crime Campaign, began in August 1983.<sup>96</sup> Police and military personnel apprehended tens of thousands of people during the first three months of the 1983 Campaign and executed thousands.<sup>97</sup> Rallies attracting up to 100,000 people at which criminal sentences were announced were widely publicized in the press and on television.<sup>98</sup> Enormous propaganda efforts also characterized the drives against crime; the press and billboards reported hundreds of arrests and executions, and denounced criminality and other social ills.<sup>99</sup>

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92. Lhasa Service, Sept. 14, 1986 (FBIS trans. Sept. 18, 1986, at Q-1) [hereinafter Lhasa Service].

93. Shenyang Liaoning Service, Jan. 30, 1986 (FBIS trans. Feb. 4, 1986, at S-8).

94. An editorial report from Hong Kong reported that on Nov. 17, 1979, Beijing Television Service broadcast the sentencing rally and execution of a rapist in Hangzhou (FBIS trans. Dec. 6, 1979, at L-9-10).

95. In 1983, Standing Committee Chairman Peng Zhen said the campaign against crime would enable China to return to the standard of social order it had enjoyed during the late 1950s and early 1960s. See LENG & CHIU, *supra* note 1, at 136.

96. See *supra* note 4. There has been some debate as to the political origins of the 1983 Anti-Crime Campaign. Some scholars think the movement was unanimously supported by the leadership as a way to curb the crime wave which followed the chaos of the Cultural Revolution when the institutional constraints of the formal legal system proved inadequate. See *Concepts of Law*, *supra* note 4, at 1896-97; LENG & CHIU, *supra* note 1, at 131-39. The Anti-Crime Campaign has also been viewed as a continuing manifestation of the party's inherent workstyle, requiring mass campaigns to effect any reform. See Leng, *Crime and Punishment in Post-Mao China*, 2 CHINA L. REP. 1, 33 (1982). There have also been rumors that the real impetus for the Campaign was an attack upon Deng Xiaoping's motorcade by a gang of hooligans during his 1983 summer vacation. South China Morning Post, Jan. 22, 1986, at A6.

97. For a discussion of the estimated number of arrests and executions in the Anti-Crime Campaign, see LENG & CHIU, *supra* note 1, at 136-7, and *infra* notes 106-08 and accompanying text.

98. See *supra* notes 92-93 and accompanying text.

99. See AI-1984, *supra* note 9, at 53-55. Posters announcing the sentencing of criminals,

Legislative changes to streamline the process of arrest, adjudication and sentencing have played a central role in the campaigns against crime. In June 1981, a provisional resolution of the Standing Committee of the National People's Congress modified Articles 144 and 145 of the Criminal Procedure Law, and granted for two years the right to approve death sentences for murder, robbery, rape, arson, and certain other crimes to the higher people's courts of the provinces, autonomous regions, and municipalities directly under the central authorities.<sup>100</sup> This suspension of the Supreme People's Court's mandated review of Intermediate-level People's Courts' death sentences has continued since 1983. On September 2, 1983, the Second Session of the Standing Committee of the Sixth National People's Congress incorporated this decision into an amendment of Article 13 of the Organic Law of the People's Courts of the PRC.<sup>101</sup> A 1983 decision by the National People's Congress Standing Committee further expedited the adjudication of capital crimes by reducing the time limit for requests for appeals from ten days to three, and limiting the availability of indictments, subpoenas and notifications for the defendant in certain cases.<sup>102</sup>

These changes apparently had the immediate effect of expediting prosecutions. For example, in late June 1981, a murderer was publicly sentenced to death and immediately executed in Nanning. It was reported that the whole process from arrest to execution, including trial, sentencing, and an appeal to the Guangxi Provincial Higher Court, took eight days.<sup>103</sup>

The number of offenses punishable by death also increased with

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with biographical information and details of their crimes, were publicly displayed and a red check was added when the execution was carried out. These posters were observed by foreigners visiting China as recently as the summer of 1986. See also Weisskopf, *China Cracks Down on "Plucking Feathers From a Wild Goose"*, Washington Post, Jan. 7, 1982, at A24; FAR EASTERN ECON. REV. June 18, 1982, at 23.

100. Decision of the Standing Committee of the National People's Congress Regarding the Question of Approval of Cases Involving Death Sentences (adopted June 10, 1981) (Foreign Languages Press trans. 1984) [hereinafter Approval Decision]. This delegation of authority to the higher courts by the Supreme Court may have actually been put into practice in 1980 on the basis of a November 1979 decision of the NPC Standing Committee. See LENG & CHIU, *supra* note 1, at 133, 160, n.59. For supporting commentary on this decision, see *Deal Heavy Blows*, *supra* note 10, at K-25.

101. Approval Decision, *supra* note 100, at 218.

102. Decision of the Standing Committee of the National People's Congress Regarding the Procedure for Rapid Adjudication of Cases Involving Criminal Elements Who Seriously Endanger Public Security (adopted Sept. 2, 1983), in Criminal Law, *supra* note 55.

103. RMRB, June 25, 1981, at 4. The August 1982 execution of five would be hijackers, four weeks after their aborted effort, further suggests the speed of criminal adjudications in this period. See Wren, *China Moves to Resurrect a Creditable Legal System*, N.Y. Times, Dec. 5, 1982, at A1, A22.



the campaigns. In March 1982, the Standing Committee allowed the death sentence for smuggling, speculative arbitrage, serious crimes of theft, selling narcotics, stealing and exporting precious cultural relics and extorting or bribing public officials.<sup>104</sup> Within a month of the commencement of the 1983 Anti-Crime Campaign, the Standing Committee further expanded the list of capital crimes, and authorized the death penalty for committing, under serious circumstances, the offenses of leading a criminal gang, illegally making and trading firearms, organizing reactionary and secret societies, and forcing or luring women into prostitution.<sup>105</sup>

Estimates of the number of arrests and executions in these campaigns vary greatly. One account reported that approximately 600 Chinese were executed in the last six months of 1983,<sup>106</sup> while other estimates for the same period range from 5000 to over 10,000 executions.<sup>107</sup> Some reports even suggested that the Party Central Committee had directed mandatory execution quotas for every county in the country.<sup>108</sup> As these figures suggest, the campaigns against crime in the 1980s, as well as the accompanying changes in laws and procedures, limited the effect of legal reform embraced in the Criminal Law and the Criminal Procedure Law. In contrast to the spirit of predictability and the notion of protecting against erroneous judgments embodied in these two laws, the procedure for the state's employment of capital punishment has been made easier under the law, and the numbers of those executed appears to have escalated.<sup>109</sup>

The campaigns against crime have continued to the present, though perhaps to a lesser degree.<sup>110</sup> In May 1986, Deputy Minister of Public Security Yu Lei announced the continuation of the policy of

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104. Decision of the Standing Committee of the National People's Congress Regarding the Severe Punishment of Criminals Who Seriously Undermine the Economy (adopted March 8, 1982) in Criminal Law, *supra* note 55.

105. Decision Regarding Severe Punishment, *supra* note 5.

106. AI-1984, *supra* note 9, at 55.

107. Agence France Presse (Hong Kong), June 26, 1986, in FBIS, June 26, 1986, at K-1-2; SEYMOUR, *supra* note 9, at 43. See DEPARTMENT OF STATE, 1986, *supra* note 9, at 738; Matthews, *Plagued by Crime, Chinese Increase Use of Executions*, Washington Post, Aug. 5, 1980, at A13.

108. Toronto Sun, Oct. 23, 1980, in SEYMOUR, *supra* note 9, at 42; Radio October (clandestine broadcasts from Hong Kong to China), Jan. 13, 1984 (FBIS trans. Jan. 20, 1984, at K-18). See also LENG & CHIU, *supra* note 1, at 137.

109. In 1984, Amnesty International published a report concluding that the death penalty was being widely applied and procedural safeguards for capital offenders violated. See AI-1984, *supra* note 9. Amnesty International urged the Chinese government to take steps toward abolition of the death penalty. See "Memorandum Submitted by Amnesty International to the Government of the People's Republic of China" (Jan. 1983), *Id.*, at 83-106.

110. See DEPARTMENT OF STATE, 1987, *supra* note 9, at 735.

"swiftly and severely punishing criminals."<sup>111</sup> While the number of executions remains unclear,<sup>112</sup> the Chinese press continues to report arrests and executions as well as to promote the anti-crime efforts.<sup>113</sup> Thirty-one criminals were executed in Beijing at one time in June 1986, reportedly China's largest mass execution since the 1983 campaign began.<sup>114</sup>

### 3. Economic Crimes

The increase in the number of executions for economic crimes, including corrupt practices, is noteworthy. Subsequent to the March 1982 Standing Committee resolution "Regarding the Severe Punishment of Criminals Who Seriously Undermine the Economy,"<sup>115</sup> criminals have been executed for embezzlement, acceptance of bribes, graft, smuggling and similar crimes.<sup>116</sup> In illustration, a salesman

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111. China Daily, May 19, 1986, in FBIS, May 21, 1986, at K-9-10. Yu Lei also cited a 12.3% rise from the first three months of 1985 to the first three months of 1986 in the number of murder and rape cases being investigated in Beijing. *Id.* See *supra* note 10, and accompanying text.

112. On November 9, 1986, Agence France Presse estimated between ten and thirty thousand people have been executed in China since 1983. FBIS, Nov. 10, 1986, at K-1. The U.S. State Department estimates that between 7000 and 14,000 people were executed in China between 1983 and 1986. STATE DEPARTMENT, 1987, *supra* note 9, at 684.

Reported statistics on general criminal proceedings suggest the scope of capital punishment. In a November 1986 interview with Agence France Presse, Wang Mingdi, Associate Director of China's Bureau of Reform Through Labor, reported that China had executed or sentenced to prison terms of over five years 624,000 offenders since the 1983 Anti-Crime Campaign was launched, while the total number of criminal sentences was 1.3 million. Agence France Presse (Hong Kong), Nov. 9, 1986, in FBIS, Nov. 10, 1986, at K-1. For more statistics on arrests and sentences, see LENG & CHIU, *supra* note 1, at 132, 135, 140. Some Western sources believe the reported statistics on criminal punishment are conservative, as they exclude a large number of people who have not been technically "sentenced," but have been detained in re-education camps for less serious crimes. *Id.*, at 135.

There appears to be a large number of young people being executed in China, a notable point in view of the Party's emphasis on reform and re-education. None of the thirty criminals executed in Beijing on Aug. 23, 1983 were older than thirty-five. Agence France Presse (Beijing), Aug. 23, 1983. Of the 51 criminals executed in Beijing in one week in October 1983, 43 were under age 30, and 19 of these were between the ages of 18 and 20. Agence France Presse (Beijing), Oct. 21, 1983, in LENG & CHIU, *supra* note 1, at 142.

113. See *A Serious Struggle Against the Enemies in the Political Realm*, HONGQI (Red Flag) (FBIS trans. Oct. 21, 1983, at K-14-21) [hereinafter HONGQI]. See also *Hubei Meeting on Cracking Down on Criminals*, Xinhua News Service, May 1, 1987, in FBIS, May 4, 1987, at P-3; *Minister on Combatting Corruption*, Xinhua News Service, Aug. 21, 1987, in FBIS, Aug. 24, 1987, at 13.

114. Agence France Presse (Hong Kong), June 26, 1986, in FBIS, June 26, 1986, at K-1. Six of the executed were condemned for murder. Among the other executed criminals, a store manager and his employee were convicted for stealing cars, money and cigarettes from their store. *Id.*

115. See *supra* note 104 and accompanying text.

116. From press reports on executions in the PRC compiled by Amnesty International (available through Amnesty International's New York Office) [hereinafter Amnesty File].

employed by a factory in Shanxi Province was sentenced to death in April 1986 for corruption after selling one million U.S. dollars on the black market.<sup>117</sup>

Economic crimes committed by officials who take advantage of their positions have been well-publicized. On September 25, 1986, the Wuzhou Prefecture Intermediate-level People's Court pronounced the death sentence for a former deputy secretary of a county party committee for accepting bribes and embezzling over 190,000 yuan of public funds. He was executed on the same day.<sup>118</sup> This case precipitated numerous editorials proclaiming that no one in China is above the law.<sup>119</sup>

The severity of legal sanctions for economic crimes is not surprising in a country where economic modernization and reform are the principal objectives of legal reform. Similarly, the extension of capital punishment to political leaders graphically illustrates Deng Xiaoping's effort to stamp out corruption within the Party. Over 500,000 party members were charged with crimes or disciplined between 1981 and 1986.<sup>120</sup> Deng Xiaoping was quoted as saying the more senior the officials found to be involved with corrupt practices, the more severely they must be handled.<sup>121</sup> Hu Qili, a member of the Politburo, reportedly stated that some corrupt officials should be executed to deter others from engaging in corrupt practices.<sup>122</sup>

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117. *One Chinese Executed, One Gets Death Sentence for Corruption*, Reuters, Apr. 14, 1986 at B3, available through Amnesty File, *supra* note 116 [hereinafter Reuters]. Amnesty International has compiled press reports of executions in China for stealing grain, fuel and steel.

118. Nanning Service, Sept. 25, 1986 (FBIS trans. Sept. 26, 1986, at P-1). The public trial reportedly took place in early May, but the sentence had been submitted earlier to the Supreme People's Court for review and approval.

The 1952 Act of the People's Republic of China for Punishment of Corruption provided the death penalty only for those cases involving over 100,000,000 yuan, or especially serious cases. See AI-1979, *supra* note 11, at 73.

119. See, e.g., *Eliminate the Borners*, Xinhua News Service, Sept. 26, 1986, in FBIS, Sept. 26, 1986, at P-2.

120. Reuters, *supra* note 117, at B3. For example, China Daily reported in December 1984 that in the previous thirteen months 279 party officials in Tianjin had been stripped of their Party membership for crimes "ranging from corruption to embezzlement." *Party Officials Sacked for Crime*, China Daily, Dec. 7, 1984, at 3, col. 1. For a discussion of the relationship between Party discipline and criminal justice, see *Concepts of Law*, *supra* note 4, at 1898-1902.

121. Reuters, *supra* note 117, at B3.

122. *Id.* In 1987, Hu Qili was elevated to the Standing Committee of the Politburo.

Crimes committed by members of either the police or military forces have been rarely reported in China. However, in a widely publicized case in February 1986, a policeman in Shaanxi Province was executed for strangling his girlfriend. Reuters, Feb. 4, 1986, available in Amnesty File, *supra* note 116.

#### 4. Chinese Elite Executed

The death penalty has also recently been applied to other members of the Chinese elite.<sup>123</sup> In a landmark case in early 1986 highlighting the government's crackdown on crime and nepotism, two sons of senior Chinese officials were executed for multiple rape convictions.<sup>124</sup> The grandson of the late Marshall Zhu De was reportedly executed in September 1983 for leading a gang and for rape.<sup>125</sup> The government is sending a strong signal that no one is above the law. Indeed, the net for capital punishment in China has been cast far and wide.

### II. A CRITIQUE OF THE JUSTIFICATIONS

Justifications for the use of the death penalty in contemporary China have been tendered, but never fully explicated. In contrast to the debate over capital punishment which rages in many countries, the Chinese press and scholarly journals rarely discuss the subject.<sup>126</sup> This section examines the reasons put forward by those who advocate capital punishment.<sup>127</sup>

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123. This contrasts with the practice in the imperial period when privilege (i.e. close relations with the Emperor) was often a mitigating factor in the determination of criminal sanctions. See NOTES ON CHINESE LAW, *supra* note 22, at 43-45.

124. Financial Times (London), Feb. 21, 1986, at B3f. The men had reportedly used their powerful connections to keep the women from pressing any charges.

125. Agence France Presse (Beijing), Oct. 12, 1983, in LENG & CHIU, *supra* note 1, at 142.

126. The few articles on the death penalty published in China have generally endorsed the practice while recognizing its severity. See e.g., *A Serious Struggle Against the Enemies in the Political Realm*, HONGQI (FBIS trans. Oct. 21, 1983, at K-15). This dearth of criticism of both the death penalty and its procedural aspects may suggest widespread support for the death penalty by Chinese officials and citizens alike. Some PRC law students in the U.S. have indicated that the death penalty is wholly appropriate for China at this point in the country's legal and political development. According to these students, their support is shared by most Chinese.

Conclusions about this enthusiasm for capital punishment, however, must be seen in light of Chinese political development. Overt criticism of state policy is rare, particularly concerning violations of individual rights. Legal discourse over "rights" has only recently emerged during the drive for legal reform. R. EDWARDS, L. HENKIN & A. NATHAN, *HUMAN RIGHTS IN CONTEMPORARY CHINA* 24-34 (1986) [hereinafter EDWARDS, HENKIN, & NATHAN].

127. For more in-depth discussions of justifications put forward for the death penalty, see T. SELLIN, *THE PENALTY OF DEATH* (1980) [hereinafter SELLIN]; R. SCHWED, *ABOLITION AND CAPITAL PUNISHMENT* (1983); D. PANNICK, *JUDICIAL REVIEW AND THE DEATH PENALTY* (1982) [hereinafter PANNICK]; W. BERNIS, *FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY* (1979) [hereinafter BERNIS]; E. VAN DEN HAAG & J. CONRAD, *THE DEATH PENALTY: A DEBATE* (1983) [hereinafter VAN DEN HAAG & CONRAD]; H. BEDAU, *DEATH IS DIFFERENT* (1987).

### A. Reform vs. Punishment

Before examining these justifications, it is necessary to mention a major philosophical obstacle to capital punishment in China: the emphasis on reform. The spirit of reform was central both to Mao's political thinking and his revolutionary promises to the Chinese people. A driving force behind Chinese communism has been that fundamental political and economic changes would mold a "new socialist man."<sup>128</sup> Mao wanted to redeem those he thought were redeemable — including the vast majority of the Chinese people — through political education and social reform.<sup>129</sup>

The principle of reform did not translate into leniency in criminal punishments. Mao endorsed severe sanctions for those "law-breaking elements" who disrupted the social order or hindered the interests of the revolution.<sup>130</sup> Mao felt that some individuals could never be remolded, even through revolutionary re-education; rather, these elements were simply irredeemable.<sup>131</sup> Even today, the question remains where to draw the line between the redeemable and the irredeemable. This tension between the theory of creating a new society through re-education and reform, and the practice of maintaining social order through quick and severe criminal sanctions, colors the justifications discussed below.

128. See M. MEISNER, *MAO'S CHINA* 76-79 (1977).

129. "Of one thing we may be sure, working people, given proper political education, can overcome their shortcomings and correct their mistakes." Mao Zedong, preface and introductory notes to *Zhongguo Nongcunde Shehuizhuyi Gaochao* (Socialist Upsurge in China's Countryside) (Dec. 27, 1955), quoted in STARR, *supra* note 40, at 244. This redeemable class includes most every human being, for man is essentially "malleable". Munro, *The Malleability of Man in Chinese Marxism*, 48 CHINA Q. 609 (1971). Dissident elements in the Party and society are seen as suffering from a curable disease. Ongoing struggle will eventually resolve the dialectical relationship between health and sickness. Questions concerning right and wrong among the people could be settled by "reliance . . . placed on education and persuasion." LENG & CHIU, *supra* note 1, at 9-10. See also STARR, *supra* note 40, at 245.

130. STARR, *supra* note 40, at 245.

131. This theme was enunciated in the lectures on Criminal Law in CRIMINAL PROCESS, *supra* note 15, at 535-36:

In order to protect and consolidate the people's democratic political power and to safeguard the people's security and interests, the state had to suppress this resistance and these sabotage activities. The death penalty was applied to those counterrevolutionaries whose crimes were heinous, who were persistently hostile to the people, and who adamantly refused to repent and reform. Only by so doing could we attack the enemies' vicious power and consolidate the fruits of the revolution. At the same time, the death penalty was applied to those who committed crimes of corruption, major opium offenders, habitual robbers, murderers whose crimes were especially serious, and criminals who sexually violated young girls — those major criminals who seriously endangered state economic construction of the people's interests.

## B. Deterrence<sup>132</sup>

The widespread use of the death penalty in China is primarily designed to deter criminal activity in the broader community. The anti-crime campaigns and the criminal sentencing rallies serve to warn and educate people to maintain law and order.<sup>133</sup> The Chinese press has explicitly highlighted the deterrence function of capital punishment. Upon the execution of an embezzler in 1983, the Yancheng Evening News commented, "Execute one as a warning to a hundred. Sometimes killing a person is worth setting off firecrackers and throwing a party to celebrate, although of course it depends on who is killed."<sup>134</sup> Covering the same case, People's Daily noted, "This . . . is a heavy blow and a serious warning to the criminals who are frenziedly sabotaging our socialist economy. It will certainly give impetus to the struggle against serious criminal activities endangering socialism in economic and other fields."<sup>135</sup> According to this rationale, "punish[ing] a few in order to reform the majority"<sup>136</sup> serves China's goal of reforming the entire society.

It is questionable whether the death penalty is a more effective deterrent than other criminal penalties such as long-term imprisonment. A preponderance of empirical studies in other countries has generally concluded that the death penalty is not a more effective deterrent.<sup>137</sup> In a study of the death penalty in various U.S. states,

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132. Chinese criminologists use the term *yiban yufang* (general deterrence) for the effect of harsh punishment on the larger community, and *teshu yufang* (specific deterrence) for the effect of punishment on the individual offender. In this note, specific deterrence and prevention are used synonymously.

133. RMRB, June 30, 1981 (FBIS trans. July 1, 1981, at K-21). As part of the deterrence justification, it may also be argued that the current use of the death penalty and emphasis on law and order are attempts to satisfy the people's concerns over security and safety.

Similarly, the use of the death penalty may serve to educate people about the legal system. As RMRB noted, one of the purposes for severely punishing criminals is "educating the masses to wage a struggle against criminal offenses." *Deal Heavy Blows*, *supra* note 10, at K-23. More recently, the Vice-Mayor of Lhasa used a sentencing rally of eleven murderers, at which 15,000 people were in attendance, to encourage widespread legal education and the popularization of legal knowledge. *15,000 Attend Rally to Sentence Murderers*, Lhasa Xizang Regional Service (FBIS trans. Oct. 1, 1987, at 27).

134. South China Morning Post, Jan. 20, 1983, available through Amnesty File, *supra* note 116.

135. Reuters, Jan. 19, 1983, available through Amnesty File, *supra* note 116.

136. Talk on the Death Penalty, *supra* note 82, at 32.

137. See SELLIN, *supra* note 127, at 175-179; PANNICK, *supra* note 127, at 233; C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 25-26 (1974). But see Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975); BERNIS, *supra* note 127, at 97-104; Report of the 1953 Royal Commission on Capital Punishment, in SELLIN, *supra* note 127, at 80; J. SEDGWICK, DETERRING CRIMINALS 39-43 (1980). See also Peck, *The Deterrent Effect of Capital Punishment: Ehrlich and His Critics*, 85 YALE L.J. 359 (1975-76); Baldus & Cole, *A Comparison of*

Thorsten Sellin concludes "there is no evidence that the abolition of the death penalty generally causes an increase in criminal homicides or that its re-introduction is followed by a decline."<sup>138</sup> Statistical studies from the European community, the United Nations, India and Ceylon have reached similar conclusions.<sup>139</sup>

No studies or reports are available indicating whether the increased use of capital punishment has curtailed criminal activity in China.<sup>140</sup> Since deterrence is an aspect of criminal psychology, some may allege that cultural differences may influence the deterrence effect.<sup>141</sup> There is no data, however, supporting such assertions. In any case, to justify the use of the death penalty, particularly its current widespread use, Chinese legal scholars and policy-makers should study deterrence in light of China's cultural and social values.

### C. Prevention<sup>142</sup>

Capital punishment has also been defended as a way of deterring further criminal activity by eliminating the source of the crime. This prevention argument assumes that serious crimes are often committed

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*the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of the Capital Punishment*, 85 YALE L.J. 170 (1975-76).

138. Sellin, *Experiments with Abolition*, in CAPITAL PUNISHMENT (T. Sellin ed. 1967) 124.

139. See, e.g., UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT, pt. II, 159, p. 123 (1968); GUPTA, CAPITAL PUNISHMENT IN INDIA 60-73 (1986) [hereinafter GUPTA]; Report of the Royal Commission on Capital Punishment 1949-1953, in PANNICK, *supra* note 127, at 66, n.7.

140. Statistics on crime rates in China are not very helpful in this regard. For instance, when the 1983 Anti-Crime Campaign began, the Chinese authorities reported a rate of 7.1 criminal offenses (without definitions) for every 10,000 people. In 1985, the ratio had dropped to 4:10,000, the lowest level since the founding of the PRC. China Daily, Apr. 18, 1985, in FBIS, Apr. 19, 1985, at K-20-21. According to a March 1987 article in the China Daily, in the 3-1/2 years since the August 1983 campaign began the number of criminal cases in Beijing fell by 37.7% compared to the 3-1/2 years prior to August 1983. *Beijing Crime Rate Drops*, China Daily, Mar. 20, 1987, at 3, col.1. However, a senior attorney from the Supreme People's Procuratorate noted in a Xinhua interview in March 1987 that Chinese procuratorates at various levels handled more than twice as many major economic crimes in 1986 than in 1985. *Major Economic Crimes More than Double in 1986*, Xinhua, Mar. 5, 1987, in FBIS, Mar. 12, 1987, at K-18.

What these statistics reveal about capital punishment is impossible to analyze. If the crime rate, however determined, has indeed dropped in China, it may be attributable to increased police protection, more satisfactory employment opportunities, more criminal sanctions or a host of other changes in Chinese society.

141. For instance, deterrence of criminal behavior may differ among societies due to variations in the information and propaganda networks, the degree of authoritarian control, the notions of good and evil, or the relationship between the individual and the collective, to name but a few possibilities.

142. Termed "specific deterrence" in Chinese criminology. See *supra* note 132. This justification is also called "incapacitation", see, e.g., VAN DEN HAAG & CONRAD, *supra* note 127, at 60.

by repeat offenders; the punishment, therefore, should insure that these offenders have no further opportunity to commit crimes.<sup>143</sup>

A commentary in support of the death penalty in the Party's ideological journal *Hongqi* explains that most serious criminals have been either unalterably exploited by the bourgeois way of life or misled by the pernicious influence of counterrevolutionaries, and should therefore be eliminated.<sup>144</sup> A Chinese legal journal characterized the prevention argument in the following manner:

We think that the death penalty is like all other kinds of penalties: none are created by peoples' minds, but are the fundamental products of the social struggles of history. Whether a country retains or abolishes the death sentence is determined by concrete historical or political circumstances. The struggle against those who destroy our social order must continue, and severe punishment, including the death penalty, must be applied to prevent causing further havoc in the Chinese social order.<sup>145</sup>

This justification leaves many questions unanswered. First, the prevention argument appears to belie the notion in Chinese criminal theory that man can be reformed. This contradiction between reforming and extinguishing is particularly troublesome because the death penalty has been applied to an increasing number of crimes. Second, if criminal punishment is designed to isolate criminals in order to check future crimes, incarceration in China's remote prisons or labor farms might serve the goal of prevention equally well. Such a conclusion could not be supported without further research into the comparative economics, risks of escape and other aspects of the different sanctions.<sup>146</sup> Finally, a study of the extent of criminal recidivism is necessary for a meaningful discussion of the prevention argument.<sup>147</sup>

#### D. Retribution

The death penalty in China and other countries has also been justified as a way to satisfy society's demand for vengeance or atonement by inflicting suffering on the criminal.<sup>148</sup> Concern for human

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143. See SELLIN, *supra* note 127, at 103.

144. HONGQI, *supra* note 113, at K-16.

145. Talk on the Death Penalty, *supra* note 82, at 32.

146. See PANNICK, *supra* note 127, at 45.

147. For an example of a study of recidivism among capital murderers, see SELLIN, *supra* note 127, at 103-20.

148. See VAN DEN HAAG & CONRAD, *supra* note 127, at 17-52.



life, while deeply rooted in Chinese values and reflected in many state policies, has not always been extended to people convicted of heinous crimes. Historically, the Chinese generally regarded "a life for a life" as fair punishment;<sup>149</sup> meting out stern punishments, including the death penalty, to criminals was simply giving lawbreakers what they deserved.<sup>150</sup>

Retributive justice infuses populist sentiment into the criminal process. In early PRC documents on criminal law, retribution as a justification for the death penalty was clearly articulated. "If the death penalty were not applied . . . the anger of the masses could not be pacified."<sup>151</sup> An American criminal lawyer in China in the mid-1970s observed: "[R]ather than raising the sentence-giver above the passions of the community, the sentence in China is set according to community passion . . . and the indignation of the masses."<sup>152</sup> Other authorities have commented that the Chinese people's "support and demand" for the death penalty helps to justify its continuation.<sup>153</sup>

The retribution justification, however, may be criticized on the ground that it is unclear whether vengeance justifies execution as a non-proportional sentence to a crime.<sup>154</sup> Retribution may also be fundamentally incongruous with legal reform premised on predictability and fairness; legal scholars should more fully explain the place of justice based on anger, resentment, wrath and revenge — all emotional reactions — in a rational legal system.<sup>155</sup> No available evidence demonstrates how retribution benefits either society or criminals.<sup>156</sup> If the

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149. See EDWARDS, HENKIN & NATHAN, *supra* note 126, at 54.

150. *On Capital Punishment*, BEIJING REV., Nov. 7, 1983, at 4.

151. *Lectures on the General Principles of Criminal Law of the Central Political-Legal Cadres' School*, in CRIMINAL PROCESS, *supra* note 15, at 536.

152. Douglas, *supra* note 52, at 46.

153. *Sixing Wenti Yanjiu* (Researching the Question of Capital Punishment), 3 FAXUE YANJIU 35 (1985). This theme has been sounded in American jurisprudence as well. In the landmark death penalty case in the U.S. Supreme Court, *Gregg v. Georgia*, 428 U.S. 153 (1976), Justices Stewart, Powell and Stevens noted that capital punishment became a legitimate expression of the society's moral outrage: "Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response must be the penalty of death." *Id.* at 184.

154. For a more in-depth discussion of this proportionality argument, see *infra* notes 172-77 and accompanying text.

155. When drafting the Criminal Law in 1979, some PRC legal scholars reportedly discussed the role of retribution in the criminal justice system and rejected it as a basis for punishment. Conversation with visiting Chinese legal scholars at Columbia Law School.

See A. KOESTLER, *REFLECTIONS ON HANGING* 105 (1956) for an interesting discussion of retribution, as well as a general discussion of the death penalty.

156. Retributive criminal justice has been repeatedly denounced by American legal scholars. Professor Herbert Wechsler stated:

Since punishment consists in the infliction of pain it is, apart from its consequence,

populist impulses of the masses are to be heeded, a more beneficial approach might be for the criminal justice system to promote more citizen involvement in formal adjudication proceedings, rather than encourage retribution through public sentencing rallies and anti-crime campaigns.

### *E. Speed of the Criminal Process*

Chinese executions have been criticized for their procedural haste.<sup>157</sup> Two explanations have been tendered for the pace of such proceedings. First, Chinese authorities claim expeditious prosecution, sentencing and execution is necessary to maintain vigilance in the society's campaign against criminals. Deng Xiaoping stated, "We must deal quick, severe and heavy blows at these crimes in order to stop them on time."<sup>158</sup> If a case remains unsettled too long, the public security forces break down, and the masses' struggle against the criminal is weakened.<sup>159</sup> People's Daily declared that only by maintaining such vigilance "can our country avoid the incurable diseases common in Western capitalist countries, such as unchecked criminal activities, social unrest, and moral degeneration."<sup>160</sup> A second explanation for the speed of criminal prosecutions is a preference for substantive justice over procedural justice. Once the truth, a unitary and knowable quality, is determined, there is no need for delay in carrying out the sentence.<sup>161</sup> If the authorities perceive that a substantively accurate and just determination has been made, a criminal needs no further appeals.<sup>162</sup>

Whether or not these justifications are valid, this rapidity does not allow for appropriate legal safeguards.<sup>163</sup> In a legal system geared

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an evil, consequently it is good and therefore just only if and to the degree that it serves the common good by advancing the welfare of the person punished or of the rest of the population . . . retribution is itself unjust since it requires some human beings to inflict pain upon others, regardless of its effect upon them or upon the social welfare.

*Quoted in GUPTA, supra note 139, at 44-45.*

157. AI-1984, *supra* note 9, at 69; EDWARDS, HENKIN & NATHAN, *supra* note 126, at 64. See *supra* notes 100-04, 111 and accompanying text.

158. DENG XIAOPING, *supra* note 10, at 394.

159. Deal Heavy Blows, *supra* note 10, at K-21.

160. *We Must Severely Crack Down on Criminal Activities*, RMRB, Sept. 4, 1983 (FBIS trans. Sept. 12, 1983, at K-8).

161. See EDWARDS, HENKIN & NATHAN, *supra* note 126, at 47.

162. For these same reasons, an aggrieved individual can often pursue several appeals in China if the facts are uncertain and guilt remains in question. *Id.*

163. The record of erroneous judgments in capital cases is not ascertainable, though a pattern of posthumous rehabilitations after the Cultural Revolution has emerged. For exam-

for fairness and protection against erroneous judgments, every step in adjudicating capital crimes merits close scrutiny.

### III. THE DEATH PENALTY AND LEGAL REFORM

The death penalty in China, while continually employed since the earliest days of Chinese history,<sup>164</sup> has been subject to vacillating political and legal forces over the centuries. During some periods the use of capital punishment was highly regularized with procedural safeguards; alternately — or at times concurrently — it was used arbitrarily and applied with a vengeance. A two-pronged policy is evident in the Chinese criminal justice system today: the leadership advocates legal reform to enhance procedural fairness and some protection for those accused of crimes; at the same time the authorities vigorously endorse the death penalty and other severe punishments.

While this dual policy underscores the historical tensions between jural and societal justice in China,<sup>165</sup> the continued reliance on law and order campaigns and the severe attitudes toward criminals do not lead to the conclusion that Chinese criminal justice has slipped back into an era of chaotic rule by retributive populist impulses and political whims. The Chinese have made great strides in codifying their criminal justice system to provide more certainty, review and fairness in adjudicating criminal cases.<sup>166</sup> Nonetheless, only eleven years after the close of the Cultural Revolution, the Chinese leadership is still struggling for ways to mete out fair penalties to those who break the rules.

The dual policies of regularizing procedures while waging a series of campaigns against crime pose numerous questions for policy-

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ple, Zhang Zhixin, a 45-year old woman, was executed for her political opinions in 1975. In 1979 she was rehabilitated as a revolutionary martyr. AI-1984, *supra* note 9, at 74-75.

The potential for erroneously sentencing criminals to death was highlighted in the Hong Kong magazine ZHENG MING (Contending) in a 1984 article calling for the Party to abolish the death penalty. The article was written in reaction to the arrest of two men for capital crimes. They were not executed, but later found to be innocent. The article criticized the Chinese government for continuing its campaign tactic of using innocent people as examples and scapegoats, comparing the Anti-Crime Campaign to previous violent movements in China. *Zhonggong Ying Zanfei Sixing* (Communist China Should Abolish Capital Punishment), ZHENG MING, July 1984, at 79.

164. Throughout Chinese history there appears to have been no period when capital punishment was abolished; likewise, there is no evidence to suggest an abolitionist movement in China today.

165. See *supra* note 36 and accompanying text.

166. In observing the recent changes in China's legal system, it is also important to note that the impetus for legal reform was primarily economic. Other substantive issues, particularly those concerning individual rights, have received less attention by Chinese policy-makers. See Edwards, *supra* note 1, at 52-53.

makers responsible for China's legal development and scholars formulating the conceptual bases of China's criminal justice system. The current use of capital punishment may be consistent with China's legal reforms. The procedural rules for and categories of capital crimes have been codified. The degree to which these statutory provisions have been followed is not ascertainable; however, the arbitrariness exhibited in criminal proceedings in the 1960s and 1970s has certainly been curtailed.<sup>167</sup> Furthermore, if legal reform can be viewed solely as a component of China's plan for modernization, the policy of severely and quickly punishing criminals may successfully serve the leadership's goal of China entering the Twenty-first Century as a modernized and stable society. In the Chinese context, both legal reform and coercive social control might concurrently be means to that end.

On the other hand, the impulses for retributive justice and the uncritical assumptions about methods to deter and prevent crimes may lead to results quite different from those sought through the fair and regularized criminal adjudications of "rule by law". For example, public sentencing rallies might induce a degree of emotionalism into the proceedings which may cause inconsistent sentencing of those convicted of similar crimes; likewise, hasty review and approval of criminal sentences may lead to erroneous judgments. Reform of the death penalty — whether it be increased procedural safeguards, limitations on its use, or total abolition — may be more in line with the spirit and goals of the current legal development in China.<sup>168</sup>

Capital punishment therefore merits the serious attention of Chinese legal reformers. Policy-makers and scholars might choose to tackle the large question of whether the death penalty is appropriate and humane in a modern state, and possibly advocate the abolition of the practice as has been done in many countries.<sup>169</sup> Even if abolition is not considered, perhaps the protection of individual defendants

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167. See LENG & CHIU, *supra* note 1, at 35, 39-44.

168. See *supra* notes 1, 2, and 58, and accompanying text for a discussion of the goals of legal development.

169. Countries which have abolished the death penalty for all crimes include Australia, Costa Rica, France, The Netherlands, Nicaragua, Sweden, and 21 others. For complete lists of countries which (1) have abolished the death penalty for all crimes, (2) have abolished the death penalty for ordinary crimes, and (3) have retained the death penalty for ordinary crimes, see AI-US, *supra* note 82, at 228-31.

Abolition or limitation of the death penalty in China is currently being urged by non-governmental organizations outside China. Amnesty International sponsors a letter-writing campaign. Upon receiving information that a criminal has been sentenced to death, Amnesty International sends a letter to the PRC President pleading for clemency. While informal sources have acknowledged the receipt of such requests in China, the letter-writing campaign appears to have had no direct effect over the past few years. Other strategies to urge China to

against unfair or erroneous death sentences may be enhanced through expanded procedural safeguards as China perfects its legal system.<sup>170</sup>

Conventional aspects of legal reform within China might also generate or influence an evaluation of the Chinese system of capital punishment. Two of several doctrinal sources for discussing capital punishment in China are highlighted below for illustrative purposes.<sup>171</sup>

### A. Proportionality

A fundamental principle of many legal systems which has been voiced in death penalty debates is that punishment must be proportional to the crime. "Treat like cases alike, and varying cases according to relevant differences among them."<sup>172</sup> Making "the punishment fit the crime" dates far back into the Chinese legal system, both in civil and criminal procedures.<sup>173</sup> The PRC has developed a sophisticated gradation system for various crimes and administrative penalties based on the degree of harm the crime creates.<sup>174</sup>

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examine its use of the death penalty are currently being studied by Amnesty International and other organizations.

170. In commenting on the Chinese criminal justice system, I do not mean to suggest that China should follow an American model. Indeed, many of the issues mentioned in this note and their conceptual underpinnings are hotly debated in the U.S. today. Given the crime rate, prison populations and judicial costs and backlogs in the U.S., scholars and legislators must continue to evaluate crime and punishment in the U.S. and design and adopt effective reforms appropriate for this country.

171. While many efforts to abolish the death penalty in other countries have been based on constitutional arguments, it would be difficult to use the current Chinese constitution for this purpose. In the United States, Singapore, India, Japan and other nations, constitutional provisions concerning "due process," "cruel and unusual punishment," and "equal protection," or functional equivalents, have become weapons in the assault on capital punishment. For a general discussion of these efforts, see PANNICK, *supra* note 127.

The 1982 PRC Constitution is in part a statement of goals to be realized which assumes a harmony of interests between the state and citizen. It is not a document of rights and principles which orders and limits the government. None of the rights in the Chinese Constitution are derived from personhood, but rather from citizenship in the state, or membership in a progressive clan of people. The rights in the Chinese Constitution are not continuous or inalienable; they can be added and withdrawn by the National People's Congress which reigns sovereign. Furthermore, the government has the power to limit all rights and no effective process is available for independent review of a law's constitutionality. See EDWARDS, HENKIN & NATHAN, *supra* note 126, at 26-36; A. NATHAN, CHINESE DEMOCRACY 110-13 (1985).

172. RADBRUCH, RECHTSPHILOSOPHIE, *quoted in* J. GORECKI, CAPITAL PUNISHMENT 22 (1983). On these grounds the U.S. Supreme Court has ruled that the death penalty is unacceptable for the rape of an adult woman, *Coker v. Georgia*, 433 U.S. 584 (1977), and for kidnapping, *Eberheart v. Georgia*, 433 U.S. 917 (1977).

173. See H. KIM, FUNDAMENTAL LEGAL CONCEPTS OF CHINA AND THE WEST 9 (1981); Cohen, Edwards & Chen, *supra* note 16, at 42-47. See also *supra* note 19 and accompanying text.

174. See, e.g., Criminal Law, *supra* note 55, arts. 150-78. "As to the severity of the penalty, the [Criminal Law] stipulates that an offender is to be given a heavier or lighter pen-

In light of an increased number of executions for embezzlement, theft of grain rations or fuel, and other non-fatal crimes, the doctrine of proportionality may constitute a basis for re-evaluating the enumeration of capital crimes.<sup>175</sup> The statutory standard for the severity of capital crimes remains unclear.<sup>176</sup> Chinese legal reformers should work for more explicit standards for courts to use in determining what crimes deserve punishment by death.<sup>177</sup>

### B. *International Standards*

State-sanctioned death penalties have often been criticized for violating international legal standards, despite the fact that the death penalty is practiced in most countries and therefore cannot be claimed to violate binding customary international law.<sup>178</sup> International legal covenants and practices pertaining to the death penalty might be an important source for scholars and policy-makers in evaluating the death penalty.

The only relevant international pronouncement in which the PRC participated was a non-binding United Nations General Assembly resolution calling for limiting the death penalty: "The main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offenses for which the death penalty may be imposed with a view to the desirability of abolishing

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alty according to the facts, nature and degree of his offense and its damage to society, but the sentence must fall within the limits of the penalties prescribed for given offenses." *The New Criminal Law*, *supra* note 58, at 18.

175. It is arguable whether the punishment should ever exceed the crime. In China, death of a victim is not a prerequisite for imposing the death penalty. Liu Yunfeng, President of the Beijing Intermediate Court, was quoted as saying:

Some people have questioned the execution of five men convicted of raping three girls, since none of the girls died. However, the sentence was applauded in the Beijing suburbs where the rapes occurred. The three girls suffered mental as well as physical injuries and one had tried to commit suicide. Experience shows that rapists are often incorrigible hoodlums. There is a prevalent erroneous notion in society now that whether a victim dies is the criterion for ordering a death sentence or not.

South China Morning Post, Dec. 15, 1982, at 14, available through Amnesty File, *supra* note 116.

176. The language of the Criminal Law provision provides for the death penalty for "criminal elements who commit the most heinous crimes," and for crimes of counterrevolution "when harm to the state and the people is especially serious and the circumstances especially odious." See *supra* notes 60-73 and accompanying text.

177. It has been argued that the proportionality between the offense and the capital sentence must be judged by reference to international, not local, standards. See PANNICK, *supra* note 127, at 146.

178. For general discussions of the death penalty in international law, see AI-1984, *supra* note 9, at 62; PANNICK, *supra* note 127, at 146, 226; Hartman, *supra* note 82, at 659.

this punishment."<sup>179</sup> The increased number of capital offenses in China over the past six years is inconsistent with the spirit of this U.N. Resolution.

The Universal Declaration of Human Rights might also be instructive.<sup>180</sup> The Declaration includes provisions endorsing the right to life,<sup>181</sup> the right not to be subjected to cruel, inhuman or degrading treatment or punishment,<sup>182</sup> and the right to a fair and public hearing and presumption of innocence.<sup>183</sup> The International Covenant on Civil and Political Rights (1966) also contains provisions to encourage the limitation of capital punishment.<sup>184</sup> In late 1986, the China Daily reported that China's citizens now "largely enjoy" the rights of the Covenant, despite the PRC not being a signatory.<sup>185</sup> The paper noted, however, that China's traditions, philosophy and level of development make it necessary "in a few instances" that China not meet all the Covenant's standards. Yet, as China's participation in international law increases,<sup>186</sup> Chinese scholars and policy-makers should consider such international pronouncements calling for careful regulation of the death penalty.

## CONCLUSION

Over the past ten years the punishment of death has been reaffirmed, if not expanded, in China; at the same time, the Chinese leadership has vigorously sought legal reforms to encourage fairness,

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179. G.A. Res. 32/61, 32 U.N. GAOR Supp. (No. 45) at 136, U.N. Doc. A/32/45 (1977).

180. The Guomindang Government endorsed the Universal Declaration of Human Rights in 1948; the PRC authorities have never formally subscribed to its principles. Many scholars consider the Universal Declaration of Human Rights to be universally binding as part of customary international law. See L. SOHN & T. BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 518-19, 522 (1973). But see H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 408-17 (1973).

181. Universal Declaration of Human Rights, 1948, art 3.

182. *Id.* art. 5.

183. *Id.* arts. 10-11.

184. The PRC is not a signatory to this Covenant.

Article 10 provides that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person," while Article 6 declares:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, the sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant.

185. China Daily, Dec. 3, 1986, at 4.

186. See Kim, *The Development of International Law in Post-Mao China: Change and Continuity*, 1 J. CHINESE L. 117 (1987).

predictability and regularity. These concurrent developments demonstrate a continuation of the historical tensions between regularized legal procedures and law-making according to political or populist sentiments. Yet, this tension might also offer an opportunity for further research on capital punishment and perhaps more public debate on the practice and its justifications. It is hoped that this note might contribute to such a discussion.

The tension between criminal punishment as practiced and the concepts of reform in the criminal justice system reflects the larger struggle over the proper route toward modernization pervading all Chinese legal and social development at the present. This tension may be explained by the transitional state of Chinese society and its legal development, or more broadly, the evolving stages of a socialist state. Conversely, the changing relationship between society and the individual in the Chinese environment may precipitate such a struggle over the proper path toward legal modernization. Such analyses lie outside the scope of this note. Suffice it to say that resolution of such conflicts will help determine the road to China's modernization. That choice, in turn, will influence the course of future legal reform and the future of the death penalty in China.

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