

# **Recent Amendments to the Criminal Law and Criminal Procedure Law in the People's Republic of China: Any Hope for Those Facing the Death Penalty?**

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## Table of Contents

Introduction .....	2
Methodological Issues .....	2
Imperial China .....	3
Judicial Independence in Imperial Times .....	5
The Imperial Appeal Process .....	6
Imperial Use of the Death Penalty for Crimes that Threatened "State Security" .....	6
Mitigated Sentencing in Imperial Times .....	8
Punishment of Official in Imperial Times .....	9
Communist China .....	9
Why the need for amendments? .....	11
Judicial Independence in Modern China .....	12
The Appeal Process .....	14
"Counterrevolutionary" vs. "State Security" Crimes .....	16
Mitigated Sentencing .....	19
Punishment of Corrupt Officials .....	21
Conclusion .....	24
End Notes .....	27
Bibliography .....	33

## **Introduction**

In March 1996, the Eighth National People's Congress (NPC) of the People's Republic of China (PRC) substantially amended the Criminal Procedure Law (CPL), which had been in force since 1979. A year later, revisions to the 1979 Criminal Law were passed, coming into force in October 1997. These changes have been described by Chinese officials as a "major step forward" towards the improvement of the Chinese legal system.<sup>1</sup> Said by some to "contribute to narrowing the gap<sup>2</sup> between Chinese law and international standards, these amendments have also been heavily criticized for their failure to reach the acceptable level of international norms.<sup>3</sup>

While a comparison of each generation's substantive law will provide some indication of any reform that may have taken place, the new laws' practical implications will provide the better insight into any "gap narrowing" that may have occurred. However, because a thorough review of each provision of the amended CPL and Criminal Law is beyond the scope of this paper<sup>4</sup>, five specific aspects of the modern laws will be compared with their dynastic counterparts.<sup>5</sup> At times overlapping, these five aspects are the independence of the judiciary, the appeal process, "counterrevolutionary" or "state security" crimes, mitigated sentencing, and the punishment of corrupt officials. Within these five areas, particular attention will be focused on death sentences carried out by the state in a judicial context. As a country notorious for having the highest death penalty rate in the world,<sup>6</sup> do these recent substantive amendments reveal an evolution in the use of capital punishment within the PRC? Has the actual use of capital punishment reflected this reformative attitude? If the practical implications of the amendments indicate few differences from imperial times, then presumably little if any improvement has in fact taken place.

## **Methodological Issues**

Unfortunately, no comprehensive public PRC government report about the use of the death penalty in China is available. In fact, actual death penalty figures are considered "state secrets."<sup>7</sup> The only public information that does exist is that which is reported in official

government-sanctioned newspapers like the China Daily. With information selectively released by the relevant authorities, only a fraction of the death sentences and executions carried out in China are publicly recorded. As Amnesty International notes in their yearly reports, "[t]hese figures are believed to be far below the actual number of death sentences and executions in China during the year."<sup>8</sup>

The unavailability of government statistics, coupled with the scarcity of writings on the matter by Chinese scholars and journalists<sup>9</sup>, is easily overwhelmed by the biased criticisms of Western scholars. Monthly cautions that "[w]hen the evaluator is privy to limited and / or skewed information and the figures on annual executions are kept as state secrets as is the case with the PRC, a different slant can jaundice the analysis."<sup>10</sup> Keeping this in mind, this paper will try to maintain an objective standard by strictly comparing China with its historical self, rather than with a culturally irrelevant nation like the United States of America (where the use of capital punishment is also prevalent).

## **Imperial China**

The persistent recurrence of death sentences and executions throughout various regimes in late imperial and modern China cannot be explained away as merely historical coincidence. The state's meting out of severe punishment to control society and serve its needs has been a constant theme throughout Chinese history."<sup>11</sup>

Essential to any understanding of the present-day use of the death penalty in China is a look at its historical use, which itself must include a brief overview of the Legalist and Confucian traditions. The Legalists, in the hope of creating a unified, stable state, advocated a society based on law (*fa*). They viewed humanity as inherently selfish, needing to be controlled by strict laws and punishments. In order to achieve the stability they so desired, factionalism and favoritism had to be abolished; the law was to be a single standard against which all individual conduct could be measured.

The Confucianists on the other hand were of the opinion that in an ideal state, laws were unnecessary; government could lead by education and moral example. The *li*, broadly described as accepted modes of conduct (as opposed to the Legalists' *fa*), were said to denote "all the institutions and relationships, both political and social..."<sup>12</sup> which if adhered to, would lead to the government's ultimate aim of preserving social harmony. The *li* however were borne of a hierarchically organized society and thus prescribed different modes of behavior based on one's status.

The Legalists' viewpoint was the first to gain official recognition when it was adopted by the first centralized Chinese empire, that of the Qin in 221 B.C. This dynasty however was short-lived, quickly replaced by the Han in 206 B.C. who subsequently substituted the dominant doctrine of Legalism with Confucianism. However as Bodde and Morris explain, this Confucianism was "a highly eclectic thought system - one that borrowed extensively from its philosophical rivals."<sup>13</sup> Consequently, the imperial codes that followed were really a marriage of the two traditions. While the substantive law of the imperial codes enforced Confucian-based norms of social harmony and hierarchical divisions, their penal emphasis and standardized treatment of offences exemplified the harsh yet equal treatment of the Legalist tradition.

According to one scholar, "[g]enerally the imperial codes were less concerned with the defendant's individual rights than with imperial interests.... Therefore, a significant goal of sentencing in early criminal codes was punishment."<sup>14</sup> The punishment meted out was to correspond to the seriousness of the offence, "as determined by its repercussions on universal harmony."<sup>15</sup> As early as the Tang Code of 653 AD the harshest of punishments, the death penalty, was codified. Each imperial code thereafter included over one hundred capital offences for "heinous" crimes ranging from treason and murder to the striking of one's paternal grandparents or one's master (if a slave).<sup>16</sup> The most severe form of execution, death by slicing, was reserved for the most ruthless crimes, followed in descending order of severity by decapitation and strangulation.<sup>17</sup>

## **Judicial Independence in Imperial Times**

In imperial times, the local magistrate was the first to try an accused indicted for an offence punishable by death. These officials were appointed by the central government and consequently viewed as embodying imperial authority. Despite their lack of legal training, the magistrates were responsible for "all aspects of civil governance, including... the investigation, prosecution, and adjudication of criminal matters."<sup>18</sup> Western scholars have been quick to pounce on these overlapping roles as evidence of the judiciary's lack of independence, but as Alford points out, an elaborate system of checks from above was intended to curb any partiality on the part of the magistrates.<sup>19</sup>

One such check consisted of the various rules that regulated nearly every aspect of a magistrate's official duties. Violations of these standards could result in a selection of punishments ranging from payment of a fine or demotion in one's official rank to death. A second check was the "obligatory review system." Local magistrates could only impose and carry out minor sentences and penalties; those sentences involving more serious penalties were provisional, needing to be reviewed by officials at a higher level. The most severe penalty, execution, often required a review by the Emperor himself. Finally, officials directly above the local adjudicator provided a third check because they had an "affirmative legal obligation to uncover and report all wrongdoing committed by officials beneath them."<sup>20</sup>

Despite the existence of these measures, many of them were ineffective.<sup>21</sup> Problems arose because higher level officials were often unwilling to re-examine the findings of subordinates; superiors could be punished for errors made at the magisterial level, thus stifling any desire to find fault. While penalties were also prescribed for this sort of willful blindness, they were for the most part viewed as "empty threats."<sup>22</sup> Other problems emanated from the cronyism of the system which often led to the appointment of unqualified individuals.<sup>23</sup> Because of their social connections, these incompetent officials were unlikely to be punished for any wrongdoing,

further reducing their incentive to adhere to the regulations. Finally, ongoing tensions between the central and provincial governments often resulted in simple legal issues, having provided the catalyst for an irrelevant political dispute, being sidelined altogether.

### **The Imperial Appeal Process**

During the Qing Dynasty (1644-1911), an accused who felt he had not received a fair hearing could send a special petition requesting a reexamination of his case to the Censorate, Board of Punishments, or the Commandant of Gendarmerie in Peking. The appeal could proceed provided the case at the lower level was complete, that the appeal was made to the superior in charge of the official whose decision was being disputed, and that a serious matter was at issue. Those officials in Peking receiving the appellate petition could either refer the case to the Emperor or send it back to the governor of the province in which it had originated. This second option however meant that appeals were often returned to officials who had heard the case previously and, facing the possibility of sanctions for their errors, were unlikely to find fault with their earlier rulings. Even in those instances when special imperial commissions were established to review cases, they often had to "rely on the very local officials whose work they would be scrutinizing."<sup>24</sup> In addition to these structural problems, there were other practical impediments to the appeal process: "...the complainant was himself subject to punishment either if he failed to exhaust all legal procedures at the lower level before appealing higher, or if his accusation were found to be untrue."<sup>25</sup>

### **Imperial Use of the Death Penalty for Crimes that Threatened "State Security"**

To govern, in the Confucian view, was to set a good example and promote good behaviour among people, that is, to create conditions in which people could live without disturbing the natural harmony. Any such disturbance was in itself a sign of the failure of government, and this was an inducement to conceal or play down lesser disturbances and to pretend that all was well. If in practice this was impossible, action had to be taken to fix responsibility somewhere, and due amends had to be made for the disruption in order to prove that government was in capable hands.<sup>26</sup>

In imperial China it was believed that strong leadership was necessary for the maintenance of a stable environment. From such conditions would arise the Confucian ideal of social harmony. The substantive law of the dynastic codes was one of several tools used to uphold the "leadership" of the imperial government. Of greatest concern then to lawmakers were those matters that threatened the security of the state and consequently, the preservation of the social order. As Jones points out in his discussion of the Ch'ing (Qing) Code:

[T]hat part of the Chinese Code that looks like criminal law to us was, in China, very much a part of the governing apparatus of the state. ...Rules which punish murder or theft... have a very different meaning when the (sic) operate in a system which punishes violations of individual rights as opposed to one which punishes interference with the administration of the Confucian empire.<sup>27</sup>

Many of the provisions in the Board of Punishments section (that part of the Code said to deal with "criminal" law) involved crimes against the state. For example, the section on robbery and theft included provisions on treason and stealing public property. The homicide section had a provision for the killing of a government official. The entire bribery and corruption section was a collection of offences against the state, while that part of the Code dealing with deception and fraud consisted mostly of offences of forgery of government documents. Given this preponderance of provisions dealing with crimes against the state, it is not surprising that some of the harshest punishments in the Qing Code "were reserved for those crimes that were regarded as threatening the continued existence of the state."<sup>28</sup> Compare for example Article 290 of the Qing Code which prescribed death by strangulation for those who committed manslaughter, to Article 254 which prescribed not only death by slicing for those who plotted rebellion, but also the beheading of all male relatives living in the same household as the accused.<sup>29</sup>



### **Mitigated Sentencing in Imperial Times**

Despite the possibility of harsh sentences, procedural limitations placed on the employment of the death penalty reduced the general severity of the Codes and provided some protection for defendants. Because the death penalty held such strong repercussions for social harmony, it was necessary that the time, place and method of punishment be given their due consideration. Some of the reasons for the methods of execution (strangulation, beheading or slicing) have already been discussed. As for the time, it was believed that executions should only take place in the fall or winter months because these were the seasons of death and decay. Even then, executions were prohibited on various holidays such as the solstices and equinoxes. This left less than two months of the year (at least according to the Tang Code of 653) when death sentences could be carried out. While not outright amnesties, these postponements may have provided some prisoners with further opportunities to have their cases reconsidered. In other discussions of mitigated sentencing it has also been noted that "[r]eflecting 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 others special categories."<sup>30</sup>

Besides these procedural limitations which applied to all equally, elites charged with capital offences benefited from the application of entirely different standards. Article 3 of the Qing Code, entitled "The Eight [Categories of Persons Whose Cases are to be Especially] Considered," distinguished nobility and officials (both civilian and military) from the rest of the populace. These people (and their immediate family members) could not be investigated, arrested, or tortured without the approval of the Emperor himself. Those found guilty would have their sentences considered by the Emperor for possible mitigation. The sentences normally given to commoners (including death) were for these privileged classes often commutable to monetary fines, demotion, or dismissal from the civil service.<sup>31</sup>

## **Punishment of Officials in Imperial Times**

Despite the leniency accorded to officials by the aforementioned "Eight Categories," there was a cost involved. According to Confucian tenets, government was to lead by moral example; officials, because they were viewed as "embodiments" of the imperial authority, were no different. Those officials who did not live up to their moral obligations were at times subject to harsher punishments for the same offence than were non-officials. An official who consorted with a prostitute, for example, was said to have "shown himself lacking in moral restraint and [had] disgraced his position as an official."<sup>32</sup>

Besides the requirement that they act as morally upright examples for the rest of the population, officials also had to obey those provisions in the Codes which related specifically to their official duties. Officials who suggested overly lenient punishments,<sup>33</sup> rendered wrong judgments,<sup>34</sup> or incorrectly cited laws and orders,<sup>35</sup> were subject to punishment - usually a certain number of strokes of the light bamboo. In particular circumstances however, the official's punishment could involve death.<sup>36</sup>

## **Communist China**

The last imperial dynasty, that of the Qing, came to an end in 1911. For the next four decades or so, uncertainty would rule China as competing forces controlled different regions of the country at different times. First the Nationalists, under the leadership of Chiang Kai-shek, would come to power in 1927. Their reign however was short-lived, hindered by feuding warlords, the invasion of the Japanese, economic strife, and civil war with the Communists. Eventually the Chinese Communist Party would come to power, founding the People's Republic of China in 1949.

Initially the Communists, having abolished all Nationalist laws and judicial organs, borrowed heavily from Soviet legal institutions. But despite their attempts to establish a systematic socialist legal system (particularly in the mid-1950s), the Communists (like the

Nationalists before them) faced severe economic hardships and security challenges (both internal and external) which would eventually limit their ability to experiment with judicial processes. In the hope of gaining complete control, eradicating social problems and progressing towards revolutionary goals, the Party sponsored numerous "mass mobilization campaigns" (e.g. the Land Reform campaign of 1949-51 and the "Anti-Rightist" campaign of 1956-57). These campaigns eschewed formal criminal adjudication procedures, organs and defences. The Party began to supercede the courts in the task of meting out punishment. The use of Party rhetoric and ideological policies ruptured during the chaos of the Great Proletarian Cultural Revolution (1966-76) when a massive purge was launched of all those who opposed Chairman Mao Zedong. Tens of thousands were persecuted, the formal legal organs having lost complete control over social order and the administration of justice. As with earlier mass campaigns, summary trials were often immediately followed by mass executions. Normalcy would only be restored in 1977 following the death of Mao and the purge of the "Gang of Four."<sup>37</sup>

Faced with increasing crime rates, economic pressures, external demands to liberalize, and internal dissension after the anarchy of the Cultural Revolution, legal modernization was deemed to be of great importance by the Deng Xiaoping administration. The courts, procuracy and legal education all needed to be restructured, having been severely damaged during the Cultural Revolution. Consequently, some of the first pieces of legislation promulgated under Deng's leadership were the Criminal Law and Criminal Procedure Law of 1979. These laws enhanced the predictability and fairness of the PRC's criminal justice system, providing for such things as appellate review and a suspended death sentence, while denouncing public executions.

Not long after their promulgation though, the Chinese leadership initiated numerous campaigns to combat crime and many of the newly legislated procedural safeguards were stripped away. The right to approve death sentences was given to the higher people's courts of the provinces, suspending the Supreme People's Court's mandated review of capital cases. The time limit for appeals was reduced from ten to three days. The number of offences punishable by

death more than doubled from the initial twenty-one (seven ordinary and fourteen "counterrevolutionary" crimes). Mass sentencing rallies and swift executions were once again commonplace; these were often evidenced by the posters that hung in public squares publicizing the names and photos of the condemned, red check marks indicating those sentences already carried out. This suspension of procedural safeguards continued right up until the amendments of 1996 and 1997, gaining particular attention after the Tiananmen massacre of June 4, 1989.

### **Why the need for amendments?**

The People's Republic of China (PRC) has been engaging in unprecedented levels of legal reform. In the past eight years alone, the National People's Congress (NPC) and its Standing Committee, which together constitute the central government's legislative arm, have passed over 150 laws, representing nearly one third of the national-level legislation ever enacted during the PRC's fifty-year history."<sup>38</sup>

After Tiananmen, the PRC found itself the target of much condemnation by an outraged international community. While the enormity of the Chinese market was a great attraction for foreign investors, it was accompanied by the knowledge that the PRC was a country with a penchant for abandoning procedural safeguards.<sup>39</sup> Investors needed predictability for their interests and foreign governments were demanding accountability for human rights atrocities.<sup>40</sup> Monthly suggests that it was foreign pressures like these that led to the promulgation of the amended Criminal Law and Criminal Procedure Law.<sup>41</sup> In a similar vein, Boxer focuses on China's inevitable accession to the World Trade Organization as the main reason for the legal reforms. As he notes: "The global development of the Chinese economy compels China to develop a corresponding legal system capable of handling the complex issues that such a business environment presents."<sup>42</sup> Others still have discussed political reasons for the amendments. China Rights Forum notes that, for example, the continued existence of "counterrevolutionary" crimes in the 1979 Criminal Law was "an international liability, as it was an easy target for outside condemnation and a hindrance to cooperation on legal issues more

generally" (e.g. cooperative cross-border judicial relations needed for extraditions.)<sup>43</sup> Added to these reasons is the more mundane, yet equally valid notion that seventeen years had passed, circumstances had changed considerably and new trends had developed (both economic and legal) all requiring a revamping of the criminal laws.<sup>44</sup> Whatever the reasons for the amendments, what effects, if any, have they had on the five areas of law discussed here?

### **Judicial Independence in Modern China**

Once rejected as "bourgeois and inconsistent with the principle of the leadership of the Communist Party,"<sup>45</sup> the principal of judicial independence has since been entrenched in the Chinese Constitution.<sup>46</sup> Article 126 states: "The people's courts exercise judicial power independently, in accordance with the provisions of the law, and are not subject to interference by any administrative organ, public organization or individual." This provision however is countered by the observations of numerous organizations like the U.S. Department of State which notes:

[I]n practice, the Government and the CCP [Chinese Communist Party], at both the central and local levels, frequently interfere in the judicial process, and decisions in a number of high profile political cases are directed by the Government and the CCP.<sup>47</sup>

This undue political influence is said to result from the fact that judges are appointed by those politicians who make up the corresponding People's Congress (e.g. provincial politicians appoint provincial court judges). "One expert estimated that more than 70 percent of commercial cases in lower courts were decided according to the wishes of local officials rather than the law."<sup>48</sup> Another constitutional requirement that could aid in the monitoring of judicial independence is Article 125 which requires that all trials be open to the public. Despite its inclusion, the reality is that many trials are not open; the legal exceptions that allow for closed trials in cases involving state secrets, privacy, and minors are frequently used to keep proceedings closed to the public.<sup>49</sup>

Despite this potential for political manipulation, the revised CPL contains a few provisions that are meant to confine the judiciary in other ways. Under the 1979 law, courts conducted a pre-trial examination that "essentially amounted to a determination of guilt prior to trial."<sup>50</sup> With the revised CPL, the court's pre-trial role is now limited to a procedural review of the materials submitted by the prosecutor. Previously at the trial stage, judges assumed a prosecutorial role, presenting evidence and questioning witnesses. This role was aided by Article 123 of the 1979 CPL which allowed a court, finding the evidence incomplete, to return the case to the procuracy for "supplementary investigation." While the revised CPL annulled this power for the judiciary, it did not eliminate it altogether; the procuracy can now request a "supplementary investigation" during the course of a hearing (Article 165). Organizations like Amnesty International warn that such procedures may be used "to bring the prosecution's evidence to the standards required for conviction."<sup>51</sup> Finally, another limit imposed on the courts dealt with the influence of one court level over another. Previously, the court president had the power to remove a "difficult, complicated, or important" case from a trial court, submitting it instead to the court's supervisory body: the adjudication committee. Under the revised CPL, the court president no longer has this power. Only the trial court itself can refer a case to this higher body, and only after it has tried and failed to reach a verdict.

Political influence and procedural limitations aside, Chen notes that "currently the most serious failures in judicial independence are attributable not to 'Party leadership' but to corruption among judges...."<sup>52</sup> Earlier this year before the Third Session of the Ninth National People's Congress, the president of the Supreme People's Court, Xiao Yang, vowed to establish a fair and efficient judicial system free of corruption. Xiao asserted that corrupt judges would not be spared from the bribery and embezzlement crackdown. In order to accomplish this task, courts would promote open trials, strengthen internal supervision and reform the judicial selection process in order to attract more highly qualified individuals. In the same address it was

noted that seventy-three percent of the 1,450 judges investigated for violations of law in 1999, were prosecuted.<sup>53</sup>

Despite Xiao Yang's avowal, modern Chinese judges (like their imperial counterparts) are subject to the influence of those outside their court. In fact, when compared with their dynastic cousins, the range of persuasive bodies has expanded. The judges themselves may request the influence, as when lower courts submit difficult cases to the adjudication committee; the initial court simply has to "rubber-stamp" the committee's decision. On other occasions, judges are the targets of bribery by those outside the system. Of particular interest though is the continued influence of politics on the judiciary. It would appear that when manipulation of the judiciary is to its advantage, the state will intervene. Procedural limitations that are said to have created a more "passive" judiciary are rendered moot when the state decides to control a trial's outcome. Like the imperial magistrates before them, modern Chinese courts continue to carry out the will of their governing authority.

### **The Appeal Process**

In 1983, the Chinese government launched a massive "Anti-Crime Campaign." Central to the campaign's success were the streamlined procedures that accompanied it. In 1981 the Supreme People's Court's approval for death sentences was suspended in cases of murder, rape, robbery, arson and other crimes. Instead, the higher people's courts of the provinces and municipalities could approve these sentences.<sup>54</sup> This was followed in 1983 by a decision to reduce the time limit for death penalty appeals from ten to three days.<sup>55</sup> Articles 183 and 200 of the revised Criminal Procedure Law essentially repeal these measures. Article 183 renews the ten-day limit for appeals that was first legislated under the 1979 CPL. And like its 1979 counterpart, Article 200 stipulates that a capital case first tried by an intermediate people's court must be reviewed by a higher people's court before being submitted to the Supreme People's Court for approval. In those instances when the court of first instance is a higher people's court,

the case must still be submitted to the Supreme People's Court for approval.<sup>56</sup> As Boxer notes, "This separation of power is a critical move toward the elimination of the summary trial."<sup>57</sup> According to Amnesty International though, these provisions are easily emasculated as "the Supreme People's Court can delegate its power to approve death sentences to the provincial high courts in some cases."<sup>58</sup> Consequently, the approval process is often rendered valueless as it can become amalgamated with the higher court's review process.<sup>59</sup> Even more blatantly ineffective are those cases where a higher court is the court of first instance; the initial sentencing and approval of the sentence may be done concurrently.<sup>60</sup>

While a defendant's appeal cannot result in a harsher punishment, both the procuratorate and the victim's family can appeal a sentence they think is too lenient. Although successful appeals by defendants are said to be rare, it is common for appeals by these others to result in increased penalties.<sup>61</sup> Perhaps most startling though is the swiftness of the appeal process. For example, the April murder of a German family of four resulted in July death sentences for the defendants; they were executed September 27<sup>th</sup>, the same day the higher court rejected their appeal.<sup>62</sup> Another case involved the murder of three children on February 27, 2000; by April 17<sup>th</sup>, the defendants had been tried, their appeals heard and reviewed, and the one defendant sentenced to death was executed.<sup>63</sup>

In the past, the provisional sentences handed out by local magistrates in imperial China required the approval of those above them; so too the death sentences imposed by present-day local courts need to be reviewed by a higher authority. The substantive law and its practical effects however, seldom parallel one another. Although today's higher courts are not subject to punishment for the incorrect decisions of those below them, they continue to "rubber-stamp" lower courts' decisions, just as imperial courts once cursorily reviewed cases. This is evidenced by the lack of successful appeals by defendants and the frequency with which reviews and approvals are amalgamated. Whereas imperial death sentences "often" required the Emperor's approval, it appears as though modern death sentences in China, despite Article 200 of the CPL



and Article 48 of the Criminal Law, no longer require the approval of the Supreme People's Court. It suffices that a provincial or municipal court, higher than the court of first instance, approves the sentence. Why then did the NPC include these provisions if they were so easily rendered ineffective? Shouldn't the appeal process, as the system's last safeguard against injustice, be carried out as mandated?

### **"Counterrevolutionary" vs. "State Security" Crimes**

Once, during a campaign to suppress counterrevolutionaries within the Party, government, schools and army, Mao Zedong aptly noted the danger of false arrests: "Once a head is chopped off, history shows it can't be restored, nor can it grow again as chives do, after being cut."<sup>64</sup> This acknowledgement of the fragility of human life however was belied by Mao's frequent use of the death penalty against those who dared to oppose him or the Communist Party. Most victims of such political purges were labeled "counterrevolutionaries." This term was codified in the Criminal Law of 1979 when twelve counterrevolutionary offences, both violent and non-violent, were listed (Articles 90 to 104). The removal of these offences from the 1997 amended law then, has not gone unnoticed.

Chinese officials discuss the change as evidence of the country's evolution towards its socialist goal; the revolutionary stage of the struggle has come to an end. Presumably then, if it is the government's attitude that such acts are no longer a threat to society, those serving sentences for counterrevolutionary offences should be able to have their cases reviewed and possibly set free.<sup>65</sup> Instead, government officials have stated that those counterrevolutionaries who are currently serving prison sentences will not be eligible for amnesty or early release.<sup>66</sup> Apparently, counterrevolutionary crimes are still considered offences under the Law on State Security.<sup>67</sup>

At first blush the removal of counterrevolutionary crimes may be thought to signal greater respect for the rule of law. Critics like the China Rights Forum however argue that "in fact,

China has merely replaced the term 'counterrevolution' with the equally elastic notion of 'endangering state security' and has, in the process, actually broadened the capacity of the state to suppress dissent."<sup>68</sup> Thus, in addition to those serving time for "counterrevolutionary" crimes there are now "state security" offenders (Articles 102 to 113). Perhaps the government hoped that, without actually having to release any political prisoners, the simple replacement of the politically-charged term with something more innocuous would help to alleviate some of the pressure coming from foreign sources. However both the China Rights Forum and a Chinese government official, admittedly for different reasons, instead point to the difficulty that existed with the earlier legislation's requirement that the prosecution prove the defendant's "subjective counterrevolutionary purpose." The former is of the opinion that the removal of this requirement was "in part intended to facilitate convictions," as it meant one less thing for the prosecution to prove.<sup>69</sup> Wang Shangzin however speaks of the inclusion of "counterrevolutionary" as having hindered the prosecution of "state security" crimes which "faced no clear charge or punishment in the law books in the past."<sup>70</sup>

Whatever the reasons for the change from "counterrevolutionary" to "state security," eight of the twelve articles are of particular relevance as they are punishable by death. Of greatest concern to critics is the possibility that the lack of a definition for "endangering state security" will result in these provisions being used to condemn a wide variety of activities. "Both entirely non-political actions - such as [prominent dissident] Wang Dan's providing humanitarian assistance to families of imprisoned dissidents - as well as political actions, can potentially be dealt with under the judicial rubric of 'endangering state security'."<sup>71</sup> Meanwhile those in ethnic minority regions are concerned with Article 103, which appears to have created the distinct crime of "separatism." Amnesty International has already noted a steady increase in the number of ethnic Uighurs sentenced to death in Xinjiang province for this crime.<sup>72</sup>

Until now, we have only examined those provisions expressly listed as "endangering state security," but what about crimes listed in other sections of the Criminal Law? Do they also

encompass the interests of the state? In Chapter Two, "Crimes against Public Safety," death is prescribed for those who by arson, breakage of dams, bombing or other dangerous acts cause serious damage to public property (Article 115). Article 127 stipulates death for those who steal weapons, ammunition or explosives from the state's organs (i.e. government, military or police). Chapter Three's "Crimes of Sabotaging Socialist Market Order" includes instances of VAT and credit card fraud causing heavy losses to the state as capital offences (Articles 199 and 205). All of Chapter Seven, entitled "Crimes against National Defence," involves state security interests, two of which are punishable by death. Chapter Eight, "Graft and Bribery" is composed of provisions that punish both state officials as well as those who influence state officials; "especially serious" instances of bribery or embezzlement may result in death. Finally, Chapter Ten includes many provisions like those found in Chapter One's "Endangering State Security," only pertaining to military personnel (e.g. conspiracy with the enemy, defection, and procurement of military secrets for foreign institutions). Eleven of these Articles can result in death sentences.

Although the notion of strong leadership continues to be of importance in modern China, as it was in imperial China, its explicit goal is no longer the Confucian ideal of "social harmony." Rather, legitimization of the state's authority is required in order to create the necessary stable environment that will attract foreign investors and quell criticism. However, because punishment is no longer inflicted upon the relatives of an accused<sup>73</sup> and a gradation of methods of execution does not exist,<sup>74</sup> the NPC has found other ways to signal its opposition to crimes that involve the state. Similar to its dynastic counterparts, the Criminal Law codifies particular state security offences as it did in its 1979 incarnation. The new law's use of the term "endangering state security" in place of the older, more politically charged "counterrevolutionary," is nothing more than a substitution in vocabulary. Contrary to any so-called reformative purpose, these provisions are similar to their correlative 1979 articles, if not broader in scope. Also similar to the imperial codes, the state imposes a more serious

punishment for a public sphere offence as compared with its private sphere counterpart. An illustration of this is found in Chapter Three where economic crimes that involve "heavy losses to state interests" result in death, while lesser sentences are imposed for instances of the same offence in the private sphere. The state then is able to establish its primacy both through the creation of "state security" offences and their subsequent harsh punishment.

### **Mitigated Sentencing**

Those having been tried and convicted must inevitably be sentenced. While a variety of punishments exist, the PRC is perhaps most famous (or rather, infamous) for its use of the death penalty. Despite the introduction of the use of lethal injection in the 1996 Criminal Procedure Law, the most common method of execution involves a single bullet to the back of the head.<sup>75</sup> Over sixty separate offences in the amended Criminal Law of 1997 include execution as a possible sentence. Amnesty International estimates that in 1998, 2,701 death sentences were handed down and 1,769 executions carried out (an average of 51 per week).<sup>76</sup> While there is some room for mitigation of this sentence, particular trends have in fact resulted in the frequent application of the death penalty.

One form of alleviation came from the 1997 Criminal Law's repeal of any form of the death penalty for pregnant women and those who were under the age of eighteen when the offence was committed. Previously, these two categories of offenders could have faced "suspended death sentences" (*sihuan zhidu*).<sup>77</sup> Also known as a two-year reprieve, this sentence postponed the death penalty for two years, during which time the prisoner would be observed. Those prisoners who demonstrated evidence of "reform" over the period could have their sentence commuted to life or fixed-term imprisonment. No standards for evaluating the prisoner were ever codified. After the 1997 amendment, execution or commutation of the death sentence now depends on whether or not the prisoner has "intentionally committed crimes" during the

period of suspension (Article 210). The revised law however does not specify what types of new crimes might warrant the carrying out of the death sentence.<sup>78</sup>

While the notion of amnesty was not new to China, the Communists were the first to adopt the "suspended death sentence." Lepp argues that this Communist innovation "reflects a traditional Chinese faith in the malleability of man and his potential productive capacities."<sup>79</sup> Monthy on the other hand is more cynical, describing it as "just another way a moralistic state can make its more deviant citizens 'reform'."<sup>80</sup> Despite the fact that most suspended death sentences are eventually commuted to life imprisonment, this form of punishment is not without reproach. The indefinite renewal of the two-year suspension or the eventual execution of the criminal who waited those years with hope of reprieve, may be considered inhumane."<sup>81</sup> Another criticism is that the largely white-collar crimes of corruption, embezzlement and fraud, when compared with other capital crimes, are more frequently punished by the two-year reprieve; this is significant knowing that regular death sentences tend to be disproportionately imposed on those with little education and social standing.<sup>82</sup> Whatever the potential benevolence behind its use and the possible benefits that might accompany it, any sense of mitigation is diminished by virtue of the fact that the two-year reprieve is used considerably less often than the death sentence; compare 200 two-year reprieves with 2,701 death sentences in 1998.<sup>83</sup>

One reason cited for the recent number of death sentences and executions is the nationwide "strike hard" (*yanda*) anti-crime campaign. First launched in 1996, the campaign continued throughout 1997 and 1998,<sup>84</sup> targeting specific crimes like drug trafficking, separatism in Tibet and Xinjiang, tax fraud, and corruption. Later, many local or regional campaigns also took hold. Crimes committed during the "strike hard" campaign were supposedly dealt with more seriously than their pre-campaign counterparts.<sup>85</sup> This harsher treatment was justified as a means to punish the criminals for having flouted the policy in the first place. Another reason had to do with the pressure faced by local officials to achieve speedy results; penalties resulted for those who did not zealously promote the campaign. Some provinces, eager to prove their

enthusiasm, were said to have retried and sentenced to death offenders previously sentenced to fixed terms of imprisonment, while others imposed the death penalty for the first time for specific crimes. Particularly harsh punishments were imposed on those with a previous criminal conviction or record of administrative penalty.<sup>86</sup>

In addition to the harsher treatment of crimes during the "strike hard" campaign, Amnesty International has identified another phenomenon responsible for the high rates of capital punishment: sentencing peaks. Often before major events, public holidays and anniversaries, the authorities will sentence and execute more prisoners than usual.<sup>87</sup> Anti-Drugs Day on June 26, National Day on October 1 and Chinese New Year tend to be popular sentencing periods. This pattern is an interesting contrast with imperial times when holidays prohibited any executions.

Unlike the imperial dynasties' use of the death penalty, fewer reasons to mitigate sentencing seem to exist in contemporary China. Holidays that once strictly forbade any executions are now reasons to impose harsher sentences and carry out executions. A few special categories of individuals were once exempt from capital punishment (e.g. minors, the elderly, the disabled and only sons); this has now been reduced to two - pregnant women and those under 18, a rather insignificant proportion of criminal offenders. Added to this is the frenzy of the "strike hard" campaign and its desire to crackdown on various crimes; those in charge of its enforcement demonstrate their enthusiasm by imposing stricter sentences than usual. And the one reprieve which does exist - the two-year suspended death sentence - is not prevalent enough to be of significance.

### **Punishment of Corrupt Officials**

Hundreds of years ago, the Qing Code legislated particular methods for dealing with officials who committed crimes. These people, known as "The Eight [Categories of Persons Whose Cases are to be Especially] Considered," were often accorded more lenient punishments

simply because of their status. Although this special category ceased to exist with the fall of the Qing Dynasty in 1911, the mitigating influence of power and privilege was not rendered obsolete. While those who criticized Mao were often labeled as "counterrevolutionaries" and subject to harsh punishments, those properly connected to the authorities could do no wrong.<sup>88</sup> This elitism that first took root in imperial China and continued through to the days of the PRC, only ceased to exist in the early 1980s when anti-crime campaigns began to crackdown on corrupt officials. Symbolic of Deng's desire to implement legal reform, the anti-crime campaigns spared no one, not even Communist Party cadres and their family members.<sup>89</sup> No longer could officials buy their way out of punishment; all who committed crimes were subject to the same penalties, including the possibility of capital punishment for those offences considered "heinous."

The campaigns to end corruption do not appear to have subsided any over the past few years. In fact, Chinese government statistics released in March 1998 revealed that corruption proceedings had increased by ten percent to over forty thousand investigations and twenty-six thousand indictments. (Perhaps most ironic was the dismissal of the head of the Anticorruption Bureau of the Supreme People's Procuratorate in January 1998 for corruption.)<sup>90</sup> Most recently, the president of the Supreme People's Court identified bribery and embezzlement of public funds as two particular targets for corruption crackdowns.<sup>91</sup> In implementing these crackdowns, officials at all levels have not been spared from the harshest of punishments. Huang Faxiang, a local official in charge of building new towns for people relocated by the Three Gorges Dam project, was sentenced to death for misappropriating over a million dollars of the project's funds.<sup>92</sup> Hu Changqing, former deputy governor of Jiangxi Province, was sentenced to death for accepting thousands of dollars worth of bribes.<sup>93</sup> Even former vice-chairman of the NPC Cheng Kejie was executed in September for accepting millions of dollars worth of bribes.<sup>94</sup> Cheng's execution was said to have spurred an appeal by one party cadre to eliminate death sentences for

party officials; but as evidence of the state's commitment to go after both "flies and tigers," President Jiang Zemin and Premier Zhu Rongji quickly rejected the idea.<sup>95</sup>

Until now, our examination of the substantive laws and their practical implications has revealed few parallels. While the substantive provisions often appear to be "modern" or "reformative," their practical implications usually lag far behind, seldom differing from their imperial ancestors. Only with regard to corrupt officials do the two finally concur; like the anticorruption crackdowns carried out by the state, the 1997 Criminal Law is equally intolerant of corrupt individuals.

The Criminal Law's Chapter Nine ("Crimes of Dereliction of Duty") is entirely devoted to the problem of corrupt officials, each article particularly detailed in its application. Compare for example Article 416 "State organ personnel charged with the responsibility of rescuing abducted or kidnapped women and children..." with Article 414 "State organ work personnel charged with the responsibility of establishing liabilities of criminal acts relating to the sale of fake and shoddy merchandise...." A separate offence seems to have been created for every type of state official known to exist (e.g. customs personnel (Article 411); quarantine personnel (Article 413); public health administrative department personnel (Article 409), etc.). Intentional acts of "favoritism and malpractice" have been distinguished from negligent acts of "serious responsibility"; the former, not surprisingly, demand a stricter punishment.<sup>96</sup> The Chapter's harshest punishment however, consists of no more than ten years imprisonment.

Besides Chapter Nine, there are other provisions scattered throughout the Criminal Law that pertain only to officials. Many are found in Chapter Eight, "Graft and Bribery." Article 383 defines the crime of "graft" while Article 384 sets out the related penalty which varies with "the seriousness of the case," i.e. the amount of money involved. "Especially serious" instances of graft over 100,000 yuan can result in capital punishment. The same punishment scheme exists for those who commit bribery (Article 386). Not all provisions dealing with officials who abuse their power however entail "state interests." Chapter Four ("Crimes against Human and Civil



Rights") includes particular provisions concerning official abuse of power and its effect on others. In illustration, Article 238 provides that an employee of a state organ who abuses his / her authority and unlawfully detains a person (whether or not serious injury or death results) "is to receive a heavier punishment" as compared with any other offender. Similarly, Articles 247 and 248 respectively deal with judicial personnel who torture suspects to extract confessions and prison officials who beat prisoners; those causing serious deformity or death may receive death sentences.

While laws against corrupt officials are not novel, the PRC's enforcement of such measures is new. Less than twenty years ago, the favoritism once explicitly set out in the Qing Code manifested itself among those privileged enough to have ties to the Communist Party. Anticorruption crackdowns however, in tandem with substantive law reforms, have done away with these distinctions. Once subject to punishments no more threatening than a demotion in rank or payment of a fine, officials who accept bribes or embezzle public funds may now face imprisonment or even death. Even in those cases where national interests are not at issue, strict punishments may prevail; this is particularly so when state officials are acting in their capacity as caretakers. The parallelism of the Criminal Law and its practical implications might finally be said to live up to the label of "reform."

## **Conclusion**

The juxtaposition of modern Chinese criminal laws and their historical counterparts reveal some instances of modernization. Nowadays there are fewer death-eligible crimes than the one hundred or so found in each dynastic code, and the methods of execution are perhaps no longer as drawn out as they once used to be. The unequal application of laws for particular groups of people in all practicality appears to have been abolished, and the judiciary has been relegated to a more passive role at trials. Other changes to the CPL and Criminal Law, incomparable with imperial laws because these issues were never documented in imperial

treatises (e.g. role of the court president), point to significant improvements from their preceding incarnations. The suspension of the court president's interference in trial decisions, the expansion of time for appeals from three to ten days, and the notion of a death penalty with reprieve, are all positive steps towards China's acceptance of international standards.

Yet on examination the same contemporary laws, particularly when compared with their practical effects, are demonstrative of a stagnancy that plagues the Chinese criminal justice system. While not in the hundreds, the categories of death-eligible crimes are more numerous than those first listed in the Criminal Law of 1979. The judiciary remains under the influence of politicians, aided by the frequent use of closed hearings. Any notion of an "obligatory review system" has been lost in the amalgamation of reviews and approvals. In fact, sometimes the most recent laws appear to have regressed beyond anything imaginable in imperial times. Whereas the death penalty's repercussions on social harmony were once strong enough to limit executions to less than two months of the year, a de-sensitization has taken hold. The speed of the process can now take an offender through his trial, sentencing, appeal and execution in a matter of days or weeks. Seasons and holidays which once expressly forbid judicially sponsored death sentences are now reasons to impose such sentences and to carry out executions. The possible number of offenders facing the death penalty is larger than in imperial times, now that the number of groups exempt from execution have dwindled to two.

Admittedly, the five areas of law taken into consideration in this paper provide only the briefest of introductions into the Chinese criminal justice system. Chosen quite randomly, these five aspects are not necessarily representative of the system as a whole. Chinese and Western scholars alike, in examining different criteria, have described the 1996 Criminal Procedure Law and the 1997 Criminal Law as "point[ing] in a positive direction,"<sup>97</sup> "hav[ing] important implications for China's observance of international standards,"<sup>98</sup> and "increas[ing] the protections for people detained under the criminal justice system."<sup>99</sup> Issues like increased access to counsel, limitations on non-judicial determinations of guilt, and the abolishment of

punishment by analogy are deservedly hailed as signals of China's evolution towards internationally acceptable norms. But only in comparing these measures with their historical counterparts can one decide whether they are truly worthy of the label "reform."

To this end, the imbalance between the substantive laws and their practical effects as identified in this paper, are only indicative of the lack of "reform" intended by the amended Criminal Law and Criminal Procedure Law. Past cycles of openness in China have been followed by violent crackdowns. Arguably it is just a matter of time before another anti-crime campaign strips away any last vestiges of procedural safeguards. The government's silence about individual rights, particularly when compared with the new laws' concern for state and economic interests, is not encouraging either. A simple historical analysis quickly reveals the transparency of any evolution.

Rather than temporarily appeasing the international community with so-called amendments, shouldn't the PRC be making some kind of real attempt to move beyond its past? If it was the watchful eye of foreign economic and political pressures that motivated these most recent changes in the first place, China cannot seriously expect that the same international community will be satisfied with only the most formalistic of changes. On the contrary, as China continues to open its doors it is likely to come under more detailed scrutiny. Monthly's description of the 1997 Criminal Law, equally appropriate for the Criminal Procedure Law, perhaps said it best: "[W]e can view the significant measure as a Janus-faced stab at pleasing both chive-cutters and legal reformers."<sup>100</sup> Over the next few years, we will anxiously wait to see if the garden is left to grow.

## End Notes

<sup>1</sup> Xinhua English Newswire: March 17, 1996.

<sup>2</sup> Amnesty International, "People's Republic of China: Law Reform and Human Rights" (1997), (visited Sept. 23, 2000) <<http://www.web.amnesty.org/ai.nsf/index/ASA170141997>> [hereinafter "Law Reform"].

<sup>3</sup> See for example *ibid*; Jeremy T. Monthly, "Internal Perspectives on Chinese Human Rights Reform: The Death Penalty in the PRC" (1998) 33 *Texas International Law Journal* 189 [hereinafter "Internal Perspectives"]; John T. Boxer, "China's Death Penalty: Undermining Legal Reform and Threatening National Economic Interest" (1999) 22 *Suffolk Transnational Law Review* 593 [hereinafter "Undermining Legal Reform"]; Daniel C. Turack, "The Chinese Criminal Justice System" (1999) Spring *Cardozo Journal of International and Comparative Law* 49 [hereinafter "Justice System"]; and Lawyers' Committee for Human Rights, "Opening to Reform?: An Analysis of China's Revised Criminal Procedure Law" (Oct. 1996), (visited Sept. 25, 2000) <<http://www.lchr.org/pubs/china.htm#OPENING>> [hereinafter "Opening"]. While some of these reports speak generally of "international standards," others specifically refer to the requirements set out in international treaties such as the U.N.'s Universal Declaration of Human Rights (adopted Dec. 1948) or the U.N.'s International Covenant on Civil and Political Rights (adopted Dec. 1966).

<sup>4</sup> The amended Criminal Law more than doubled in size from its 1979 incarnation, growing from 192 to 452 articles.

<sup>5</sup> For the sake of brevity, I have chosen not to discuss the period between 1911 and 1949 which saw the rise to power of the Nationalists, followed by civil war with the Communists and the eventual founding of the PRC in 1949. Due to the instability and chaos that existed throughout most of this period, I decided that it would create too much of an anomaly when surveying the historical treatment of criminal law in the PRC.

<sup>6</sup> China is reported to have executed 1,067 prisoners in 1998; the next highest rate of execution was in the Democratic Republic of Congo where 100 death sentences were carried out. See Amnesty International, "Facts and Figures on the Death Penalty" (April 1999), (visited Nov. 17, 2000) <<http://www.amnestyusa.org/abolish/act500299.html>>.

<sup>7</sup> See Amnesty International, "Peoples Republic of China: the Death Penalty in 1998" (1999), (visited Sept. 23, 2000) <[http://web.amnesty.org/\\_802568f7005c4453.nsf/747054d7fd43f9328025693e00500113/8203acb0a0173bc8025690000692fa0!OpenDocument](http://web.amnesty.org/_802568f7005c4453.nsf/747054d7fd43f9328025693e00500113/8203acb0a0173bc8025690000692fa0!OpenDocument)> [hereinafter "Death Penalty '98"]; and Amnesty International, "People's Republic of China: the Death Penalty in 1997" (1998), (visited Sept. 23, 2000) <[http://web.amnesty.org/\\_802568f7005c4453.nsf/747054d7fd43f9328025693e00500113/8e0da9c9e68f09d68025690000692d58!OpenDocument](http://web.amnesty.org/_802568f7005c4453.nsf/747054d7fd43f9328025693e00500113/8e0da9c9e68f09d68025690000692d58!OpenDocument)> [hereinafter "Death Penalty '97"].

<sup>8</sup> *Ibid*.

<sup>9</sup> See China Rights Forum, "The Revised Criminal Procedure Law: Will it Mean What It Says?" (1996), (visited Sept. 23, 2000) <<http://www.hrichina.org/crf/english/96fall/e4.html>> [hereinafter "China Rights Forum"].

<sup>10</sup> See Internal Perspectives, *supra* note 3, p 199.

- <sup>11</sup> See Alan W. Lepp, "Note, The Death Penalty in Late Imperial, Modern, and Post-Tiananmen China" (1990) *11 Michigan Journal of International Law* 987 [hereinafter "Post-Tiananmen"], p 988.
- <sup>12</sup> See Derk Bodde & Clarence Morris, *Law in Imperial China* (Cambridge: Harvard University Press, 1967) [hereinafter "Bodde & Morris"], p 19.
- <sup>13</sup> *Ibid*, p 27.
- <sup>14</sup> See Stephen B. Davis, "The Death Penalty and Legal Reform in the PRC" (1987) *Fall Journal of Chinese Law* 303 [hereinafter "Legal Reform in the PRC"], p 307.
- <sup>15</sup> *Ibid*, p 306.
- <sup>16</sup> See Internal Perspectives, *supra* note 3, pp 213-221 for a helpful chart that lists the Qing Code's death-eligible crimes.
- <sup>17</sup> "Death by slicing" involved the executioner making dozens of slices on the defendant's body, presumably letting him / her bleed to death. While strangulation likely made for a more prolonged death than decapitation, the latter was considered the more severe punishment; traditional tenets of Chinese filial piety viewed the body as a bequest from the parents and therefore not to be mutilated.
- <sup>18</sup> William P. Alford, "Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Late Imperial China" (1984) *72 California Law Review* 1180, p 1192.
- <sup>19</sup> *Ibid*, pp 1227-28.
- <sup>20</sup> *Ibid*, p 1228.
- <sup>21</sup> *Ibid*, pp 1229-1237.
- <sup>22</sup> *Ibid*, p 1231.
- <sup>23</sup> *Ibid*, p. 1234. Alford discusses the appointment of one provincial Governor who had never passed an imperial civil service examination.
- <sup>24</sup> *Ibid*, p 1232.
- <sup>25</sup> See Bodde & Morris, *supra* note 12, p 118.
- <sup>26</sup> Sybille van der Sprenkel, *Legal Institutions in Manchu China* (Toronto: Oxford University Press, 1966), p 29.
- <sup>27</sup> William C. Jones, "Studying the Ch'ing Code - The Ta Ch'ing Lu Li" (1974) *22 American Journal of Comparative Law* 330, pp 354-355.
- <sup>28</sup> See Internal Perspectives, *supra* note 3, p 201.
- <sup>29</sup> *The Great Qing Code*, trans. William C. Jones (New York: Oxford University Press Inc., 1994) [hereinafter "Great Qing Code"], pp 276 & 237, respectively.
- <sup>30</sup> See Legal Reform in the PRC, *supra* note 14, p 307.
- <sup>31</sup> See Bodde & Morris, *supra* note 12, pp 34-35.
- <sup>32</sup> *Ibid*, p 435.
- <sup>33</sup> *Ibid*, p 330.
- <sup>34</sup> *Ibid*.
- <sup>35</sup> See Great Qing Code, *supra* note 29, p 396.
- <sup>36</sup> *Ibid*, p 381. Officials who wrongly increased a penalty to death and the sentence was carried out (or conversely wrongly decreased a death penalty and the offender was released) were to be executed.

<sup>37</sup> See Post-Tiananmen, *supra* note 11, p 998.

<sup>38</sup> C. David Lee, "Legal Reform in China: A Role for Nongovernmental Organizations" (2000) 25 *Yale Journal of International Law* 363, p 364.

<sup>39</sup> See Post-Tiananmen, *supra* note 11, p 1002 where Lepp discusses the pattern of abandoned procedural safeguards: "In times of greatest threat, during which external pressures undermine the authority of the leaders, criminal punishment has been susceptible to greater arbitrariness, capriciousness, and brutality. Conversely, a relatively peaceful and complacent environment has enabled a more regularized legal system to dispense more predictable and often more lenient punishments."

<sup>40</sup> Human rights issues continue to be the topic of discussion between many foreign governments and the PRC. See for example, *Australian Financial Review*: "Talks on China Human Rights," August 11, 2000 discussing the fourth annual Australia - China human rights dialogue; *Bangkok Post*: "Beijing Continues To Go Its Own Way," October 2, 2000 discussing the biannual European Union - China talks on human rights; and *Deutsche Presse-Agentur*: "Germany Stresses "No" to Death Penalty in Talks with China," October 18, 2000.

<sup>41</sup> See Internal Perspectives, *supra* note 3, p 211.

<sup>42</sup> See Undermining Legal Reform, *supra* note 3, FN 77 pp 607-608.

<sup>43</sup> China Rights Forum, "Whose Security?: "State Security" in China's New Criminal Code" (Summer 1997), (visited Nov. 7, 2000): <http://www.hrichina.org/crf/english/97summer/e8.html> [hereinafter "Whose Security"].

<sup>44</sup> See Cai Ding Jian, "Commentary: China's Major Reform In Criminal Law" (1997) *Columbia Journal of Asian Law* 213, p 213. Cai, Division Chief for the Research Department of the Standing Committee of the National People's Congress notes that the Criminal Law of 1979 "focused largely on principles and was comprised of definitions that were unduly formalistic as well as containing many loopholes." In the intervening years...

"the National People's Congress adopted 22 ordinances and decisions that amended or supplemented the criminal statute. In addition, it adopted 130 articles regarding criminal liabilities in context of civil, economic, and administrative law. The Reform Bill on Criminal Law was formulated out of the accumulated experiences from the enactment of criminal laws over the past 17 years, the research conducted on criminal laws of various foreign countries, and the studies made on modern criminal legislation and developmental trends."

<sup>45</sup> Albert H.Y. Chen, "Towards a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law" (1999) 17 *UCLA Pacific Basin Law Journal* 125 [hereinafter "Legal Enlightenment"], p 147.

<sup>46</sup> Constitution of the People's Republic of China, 1993. Available online at: <http://www.qis.net/chinalaw/lawtranl.htm>.

<sup>47</sup> U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, "1999 Country Reports on Human Rights Practices" (Feb. 25, 2000), (visited Oct. 27, 2000) [ftp://ftp.state.gov/DOSFTP/pub/hrcr/\\_1999/04\\_East\\_Asia\\_and\\_Pacific/China](ftp://ftp.state.gov/DOSFTP/pub/hrcr/_1999/04_East_Asia_and_Pacific/China) [hereinafter State Department]; see also China Rights Forum, *supra* note 9.

<sup>48</sup> See State Department, *supra* note 47.

<sup>49</sup> *Ibid.* See also Opening, *supra* note 3.

<sup>50</sup> See Opening, *supra* note 3; and Law Reform, *supra* note 2 where this is referred to as "verdict first, trial second."

<sup>51</sup> See Law Reform, *supra* note 2.

<sup>52</sup> See Legal Enlightenment, *supra* note 45, p 157.

<sup>53</sup> See *China Daily*: "Fair, Efficient Justice Promised," March 11, 2000 [hereinafter "Fair Justice"].

<sup>54</sup> 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).

<sup>55</sup> 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).

<sup>56</sup> Article 48 of the Criminal Law also states: "Except for judgments made by the Supreme People's Court according to law, all sentences of death shall be submitted to the Supreme People's Court for approval."

<sup>57</sup> See Undermining Legal Reform, *supra* note 3, p 610.

<sup>58</sup> See Law Reform, *supra* note 2.

<sup>59</sup> See for example *Xinhua English Newswire*: "Murderer of 3 Pupils Executed in Central China City," April 17, 2000 [hereinafter "Murderer of 3"] where it was reported: "The Higher People's Court of Henan Province then checked and approved the death penalty for Xin Xiangwu... " (emphasis added).

<sup>60</sup> For a confusing example see *Xinhua English Newswire*: "Woman Gets Death Penalty for Children-Trafficking," May 28, 1999 where the defendant was executed the same day that she was sentenced by the municipality's First Intermediate People's Court, yet somehow the sentence had been "approved by the Higher Court of the city earlier."

<sup>61</sup> See Death Penalty '98, *supra* note 7.

<sup>62</sup> See *The Washington Post*: "China Executes Four for Family's Murder," Sept. 27, 2000.

<sup>63</sup> See Murderer of 3, *supra* note 59.

<sup>64</sup> See Mao Tsetung, *On the Ten Major Relationships* (Peking: Foreign Language Press, 1977), p 23.

<sup>65</sup> According to the U.S. Department of State, 1,946 people were serving time for counterrevolutionary offences in September 1998. See State Department, *supra* note 47.

<sup>66</sup> See Whose Security, *supra* note 43.

<sup>67</sup> See State Department, *supra* note 47.

<sup>68</sup> See Whose Security, *supra* note 43.

<sup>69</sup> Ibid.

<sup>70</sup> Wang Shangxin, deputy director with the Criminal Law Department of the Legislative Affairs Committee under the Standing Committee of the National People's Congress, quoted in *China Daily*: "China: Revised Criminal Law Clarifies Court Procedure," Oct. 27, 1997.

<sup>71</sup> See Whose Security, *supra* note 43.

<sup>72</sup> See Death Penalty '98 and Death Penalty '97, *supra* note 7.

<sup>73</sup> See *supra* note 29.

<sup>74</sup> See *supra* note 17.

<sup>75</sup> See Post-Tiananmen, *supra* note 11, p 1015 for a description of a modern execution.

<sup>76</sup> See Death Penalty '98, *supra* note 7.

<sup>77</sup> Amnesty International is aware of some cases where the defendant's age was in question or where the defendant was in fact under 18 at the time the offence was committed, yet still received the death penalty. See Death Penalty '98, *supra* note 7.

<sup>78</sup> See Law Reform, *supra* note 2.

<sup>79</sup> See Post-Tiananmen, *supra* note 11, p 1036.

<sup>80</sup> See Internal Perspectives, *supra* note 3, p 207.

<sup>81</sup> See Legal Reform in the PRC, *supra* note 14, p 314.

<sup>82</sup> See Death Penalty '98, *supra* note 7.

<sup>83</sup> Ibid.

<sup>84</sup> No specific information is available about whether or not the "strike hard" campaign continued into 1999 and 2000, however some targeted campaigns are known to exist, suggesting a continuation in one form or another of the "strike hards." See for example *supra* note 53, discussing the crackdown on corruption.

<sup>85</sup> See Death Penalty '98, *supra* note 7.

<sup>86</sup> See Amnesty International, "People's Republic of China: At Least 1,000 People Executed in 'Strike Hard' Campaign Against Crime", (visited Sept. 23, 2000) <<http://www.amnesty.org/ailib/intcam/dp/country/hard.htm>>.

<sup>87</sup> See Death Penalty '98 and Death Penalty '97, *supra* note 7.

<sup>88</sup> Privilege however, was a tenuous characteristic; those within the "inner circle" could easily fall out of favor with Mao. Deng Xiaoping for instance, once Chairman of the Secretariat and General Secretary of the Party, was purged at the beginning of the Cultural Revolution.

<sup>89</sup> See Post-Tiananmen, *supra* note 11, p 1030.

<sup>90</sup> See State Department, *supra* note 47.

<sup>91</sup> See Fair Justice, *supra* note 53.

<sup>92</sup> See *China Daily*: "Official Pays Dearly for Crime," March 15, 2000.

<sup>93</sup> See *China Daily*: "Official Sentenced to Death," February 16, 2000.

<sup>94</sup> See *China Daily*: "The Fight Against Corruption," Sept. 21, 2000.

<sup>95</sup> See *South China Morning Post*: "Clemency for Top Officials Rejected; Leaders put Weight Behind Death Penalty to Scare Off Big-Time Graft Offenders, Despite Purge Fears," Sept. 22, 2000.

<sup>96</sup> Compare for example Article 412 paragraph 1: "Work personnel with state commercial inspection departments or organizations, who practice favoritism and malpractice and forge inspection results, shall be punished with imprisonment or criminal detention of less than five years..." and paragraph 2: "Work personnel mentioned in the preceding paragraph, who, because of serious irresponsibility, fail to inspect goods requiring inspection, or delay inspection and issuance of certificates, or wrongly issue certificates resulting in serious losses to state interests, shall be punished with imprisonment or criminal detention of less than three years."

<sup>97</sup> See China Rights Forum, *supra* note 9.

<sup>98</sup> See Opening, *supra* note 3.



<sup>99</sup> See Law Reform, *supra* note 2.

<sup>100</sup> See Internal Perspectives, *supra* note 3, p 194.

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