

# Criminal Law Reform in the People's Republic of China:

Any Hope for those facing the death penalty?

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## 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 also passed. These changes have been described by Chinese officials as a "major step forward" in 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> As a country notorious for having the highest death penalty rate in the world,<sup>4</sup> the purpose of this

article is to ask whether these recent substantive amendments reveal an evolution in the use of capital punishment within the PRC. This will be done by juxtaposing four aspects of criminal law from imperial China with their modern-day counterparts.

## PUNISHMENT IN 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>5</sup>

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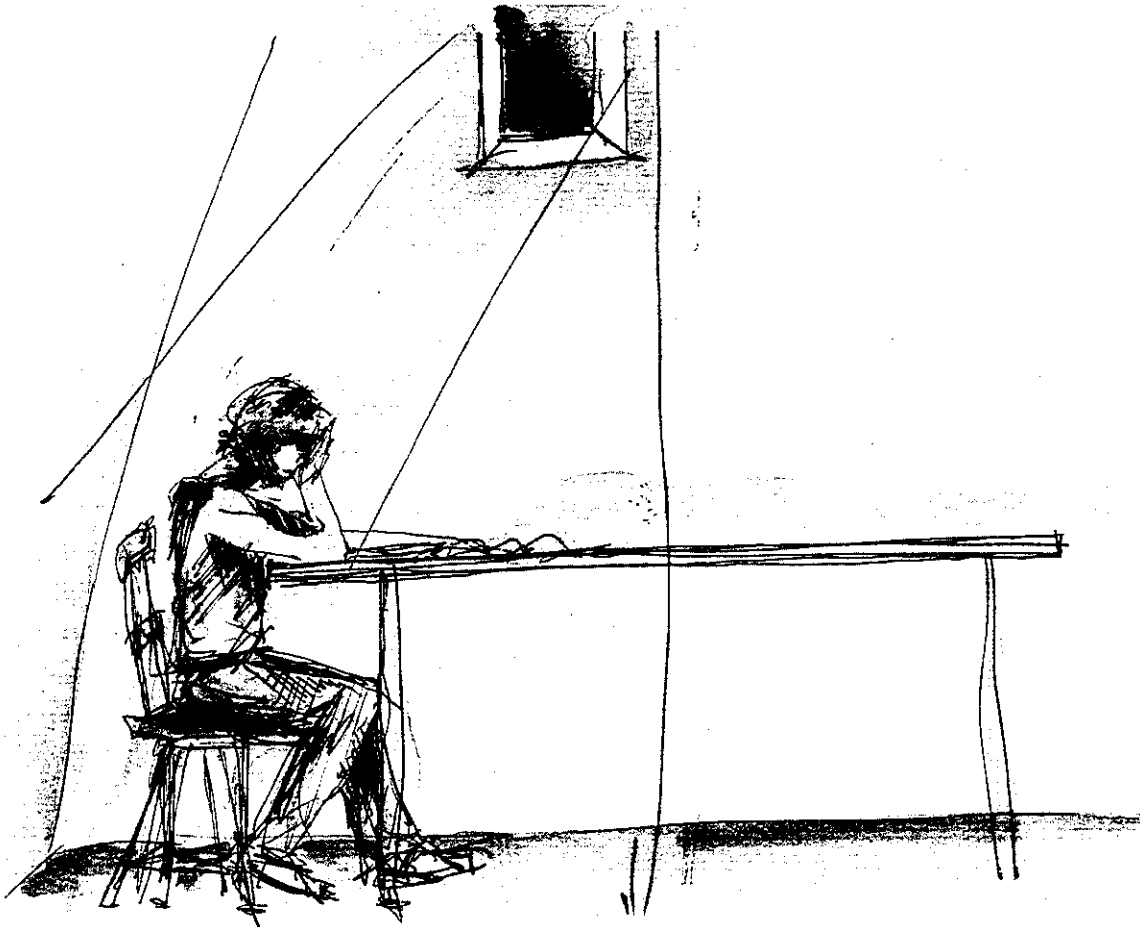
1 *Xinhua English Newswire* (17 March 1996).

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

3 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 "Opening to Reform?: An Analysis of China's Revised Criminal Procedure Law" (Oct. 1996) *Lawyers' Committee for Human Rights*, online: *Lawyers' Committee for Human Rights* <<http://www.lchr.org/pubs/china.htm#OPENING>> (date accessed: 25 Sept. 2000) [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).

4 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 "Facts and Figures on the Death Penalty" (April 1999) *Amnesty International*, online: *Amnesty International* <<http://www.amnestyusa.org/abolish/act500299.html>> (date accessed: 17 Nov. 2000).

5 See Alan W. Lepp, "Note, The Death Penalty in Late Imperial, Modern, and Post-Tiananmen China" (1990) 11 *Michigan Journal of International Law* 987 at 988 [hereinafter "Post-Tiananmen"].



Essential to any understanding of the present-day use of the death penalty in China is a look at its historical use. According to one scholar, Chinese 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>6</sup> The punishment meted out was to correspond to the seriousness of the offence, “as determined by its repercussions on universal harmony.”<sup>7</sup> As early as the Tang Code of 653 AD, the harshest of punishments, the death penalty,

was codified. Each imperial code thereafter included more than 100 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>8</sup> The most severe form of execution—death by slicing—was reserved for the most ruthless crimes, which was followed, in descending order of severity, by decapitation and strangulation.<sup>9</sup>

#### THE IMPERIAL APPEAL PROCESS

During the Qing Dynasty (1644–1911), an accused who felt he had not received a

6 See Stephen B. Davis, “The Death Penalty and Legal Reform in the PRC” (1987) Fall Journal of Chinese Law 303 at 307 [hereinafter “Legal Reform in the PRC”].

7 *Ibid.* at 306.

8 See Internal Perspectives, *supra* note 3 at 213–221 for a helpful chart that lists the Qing Code’s death-eligible crimes.

9 Death by slicing involved the executioner making dozens of slices on the defendant’s body, presumably letting him or 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 was therefore not to be mutilated.

fair hearing could send a special petition requesting reexamination of his case to the Censorate, the Board of Punishments, or the Commandant of Gendarmerie in Peking. The appeal could proceed provided that 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. However, this second option meant that appeals were often returned to officials who had heard the case previously. Officials, 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>10</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>11</sup>

#### IMPERIAL USE OF THE DEATH PENALTY FOR CRIMES THAT THREATENED "STATE SECURITY"

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 impe-

rial government. Of greatest concern 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>12</sup>

Many of the provisions in the Board of Punishments section (the 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 the 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>13</sup> Compare, for example, Article 290 of the Qing Code, which prescribed death by strangulation for those who committed manslaughter, to Article 254, which

10 William P. Alford, "Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Late Imperial China" (1984) 72 *California Law Review* 1180 at 1232.

11 See Derk Bodde & Clarence Morris, *Law in Imperial China* (Cambridge: Harvard University Press, 1967) at 118 [hereinafter "Bodde & Morris"].

12 William C. Jones, "Studying the Ch'ing Code—The Ta Ch'ing Lu Li" (1974) 22 *American Journal of Comparative Law* 330 at 354-355.

13 See *Internal Perspectives*, *supra* note 3 at 201.

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>14</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 due consideration. Some of the reasons for the methods of execution (strangulation, beheading and slicing) have already been discussed. As for the time, it was believed that executions should only take place in the fall or winter 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 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 other special categories.”<sup>15</sup>

Besides these procedural limitations that 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 often commutable to monetary fines, demotion or dismissal from the civil service for these privileged classes.<sup>16</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>17</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 that related specifically to their official duties. Officials who suggested overly lenient punishments,<sup>18</sup> rendered wrong

14 *The Great Qing Code*, trans. William C. Jones (New York: Oxford University Press Inc., 1994) at 276 & 237 [hereinafter “Great Qing Code”].

15 See Legal Reform in the PRC, *supra* note 6 at 307.

16 See Bodde & Morris, *supra* note 11 at 34–35.

17 *Ibid.* at 435.

18 *Ibid.* at 330.

judgments,<sup>19</sup> or cited laws and orders incorrectly<sup>20</sup> were subject to punishment—usually a certain number of strokes of the light bamboo. In particular circumstances, however, the punishment could involve death.<sup>21</sup>

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#### COMMUNIST CHINA

The last imperial dynasty, that of the Qing, came to an end in 1911. For the next four decades or so, uncertainty ruled China as competing forces controlled different regions of the country at different times. First the Nationalists, under the leadership of Chiang Kai-shek, came 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 came 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) that would eventually limit their ability to experiment with judicial processes. Eventually, the party began to supercede the courts in the task of meting out punish-

ment. 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 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>22</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 suspended death sentences, 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

19 *Ibid.*

20 See Great Qing Code, *supra* note 14 at 396.

21 *Ibid.* at 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.

22 See Post-Tiananmen, *supra* note 5 at 998.

limit for appeals was reduced from 10 to three days. The number of offences punishable by death more than doubled from his initial 21 (seven ordinary and 14 “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.



promulgation of the amended Criminal Law and Criminal Procedure Law.<sup>25</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>26</sup>

*In 1983, the Chinese government launched a massive “anti-crime campaign.” Central to the campaign’s success were the streamlined procedures that accompanied it.*

#### WHY THE NEED FOR AMENDMENTS?

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>23</sup> Investors needed predictability for their interests and foreign governments demanded accountability for human rights atrocities.<sup>24</sup> Monthly suggests that it was those sorts of foreign pressures that led to the

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>27</sup> Added to these reasons is the more mundane, yet equally valid, notion that 17 years had passed, circumstances had changed

23 See *ibid.* at 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.”

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

25 See *Internal Perspectives*, *supra* note 3 at 211.

26 See “Undermining Legal Reform”, *supra* note 3 at 607–608 (footnote 77).

27 “Whose Security?: “State Security” in China’s New Criminal Code” (Summer 1997) China Rights Forum, online: China Rights Forum <<http://www.hrichina.org/crf/english/97summer/e8.html>> (date accessed: 7 Nov. 2000) [hereinafter “Whose Security?”].

considerably and new economic and legal trends had developed, all requiring a revamping of the criminal laws.<sup>28</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 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>29</sup> This was followed in 1983 by a decision to reduce the time limit for death

penalty appeals from ten to three days.<sup>30</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>31</sup> As Boxer notes, “This separation of power is a critical move toward the elimination of the summary trial.”<sup>32</sup> However, according to Amnesty International, 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>33</sup> Consequently, the approval process is often rendered valueless as it can become amalgamated with the higher court’s review process.<sup>34</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>35</sup>

28 See Cai Ding Jian, “Commentary: China’s Major Reform In Criminal Law” (1997) Spring Columbia Journal of Asian Law 213 at 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.

29 Decision of the Standing Committee of the National People’s Congress Regarding the Question of Approval of Cases Involving Death Sentences (adopted 10 June 1981).

30 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 2 Sept. 1983).

31 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.”

32 See “Undermining Legal Reform”, *supra* note 3 at 610.

33 See “Law Reform”, *supra* note 2.

34 See for example “Murderer of 3 Pupils Executed in Central China City” *Xinhua English Newswire* (17 April 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).

35 For a confusing example see “Woman Gets Death Penalty for Children-Trafficking” *Xinhua English Newswire* (28 May 1998) 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.”

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>36</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, the same day the higher court rejected their appeal.<sup>37</sup> Another case involved the murder of three children on February 27, 2000; by April 17, the defendants had been tried, their appeals heard and reviewed, and the one defendant sentenced to death was executed.<sup>38</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. Unfortunately, the substantive law and its practical effects seldom parallel one another. While 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.

**"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>39</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 12 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.

At first blush, the removal of counterrevolutionary crimes may be thought to signal greater respect for the rule of law. At the same time, critics like the China Rights Forum 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>40</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

36 See "Peoples Republic of China: the Death Penalty in 1998" (1999) Amnesty International, online: Amnesty International <[http://web.amnesty.org/\\_802568f7005c4453.nsf/747054d43f9328025693e00500113/8203acb0a0173bc8025690000692fa0!OpenDocument](http://web.amnesty.org/_802568f7005c4453.nsf/747054d43f9328025693e00500113/8203acb0a0173bc8025690000692fa0!OpenDocument)> (date accessed: 23 Sept. 2000) [hereinafter "Death Penalty '98"].

37 See "China Executes Four for Family's Murder" *The Washington Post* (27 Sept. 2000).

38 See "Murderer of 3", *supra* note 34.

39 See Mao Tsetung, *On the Ten Major Relationships* (Peking: Foreign Language Press, 1977) at 23.

40 See "Whose Security", *supra* note 27.



was “in part intended to facilitate convictions,” as it meant one less thing for the prosecution to prove.<sup>41</sup> Wang Shangzin, however, speaks of the inclusion of “counter-revolutionary” as having hindered the prosecution of state security crimes that “faced no clear charge or punishment in the law books in the past.”<sup>42</sup>

Whatever the reasons for the change from counterrevolutionary to state security, eight of the 12 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>43</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>44</sup>

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. The state has chosen to establish its primacy both through the creation of state security offences and their subsequent harsh punishment. 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.

#### MITIGATED SENTENCING

Those who have 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>45</sup> More than 60 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 (an average of 51 per week)<sup>46</sup> were handed down and 1,769 executions carried out. 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 18 when the

41 *Ibid.*

42 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: Revised Criminal Law Clarifies Court Procedure” *China Daily* (20 Oct. 1997).

43 See “Whose Security”, *supra* note 27.

44 “Peoples Republic of China: the Death Penalty in 1997” (1998) See Amnesty International, online: Amnesty International <[http://web.amnesty.org/\\_802568f7005c4453.nsf/747054d43f9328025693e00500113/8e0da9c9e68f09d68025690000692d58!OpenDocument](http://web.amnesty.org/_802568f7005c4453.nsf/747054d43f9328025693e00500113/8e0da9c9e68f09d68025690000692d58!OpenDocument)> (date accessed: 23 Sept. 2000) [hereinafter “Death Penalty ‘97”]; and “Death Penalty ‘98”, *supra* note 36.

45 See “Post-Tiananmen”, *supra* note 5 at 1015 for a description of a modern execution.

46 See “Death Penalty ‘98”, *supra* note 36.

offence was committed. Previously, these two categories of offenders could have faced suspended death sentences (*sihuan zhidu*).<sup>47</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 does not, however, specify what types of new crimes might warrant carrying out of the death sentence.<sup>48</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>49</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>50</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>51</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>52</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>53</sup> This harsher treatment was justified as a means to punish 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 promote the campaign zealously. 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>54</sup>

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47 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 36.

48 See “Law Reform”, *supra* note 2.

49 See “Legal Reform in the PRC”, *supra* note 6 at 314.

50 See “Death Penalty '98”, *supra* note 36.

51 *Ibid.*

52 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 “Fair, Efficient Justice Promised” *China Daily* (11 March 2000) [hereinafter “Fair Justice”], discussing the crackdown on corruption.

53 See “Death Penalty '98”, *supra* note 36.

54 See “People's Republic of China: At Least 1,000 People Executed in 'Strike Hard' Campaign Against Crime” (1998) Amnesty International, online: Amnesty International <<http://www.amnesty.org/ailib/intcam/dp/country/hard.htm>> (date accessed: 23 Sept. 2000).

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>55</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.

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#### 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>56</sup> This lenient punishment of corrupt officials 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 anticrime campaigns began to crack down on those with power and privilege. Symbolic of Deng’s desire to implement legal reform, the anticrime campaigns spared no one, not even Communist Party cadres and their family members.<sup>57</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 in the past few years. In fact, Chinese government statistics released in March 1998 revealed that corruption proceedings had increased by ten percent to more than 40,000 investigations and 26,000 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>58</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>59</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

55 See “Death Penalty ’98”, *supra* note 36 and “Death Penalty ’97”, *supra* note 44.

56 Privilege, however, was a tenuous characteristic; those within the inner circle could easily fall out of favour 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.

57 See “Post-Tiananmen”, *supra* note 5 at 1030.

58 “1999 Country Reports on Human Rights Practices” (Feb. 25, 2000) U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, online: U.S. Department of State, Bureau of Democracy, Human Rights, and Labor <[ftp://ftp.state.gov/DOSFTP/pub/hrct/\\_1999/04\\_East\\_Asia\\_and\\_Pacific/China](http://ftp.state.gov/DOSFTP/pub/hrct/_1999/04_East_Asia_and_Pacific/China)> (date accessed: 27 Oct. 2000).

59 See “Fair Justice”, *supra* note 52.

more than a million dollars of the project's funds.<sup>60</sup> Hu Changqing, former deputy governor of Jiangxi Province, was sentenced to death for accepting thousands of dollars' worth of bribes.<sup>61</sup> Even former vice-chairman of the NPC Cheng Kejie was executed in September 2000 for accepting millions of dollars worth of bribes.<sup>62</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>63</sup>

Until now, this examination of 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 "favouritism and malpractice" have been distinguished from negligent acts of "serious responsibility"; the former, not surprisingly, demand a stricter punishment.<sup>64</sup> The chapter's harshest punishment, however, consists of no more than ten years' imprisonment.

*The expansion of time for appeals from three to ten days and the notion of a death penalty with reprieve are positive steps towards China's acceptance of international standards.*

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 that 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 entail "state interests." Chapter Four, "Crimes against Human and Civil Rights", includes particular provisions concerning official abuse of power and its effect on

60 See "Official Pays Dearly for Crime" *China Daily* (15 March 2000).

61 See "Official Sentenced to Death" *China Daily* (16 February 2000).

62 See "The Fight Against Corruption" *China Daily* (21 Sept. 2000).

63 See "Clemency for Top Officials Rejected; Leaders put Weight Behind Death Penalty to Scare Off Big-Time Graft Offenders, Despite Purge Fears" *South China Morning Post* (22 Sept. 2000).

64 Compare, for example, Article 412 paragraph 1: "Work personnel with state commercial inspection departments or organizations, who practice favouritism 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."

others. In illustration, Article 238 provides that an employee of a state organ who abuses his or 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 deal respectively 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.

*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 desensitization has taken hold.*

While laws against corrupt officials are not novel, the PRC's enforcement of such measures is new. Fewer than 20 years ago, the favouritism once explicitly set out in the Qing Code manifested itself among those privileged to have ties to the Communist Party. Anticorruption crackdowns, however, in tandem with substantive law reforms, have done away with these distinctions. Finally, the parallelism of the Criminal Law and its practical implications might 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. Today, there are fewer death-eligible crimes than the 100 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 also appears to have been abolished in all practicality. 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 expansion of time for appeals from three to ten days and the notion of a death penalty with reprieve are 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. 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 desensitization 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 has dwindled to two.

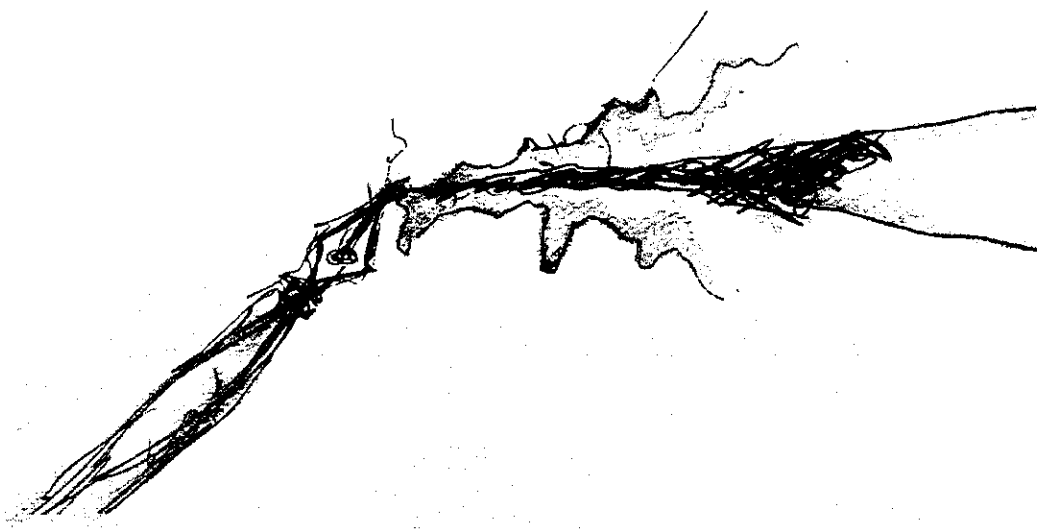
Admittedly, the four areas of law taken into consideration in this article provide only the briefest of introductions into the Chinese criminal justice system. Chosen quite randomly, these four aspects are not necessarily representative of the system as a whole. Chinese and Western scholars alike, in examining different criteria, have described the 1996 Criminal Procedure Law and the 1997 Criminal Law as "point[ing]

in a positive direction,"<sup>65</sup> "hav[ing] important implications for China's observance of international standards,"<sup>66</sup> and "increas[ing] the protections for people detained under the criminal justice system."<sup>67</sup> Issues such as 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.

The imbalance between the substantive laws and their practical effects, as identified in this article, 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 anticrime 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, the PRC should be making some kind of real attempt to move beyond its past. 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>68</sup> 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 cosmetic of changes. On the contrary, as China continues to open its doors, it is likely to come under more detailed scrutiny. In the next few years, we will wait anxiously to see if the garden is left to grow. ■



65 See "The Revised Criminal Procedure Law: Will it Mean What it Says?" (1996) China Rights Forum, online: China Rights Forum <<http://www.hrichina.org/crf/english/96fall/e4.html>> (date accessed: 23 Sept. 2000).

66 See "Opening", *supra* note 3.

67 See "Law Reform", *supra* note 2.

68 See "Internal Perspectives", *supra* note 3 at 194.