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NOTE, THE DEATH PENALTY IN LATE IMPERIAL, MODERN, AND POST-TIANANMEN CHINA

Alan W. Lepp*

When he reached the big hall, the old man with the clean-shaven head was still sitting there as usual, and Ah Q also knelt down as usual. Very gently the old man questioned him: “Have you anything more to say?” Ah Q thought, and decided there was nothing to say, so he answered, “Nothing.” A number of men in long coats and short jackets put a white vest of foreign cloth on him. It had some black characters on it. Ah Q felt considerably disconcerted, because this was very like mourning dress, and to wear mourning was unlucky. At the same time his hands were bound behind his back, and he was dragged out of the yamen. Ah Q was lifted on to an uncovered cart, and several men in short jackets sat down with him. The cart started off at once. In front were a number of soldiers and militia-man shouldering foreign rifles, and on both sides were crowds of gaping spectators, while what was behind Ah Q could not see. Suddenly it occurred to him— “Can I be going to have my head cut off?”... Naturally all agreed that Ah Q had been a bad man, the proof being that he had been shot; for if he had not been bad, how could he have been shot? But the consensus of opinion in town was unfavorable. Most people were dissatisfied, because a shooting was not such a fine spectacle as a decapitation.

— Lu Xun, “The True Story of Ah Q”

INTRODUCTION

In this classic tale written in 1921, the great satirist Lu Xun had recognized a Chinese capacity to tolerate the arbitrary exercise of state power over the criminal process. In the story, Lu Xun described how the self-deceiving and boastful Ah Q was finally shot in 1911 before a captivated crowd for proclaiming himself a revolutionary, when actu-

* University of Michigan Law School, Class of 1990. Special thanks to Professor Michel Oksenberg, Marc Lambert, and Michael Winter for their helpful suggestions and encouragement.

1. Lu Hsun [Lu Xun], Selected Stories of Lu Hsun 110, 112 (1978). Fiction, while perhaps just an idealized version of reality, nevertheless can offer penetrating glimpses of individual thought and informal group activities. The portrayal of local leaders and events in short stories can probe various dimensions of society in a way unmatched by the press, travelogs or other sources. See Oksenberg, Sources and Methodological Problems in the Study of Contemporary China, in Chinese Communist Policies in Action 602-03 (A.D. Barnett ed. 1969). See also, Lin Yu-sheng, The Crisis of Chinese Consciousness 125 (1979) (“[T]he general features of the Chinese people are embodied in the particular behavior and the distinctive personalities of Ah Q and the people around him in such a manner that they have become an integral part of the twentieth-century Chinese imagination.”).
ally he was nothing more than a braggart and petty thief. Deeply disturbed by the effects of mob behavior and abuse of power, Lu Xun sought to express in his writings the cruel and heartless side of China’s “ancient spiritual civilization.”

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. The imperial dynasties dating back to the Tang, for instance, each had codified well over one hundred crimes legally punishable by death. During the twentieth century, the Nationalists and the Chinese Communists had passed numerous laws imposing the death penalty. Even in the post-Mao era, the Criminal Law adopted on July 1, 1979, listed seven ordinary offenses and fourteen counterrevolutionary offenses punishable by death. Since 1981, new legislation has applied the death penalty to twenty-three more offenses.

While China’s criminal justice process over the past two centuries should not be characterized as static or monolithic, the criminal process has nevertheless demonstrated a longstanding pattern of using execution to serve its goals and purposes. This ancient tradition’s most

2. Lu Xun presented his bleak prognosis of Chinese behavior in a letter to a friend in 1925: “When the Chinese are confronted with power, they dare not resist, but use the words ‘taking the middle course’ to put a good face on their real behavior so that they feel consoled. If they have power and realize that others cannot interfere with them, or they are supported by the ‘majority,’ most of them are cruel, heartless, and tyrannical, just like despots; they then do not take the middle course.” LIN YU-SHENG, supra note 1, at 128-29.


4. Shen Jia-ben compiled the number of capital offenses for each of these dynasties: Tang Code of 653 - 223 crimes; Sung Code of 963 - 293 crimes; Yuan Code of 1277 - 135 crimes; Ming Code of 1397 - 282 crimes; Qing Code of 1740 - 813 crimes. These statistics are reprinted in D. BODDE & C. MORRIS, LAW IN IMPERIAL CHINA 102-04 (1967) [hereinafter D. BODDE & C. MORRIS].


6. The Criminal Law of the People’s Republic of China (promulgated July 1, 1979) [hereinafter Criminal Law], trans. in CRIMINAL LAW AND CRIMINAL PROCEDURE LAW OF CHINA (Beijing 1984) [hereinafter CRIMINAL LAW AND CRIMINAL PROCEDURE LAW]; the Criminal Procedure Law of the People’s Republic of China (promulgated July 1, 1979) [hereinafter Criminal Procedure Law], trans. in CRIMINAL LAW AND CRIMINAL PROCEDURE LAW.


8. See Alford, Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Late Imperial China, 72 CALIF. L. REV. 1180, 1190-92 (1984) (pointing out that prevailing Western images of “the entire late imperial state as an authoritarian monolith essentially uninterested in law” are being chipped away by recent studies in Chinese legal history).
recent episode — the spate of executions following the Tiananmen Square massacre on June 4, 1989 — reaffirms the Chinese leadership's acceptance of the death penalty as both a form of criminal punishment and a tool of the state to preserve its power.\textsuperscript{9} Despite the dramatic transformations China has undergone during the past two centuries, the death penalty remains deeply embedded in the Chinese notion of justice.

This paper seeks to explore the crucial determinants that shape the Chinese legal system's use of the death penalty. Why have the Chinese relied so heavily on execution as a form of sentencing? What factors and conditions account for the major changes in the frequency of China's use of the death penalty? What indigenous traditions are reflected in China's implementation of the death penalty? In order to inquire into the role and function of the legal system in affecting the severity of criminal punishment in China, this study will focus on only those death sentences carried out by the state in a judicial context.

Part I of this paper examines how China's different regimes have used law and punishment as tools of the state to enhance its power and shape people's behavior. Part II reviews the external pressures threatening the stability of Chinese leadership that have also influenced both the frequency and the harshness of Chinese criminal sentencing. Throughout this paper, the term "external" is used to describe these exogenous pressures, either domestic or foreign, that arise out of state leadership, yet still shape its decision-making process. Part III then examines the Chinese use of the death penalty through the policy justifications of deterrence and retribution. Part IV seeks finally to identify the indigenous traditions of the death penalty in China and examines the persisting emphasis on hierarchy, the role of elite privilege, and the concept of amnesty. A concluding section will assess the continuities and changes demonstrated in the Chinese legal regime's handling of the death penalty.

I. THE CRIMINAL JUSTICE PROCESS AS AN INSTRUMENT OF STATE CONTROL

State control, initiated by leaders at the apex\textsuperscript{1} and implemented through bureaucratic hierarchies, has long been essential to China's effective functioning as a command-style political system. In no other policy area has state control been as crucial to China's rulers as in the

\textsuperscript{9} At least forty executions and death sentences connected to the student protests during the spring of 1989 have been officially announced. \textit{Asia Watch Committee, Punishment Season: Human Rights in China after Martial Law} 7 (Feb. 7, 1990) [hereinafter Punishment Season].
maintenance and preservation of social order. Social control has often been most effectively exercised through the extensive use of the criminal justice system, including use of the death penalty as the surest means of eliminating opposition and deterring others.

China's ruling elite historically has devoted considerable attention to the role of law and legal institutions, and in particular, to the dispensation of criminal punishment. Debate over the purposes of punishment actually dates back more than two thousand years to the philosophical controversy between the humanist Confucian thinkers and the more rationalistic exponents of Legalism. The Confucianists, who believed in governance by moral example and virtuous rule, asserted that the ultimate aim of government was to preserve social harmony. In contrast, the Legalists preferred a harsh system of laws and punishments in subordinating all concerns to building up the strength of the state. These concepts resonated strongly throughout the imperial and Republican periods, and especially during the Communist rule, despite the enormous change and upheaval in Chinese life over the past forty years. Among the most striking continuities has been the steadfast belief of the ruling regime that the criminal process should serve as an adjunct of state power.

The events surrounding Beijing Spring, 1989, confirmed that this belief still prevails. The decision of the Deng Xiaoping leadership to use armed force to quash the mass pro-democracy protests in Tiananmen Square demonstrated the regime's unwillingness to tolerate such public defiance of national authority and control. The sum-

10. See B. SCHWARTZ, THE WORLD OF THOUGHT IN ANCIENT CHINA 321-49 (1985); SOURCES OF CHINESE TRADITION 136-58 (de Bary, Chan, & Watson eds. 1960); see also S. VAN DER SPRENKEL, LEGAL INSTITUTIONS IN MANCHU CHINA 30-33 (1966).

11. Several landmark studies have sought to place the Chinese criminal process in historical perspective. See, e.g., J. COHEN, THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA 1949-1963 7 (1968) [hereinafter J. COHEN, CRIMINAL PROCESS] (In comparing the uses of law in traditional China, the Republic of China, and the People's Republic of China, "one major similarity stands out — law and legal institutions still serve principally as instruments for enhancing the power of the state and for disciplining the people to carry out its policies."); Lubman, Form and Function in the Chinese Criminal Process, 69 COLUM. L. REV. 535, 537 (1969) ("My own interpretations differ from Cohen's ... in stressing ... greater hesitancy to find direct continuities between traditional and Communist Chinese legal institutions."); Li, Book Review, 67 MICH. L. REV. 179, 195 (1968) [hereinafter Li, Book Review] (Review of D. BODDE & C. MORRIS, LAW IN IMPERIAL CHINA (1967) and J. COHEN, THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949-1963 (1968)), ("A significant proportion of the ideas and institutions that exist in the People's Republic of China today is a direct or indirect product of the old system."); Li, The Role of Law in Communist China, 44 CHINA Q. 66, 73-74 (1970) (arguing that the internal model of law relying upon persuasion and education to mold people's behavior includes many traditional Chinese ideas as well as Communist Chinese ideology).

12. But see Alford, supra note 8, at 1242 (questioning the view that "the imperial criminal justice process was little more than a vehicle for the consolidation of state control by the district magistrate").
mary executions of participants in the aftermath of the bloody crackdown indicated that once again the state would use the criminal law to consolidate its control and discipline the people to carry out its policies. When viewed alongside other anti-crime campaigns of recent years, the executions following Tiananmen represent yet another of the periodic attempts by the Communist leadership to use law as an instrument of control to serve the interests of the state.

A. Late Imperial China

The Qing dynasty is a useful period with which to begin a review of China's traditional use of the death penalty. Not only have its institutions been regarded as the culmination of the Chinese imperial system, but also it marks a time when Westerners first made substantial contact with China. Prior to the Qing, successive dynasties enacted their own penal statutes and amended them from time to time, yet the general format and many individual statutes were adopted almost entirely from earlier codes. The section headings of the Ming and Qing penal codes, for example, remained essentially unchanged from those of the Tang dynasty.

The substantive law of the comprehensive Qing code served as an instrument for enforcing Confucian-based social norms and for shaping the behavior of the people to suit the aims of the authoritarian government. The Qing state viewed the legal system, along with morality, custom, and education, as necessary for the preservation of the social order. Thus, the harshest punishments were reserved for those crimes that were regarded as threatening the continued existence of society. Matters of greatest concern to the state included family affairs, crimes of violence, and crimes against the state. The severity of punishment, often carried out publicly, sought to ensure that the population would give absolute obedience and allegiance to the emperor. The modes of punishment during the Qing Dynasty for cases of disloyalty included strangulation, decapitation, and death by slow slicing; the last two were believed to deprive the offenders of any chance of salvation in the next world. The punishments for offenses against state

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14. 1644-1911.
15. The Ming dynasty ruled China from 1368-1644.
17. See infra notes 114-17 and accompanying text.
power — desertion, rebellion, and subversion — were not only far more severe than those for any other crime in China, but also much more serious than those for similar offenses in other legal systems.\textsuperscript{18} For conduct not specifically covered by any existing statute, the Qing code allowed prescriptions to be applied by analogy.\textsuperscript{19} This method further extended the reach of the substantive criminal law by allowing the magistrate to raise or lower the statute's penalty in accordance with the circumstances.

The criminal justice process also served the state's needs by reinforcing the dominant moral values. The penal emphasis in codified law and the symbolic importance attributed to harsh punishments reflected the Chinese view that any lapse from moral perfection was a threat to society.\textsuperscript{20} These laws were premised on widely-shared beliefs about what was just, fair, and acceptable to the Chinese populace.\textsuperscript{21} This paternalistic strain, with its emphasis on the emperor, and its popular concepts regarding the political order, justice, morality, and the place of the individual in society, permeated the traditional Chinese legal practice.\textsuperscript{22} Even the magistrate, as the imperial officer closest to the people, was called the fu-mu guan, "the father and mother official." The magistrate, in turn, was expected to behave properly in accordance with the prevailing standards and his obligations.

The perception that the criminal process served as a tool of the state is further reinforced by the position of the district magistrate, who as the representative of the imperial government performed a variety of administrative functions ranging from tax collection and maintenance of public order to the investigation, prosecution, and adjudication of criminal matters.\textsuperscript{23} This aggregation of authority in

\textsuperscript{18} These three offenses also extended punishment to the wrongdoers' relatives in order to impose a maximal penalty proportionate to the injury to the state. Given an individual's deep sense of familial obligation, the ultimate penalty was to deprive the dead of family progeny. See Ch'en, Disloyalty to the State in Late Imperial China in STATE AND LAW IN EAST ASIA 159, 169, 182 (D. Eikemeier & H. Franke eds. 1981).

\textsuperscript{19} D. Bodde & C. Morris, supra note 4, at 32.

\textsuperscript{20} See S. Van der Sprenkel, supra note 10, at 124-30 (describing the correlation between sources of law and preservation of the social order during the Qing dynasty).


\textsuperscript{22} Sybille Van der Sprenkel traces this juxtaposition of morality and punishments to the sources of law in late imperial China:

[The ultimate source of law is traceable to the belief shared by all sections of society — or at least never openly challenged — that there was an overriding obligation to preserve the harmony of the universe, under pain of evil consequences for all, if the natural order were disturbed. It was this belief and this fear that led Emperor, officials and people to accept theoretically the necessity for the enforcement of morality, administrative requirements and legal custom.]

S. Van der Sprenkel, supra note 10, at 127.

\textsuperscript{23} Serving as judges of the court of first instance, district magistrates conducted investigations of criminal cases, issued warrants for arrest, examined suspects and witnesses, decided the
one man carried great implications for the potential use and abuse of state power. The district magistrate's office, or yamen, represented the lowest administrative level where government law directly confronted the population of the empire. The yamen served as the court of first instance for the hearing of lawsuits, the point where the official law impinged vertically from the state down to the individual, rather than on a horizontal plane directly between individuals. Despite this impressive display of state power in the hands of one man, some administrative checks as well as practical considerations limited the exercise of magisterial discretion.

The use of the criminal process as an instrument of state control was also reflected in a highly centralized judicial procedure. Magistrates were guided by a detailed set of rules and laws prescribing an inquisitorial mode of adjudication that lacked a developed concept of "rights" for the accused as a limitation upon state power. The form of the trial procedure gave the appearance that the defendant was presumed guilty even before the case was heard. Magistrates often made full use of legal provisions that authorized torture in order to extract a confession from the accused. The defendant was denied legal counsel and precluded from presenting his own witnesses.

B. The Republican Period

Following the collapse of the Qing dynasty in 1911, a republican

cases and sentences according to the prescriptions of the penal laws and statutes, and oversaw their executions. J. Watt, The District Magistrate in Late Imperial China 12 (1972).

24. See S. Van der Sprenkel, supra note 10, at 70 (arguing that the Qing legal system provided no checks upon the exercise of power by the administrative officials such as magistrates); J. Cohen, Criminal Process, supra note 11, at 6-7 (noting the inadequate institutional safeguards available to a defendant in the magistrate's court of law).

25. See A. Feuerwerker, State and Society in Eighteenth-Century China: The Ch'ing Empire in Its Glory 66 (1976) (The magistrate's "responsibilities were all-encompassing, but his omnipotence was only theoretical."); Alford, supra note 8, at 1193 (arguing that the Qing possessed an elaborate system of checks operating from above that significantly restrained magistrates exercising their authority in legal matters).

26. J. Cohen, Criminal Process, supra note 11, at 7; Alford, supra note 8, at 1194.

27. See Gelatt, The People's Republic of China and the Presumption of Innocence, 73 J. Crim. L. & Criminology 259, 263-65 (1982) ("[T]he magistrate's approach seemed to have been to presume guilt from the mere fact that the accused was before him.").

28. See T. C'hu, Local Government in China Under the Ch'ing 124-27 (1969) (noting that legal forms of torture included flogging, slapping, squeezing fingers or ankles, or having the suspect kneel upon an iron chain or pressing a stick against the back of the knees in cases of robbery or homicide where he did not confess).


30. Unfortunately, the literature on the Republican era policies toward criminal justice and the death penalty is scant and incomplete. Extra-judicial executions were certainly commonplace, numbering in the tens of thousands in individual years alone. These deaths often resulted from the arbitrary use of power by warlords or Guomindang troops.
government was established that swept away China's traditional legal system. The Provisional Criminal Code, drafted by a Law Revision Commission created under the Qing, was promulgated in 1912. The Code introduced some sweeping reforms, including the abolition of forced confession, analogical interpretations, and the most ruthless forms of capital punishment, including "death by a thousand cuts." It also contained the proposition that a suspect was to be presumed innocent unless proven otherwise.

The overarching aim of the Nationalist leadership that assumed power under Chiang Kai-shek in 1927 was to unify a fragmented country (controlled in part by warlords and then by Communists) into a single modern state. Chiang recognized that in order for China to become a first-class power, the rule of law would be necessary for building a modern military, administrative, and industrial system.

After obtaining control of the Republic of China in 1927, Chiang's Nationalist Party (Guomindang) framed modern legal codes of criminal law and procedure along the lines of the continental European models. Intending to modernize the existing judicial administration, the Nationalists sought to abandon the imperial practice of governance that embraced a cosmic philosophy of law and left wide discretion in the local enforcement of the law in the hands of magistrates. The Nationalists, in turn, attempted to impose tight national control over the villages through the enlargement of the bureaucracy at the xian level and the revival of the bao-jia neighborhood system of police control. They envisaged the establishment of a government that based its rule of law on statutes, custom, and legal reason, rather than personal whims or choices.

32. M. MEIJER, INTRODUCTION OF MODERN CRIMINAL LAW IN CHINA 119 (1950).
33. Gelatt, supra note 27, at 266.
34. See J. COHEN, CRIMINAL PROCESS, supra note 11, at 69. Cohen points out that Chiang's notion of "respect for law" had more in common with the old Legalist conception of the function of law rather than any Western type of liberalism. In his book CHINA'S DESTINY, for instance, Chiang's principle association with "rule of law" was the notion of law as a means to increase the power of the state. Similarly, the rule of law reflected the notion of sovereignty of the people. Since the state derived its sovereignty from the people, the law was an expression of the people's will.
35. J. COHEN, CRIMINAL PROCESS, supra note 11, at 7.
36. Eastman, Nationalist China during the Nanking Decade, in 13 CAMBRIDGE HISTORY OF CHINA 147 (J. Fairbank & A. Feuerwerker eds. 1986) ("[Chiang Kai-shek] was a would-be totalitarian, aspiring to extend the controls of his regime down to the local level, and to subordinate the individual and all of society to the regime to a degree that emperors of the [Qing] dynasty had not even dreamed of.")
Despite these high ideals, however, persisting wartime conditions and arbitrary military justice obstructed the actual implementation and enforcement of the new legislation. The regime responded to political dissent with brutal repression, including midnight arrests, methods of torture and mutilation, assassinations, and summary executions.\textsuperscript{38} In those isolated instances where the modern laws were actually carried out, the legislation still failed to supplant traditional moral beliefs.\textsuperscript{39} More commonly, bribery and blackmail fueled the Republican judicial system, which served not only to accommodate the wealthy and influential, but also to support the army in suppressing any enemies of the state.\textsuperscript{40} Yet, the patchwork alliance of police, army, and gangster forces proved unable to induce popular support for the ruling regime, which never established sufficient central control to administer an effective legal reformation or implement the rule of law.

C. The Early Chinese Communist Experience: 1927-1949

Even prior to officially founding the People's Republic of China in 1949, the Chinese Communists, like their Legalist and Nationalist predecessors, saw law as a political tool with which to serve the interests of the state rather than the individual. In 1927, the Chinese "soviet" were first established in the South China countryside, where peasant tribunals oversaw rapid "trials" of gentry and landlords followed by immediate execution. Borrowing from the Soviet Stalinist model of the state, the Communists viewed law mainly as an instrument of domination and coercion. Law had value only to the extent that it aided in the achievement of state objectives.\textsuperscript{41} It was to be used for purposes of conformity, disciplining and molding the people to meet state needs. To insure consistency between Communist ideology and judicial actions, the Chinese Communists rejected an independent judiciary in favor of political control over the courts. Local governments approved judicial personnel, and judicial committees composed

\textsuperscript{38} See, e.g., H. Isaacs, The Tragedy of the Chinese Revolution 272 (1951) (journalistic accounts of some of the most ruthless acts of violence).

\textsuperscript{39} This resistance to the adoption of European legal forms was exemplified by the inheritance law, which Jean Escarra indicates was "in disagreement with the centuries-old tradition for at least eighty out of every hundred of the population." The Chinese had clung to Confucian mysticism for twenty five centuries, added Escarra, "and a stroke of the pen cannot destroy it." See J. Escarra, Chinese Law 574-75 (G. Browne, trans. 1961).

\textsuperscript{40} Judges, for instance, were given medals and promotions for sentencing and authorizing the execution of Communists and other subversives. See J. Brady, Justice and Politics in People's China: Legal Order or Continuing Revolution? 51-53 (1982).

\textsuperscript{41} The Commissar of Justice, Liang Botai, charged that Communist leaders who favored stricter observance of legal formality "did not understand that law develops in accord with the needs of the revolution, and whatever benefits the revolution is law." P. Griffin, The Chinese Communist Treatment of Counterrevolutionaries: 1924-1949, 139 (1976).
of Party and government leaders reviewed important decisions. In short, law was the political organ of state power.

D. The People's Republic of China

The post-1949 era followed the earlier pattern of using law as a means to promote socialist revolution and the construction of a new socialist state. The Communists implemented land reform in 1949-51 in order to destroy the former local elite’s hold on power and wealth, but the campaign soon spilled over into widespread violence and terror, which was often unchecked and overlooked by the higher authorities. On paper, the Agrarian Reform Law was supposed to prohibit the beating and killing of people, but in practice, the government imposed little discipline over the killing and even encouraged violent class warfare in the villages.

A viable legal system was considered an important prerequisite for a legitimate government and would serve to maintain public order and enforce new policies. Having consolidated power, the Communists established a system of formal law and justice modeled basically on Soviet legal institutions, including the establishment of people’s courts and people’s procuracies responsible for supervising the prosecution of offenders. Although the Communists’ newly promulgated Common Program formally abolished the laws and institutions of Chiang’s regime, in fact, many Guomindang judicial and police organs, were retained by the Communists with little change. These compromising measures reflected the importance attached by the Communists to strengthening the judicial system.

China’s movement towards the creation of a formal legal system, however, suffered a serious setback in 1957 when the Party increased its own powers and authorized informal extrajudicial institutions to impose sanctions. The Party began to supercede the courts in the task of meting out punishment, which was carried out against opponents of the regime swiftly and through informal procedures. The Party also

42. Id.
44. A.D. Barnett, Cadres, Bureaucracy, and Political Power in Communist China 228 (1967) (It was the government’s policy “to choose at least one landlord, and usually several, in virtually every village, for public execution.”).
45. Li, The Evolution and Development of the Chinese Legal System, in China: Management of a Revolutionary Society (Lindbeck ed. 1971) (“In Peking, for example, the [Guomindang] court system was retained virtually intact after Liberation, except that it was now called the ‘people’s court.’ ”).
46. See S. Leng, Justice in Communist China 45-63 (1967).
brought the public security apparatus under firmer control following its promulgation of several national regulations concerning political-legal work.\textsuperscript{47} As judicial work increasingly assumed political forms, law as an instrument of control fell under the jurisdiction of the Party.\textsuperscript{48}

The Communist Party set goals far more ambitious than those of either the imperial dynasties or the Nationalists. The Communists sought for the first time in Chinese history to extend the authority of the central government down to the local level and to control nearly every aspect of human activity. In order to harness the energies of the people so as to meet the demands of altering both the physical environment and human nature itself, the Communists relied heavily on the criminal justice process in subjecting the populace to increasingly rigorous discipline.\textsuperscript{49} They intensified the Marxist theory of class struggle, which sought to classify each case individually according to its class nature. They also adopted the form of "mass line" leadership, purporting to involve the masses in government and legal decision-making. Finally, they accepted the need for ruthlessness in carrying out the Party policy. Mao himself had likened his rule to that of the merciless first, unifying emperor Qin Shi-huang, but in the end, concluded he was more oppressive and violent than the ancient emperor.\textsuperscript{50}

The increasing use of these doctrinaire and ideological policies ruptured during the anarchic period of the Great Proletarian Cultural Revolution (1966-76), when the Maoists repudiated their earlier reliance on the organs of the formal legal system and launched a mass purge of all those in Chinese society who opposed Chairman Mao Zedong's policy and ideas. In their zeal to dismantle the "bourgeois" law enforcement apparatus, the Maoists extended the targets of attack

\textsuperscript{47} Li, \textit{The Public Security Bureau and Political-Legal Work in Hui-yang, 1952-64}, in \textbf{THE CITY IN COMMUNIST CHINA 51, 72} (J. Lewis ed. 1971) (examining the Party's involvement in public security work in one Guangdong county).

\textsuperscript{48} See F. Schurmann, \textit{Ideology and Organization in Communist China} 188 (1968) ("[T]he Party, in effect, has displaced the system of law as the third arm of the state.").


\textsuperscript{50} Oksenberg, \textit{The Political Leader}, in MAO TSE-TUNG IN THE SCALES OF HISTORY 70, 71 n.2 (D. Wilson ed. 1977). At one Party meeting in 1958, Mao sought to distinguish himself from the first emperor of the Qin dynasty (221-206 B.C.):

What did [Qin Shi-huang] amount to? He only buried alive 460 scholars, while we buried 46,000. In our suppression of the counterrevolutionaries, did we not kill some counterrevolutionary intellectuals? . . . You accuse us of acting like [Qin Shi-huang], but you are wrong; we surpass him 100 times. You berate us for imitating [Qin Shi-huang] in enforcing dictatorship. We admit them all. What is regrettable is that you did not say enough.

to include even members of the Communist Party who were thought to be "following the capitalist road."

Rather than serve as a coercive restraint, law was to be subordinated to revolutionary doctrine and serve as the key instrument of social change. Mao unleashed his Red Guards — the students of China's universities and middle schools — to spearhead the attack on a broad range of "enemies," including most of the members of the Party's Central Committee. Many Red Guards independently conducted investigations of their political enemies, made arrests, adjudicated cases, and imposed sanctions during mass meetings and tribunals. Tens of thousands were cruelly persecuted as the formal legal organs lost complete control over social order and the administration of justice. Mao purged many law enforcement personnel, including the President of the Supreme People's Court, the Chief Procurator, and the First Deputy Minister of Public Security. During this period of ideological fervor and violent upheaval, former general secretary of the Party Hu Yaobang would say that one hundred million people had been either directly or indirectly rendered victims of the decade-long lawlessness.

When normalcy was restored to the legal system by 1977, following the death of Mao and the subsequent purge of Mao's wife and the other members of the "Gang of Four," the Party and the police had resumed their dominant roles. The government cautiously moved to reestablish the institutions that had comprised the judicial system in the pre-1957 period. Announcements of criminal sentencing were again determined according to Party policy, especially that of "dealing leniently with those who confess and severely with those who resist."

51. See generally A. Thurston, Enemies of the People (1987) (using personal interviews to examine how the political chaos of the Cultural Revolution affected the lives of individual Chinese).


53. Thurston, supra note 51, at xvi.

54. The "Gang of Four" refers to Jiang Qing (Mao's widow), Yao Wenyuan, Wang Hongwen, and Zhang Chunqiao, who were blamed for the overzealous acts of the 1966-76 Cultural Revolution. They were arrested about a month after the death of Mao Zedong in September, 1976.

55. S. Leng & H. Chiu, supra note 52, at 19.
The passing of the Maoist era marked a turning point in the evolution of China’s criminal justice system. The leadership under Deng Xiaoping has attempted to implement law reform in order to advance its commitment to the “four modernizations,” as well as to prevent any recurrence of the arbitrary treatment and lawlessness of the Cultural Revolution. Since 1978, the government has toned down the heavy emphasis on ideological elements such as the “mass line” and class struggle, and identified development of the rule of law as an urgent task of modernization. In a sense, the attempts of the Dengist leadership at legal modernization recalls the failed Nationalist efforts to codify laws and strengthen the legal institutions. New laws have been promulgated on a scale unseen since the 1930’s when the Nationalists promulgated a complete set of new laws, known as the Six Codes. With the enactment of the Criminal Law and the Code of Criminal Procedure, as well as a new constitution, the criminal justice system seems to provide more predictability and equality than at any time in the past four decades.

The process of law reform under Deng Xiaoping also seeks to restructure the formal legal institutions damaged by the Cultural Revolution. The courts, whose authority was supplanted by the police and other nonjudicial agencies for much of the Communist rule, have been reorganized and given an enlarged role in the exercise of social control and the administration of justice in post-Mao China. They are linked more closely and overtly to the implementation of national policy, as in the promotion of anti-crime campaigns, the punishment of


59. The Constitution of the People’s Republic of China (Beijing 1983) (promulgated Dec. 4, 1982) [hereinafter P.R.C. Constitution]. While the 1982 Constitution, the fourth under the Communist leadership, reaffirms China’s adherence to the four basic principles (Socialism, the People’s Democratic Dictatorship, Marxism-Leninism, and Mao Zedong Thought and the Chinese Communist Party leadership), it seeks also to distinguish implicitly the functions of the state from those of the Party. See especially arts. 5, 126, 131.

60. See Note, Concepts of Law in the Chinese Anti-Crime Campaign, 98 Harv. L. Rev. 1890, 1904 (1985) [hereinafter Note, Concepts of Law] (arguing that the Party’s prominent role in implementing anti-crime measures has led to the use of “policy” rather than “law” as a guide for determining when legal sanctions should be applied).
political dissidents, and the clampdown against economic crime. With regard to the latter, the courts have openly joined with the police and the recently revived procuracy to wage a coordinated battle. Although article 126 of the Chinese Constitution prohibits interference in court affairs by administrative organs, public organizations, or individuals, the courts remain highly susceptible to Communist Party influence on broad policy matters and important or complex cases. By continuing to maintain its longstanding central role in the preservation of order in Chinese society, the Party has reinforced the notion that law and legal institutions are state interests, serving to enhance state power and discipline the people to carry out state policies.

F. The Aftermath of Tiananmen

Since the demonstrations of spring 1989, there have been at least forty officially announced death sentences and executions of individuals associated with the pro-democracy movement. Numerous unannounced executions are also believed to have taken place. Many of those executed were convicted of crimes against property, such as burning vehicles, obstructing traffic, and setting fire to trains. For instance, three were executed in Shanghai on June 22 for allegedly burn-

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61. See e.g., A. NATHAN, CHINESE DEMOCRACY 33-41 (describing Deng Xiaoping's harsh criticism of political dissidents and the short-lived democracy movement of 1978-81); Silk, The Crime of Dissent in China, 34 PROBLEMS OF COMMUNISM 61, 66 (July-Aug. 1985) (observing the close resemblance between the "procedural" court that sentenced dissident Wei Jingsheng to fifteen years imprisonment in 1979 and the "revolutionary" court that sentenced the dissident Beijing University student Lin Xiling in 1957); S. LENG & H. CHIU, supra note 52, at 145-50 (reviewing the post-Mao leadership's treatment of Chinese political activists and dissidents).

62. See Note, The Death Penalty and Legal Reform in the PRC, 1 J. CHINESE L. 303, 320-21 (1987) [hereinafter Note, The Death Penalty and Legal Reform] (noting that the harshness of legal sanctions for economic crimes is not surprising in a country where economic reform and modernization are the primary policy objectives of legal reform).

63. Dismantled during the Cultural Revolution, the procuracy was reinstated by the 1978 organic law of the People's Procuratorates. Its functions include investigating criminal cases, supervising the police, instituting prosecution, overseeing trial procedures, and scrutinizing the execution of judgments and prison operations.

64. See Lubman, Western Scholarship on Chinese Law: Past Accomplishments and Present Challenges, 22 COLUM. J. TRANSNAT'L. L. 83, 95 (1983) [hereinafter Lubman, Western Scholarship] (perceiving a contradiction between the "mass line" style of policy implementation and the establishment of a regularized legal system); see also Leng, Legal Reform in Post-Mao China: A Tentative Assessment, in CHINESE POLITICS FROM MAO TO DENG 203, 223 (V. Falkenheim & I. Kim eds. 1989) [hereinafter Leng, Legal Reform in Post-Mao China] ("In practice, party officials too often let political considerations prevail over legal requirements.").

65. PUNISHMENT SEASON, supra note 9, at 7.

66. In light of China's past reporting practices on arrests and executions, official Chinese press statistics probably represent only a small portion of the total number of recent executions. Id. at 26. The Chinese government has sought to defend its actions by a massive disinformation campaign, harassment and expulsion of foreign journalists, and the jamming of the Voice of America and other foreign radio stations. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1989, at 802 (1990) [hereinafter 1989 COUNTRY REPORT].
Note, Death Penalty in China

Note, Death Penalty in China

ing a train. In addition, seven persons were executed in Beijing on June 22 for allegedly "setting fire to military trucks, stealing military goods, and assaulting soldiers,"67 and two more were executed in Chengdu in July, allegedly for arson.68 In late October, a Jinan factory worker was sentenced to death for allegedly setting ablaze a car during one of the June demonstrations.69 In November, three persons from Chengdu were given death sentences for burning a cinema during the period June 4-6. In December, two persons in Beijing were sentenced for beating a policeman to death on the morning of June 4.70

The reappearance of old customs from the Cultural Revolution years suggests that the legal reforms of the Dengist years have yet to stabilize themselves.71 The atmosphere of intimidation carried out by the police, the public humiliation of offenders with heads shaven and placards hung around their necks, indicating their names and crimes, the use of ideological terms such as "thugs" and "ruffians" who staged the "counterrevolutionary" rebellion once again demonstrate the power of the state. In the aftermath of Tiananmen, phrases that had been downplayed in recent years like "dictatorship of the proletariat" and "class struggle" have also been revived. These post-Tiananmen developments demonstrate not only that the status of law has suffered a serious setback, but also that earlier patterns of arbitrary violence are reasserting themselves. The aging leadership behind Deng Xiaoping continues to endorse the traditional notion of using law as a means to shape behavior and further the aims of authoritarian government.

II. EXTERNAL PRESSURES AND USE OF THE DEATH PENALTY

State attitudes toward the criminal justice process have not been the sole determinant in deciding the severity of punishment in Chinese criminal cases. External pressures that impinge upon the govern-

67. 1989 COUNTRY REPORT, supra note 66, at 806-07. An eighth "rioter" who was sentenced to death was apparently not executed because his defense lawyer had claimed he was mentally retarded. AI-1989, supra note 13, at 45.
68. On July 1, 1989, two people were sentenced to death for setting fire to vehicles during rioting in Chengdu on June 5. AI-1989, supra note 13, at 45.
71. Kristoff, Unleashing the Dark Methods of the Cultural Revolution, N.Y. Times, June 18, 1989, at E1, E3 ("The revival of such concepts now inspires fear that China will somehow slip back toward the terror that marked the last decade of the Maoist period.").
72. See Feinerman, Human Rights in China, 88 CURRENT HISTORY 273, 276 (1989) (linking the official reappearance of the term “counterrevolution” in labeling student demonstrators to the norms of criminal law and procedure found during the Cultural Revolution).
ment’s power, such as political and military threats, domestic disturbances, or even international criticism, have also shaped Chinese decisions on whether or not to impose the death sentence. The history of the past four decades has been dynamic, including extreme shifts in Party policy that have oscillated between periods of coercion and persuasion. These policy shifts have been closely related to the external pressures confronting the status quo of the ruling powers.

While it is difficult to generalize about the effect of these recurrent cycles on the use of the death penalty, some basic tendencies are noticeable. 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. Each episode or phase of harsh punishment, therefore, must be viewed in light of the political winds prevailing at a particular time in Chinese history.

The political nature of the death penalty in Communist China underscores these alternating cycles of Party policy over the past six decades. In China, the death penalty has been used extensively to liquidate political enemies, often labeled as “counterrevolutionaries,” a very severe criminal charge clearly containing political overtones. This display of political power has been achieved through streamlined and truncated judicial procedures, such as in the case of mass trials or people’s courts, or through the circumvention or evasion of formal processes entirely, such as when the leadership deliberately sanctions killing either by specific prior instructions or by collaboration with other governmental organs. While the basic aims of such actions are


74. Li, Book Review, supra note 11, at 179, 186 (“The feeling of insecurity often leads to hasty and violent action, which usually takes the form of biennial rectification campaigns during which the normal rules are abrogated.”).

75. Policy changes during the People’s Republic have resulted in striking inconsistencies in the application of the death penalty. For example, many persons who were executed for corruption during the harsh sentencing of the early years would have only been imprisoned during the more moderate 1956-57 era. Also, during the “Strike One-Oppose Three” campaign of 1970-71, the death penalty, used sparingly in cases of economic crimes in the two previous decades, was applied widely in order to eradicate speculation, corruption, and various blackmarket activity that proliferated during the lawlessness of the Cultural Revolution. See Cohen, Criminal Law supra note 73, at 331; see also, S. Leng & H. Chiu, supra note 52, at 25.

76. For a general discussion on the relationship of political prisoners to capital punishment, see L. Sheleff, Ultimate Penalties 10-11 (1987).
the traditional ones of deterrence and retribution, they take on a different significance in a political context. When the aging Chinese leadership decided to use lethal force against the mass protests on June 4 and subsequently to employ the death penalty less restrictively, it demonstrated the extent of the political power it was willing to expend in order to quash threats to its authority.\(^{77}\)

A. Late Imperial China

The traditional legal system functioned most predictably and humanely during periods with strong central government. During times of political confusion and turmoil, as in the intervals between the great dynasties when central authority temporarily disintegrated, executive prerogative shifted from the center to the local civil and military officials. In such times, normal checks on behavior failed to be effective, and the administration of justice became both summary and arbitrary.\(^{78}\)

Throughout imperial times, the death penalty was ordered in accordance with the dynastic codes for commission of heinous crimes. The most severe form of punishment, death by slicing,\(^{79}\) was reserved only for the most ruthless crimes such as high treason, rebellion, murder of the husband, patricide, mutilation of a living person, witchcraft, and other offenses known as the "Ten Abominations." Although the frequency of the death penalty during the Qing dynasty is not generally known,\(^{80}\) it could be surmised that the Manchus, as foreigners in China, were deeply fearful of possible subversion. In fact, however, the Qing Code has been deemed mild when compared with the Roman Twelve Tables which permitted creditors to slice up the body of an

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77. Leon Sheleff, writing in 1987 in a context without explicit reference to China, nevertheless anticipated and captured the dilemma of Beijing's leadership during the Tiananman tragedy:

In the areas of political crime, it is, after all, not the welfare of the total population that is of major concern, but the narrow sectarian interests of those holding power, who are intent on ensuring that they quash any threats to that power, including the use of the full repressive apparatus of the criminal justice system or the police force.

Id. at 10.

78. When Sichuan province was under the control of a military strongman during the later Chin dynasty (936-946 A.D.), the secret state police executed countless people for discussing certain public affairs so that "no one dared to say a word fearing lest the man standing by his side was a secret agent." This case is told in the Tang-Yin-Bi-Shi, a collection of 144 selected criminal and civil cases spanning fourteen centuries from 300 B.C. until 1100 A.D. See R. VAN GULIK, T'ANG-YIN-PI-SHI [TANG-YIN-BI-SHI], Parallel Cases from under the Pear-Tree, A 13th Century Manual of Jurisprudence and Detection 140-41 (1956).

79. Under this punishment, also known as "lingering death," the convict's body was slowly sliced to pieces while he was still alive. D. BODDE & C. MORRIS, supra note 4, at 93.

80. Estimates are available for some periods. Ichisada Miyazaki, for example, has estimated that about 2,000 criminals were executed every year during the Sung Dynasty (960-1279). Miyazaki, The Administration of Justice during the Sung Dynasty, in ESSAYS ON CHINA'S LEGAL TRADITION 56, 69 (J. Cohen, R. Edwards, and F. Chen eds. 1980).
insolvent debtor.  

B. The Republican Period

The Guomindang leadership during the later Republican period confronted a number of enormous problems that weakened its capacity to control society at the local, regional, and national levels. These problems included the devolution of political and military power in the hands of regional warlords, civil war, the Japanese invasion, and economic scarcity. Its power was sapped further by internal dissen-

sion, a corrupt and stagnant bureaucracy, and a lack of effective central-

dized control.

In order to stave off such centrifugal pressures and the increasingly imperative threat from the Communist Party, whose membership experienced rapid growth beginning in late 1925, the Guomindang regime relied on violence, payoffs, and political compromise of its authority. Following the collapse of the Nationalist-Communist coalition in 1926, Chiang Kai-shek's assaults on the Communists effectively reduced their membership from 58,000 to 10,000 by late 1927.  

Political arrests, purges, and executions were reported frequently not only against Communists but also against any other potential opponents of the regime.

Amidst these wartime conditions and intensified political repression, the hailed legal reforms failed to take root throughout most of China. Arbitrary military justice and corruption were far more prevalent than orderly judicial procedure. Even in the central provinces under government control, the Guomindang military acted arbitrarily
and destructively, arresting and executing so-called "bandits" or "robbers" without any formal court procedure, and often in particularly merciless fashion.86 Chiang's encirclement and annihilation campaigns in the early 1930's again wiped out Communist Party membership, depleting the numbers from 300,000 to just 40,000 between 1934 and 1937.87

In addition to being weakened by the continuing struggle with the Communists, the Nationalist regime faced the Japanese presence in Manchuria after 1931,88 and suffered a loss of control over China's southwest which was under warlord control. The legal reforms promulgated in 1935, therefore, had limited reach, and they soon became obsolete when war broke out with Japan in 1937. When the Second World War finally ended in 1945, the Nationalists were still embroiled in civil war and would be overthrown by the Communists within four years.

C. The Early Chinese Communist Experience: 1927-49

The Communists, struggling for military power from their rural bases, were attempting prior to 1949 to devise strategies for building a strong central state. The need to control territorial sanctuaries strongly influenced their attitude towards law and use of the death penalty. The survival of the Party as a viable revolutionary movement depended upon its control of these territories. During the war-dominated years of the Republican era when both sides tenaciously vied for power, the Communists, like the Guomindang, also used coercive and violent means to suppress opposition.89

As early as the 1927 peasant uprisings at the Hailufeng Soviet in Guangdong province, the Communists permitted peasants to freely execute counterrevolutionaries. Under the Chinese Soviet system, governments at the county, district, and township levels all had judicial committees or officials to handle litigation and try counterrevolutionaries.

86. Michael, The Role of Law in Traditional, Nationalist, and Communist China, 9 CHINA Q. 124, 134 (1962); see also P. BILLINGSLEY, BANDITS IN REPUBLICAN CHINA 47 (1988) (describing how the decapitated heads of bandit leaders were displayed, suspended in cages on the city walls or gates, as a warning to the populace to forego the path of outlawry).

87. Not all were killed in these campaigns; some deserted. See F. SCHURMANN, supra note 48, at 129 (1968).

88. Following the "Mukden incident" of September 18, 1931, Japanese troops took over Manchuria and later established a puppet state, known as Manchukuo.

89. Scattered reports from HONGSE ZHONGGUO (RED CHINA) from the spring of 1933 onward indicate that the State Political Security Bureau had executed criminals without mention of any trial. A decree issued by the Council of People's Commissars on February 9, 1934, citing the military situation at the time, empowered the Security Bureau to directly punish counterrevolutionaries without going through the courts. T. LÖTVEIT, CHINESE COMMUNISM 1931-1934: EXPERIENCE IN CIVIL GOVERNMENT 122 (1979).
One Communist source reported that 1,822 landlords were executed within just a few months. In many cases, the accused were killed on the spot before cheering crowds at anti-counterrevolutionary meetings.

Between 1927 and 1933, the Communist Party was fragmented by internal dissension, hounded by the Guomindang, and diverted from the task of establishing a unified legal policy. Hence, the Party's approach towards the death penalty was shaped primarily by its competition with the Guomindang and its central concern with seizing and maintaining territory. Accordingly, it defined the term "counterrevolutionary" broadly enough to encompass a range of enemies based on economic class, political party, or overt action against the Communist Party. A variety of punishments were used; persons sentenced to death were usually shot, although in some cases the traditional practice of mutilating the body by beheading was used. Penal legislation of the Chinese Soviet Republic was virtually non-existent prior to 1933.

By 1933, a stronger Guomindang threat necessitated more expeditious procedures for handling counterrevolutionaries and other criminals. The previous method of requiring a superior's approval before carrying out the death sentence was declared inappropriate; only those cases in which the offender appealed his sentence were reviewed at the higher level. Lower-level cadres with suspect or limited judicial training, therefore, were delegated discretion to execute criminals with no means of re-examination until after the fact. In addition, the right of appeal was shortened from fourteen to seven days. Furthermore, the tasks typically performed by the judicial organs were increasingly replaced by the Political Security Bureau, which was given the right to arrest and detain suspects, conduct mass trials, and even execute offenders without the approval of the courts. The Communists justified these changes by explaining that when they were in particular danger (i.e. when territory was not yet firmly under Communist control, when the Guomindang was attacking, or when the Party was leading a campaign) they required more power to con-

90. The Hai-feng Soviet government had a nine-man judicial committee; each district government had a five-man judicial committee; each township government had one judge. S. LENG, supra note 46, at 2-3 n.10.
91. Id. at 3.
92. P. GRIFFIN, supra note 41, at 36.
93. See id. at 128-29.
94. Id. at 47.
95. Id.
trol political opposition.96

From 1934 onward, the CCP leadership demonstrated strong contempt for laws and regulations, warning local cadres not to permit the fight against counterrevolutionaries to be restrained by legal considerations. Increasingly, mob emotion rather than legal procedure fueled the public trials, which uniformly prescribed the death sentence as punishment.97 Once the leaders had subordinated law to the demands of the revolution, terror was unleashed in the tenuously-held war zones and border areas.98

The Communists began to restrain these revolutionary excesses when victory appeared imminent in late 1948. Policy directives and proclamations spoke of providing protection for human rights and democratic freedom. Communist leaders began to formalize and regulate court procedure and prohibit corporal punishment and indiscriminate killing.99 However, in areas involved in the fanshen land reform movement,100 the commissioner's office could still authorize lower level cadres to carry out immediate executions upon the township magistrate's approval.101

D. The People's Republic of China

After taking power in 1949, the Communist Party again confronted severe economic crises, divisive internal conflict both within the Party and from opponents outside the regime, and shifting foreign policy alignments — all of which generated a pervasive fear of threats to its control over the country. One of the tools used by the leadership to resist this opposition was the system of mass on-the-spot trials,
where death sentences were carried out immediately. Although prop-
agated from the central government, these summary executions were
encouraged by mob rule and individual cadres who regarded the pol-
icy as necessary to overcome local elite power still entrenched from
the former socio-political order. The bloody Land Reform campaign
of 1949-51, which led to the trial and execution of perhaps a million
people,\textsuperscript{102} illustrated the unrestrainable terror that could be unleashed
during such revolutionary frenzy. Victor Li advises that such in-
stances of extreme brutality must be viewed within their proper con-
text—here within the context of a revolution.\textsuperscript{103} Mao Zedong, after
all, had warned that violence inevitably accompanied the overthrow of
the old order:

[A] revolution is not a dinner party, or writing an essay, or painting a
picture, or doing embroidery; it cannot be so refined, so leisurely and
gentle, so temperate, kind, courteous, restrained and magnanimous. A
revolution is an insurrection, an act of violence by which one class over-
throws another.\textsuperscript{104}

During land reform and the campaign to suppress counterrevolu-
tionaries that was launched in February, 1951, the Communists
branded landlords, rich peasants, and persons with capitalist back-
grounds as opponents of the regime. Individuals perceived as
Guomindang agents were also targeted and ruthlessly oppressed. Us-
ing an extremely broad definition to identify counterrevolutionaries,
the Party treated these individuals as enemies of, and threats to, the
system it was seeking to establish. Some of the most violent cam-
paigns were launched after China's entry into the Korean War in late
1950. The Party, aware of the possibility of sabotage operations by
political opponents, perceived an increasing need for vigilance. Thus,
in September, 1950, just prior to the decision to intervene, Mao an-
nounced, "[I]t is imperative that we adhere to a policy of not killing
even a single agent"; in January, 1951, he declared that "we must
firmly kill all those reactionary elements who deserve to be killed."\textsuperscript{105}

\textsuperscript{102} J. Domes, The Internal Politics of China, 1949-1972, 51-52 (1973) [hereinafter J.
Domes]. The sum total of the victims of this campaign is unclear. At the eighth Party Congress
of the Chinese Communist Party in September, 1956, the Minister of Public Security Luo Ruiq-
ing talked of 800,000 executions. The Minister of Finance Bo Yibo, however, proposed a figure
of more than two million in a work report published in Beijing in late 1952. See B. Stavis, The
Politics of Agricultural Mechanization in China 25-30 (1978) (using Western and Chi-
nese sources to arrive at a cautious estimate of between 400,000 and 800,000 deaths).

\textsuperscript{103} Li, Book Review, supra note 11, at 184-85 (1968) (Given the extreme brutality of the
Guomindang's annihilation campaigns, "it was no surprise that the Communist victory of 1949
was accompanied by a desire for revenge and a resolve to eradicate the enemy class.").

\textsuperscript{104} Mao Tse-tung, Report on an Investigation of the Peasant Movement in Hunan (1927), 1
Selected Works 23, 28 (Peking 1967).

\textsuperscript{105} Comments on the Work of Suppressing and Liquidating Counterrevolutionaries (1950-
51), in Miscellany, supra note 50, at 6.
Following a brief relaxation from the violence in 1956-57, the Party's "anti-rightist" campaign of 1957-58 systematically resumed the brutal disciplining of critics of its regime. In August, 1957, a mass court sentenced three leaders of the student movement in Wuhan to the death penalty. Execution was carried out immediately and without the constitutionally requisite approval of the People's Supreme Court. From July to October, another 400 executions of opponents of the Party were reported. This comparatively limited physical liquidation of critics was soon accompanied by an "education through labor" campaign, which authorized the security authorities to send criminal offenders, counterrevolutionaries, and "reactionaries" to forced labor camps without trial for an indefinite time until sufficiently "educated."

Much of the Red Guard violence during the early phase of the Great Proletarian Cultural Revolution was aimed at critics and opponents of Mao, in particular, rather than the Party in general. Following Mao's order to "smash Gongjianfa (police, procuracy, and courts)," the Red Guards attacked the Public Security organs for abusing power, taking reactionary positions, and failing to carry out the mass line. Mao purged large numbers of cadres without resort to any formal judicial process. In a self-criticism speech of January, 1967, the Minister of Foreign Affairs Chen Yi admitted the execution in the latter half of 1966 of more than 400,000 members of the "work teams," or units sent by the central and provincial Party leadership to implement Party policies among the population. The People's Liberation Army oversaw the administration of justice during this anarchic period until 1973, when normalcy seemed to reappear in the legal arena.

Also during the Cultural Revolution, even parents of students sent down to the countryside played a role in influencing government policy toward criminal punishment. During Mao's program of resettling young school graduates from the cities in the countryside, the Party issued a policy that imposed severe punishment on those persons in the rural areas who had any sexual relations with the young urban

106. If these data from most of the cities and a few rural areas were projected to the entire country, then altogether less than a thousand opponents of the Party were executed. Domes compiled these figures from reports by national, local, and Hong Kong newspapers. J. DOMES, supra note 102, at 83.

107. S. LENG & H. CHIU, supra note 52, at 18.

108. Although top-level Party leaders, against whom the purge had been initially directed, generally were not physically attacked, at the lower level many victims died. See J. DOMES, supra note 102, at 167 (1973).

109. See S. LENG & H. CHIU, supra note 52, at 18.
women. Numerous executions were carried out in accordance with this policy, which had been adopted partly in response to complaints from parents who were outraged that their daughters were being taken advantage of in villages far from home while at the mercy of local officials.\textsuperscript{110}

E. The People's Republic After 1978

Since 1979, Communist leadership has faced the problems of increasing crime in society, pressures to liberalize from the outside world, further internal dissension, and serious economic pressures. Yet, none of these forces were strong enough to distract Deng's introduction of legal reforms. The number of cases involving "counter-revolutionaries" dropped markedly in the late 1970's, reaching a reported low of 0.5 percent of all criminal cases in 1982.\textsuperscript{111}

Until recently, China has remained conspicuously absent from the human rights debates in the United States and Europe that focused on the human rights records of countries receiving economic or military aid from the West.\textsuperscript{112} To a large extent, this exclusion stemmed from the West's lack of access to and leverage in China, that came with many years of economic, diplomatic, and military isolation. Yet, well after Richard Nixon's historic visit in 1972, China remained largely exempt from the human rights standards applied by the West to other countries.\textsuperscript{113}

While Western external pressure on China in the human rights sphere remains subtle, if not suppressed, Western governments now have greater economic and military leverage to undertake human rights initiatives with the People's Republic. Occasionally, these governments have demonstrated greater resolve in criticizing Chinese

\textsuperscript{110} This Party policy was called \textit{po-huai shang-shan xia-xiang zui}, "the crime of sabotaging the policy of living on the mountains and settling down in the countryside." Thomas Bernstein has noted that cases of sexual misconduct at the time were not reported in the Chinese press. T. Bernstein, \textit{Up to the Mountains and Down to the Villages: The Transfer of Youth from Urban to Rural China} 340 n.80 (1977).

\textsuperscript{111} Jiang Hua \textit{6th N.P.C. Report, supra} note 56, at K-3.

\textsuperscript{112} This section on China's exemption from the human rights debates in the West has been drawn from Roberta Cohen, \textit{People's Republic of China: The Human Rights Exception}, 9 \textit{Human Rights Q.} 447, 471-91 (1987) [hereinafter Cohen, \textit{Human Rights Exception}].

\textsuperscript{113} For example, in 1975 the communist countries of Eastern Europe signed on to the Helsinki Final Act, which authorized the Western governments and non-governmental organizations to monitor Soviet and East European compliance with the human rights provisions set forth in the Act. The Jackson-Vanik Agreement of 1974 also focused on the human rights records of the Soviet Union and Eastern Europe by linking their emigration restrictions to the extension of most favored national treatment in trade. \textit{Id.} at 473.
human rights policies. 114 Gradually, too, the Chinese leadership has become more responsive to human rights initiatives and pressure from the West. Recent rulings indicate that Chinese courts have dispensed lighter sentences to those defendants who received international attention. 115

Since 1984, the Chinese authorities have publicly countered the negative international coverage of their use of the death penalty and other punishments. 116 Although they continue to insist that their legal system and human rights record is an internal matter into which the international arena should not intrude, they have begun to respond to their critics. 117 Pleas on behalf of international human rights organizations, however, have played a minimal role, if any, in encouraging the Communists to curb police abuses and adhere to international human rights standards. Party politics and institutional inertia still restrain any major attempts to rectify the problems of abuse.

F. The Aftermath of Tiananmen

With at least forty persons put to death for activities related to pro-democracy demonstrations since June 4, the government has reacted more severely against political opposition than at any time since the Cultural Revolution. In the past, the Chinese leaders tended to spare political dissidents, sentencing them instead to lengthy terms in forced labor camps. Chinese officials, however, contend that the executed persons are “hoodlums,” guilty of committing common crimes such as arson, theft, or destruction of state property, rather than political offenses. 118

In the months following the massacre in Tiananmen, the senior leaders have imposed tighter control over those persons whom the

114. For instance, a 1985 Congressional resolution condemned Chinese forced abortion and sterilization as “crimes against humanity.” Id. at 527.
115. Silk, supra note 61, at 68. For instance, the release of Hanson Huang, a Hong Kong-born, Harvard-trained lawyer, who was given a fifteen-year imprisonment sentence on a spying charge, followed a campaign of international protest. Cohen, Human Rights Exception, supra note 112, at 532.
116. While the Chinese leaders remained silent about Amnesty International’s first 1978 report on China and its 1983 memorandum, the Ministry of Justice in 1984 publicly denied the charges in Amnesty’s 1984 report that political prisoners were still subject to secret detention and mistreatment, and denial of fair trial. Cohen, Human Rights Exception, supra note 112, at 533.
117. In November, 1984, following Amnesty International’s repeated denunciations of the executions of counterrevolutionaries and criminals, the Ministry of Public Security defended the anti-crime campaign. In a press conference, a Ministry spokesperson defended the necessity of executions to educate the public but denied that there were any political prisoners or dissidents in China. The Foreign Ministry also sought to counter criticism abroad by stating that Amnesty International’s calls for the curtailment of executions and the abolition of the death penalty reflected “Western legal opinions” inappropriately imposed on China. Id.
leadership views as constituting "hostile elements at home." 119 Officials have been ordered to concentrate on ideological and political work, and to heighten vigilance against those "factors leading to social instability." 120 Governments at all levels have also been called upon to strengthen police units in order to tighten public security.

The Chinese leadership, as it has frequently done during periods of internal instability, has sought to attach blame to the outside world, particularly Taiwan and the United States. Beijing has accused the former of exploiting the student demonstrations and escalating them into an anticommunist movement, while criticizing the latter for its human rights protests and sanctions that unduly interfere in China's internal affairs. "The Chinese have never yielded to external pressure," said a Foreign Ministry spokeswoman. "It is unwise and fruitless to exert political or economic pressure on China." 121

In the aftermath of Tiananmen, however, the Chinese have found themselves susceptible to outside foreign pressure, especially as the country struggled with its own financial difficulties. Economic pressures, most particularly in the form of inflation, unemployment, and slow growth, contributed to the lifting of martial law in January, 1990. 122 Just days later, the Chinese leaders freed nearly 600 pro-democracy demonstrators from jail in what appeared to be another gesture to gain goodwill for sorely needed foreign loans and investments. While the lifting of martial law was regarded by foreign companies as a necessary condition for a better business climate, China's deteriorating economy still suffered from tight credit, reduced demand, and shortages of raw materials and foreign exchange. 123

III. POLICY JUSTIFICATIONS FOR THE DEATH PENALTY

Both deterrence and retribution have been the primary motivations

119. See Kristof, China's Premier Urges Tighter Control, N.Y. Times, March 21, 1990, at A3. At the formal opening of the National People's Congress, Prime Minister Li Peng expressed the official hard line policy on social control:

While fostering socialist democracy and the socialist legal system, we must intensify dictatorship by the socialist state apparatus. . . .Prosecutors and judges should fully perform their duties and be on the alert so that they can promptly crush attempts at infiltration and subversion by foreign hostile forces, and so that they can crack down on all sabotage by hostile elements at home.

120. Id.

121. Id. at A1.


in China's use of the death penalty over the years. In describing the purposes that punishment may serve, or may be perceived to serve, in the Chinese context, the edges between the different justifications are not easy to separate. The Chinese leadership continues to resort to draconic measures to instill fear in the populace.

A. The Question of Deterrence

At present, deterrence seems to be the main justification for capital punishment in China. According to this doctrine, the death penalty aims to deter both actual and potential offenders from the commission of crimes. The severity of the punishment should not be greater than that which is necessary to prevent crime. This emphasis on the deterrent function of the death penalty has consistently been a central feature of criminal law throughout Chinese history.

1. Severity of Punishment as Deterrence

Chinese authorities have long recognized the need for heavy penalties and exemplary sentences in order to deter crime. The traditional use of graduating degrees of harsh punishment\(^\text{124}\) reflects the Chinese belief that the severity of the punishment is relevant to its degree of deterrence.\(^\text{125}\) The Chinese Legalists, who regarded law as essential for effectively controlling the population, ardently advocated the use of harsh laws as a means to deter wrongdoing. Viewing human nature as fundamentally selfish, the Legalists believed that only deterrence through fear could prevent the commission of wrongful acts.\(^\text{126}\) The Guanzi,\(^\text{127}\) an eclectic work ascribed to Confucianists under strong legalist influence, expressed the importance of stringent laws: "[I]f a punishment does not inspire fear, cruel people will violate the prohibitions readily. The people will obey only when they are submissive to

\(^{124}\) The Chinese use the term *wu xing*, "the five punishments," to connote their most serious legal punishments. While this notion has been traced back to the non-Chinese Miao people in the twenty-third century B.C., it was the Sui Code of 581-83 which delineated the five punishments that basically have remained until this day:

1. Beating with a light stick (5 degrees: 10 to 50 blows)
2. Beating with a heavy stick (5 degrees: 60 to 100 blows)
3. Penal servitude (5 degrees: 1-3 years)
4. Legal exile (3 degrees of distances: 2,000 to 3,000 li) [3 li = 1 mile]
5. Death (2 degrees: strangulation and decapitation)

As for later changes, the most important addition was a third degree of death penalty: death by slicing. D. Bodde & C. Morris, supra note 4, at 76-78, 93.

\(^{125}\) A number of four-character Chinese idioms reflect this ancient faith in the power of deterrence. *Sha ji he hou*, literally "kill the chicken to frighten the monkey," means punishing someone as a warning to others. *Sha yi jing bai* translates as "execute one as a warning to a hundred."

\(^{126}\) D. Bodde & C. Morris, supra note 4, at 24, 99.

\(^{127}\) The Guanzi probably dates from the third century B.C.
power and execution.”

Ever since the sixth century, the standard death penalties, in increasing order of severity, were strangulation and decapitation. Although strangulation caused a more prolonged, painful death than decapitation, it was considered the less severe punishment for social and religious reasons. A less ancient form of death, considered even more severe than either strangulation or decapitation, was “death by slicing,” also called “lingering death.” Under this punishment, the convict’s body was slowly sliced to pieces while he or she was still alive. The aim was not so much to inflict torture as it was to destroy the present life and, more importantly, the future spirit of the offender.

When the Qing dynasty codifiers redrafted the Ming Code in 1740, they retained the traditional capital punishments of “strangulation” and “decapitation” where originally cited in the statutes. Although, by this time “strangulation” usually was commuted to exile, the severe terminology was probably continued because of its supposed deterrent effect. The reluctance of the Qing codifiers to alter the older language of such severe sentences, which actually were often reduced to more lenient penalties, demonstrates the Chinese reverence for tradition as well as the hope that the forceful wording of punishment provisions would deter wrongdoing.

Since consolidating power in 1949, the Communist Chinese regime has used brute terror against enemies of the state, criminals, or persons who represented the elite of the former socio-political order. During the early land reform period, the leaders insisted on violent class warfare in every village to destroy the vestiges of the traditional power structure in local communities. At least one landlord, and usually

129. Chinese filial piety taught that a person’s body was a bequest from his parents rather than his own property. Decapitation, therefore, was unfilial because it mutilated one’s body; strangulation, by contrast, left the body whole with the spirit intact. D. Bodde & C. Morris, supra note 4, at 92.
130. According to the Chinese legal historian Shen Jiaben, each executioner had his own technique for carrying out the death by slicing, the procedure of which was not defined in the dynastic codes. Although slight variations were reported in different localities, a typical procedure involved the infliction of eight cuts upon the victim. The executioner made successive cuts upon the victim’s face, his two hands, two feet, breast, stomach, and the final slicing off of the head. Niida Noboru, the preeminent Japanese scholar of Chinese law, presented a much more gruesome picture of the slicing death. He indicates that as many as 24, 36, 72, or over 120 cuts might have been inflicted upon the victim. Id. at 93-94.
131. See id. at 99.
132. Id.
more, were chosen from nearly every village for public execution.  

In a typical execution, the victim kneels in front of two or three standing soldiers, policemen, or officers from the Public Security Bureau. His hands are commonly tied behind his back. In a tradition that dates back to imperial China, when executioners approached from the rear for fear that the victim's souls might return to haunt them, the pistol is placed against the base of the man's neck. After a single shot, the body is rolled over and photographed for the court record. The family of the deceased is required to pay one yuan for the cost of the bullet.

2. Publicity of Punishment as Deterrence

For the threat of capital punishment to be effective, communication networks and propaganda is essential. The death penalty has been widely publicized in the belief that its emotional effect would be strongest if more people witnessed or heard about trials and executions. Frequently, authorities have sought to capture the attention of a threatened audience by making examples of select lawbreakers. The severe sentencing of offenders is intended to send to potential criminals a powerful message that will result in general deterrence. As Liu Yunfeng, president of the Beijing High People's Court, explained, "We sentence people to death not to seek revenge but to educate others — by killing one we educate one hundred."

The importance of publicizing negative examples reflects both the

133. A. Doak Barnett has described the emotional potency of such public executions on the local populace:

"[T]he killings [of landlords] had a lasting imprint on the attitudes of everyone, including the ordinary peasants; it impressed upon them the power of the new regime and its capacity to use arbitrary and extreme violence, if and when it wished, against all persons classified as enemies of the state."

A.D. BARNETT, supra note 44, at 228-29.


135. See, e.g., Lee, Happy Holidays and Busy Killing Fields, FAR EASTERN ECON. REV., Feb. 20, 1986, at 47.

136. See F. ZIMRING & G. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 141-49 (1973) (arguing that the effective operation of deterrence as a means of social control depends on the effective communication of threats of punishments and their concrete exemplifications to the public).

137. Lee, supra note 135, at 47. A spokesman for the Ministry of Public Security said in 1984: "Facts show that the executions of a small number of criminals guilty of the most heinous crimes have contributed to the education of the majority of the criminals." Sun, China Reports Sharp Drop in Crime Rate, Wash. Post, Nov. 15, 1984, at A33.
underlying traditional Chinese belief in the malleability of man138 and Mao Zedong's great faith in "mass line" governance.139 Thus, for many trials and executions, the masses have been mobilized to observe and learn. Almost all cases are heard in public,140 often held in large stadiums, and are generally open to people with admission tickets distributed through organizations designated by the authorities.141 Adopted by the Chinese Communists during the Soviet period of 1927-1934, mass trials142 are envisioned as a means to involve the populace directly in the legal process. Cases of important propaganda value have been carefully staged to inspire fear and class hatred, and to endorse government decisions against the accused.143 The size of a mass sentencing rally has totaled as many as 100,000 people.144

In addition to the mass trials, modern technology and the media — in particular, television, radio, and the press — have been utilized to disseminate news of executions to a wider audience. Occasionally, the announcement of death sentences at mass trials and even executions

138. See Munro, The Malleability of Man in Chinese Marxism, 48 CHINA Q. 609, 639 (1971) ("The belief that people are educable is a self-fulfilling prophecy which may produce the effort or the climate that makes some change for the better in individuals possible.").


140. Cases involving minors, state secrets, or personal intimacies are the exceptions. See S. Leng & H. Chiu, supra note 52, at 91.

141. Id.

142. Mass trials were well prepared, widely publicized, and carefully orchestrated in order to create an atmosphere of dignity. At the trial anyone could make accusations against the accused, and court members and people's representatives frequently used the opportunity to give inflammatory speeches. With an audience now aroused, the trials often concluded with a swift sentence and immediate execution. Jerome Cohen has characterized these trials as "morality plays" because of their careful staging and educational objectives. See J. Cohen, Criminal Process, supra note 11, at 13; Edwards, Reflections on Crime and Punishment in China, with Appended Sentencing Documents, 16 COLUM. J. TRANSNAT'L L. 45, 59 (1977) ("[T]he proceedings called 'mass trials' are not really trials but are rather educational dramas staged to heighten the vigilance of the masses."); Leng, supra note 46, at 35 ("A facade of legality was provided by the judiciary which unfailingly gave formal approval to the verdicts 'demanded' by the masses.").

143. Shao-chuan Leng has described one of the huge mass trials for the accusation of counter-revolutionaries held by the Peking Municipal People's Government on May 21, 1951:

Speaking before the aroused crowd, [Luo Ruiqing], Minister of Public Security, "suggested" that some 220 criminals be sentenced to death. He was followed by Mayor [Peng Zhen] who wound up the drama by saying: "What shall we do with such a group of beasts as these vicious despot, bandits, traitors, and special agents?" "Shoot them!" the audience shouted. "Right, they should be shot," the Mayor replied. "Following this meeting we shall hand over the cases to the Military court of the Municipal Military Control Commission for conviction. Tomorrow, conviction; the next day, execution." The crowd responded with wild applause and loud cheers.

Leng, supra note 46, at 35.

144. On August 23, 1983, during the anti-crime campaign of that month, thirty persons were executed in Beijing following a mass rally of 100,000 people. AI-1984, supra note 7, at 59 (1984).
have been shown on Chinese television. On January 30, 1986, the Shenyang City Intermediate People's Court sentenced fourteen criminals to death, while more than 200,000 people throughout the city listened to the live relay at some 150 assembly sites. Despite the message of article 155 of the new Law of Criminal Procedure, stating that "the condemned should not be exposed to the public," some executions continue to be carried out in public and some corpses still remain exposed afterwards. Furthermore, prior to execution, condemned prisoners are often paraded in public with their heads bowed and placards proclaiming their crimes hung around their necks, a practice particularly widespread during the Cultural Revolution.

The leadership has also used other means of propaganda to send messages to the populace about the harshness of the death sentence. In Beijing, the government has emphasized the seriousness of executions by placing posters on the main streets and at major intersections which publicize execution notices with the names of the condemned underlined in red and, on occasion, their photos, with heads shaven, provided for added effect. Posters bearing large red check marks signify that the sentences have been carried out. In addition to execution notices, government propagandists have utilized other forms of communication, like comic strips, to pass on stern messages about the severity of the law. Chinese newspapers still

145. One mass sentencing rally with 100,000 people in attendance in Taiyuan was televised in July, 1981. Id. at 73. The execution of Xiong Ziping, one of twin brothers from Hangzhou convicted of rape, was shown on China's television news in November, 1979, reportedly with only two seconds of the pistol firing cut from the film. Mathews, Plagued by Crime, Chinese Increase Use of Executions, Wash. Post, Aug. 5, 1980, at A13.


147. Criminal Procedure Law, supra note 6, art. 155.

148. AI-1984, supra note 7, at 73-74. The practice of parading criminals through the streets has been criticized by Jiang Hua, the president of the Supreme People's Court, and other members of the Communist Party's Central Committee. Campbell, China Suddenly Taking a Tougher Line on Crime, N.Y. Times, Sept. 13, 1983, at A2.

149. See, e.g., Campbell, To Shame Its Felons, China Puts Them on Parade, N.Y. Times, Sept. 16, 1983, at A2 ("The public humiliation of condemned criminals is an ancient Chinese custom that was revived with a vengeance during the Cultural Revolution of the late 1960's and early 1970's" and "appears to have been called into service again to dramatize the campaign against crime.").

150. Court posters describing the crimes are popular with many people because their lurid details contrast favorably with the bland fare available in the official Chinese press. For instance, one poster detailed the story of an executed factory manager, who was said to have put arsenic into the rice at the home of his married lover after she decided to curtail the affair. Both the woman's husband and daughter died. Burns, When Peking Fights Crime, supra note 134.


152. See, e.g., Burns, When Peking Fights Crime, supra note 134.

153. One such comic strip posted near the fine arts museum in Beijing illustrated a man's
continue to cover executions as a form of popular education and general deterrence of crime.\textsuperscript{154} In a commentary about a former Communist Party official who was executed for taking more than $29,000 worth of goods seized from smugglers, the Yangcheng Evening News of Guangzhou wrote, "Execute one as a warning to a hundred."\textsuperscript{155}

3. Frequency of Punishment as Deterrence

If capital punishment is to serve as a deterrent, then executions should be frequent rather than scarce and sporadic. When China experienced a significant jump in its crime rate during the early post-Mao period, the Chinese leaders increased the use of the death penalty in 1979-80.\textsuperscript{156} As the number of serious crimes continued to rise,\textsuperscript{157} in large part due to the increasing liberalization of Chinese society, the government launched an anti-crime campaign in 1981 and again resorted to more frequent use of the death penalty. \textit{Beijing Review} commented, "Anyone without bias who is really concerned with the welfare of the people in this part of the world will feel pleased that China is cracking down on crime."\textsuperscript{158}

A wave of mass executions immediately followed the launching of the anti-crime campaign of August, 1983. Foreign press reports estimated that more than 5,000 executions were carried out during the first three months of the campaign.\textsuperscript{159} Within five months, some one hundred persons had been put to death in Beijing\textsuperscript{160} and at least 120

\textsuperscript{154} Commenting on the death sentence given to a Public Security Bureau official for bribery, Nanfang Ribao clearly indicated that the purpose of the execution was deterrence: "The example of the degradation of Ou Chujie is \textit{rare negative educational material}. We should not let this example go by easily but make use of it to the fullest extent." \textit{Guangdong's Foshan City Executes Corrupt Official}, Nanfang Ribao (Guangzhou) Apr. 12, 1987 (FBIS trans. Apr. 16, 1987, at P-2) [hereinafter \textit{Guangdong's Foshan City Executes Corrupt Official}] (emphasis added).


\textsuperscript{156} A review of official press and courthouse notices revealed that at least 198 people had been executed, and another 214 sentenced to death with a two-year reprieve in the twelve months preceding June 30, 1980. Most of the persons executed had been convicted of murder or rape; others were convicted of armed robbery, drug peddling, and gold speculation. Mathews, \textit{supra} note 145, ("The current wave of executions is a revival of the tougher and more public means of justice of the 1950's."); S. LENG & H. CHIU, \textit{supra} note 52, at 132.

\textsuperscript{157} In the first half of 1980 alone, China's chief prosecutor reported that the police had arrested 84,000 criminals, more than half for "grave crimes," alluding to murder and rape. F. BUTTERFIELD, \textit{CHINA: ALIVE IN THE BITTER SEA} 361 (1982).


\textsuperscript{159} AI-1984, \textit{supra} note 7, at 55.

\textsuperscript{160} Agence France Presse (Hong Kong), Jan. 18, 1984, in FBIS, Jan. 19, 1984, at K-14.
others had been executed in the more remote city of Guiyang. The rate of executions reported during this time was the highest in China since the early 1970's. Between 1983 and 1986, Western estimates of the number of executions ranged from 7,000 to as many as 14,000.

A substantial drop in the number of crimes during the first six months of 1986 was announced in early 1987, reportedly as a result of the successfully waged anti-crime campaign. Politburo member Peng Zhen, in an address of March 31, 1987, attributed this improvement to the policy of “striking ruthless blows” that had been carried out since 1983. He found that severe punishment had deterred criminals and returned public order to society. While the anti-crime campaign continued in 1987, it was carried out less intensively than in the previous year.

During the first half of 1988, however, serious crime increased thirty-five percent over the same six-month period in 1987. The government’s response in controlling this disorder was an uncompromising policy of severe punishment, including the continued convening of large “mass sentencing rallies” and frequent use of the death penalty.

The question of whether China’s public and frequent use of the death penalty constitutes a more effective deterrent than other forms of punishment, such as life imprisonment, has been left unanswered due to the unavailability of statistics and the political sensitivity of

162. AI-1984, supra note 7, at 55.
165. Speaking before the National Forum on Political and Judicial Work on March 31, 1987, Peng Zhen applauded the success of the “striking ruthless blows” policy of more than three years:

In the second year after the “striking ruthless blows” policy was implemented, wherever I went, I used to ask people whether women comrades had to be escorted when they went for night shift work. Many people said it was not necessary to do so. This shows that the intolerable arrogance of criminals has been repelled and the situation in public order has taken a favorable turn.

166. DEP’T OF STATE, COUNTRY REPORTS on HUMAN RIGHTS PRACTICES FOR 1987, 661 (1988).
researching the Party's criminal justice policy. Presently, no studies or reports are available in China that indicate whether the death penalty has effectively deterred criminal activity. The available evidence in other countries still does not sufficiently show that the increased use of the death penalty has reduced the rate of criminal offenses.

B. The Question of Retribution

Retributive justice has also been one of the primary purposes for China's frequent use of the death penalty. According to this theory, the crime itself justifies the punishment, and the punishment is intended solely to be imposed as the legal consequence of guilt. Retribution is irrelevant to the utilitarian question of whether the death penalty serves as a deterrent. Instead, the retributivist focuses on the issue of whether justice permits or even requires the death penalty.

1. Vengeance and Anger

One justification for retribution that the Chinese criminal justice system has consistently advanced is the demand for vengeance. This aim of punishment is backward-looking to the offense rather than forward-looking to the offender. Vengeance is punitive rather than preventative; its purpose is to express anger at the wrongdoer, regardless of any social justification for punishment. The Chinese use of the death sentence, when viewed through its highly publicized process of public trial, parade, and execution, is said to serve as an outlet for popular cries of revenge and outrage.

170. See Note, The Death Penalty and Legal Reform, supra note 62, at 325.
171. See, e.g., S. Nathanson, An Eye for An Eye: The Morality of Punishing by Death 21 (1987) ("[W]e cannot conclude that a penalty has worked simply because the actions it seeks to prohibit decline when it is imposed. Other factors may have led to the decline."); see also E. Van Den Haag & J. Conrad, The Death Penalty: A Debate 87 (1983) ("Speculations on the proper amount of punishment to inflict so that the maximum amount of crime can be deterred... are not open to conclusive scientific investigation.").
173. See W. Berns, For Capital Punishment 8 (1979) (The death penalty presents a means of paying back the offenders.).
174. Jan Gorecki has explained how the emotions of hate, hostility, and outrage underlie use of the death penalty.
Anger, fear, and the resulting hatred of the wrongdoer do not necessarily stimulate the idea of the general moral education; they rather arouse the wish to deter strongly or to take revenge. Consequently, they spur requests for severe, rather than merely certain and just, punishments, and especially, for capital punishment — the severity increases deterrence and makes revenge sweeter.

175. One popular Chinese idiom reflecting the role of anger in punishment is min fen nan ping, literally meaning "popular indignation is difficult to calm." Another saying was often used by the students in Tiananmen Square during the spring of 1989, as they awaited the eventual
As early as 1926, when peasant associations first sprouted throughout the countryside and assumed responsibility for the settling of local disputes among the peasants, village leaders employed various means to punish counterrevolutionaries. These methods included humiliating parades of the accused donning tall dunce caps, struggle sessions, imprisonment, and execution — which Mao Zedong justified in February, 1927 as “meted out to the biggest of the local bullies and evil gentry by request of the peasants and the people as a whole.” In light of all the peasant suffering, Mao viewed the wave of landlord executions as an expression of revolutionary justice: “[H]ow can one say that the peasants should not now rise and shoot one or two of them and bring about a small-scale reign of terror in suppressing the counterrevolutionaries?”

The revenge motive surfaced again in the pre-1949 enforcement of land reform and punishment of “despots” and counterrevolutionaries through mass trials, struggle meetings, and accusation rallies. One district in the north of Jiangsu province reportedly organized more than 12,000 “anti-traitor” and “anti-despot” meetings involving some two million people. These mass trials and meetings often ended in violence or terror, with the accused sometimes being beaten or killed by enraged “victims.” In other cases, they were sentenced to death and executed on the spot. The bloodshed became so excessive that Mao admitted in a speech of April, 1948, that not only had landlords and rich peasants been unnecessarily killed but many workers had also been killed by rural peasants seeking revenge.

The tone of criminal sentencing in post-1949 China continues to reveal hostility and vengeance directed at opponents of socialism rather than any professed concern to reform the deviant. In frequently imposing the death penalty, the Chinese Communist authorities often claimed that their sentencing was in response to min-fen, or “popular anger.” This acknowledgment represents a recognition on

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government response: *qiu hou suan zhang*, literally meaning “to settle accounts after the harvest.” The actual meaning is “to take vengeance when the time is ripe.”


177. S. Leng, supra note 46, at 21.

178. Id.

179. Many commentators have written about the importance that the Chinese criminal process places upon reform and rehabilitation of the offender to enable him to contribute to socialist development. Jean Pasqualini, for example, spent eight years in a Chinese labor camp and noted, “Not only is the society within the camps in many ways purer than the larger one outside, but it is also freer. It is in the prisons and camps that the notions of friendship and personal freedom are the most highly developed in China.” J. Pasqualini, Prisoner of Mao 12 (1973); see generally A. & A. Rickett, Prisoners of Liberation (1973).
the part of the leadership that harsh sanctions could legitimately be justified as necessary to assuage the anger of the people.\textsuperscript{180} Thus, offenders received the death sentence in cases where the court stated that "the people are extremely indignant."\textsuperscript{181} Such pronouncements have taken place even in adultery cases, where the disruption of social relations has been deemed sufficiently great to merit the harshest punishment.\textsuperscript{182} In other cases where the court declared that the people are merely "very indignant," the sentence is life or long imprisonment.\textsuperscript{183}

For important politically sensitive cases, however, the public was usually provided with brief, conclusive materials referring to the charges as "arousing the great anger of the masses" or "viciously attacking socialism."\textsuperscript{184} This style of pre-rehearsed justice caused some observers to regard the widely-publicized "show trial" of the Gang of Four as representing more an act of revenge on the part of Cultural Revolution victims and an attempt at popular catharsis than any credible attempt to reach a fair outcome.\textsuperscript{185}

2. Just Requital

The principle behind just requital is that reciprocation for moral evil voluntarily done is, in and of itself, just or morally good.\textsuperscript{186} In imperial China, just requital was used to redress violations of the so-

\textsuperscript{180} Cohen, Criminal Law, supra note 73, at 323, 342 (1977) (The authorities' justification of the death penalty as a response to min-fen was "an explicit recognition of the legitimacy of providing an outlet for the spirit of vengeance aroused by the most heinous crimes.").

\textsuperscript{181} A 1983 decree providing for speedier trials in cases arousing "great popular indignation" was apparently invoked in December, 1985, when an off-duty deckhand was sentenced to death for having provoked a drunken brawl aboard a ferry crossing the Songhua River in the Manchurian city of Harbin. The ferry was greatly overloaded, and the mob of passengers crowding for a view of the fight caused it to capsize, killing 158 persons. Burns, When Peking Fights Crime, supra note 134, at 2 ("At times, the decision to impose the death penalty appears to have less to do with the severity of the crimes than with the need to placate public opinion or find a scapegoat.").

\textsuperscript{182} For example, the head of one commune brigade team was sentenced to immediate death for raping young women. This "incorrigible hooligan" committed "extremely evil crimes and the people are extremely indignant." This case and other death penalty sentences are included in a document announcing the names and sentences of twenty-nine persons sentenced by the Tianjin Intermediate People's Court on August 5, 1973. Edwards, supra note 142, at 59, 72, 77-78 (1977).

\textsuperscript{183} Id. at 59.

\textsuperscript{184} S. Leng & H. Chiu, supra note 52, at 24.

\textsuperscript{185} See Butterfield, Revenge Seems to Outweigh Justice at Chinese Trial, N.Y. Times, Dec. 6, 1980, at 2 ("The trial so far seems more an act of vengeance by the victims of the Cultural Revolution than a careful attempt to trace responsibility for the persecutions and dislocations of that period.").

cial order caused by improper individual acts or criminal violence. The magistrate dutifully dispensed retributive punishment for disturbance of the natural harmony that existed between the affairs of his district and the will of Heaven. The severity of the punishment was supposed to correspond exactly to the disruption of the natural order. Resonating with the notion that a punishment should match the seriousness of the violation to the natural order, death by slicing was reserved for only the most heinous crimes such as high treason, rebellion, murder of the husband, patricide, mutilation of a living person, witchcraft, and other offenses collectively known as the "Ten Abominations."

The Qing Code contained various life-for-a-life provisions for certain kinds of homicide. In one case involving a common man's unsuccessfully attempted killing of a slave, the Board of Punishments pronounced a judgment of life exile. Had death resulted, however, the Board reasoned that death by strangulation would have been the standard penalty required under the Code. The Board of Punishment wrote: "[F]or any destruction of a human life there has to be proper requital." This statement reflected the ancient idea that a homicide upsets the cosmic order, the restoration of which required that a life be given as requital for the life taken away. It also resonated of the Yuan dynasty's imposition of retaliatory punishment, or the taking of retribution proportional to the degree of injury suffered by the offender.

The 1935 Criminal Code promulgated by the Guomindang refined earlier similar codes and was intended to inflict on the criminal a punishment proportional to the particular social danger he had caused. While the Criminal Code vested judges with considerable discretion in selecting a criminal sentence from a range of maximum to minimum

187. D. Bodde & C. Morris, supra note 4, at 43.
188. M. Meijer, supra note 32, at 32.
189. See D. Bodde & C. Morris, supra note 4, at 93.
190. The Code applies the terms di or di ming, literally "requiting a life," signifying the type of homicide for which another must be given in requital. Id. at 182.
192. Id.
193. Id. at 374-75.
194. 1271-1368.
195. P. Ch'en, Chinese Legal Tradition under the Mongols: The Code of 1291 as Reconstructed 61-62 (1979) [hereinafter P. Ch'en]. Paul Ch'en notes that the notion of retaliatory punishment was understood by ancient Chinese thinkers such as Mencius, who once said: "When a man kills another's father, that other will kill his father; when a man kills another's brother, that other will kill his elder brother."
196. J. Escarra, supra note 39, at 315.
punishments, some life-for-life provisions still existed.\textsuperscript{197} For example, the killing of the Chief Executive of a friendly state\textsuperscript{198} or of one's lineal ascendants both carried the death sentence.\textsuperscript{199}

The Chinese Communist rule has continued the pattern of justifying capital punishment in terms of social fairness or justness. "A life for a life" remains a popular notion of fair punishment.\textsuperscript{200} The leading criminal law text produced by the leadership in 1957 explained, "To use the death penalty is not only necessary but also just."\textsuperscript{201}

Other countries have determined that retributive justice does not require the death penalty in order to maintain its utility of credibility. Nearly all the European countries, except for the Soviet Union\textsuperscript{202} and some of its satellites, have rejected the notion of death as the penalty for murder.\textsuperscript{203} United States Supreme Court Justice Thurgood Marshall wrote that retribution was the equivalent of vengeance and hence, an improper goal of the state. In many instances, he wrote, long imprisonment can satisfy the demands of retributive justice for a proportional punishment. Once the punishment lapses into vengeance or mere retaliation, however, the outcome hinges upon the emotional sensibilities of the victimized community. Thereby lacking valid and objective purpose, the penalty of death was excessively cruel.\textsuperscript{204}

IV. INDIGENOUS TRADITIONS AND THE DEATH PENALTY

A. The Penchant for Hierarchy: Judicial Review of Death Sentences

China has historically relied on its massive, hierarchical bureaucracy to administer justice and implement the criminal law. The traditional Chinese philosophy instructed that hierarchy was cosmologically natural, just as man and nature were intrinsically linked in a state of equilibrium. Injustices of any kind disrupted the

\textsuperscript{197} See J. Wu, supra note 37, at 55-56.
\textsuperscript{198} 1923 Provisional Criminal Code, supra note 5, art. 121.
\textsuperscript{199} Id. arts. 312, 314.
\textsuperscript{201} J. COHEN, CRIMINAL PROCESS, supra note 11, at 536 (emphasis added).
\textsuperscript{202} Even the Soviet Union has begun to reexamine its position towards the death penalty. Policies of leniency have begun to gain ground; a 1988 draft for the new criminal code includes a substantial reduction in the number of capital offenses. While the eventual abolition of the death penalty is envisaged by the draft, the penalty is to be retained for treachery, terrorism, espionage, subversion and heinous crimes of premeditated murder and the rape of juveniles. Dejevsky, Kremlin Moves Towards Death Penalty Abolition, The Times (London), Dec. 19, 1988, at 1.
\textsuperscript{203} T. Sorell, supra note 186, at 24.
\textsuperscript{204} U.S. Supreme Court Justice Thurgood Marshall found retribution to be an illegitimate goal in Furman v. Georgia, 408 U.S. 238, 342-45 (1972) (concurring).
natural order and needed to be redressed in order to restore the equilibrium. With regard to capital cases, therefore, the procedure for review was quite elaborate and hierarchically organized. Chinese law insisted on close scrutiny of every capital case at the highest level before life could be taken.205 Ultimate judgments upon capital cases required final ratification by the Emperor himself. While previous Chinese dynasties had recognized the importance of this system of review, it was not until the Qing that the appellate system developed into its most sophisticated form.206

Under the Manchu state, the xian, or “county,” magistrate served as the judge of the court of first instance.207 Responsible for the maintenance of law and order in his local district, he was the lowest official in the hierarchy of the imperial government’s territorial network of authority. He was scholar, literati, administrator, tax collector, transmitter and implementer of official dicta, and arbiter. Although not a judge trained in law,208 the xian magistrate played a vital position in the imperial judicial system by deciding which cases to accept or reject for trial. Yet, on the whole, magistrates were usually inexperienced,209 overworked,210 and harassed by legal deadlines for apprehending and convicting criminals.211 Frequently unable to speak the local dialects, they depended on locally hired staff which was often corrupt and opportunistic.212 Constables,213 for instance, sometimes arrested the wrong persons and then extracted false confessions through torture in order to receive the official reward for arresting suspects who were

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205. D. BODDE & C. MORRIS, supra note 4, at 131.
206. Ocko, I’ll Take It All the Way to Beijing: Capital Appeals in the Qing 47 J. ASIAN STUDIES 291 (1988) (arguing that the Qin legal system had acknowledged the right of appeal for a new trial, the early Han system imposed a mandatory review by the imperial court for the difficult cases, and the Sui permitted victims of injustice to bring their cases to the capital in the hope that the emperor might listen to their complaints); see also P. CH’EN, supra note 195, at 79-80 (noting that the Yuan dynasty had a mandatory review system, requiring that every capital offense case be submitted to the more experienced officials of the central government for final approval of punishment).
207. See infra text accompanying note 23.
208. See J. COHEN, THE CRIMINAL PROCESS, supra note 11, at 6. The xian magistrate could more aptly be characterized as an administrator steeped in Confucian classics and morality. This moral education, however, did not prevent many from being cruel, corrupt, and arbitrary.
210. See, e.g., Kim & LeBlang, supra note 81, at 77, 97-98.
211. J. COHEN, CRIMINAL PROCESS, supra note 11, at 6.
212. See id.; see also R. VAN GULIK, supra note 78, at 59, where it is noted that lower court personnel were locally recruited and thus were often biased towards serving their own interests and those of the local elite.
213. These agents of the magistrate, armed during court proceedings with the terrifying paraphernalia of the cangue, manacles and fetters, were generally feared and despised by the people. R. VAN GULIK, supra note 78, at 55.
subsequently convicted.\textsuperscript{214}

Under the Qing dynasty system of review, the seriousness of a case, and especially the severity of the sentence, determined whether the case was subject to mandatory review. The severest penalties (in excess of the cangue) required approval by higher authorities.\textsuperscript{215} After conducting the trial and pronouncing his provisional sentence, the magistrate then forwarded the criminal, witness, and case records to the prefect. He reviewed the trial transcript, questioned the accused, and then transferred the recorded materials to the judicial commissioner and governor who in turn made their deliberations. Death sentences, constituting the most severe form of sentencing, had to be reviewed by the highest judicial organ in the capital, the Board of Punishment. Only the Emperor himself could sanction executions, and even then only after careful review (except in cases of summary execution). In such instances, a memorial containing the facts of the case was prepared and sent to the Emperor for endorsement.\textsuperscript{216} The Emperor routinely endorsed judgments in the form of a confirmatory rescript, although he could always disapprove, in which case he would return a rescript of disapproval.

The Qing judicial structure, with its well-defined delegation of judicial authority at different levels of government, sought to extend effective protection to the people and limit the danger of abuse of power. Since death penalty offenses were entitled to a mandatory review by more experienced officials at higher levels of government, suspects were more likely to secure a just trial than under previous dynasties. The Qing review and appellate process, however, became increasingly overwhelmed by the growing burden of reviews and appeals, in good part due to the eighteenth-century population explosion and the consequent demands it imposed on the judicial system.\textsuperscript{217}

The new Republic that succeeded the Qing promised to overturn the bureaucratic corruption of the dynasty's legal system. It announced its intentions to modernize the law and build a specialized professional judiciary. Despite the promulgation of new regulations requiring judges to complete university legal training and pass a national law examination, however, the rhetoric of reform produced few tangible results. Many judges were granted exemptions from these new requirements by high government officials, and many other mag-

\textsuperscript{214} Kim & LeBlang, supra note 81, at 97-98.
\textsuperscript{215} The following description of the review process is based on the description in Ocko, supra note 206, at 292-93.
\textsuperscript{216} D. Bodde & C. Morris, supra note 4, at 133.
\textsuperscript{217} Ocko, supra note 206, at 310.
istrates ignored the new laws and remained on the job.\textsuperscript{218} In addition, most judges were selected from military tribunals that retained strong loyalties to local warlords and generals.\textsuperscript{219}

The great ambitions of the Guomindang leadership to modernize the legal system similarly dissipated, in part due to the resiliency of corruption, old loyalties, and ineffective training programs, and in part due to the mounting external pressures on the ruling regime. Although it established an independent judicial hierarchy composed of district courts, high courts, and the Supreme Court, the Nationalist regime lacked judges with formal legal training and, therefore, was forced to rely on retired officials or soldiers. The Western-oriented legal structure existed only in theory; in practice, power had devolved into the hands of the local elite.

Although the Communists formally abolished the Nationalist legal structure upon assuming power in 1949, a shortage in trained legal personnel forced them to retain many of the Nationalist judicial and police organs, as well as personnel who had specialized training.\textsuperscript{220} In the 1950's, legal education was neglected and shunned, remaining virtually non-existent for the next two decades.\textsuperscript{221} The disruptions of the Cultural Revolution contributed in large part to the present shortage of qualified judicial personnel. The revival of legal education in the late 1970's,\textsuperscript{222} however, began to rebuild the student legal corps, so that by 1983, some 13,000 full-time law students were studying in twenty-six university law departments and three institutes of political science and law.\textsuperscript{223} By 1987, there were thirty-five law departments at universities, one political-legal university, and four political-legal institutes with a total enrollment of more than 25,000 students.\textsuperscript{224} At that same time, some 3,435 courts had been established employing 195,000 court workers,\textsuperscript{225} and 20,000 lawyers had been registered.\textsuperscript{226}

\textsuperscript{218} J. Brady, \textit{supra} note 40, at 49. Brady indicates that in Hainan province, ten percent of the judges were given special exemptions, and another sixty percent ignored the new regulations.

\textsuperscript{219} Id.

\textsuperscript{220} Li, Book Review, \textit{supra} note 11, at 187.

\textsuperscript{221} Jerome Cohen found during his visit to China in 1972 that "the first thing to understand about legal education in China today is that there isn't any." Cohen, \textit{Notes on Legal Education in China}, 4 LAWASIA 205 (1973).

\textsuperscript{222} See, e.g., Gelatt & Snyder, \textit{Legal Education In China: Training for a New Era}, 1 CHINA L. REP. 41 (1980).


\textsuperscript{224} Leng, \textit{Legal Reform in Post-Mao China}, supra note 64, at 215.


\textsuperscript{226} New Justice Minister Discusses Legal Services, Beijing Xinhua, Apr. 14, 1988, in FBIS Apr. 15, 1988, at 19.
The shortage of personnel trained in the administration of law during the post-Mao era has encouraged continued reliance on policy as a guide for legal adjudicators. Simply stated, there are not enough courts, lawyers, and judges to go around. These shortages, coupled with the Party's ideological demands, have failed to insulate legal adjudicators from Party controls in cases of a political nature. Without clear guidelines for defining non-political cases, virtually any case is susceptible to Party interference. It remains to be seen whether sufficient pressure can be mobilized to prevent local Party secretaries from interfering with the judicial decision-making process even in those cases of a clearly political nature.

Theoretically, reform of the appellate review process for death sentences has encouraged greater judicial protection of the defendant. The Law of Criminal Procedure provided for mandatory review by the Supreme People's Court of all death sentences, whether or not appealed by the defendant. The accused was also given the right to one appeal within ten days of the conviction. This process was streamlined, however, when the Standing Committee of the Fifth National People's Congress in June, 1981, passed a provisional resolution modifying articles 144 and 145 of the Criminal Procedure Law. The new resolution allowed the Supreme People's Court to delegate the right to approve death sentences for murder, robbery, rape, bombing, arson, and sabotage to the high courts at the provincial or equivalent level. This guarantee of mandatory review for death sentences by other high courts, however, was occasionally disregarded. In September, 1983, the Standing Committee of the Sixth National People's Congress incorporated the new resolution into an amendment to article 13 of the Organic Law of the People's Courts. In addition, the Standing Committee also decided to reduce the time

228. The drafters of the Constitution deliberately hedged on the question of the relationship between the Communist Party and the courts. See Lubman, Western Scholarship, supra note 64, at 94.
229. Criminal Procedure Law, supra note 6, arts. 144, 145.
230. Id. arts. 129, 131.
231. See 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), in CRIMINAL LAW AND CRIMINAL PROCEDURE LAW, supra note 6, at 217 [hereinafter NPC Death Sentence Decision].
232. Death sentences rendered for counterrevolutionary crimes and embezzlement still require approval by the Supreme People's Court. Id. at 218.
233. See Woo, The Right to a Criminal Appeal in the People's Republic of China, 14 YALE J. INT'L L. 118, 147 n.187 (1989) (citing cases where the accused was executed solely on the basis of a lower court's decision).
234. NPC Death Sentence Decision, supra note 231, at 218.
limit for requests for appeals from ten to three days.\textsuperscript{235} Sentences were rarely changed on appeal, however, and the trend has been towards further curtailing review,\textsuperscript{236} especially as the growth of litigation increasingly burdens the courts. The result of these legislative changes has been to expedite the whole process of arrest to appeal to execution.\textsuperscript{237}

The effective functioning of the review apparatus in China’s criminal justice system is closely linked to the available pool of qualified political-legal cadres. While efforts to staff the courts and raise the technical expertise of judges have progressed, the judiciary still suffers from a lack of sufficient personnel, funding, and training materials.\textsuperscript{238} Until these problems are addressed, the Chinese legal system will encounter continued difficulty in handling cases carefully and in conformity with the standards set by a hierarchical system of review.

B. Unequal Before the Law: Privilege for the Chinese Elite

Favoritism toward officials in the Chinese courts, as in the form of dismissed claims and lenient treatment, has also been a longstanding tradition of the Chinese legal system. The imperial codes recognized entire categories of persons as deserving of special judicial procedural status, differentiating and elevating them from the general population.\textsuperscript{239} While the groups that qualified for consideration included those linked to the imperial family, the most significant category was that of high officials and their immediate families.\textsuperscript{240} The general population, knowing little or nothing about the law and rarely involved with legal matters, had no remedy against improper official acts except for employing extralegal methods of obtaining relief.\textsuperscript{241}

Although the scope of privilege varied from dynasty to dynasty, its essence was that high officials and their immediate family members

\textsuperscript{235} Decision of the Standing Committee of the National People’s Congress Regarding the Procedure for Rapid Adjudication of Cases Involving Criminal Elements Who Seriously Endanger Public Security (adopted Sept. 2, 1983), in CRIMINAL LAW AND CRIMINAL PROCEDURE LAW, supra note 6, at 246.

\textsuperscript{236} AI-1984, supra note 7, at 68.

\textsuperscript{237} Summary executions without procedural protections were increasingly common during anti-crime campaigns. See S. Leng & H. Chiu, supra note 52, at 134-36; Note, The Death Penalty and Legal Reform, supra note 62, at 318; see also Woo, supra note 233, at 146.

\textsuperscript{238} See, e.g., Lubman, Emerging Functions of Formal Legal Institutions in China’s Modernization, 2 CHINA L. REP. 195, 206 (1983); see also Supreme Court N.P.C. Report, supra note 225, at 18.

\textsuperscript{239} In the code of the Manchu dynasty, for instance, special articles conferred a privileged position upon offending public officers and princes, among others. M. Van der Valk, Interpretations of the Supreme Court at Peking: Years 1915 and 1916, at 28 (1968).

\textsuperscript{240} D. Bodde & C. Morris, supra note 4, at 34.

\textsuperscript{241} Li, Book Review, supra note 11, at 207.
could not be investigated, arrested, or tortured without the approval of
the Emperor himself; that guilty sentences were subject to considera-
tion by the Emperor for possible mitigation; and that the usual
sentences to the common people (including death) were for the offi-
cials often commutable to monetary fines, demotion in official rank, or
dismissal from the civil service. The imperial tendency to separate
the general populace from the ruling elite reflected not merely a pro-
tective self-interest, but also the notion that such a distinction main-
tained the power of the state and facilitated social and cosmological
harmony.

Privilege during imperial China, however, also had its price. Offi-
cials had to meet higher expectations, and although different standards
applied when these expectations were not fulfilled, punishments were
severe and offenders held up to censure. Officials who violated the
sumptuary regulations, for instance, were punished according to the
Qing Code by 100 blows of the heavy bamboo, while a non-official
violator would only receive fifty.

Throughout the forty years of Chinese Communist rule, govern-
ment, Party, and military personnel who violated regulations have
been sentenced less severely than the general population for political
and public order offenses. Not until the early 1980s and the govern-
ment's crackdown on crime and nepotism, however, did Chinese au-
thorities begin to depart from the traditional practice of allowing
privilege to reduce criminal sentences. Executions of public officials
not only represented a sharp break from the past, but also dramati-
cally symbolized the leadership's desire to implement legal reform.
The 1982 Constitution, unlike the 1975 and 1978 versions, proclaimed
the equality of all Chinese citizens before the law. People's Daily
editorials exhorted Party and government officials to adhere to the
principle that all people, regardless of political status, are legally
equal. The anticrime campaigns, which included drives against eco-

243. Id. at 35.
244. Yuan-li Wu has used reports from the Chinese news media for the 1949-1984 period to
analyze statistically the judicial practice and the human rights conditions in the People's Repub-
lic of China. For his conclusions on the role of privilege, see Wu, A Statistical Analysis (Appendix
245. Yuan-li Wu concludes that the ratio of economic offenses committed by privileged em-
ployees to the general population was considerably higher during the period of Deng's economic
reforms of 1979-1984 than during the Party's more "normal" years of 1952-1957. Id. at 315.
246. P.R.C. Constitution, supra note 59, art. 33.
247. See, e.g., Economic Criminals Must Be Punished 'Severely,' Beijing Remnin Ribao, Sept.
When cadres commit crimes they must be punished according to law regardless of their
level. Their sons and daughters are no exception. Anyone trying to place obstacles or to
nomic crimes and violent crimes, did not spare cadres and their family members.\textsuperscript{248} The late General Zhu De’s grandson was executed in Tianjin in September, 1983, reportedly for being a gang leader and a rapist.\textsuperscript{249} The grandnephew of former President Li Xiannian was also executed about the same time in the northern city of Xian for murder and rape.\textsuperscript{250}

In January, 1986, the government began a campaign against corruption within the Chinese Communist Party, with the press warning that senior cadres and their offspring would not be exempt from punishment. The last time that leading party officials were legally executed dated back to the early 1950s, when senior party officials were executed at the start of the Five-Anti Campaign.\textsuperscript{251} In February, two children of senior party officials in Shanghai were executed after having been convicted on multiple rape charges.\textsuperscript{252} More than a year later, another Party cadre was executed after having been convicted of raping fourteen young women since 1977.\textsuperscript{253} Rape has been one of the most common abuses of power by party cadres.\textsuperscript{254}

With the growing importance given economic reform and modernization, the authorities have become increasingly attentive towards the economic crimes of public officials, including embezzlement, bribery, and corruption.\textsuperscript{255} Deng Xiaoping, in an address before the Politburo harbor evildoers must also be dealt with according to party discipline and state law. Under no circumstances must we tolerate him.

\textsuperscript{248} More than 500,000 Party members were arrested or disciplined between 1981 and 1986. Note, The Death Penalty and Legal Reform, supra note 62, at 321.

\textsuperscript{249} S. LENG & H. CHIU, supra note 52, at 142; see also, Beijing Mayor Confirms Execution of Zhu De’s Grandson, Hsin Pao (Hong Kong), Nov. 30, 1983, (FBIS trans. Dec. 1, 1983, at W-3-4), where Beijing Mayor Chen Xitong confirmed news of the execution to a reporter in New York: “At present, in China, all people are equal before the law.”

\textsuperscript{250} Lee, Death of the Tigers, FAR EASTERN ECON. REV., Mar. 6, 1986, at 34.

\textsuperscript{251} The Five-Anti Campaign of 1951-52 targeted capitalist bribery of government workers, tax evasion, theft of state assets, cheating on government contracts, and stealing of state economic intelligence. References of the Chinese government in 1986 to that movement fueled speculation that major cases were pending against individuals involved in scandals related to the “open door” economic policy. Burns, Peking Focuses on Execution of 3 Aides’ Sons, N.Y. Times, Feb. 25, 1986, at A11.

\textsuperscript{252} The executions of these two “cubs” — sons of senior party officials — were the first such executions to be announced publicly. They were perceived to send a clear signal that the leadership was seriously tackling the problem of abuse of power. Id.; see also Southerland, Cadres’ Sons Executed in China, Wash. Post, Feb. 21, 1986, at A21 (“Official press reports indicated that the executions were aimed in part at countering the widespread perception that the country’s laws are designed only for ordinary citizens and that Communist Party officials and their relatives are above the law.”).

\textsuperscript{253} CPC Cadre Accused of Rape Executed, Agence France Presse (Hong Kong), Jan. 5, 1988, in FBIS Jan. 5, 1988, at 19.

\textsuperscript{254} The deeply-rooted prejudice against rape victims and a lack of legal recourse have protected rapists in the past. Id.

\textsuperscript{255} The statement by Hu Qili, a member of China’s Communist Party Politburo, that those who “deserve to be killed should be killed,” was regarded by observers as the most explicit
in January, 1986, said that he favored the death penalty for corrupt officials responsible for heavy financial losses to the state.256 In September, 1986, the former deputy secretary of the Hexian County (Guangxi) Party Committee was sentenced to death for accepting bribes and embezzling more than 190,000 yuan of public funds.257 The following April, an official of the Visa Department of the Foshan Public Security Bureau was given the death penalty for accepting bribes.258 The local newspaper soon thereafter commented that the execution should deter other cadres from participating in corrupt activities.259

China's historical legacy of privilege, however, still burdens efforts to reform and regularize the legal system. Some observers have noted that the campaign against corruption and other economic crimes has "only struck flies but not tigers."260 To date, only mid-rank cadres have been punished; no high officials have ever been criminally prosecuted and sentenced for their offenses.261 In a highly publicized case of 1986, Ye Zhifeng, deputy director of the State Economic Commission's Export-Import Bureau, was convicted of selling confidential information concerning national commercial policy to foreign businessmen. She also was the daughter of General Yeh Fei, the Vice Chairman of the National People's Congress Standing Committee. While her accomplice received the death penalty, Yeh Zhifeng was sentenced to just six years' imprisonment, even though she was the principal offender in the case. Not only has this case been severely criticized within China, but it has also called into question the credibility of China's new legal reforms with respect to judicial independence and equality before the law.262

warning to date that high-ranking officials could be subjected to the death penalty if convicted of economic crimes as part of the drive against corruption. Southerland, China Warns on Economic Crimes, Wash. Post, Jan. 19, 1986, at A20.


257. Guangxi Official to be Executed for Corruption, Nanning Guangxi Regional Service, Sept. 25, 1986 in FBIS trans. Sept. 26, 1986, at P-1. The report concluded that the severity of the punishment "has evoked strong repercussions among cadres and the masses. Many people believed that the judgment of this major case indicates that everybody has to answer to the law ...."

258. Guangdong's Foshan City Executes Corrupt Official, supra note 154.

259. Id. at P-1-2.

260. Leng, Legal Reform in Post-Mao China, supra note 64, at 224.

261. Id.

262. See id. at 224-25; see also, Cheng Ming Details Crimes of CPC Cadre Families, Hong Kong Cheng Ming, May 1, 1986 (FBIS trans. May 14, 1986, at W-3-5).
C. The Concept of Amnesty: The Two-Year Suspended Death Sentence

Any account detailing the severity of China’s criminal death penalty needs to be balanced by a discussion of the enduring concept of amnesty that the ruling leaders have adopted to soften the sharp edge of harsh criminal punishment. The world of traditional China, after all, seems to have been one of brutal punishment where the death penalty was easily invoked and rarely challenged. Yet in practice, the concept of amnesty occasionally prevailed.\(^{263}\)

For more than two thousand years, the concept of “natural harmony”\(^{264}\) influenced Chinese attitudes towards harsh legal rulings, especially in the specific timing for carrying out death sentences. Executions were carried out only in the autumn and winter, which were regarded as seasons of destruction and death, rather than in the growing seasons of spring and summer.\(^{265}\) In addition, executions were prohibited on many other days of the year, including the winter solstice and equinoxes, days of fasting and sacrifice, and specific events such as the accession of a new ruler. The days remaining open for executions actually totalled less than two months of the year.\(^{266}\) Not until the Qing Code of 1740 were the taboo periods significantly reduced, in part reflecting the weakening of belief in the doctrine of cosmic harmony.\(^{267}\)

Once a condemned person had survived into the spring, he was entitled to a stay of execution until the following season of executions, and in the meantime, he could hope for a commutation of sentence. In some instances, he might be granted a pardon, in others a lesser penalty, such as banishment for life, or even military service for life. Thus, in many ways the harsher aspects of the law were softened by strong humanitarian impulses. The commutation of executions also often resulted from the sophisticated and hierarchical system of judicial review that was inspired by Confucian teachings.\(^{268}\) One Chinese account indicates that no more than ten percent of those offenders sen-

\(^{263}\) See generally B. McKnight, The Quality of Mercy: Amnesties and Traditional Chinese Justice (1981) (describing the system of amnesties that existed during pre-modern China).

\(^{264}\) According to this theory, the human and natural worlds were so closely entwined through various relationships that any disturbance in one would cause a corresponding disturbance in the other. This doctrine of oneness between man and nature premised that man should adapt his institutions to the movements of nature. D. Bodde & C. Morris, supra note 4, at 44.

\(^{265}\) Id. at 45.

\(^{266}\) Id. at 46-47.

\(^{267}\) Id. at 47-48.

\(^{268}\) See text accompanying notes 205-17, infra.
tenced to death were actually executed.269

One of the most important changes in the criminal code that replaced the old imperial code in the first decade of the twentieth century was the new section on discretionary reduction of capital punishment. Under the new law, the judge was empowered to choose the proper punishment to be inflicted, between fixed maximum and minimum limits, except in the most heinous cases such as regicide or patricide.270 The judge was granted special discretion to reduce the punishment by one or two degrees in extraordinary cases, taking into consideration the offender’s motives and the particular facts of the case.271 Such reduction of punishment was deemed consistent with China’s long tradition of commuting capital punishment sentences.272

The Communist leadership adopted the unique policy of sihuan zhidu, “death sentence with a reprieve,” which provides a legally sanctioned waiting period of two years prior to execution in order to give the condemned person sufficient time to repent and reform.273 If the offender demonstrates repentence over the two years, the sentence may be commuted to life or fixed-term imprisonment. This two-year reprieve was codified both in the Criminal Law274 and the Law of Criminal Procedure.275 Although the standards for evaluating the offender’s behavior are not statutorily defined, the majority of two-year suspended death sentence cases are commuted to life or lesser terms of imprisonment.276 This two-year reprieve has been applied primarily in the case of political prisoners, the most notable whom have included Mao Zedong’s widow and one of her associates in the “Gang of Four.”277 It has also been applied to young offenders in other ordi-

269. M. MEIJER, supra note 32, at 67. This estimate was made by Shen Jiaben, regarded as the most important scholar of Chinese law, who, after serving on the Board of Punishments played a leading role in the reform of the Chinese legal system during the first decade of the twentieth century.

270. See id. at 67-68, 74-75, 95.

271. Draft of the New Criminal Code (1907), arts. 54, 55, reprinted in id. at 74-75.

272. Id. at 67.

273. The first legal provision mentioning the two-year suspended death sentence was in the Regulations for Dealing with Cases of Corruption, Waste, and Bureaucracy (March 8, 1952). The reprieve was first explained in Remnin Ribao (“People’s Daily”) on June 1, 1951. S. Leng, supra note 46, at 167 n.78.

274. Criminal Law, supra note 6, art. 46.

275. Criminal Procedure Law, supra note 6, arts. 146, 153.


277. Both Jiang Qing and Zhang Chunqiao were given suspended death sentences in 1981 following their well-publicized trial for counterrevolutionary offenses. In 1983 the Supreme People’s Court commuted their sentences to life imprisonment. See generally D. BONAVIA, VERDICT IN PEKING: THE TRIAL OF THE GANG OF FOUR (1984) (using the trial transcripts to elucidate the political workings and personalities of this “central event in the political development of modern China”); see also A GREAT TRIAL IN CHINESE HISTORY (1981).
Chinese officials and jurists have cited the two-year suspended death sentence as evidence that the underlying principle of China's criminal law is to restrict and reduce the use of the death penalty and to combine punishment with leniency in the spirit of revolutionary humanitarianism. Although they agree that retention of the death penalty is necessary because of its deterrent value in dealing with major counterrevolutionary crimes and other most heinous offenses, they have stated that it should be used both reluctantly and carefully.

Toward the end of the 1955-56 campaign to suppress counterrevolutionaries, for instance, the Communist leadership made a series of rather remarkable statements suggesting a diminishing use and gradual abolition of the death penalty. Mao, concerned that the bloodshed had become excessive, in his "On the Ten Major Relationships" speech of April, 1956, called for fewer arrests and executions among ordinary persons and for "killing none and arresting few" among Party and government members. Mao offered four reasons why executions needed to be discouraged: 1) though some executions are justified, many yield no advantages; 2) some people may be wrongly executed— "Once a head is chopped off, history shows it can't be restored, nor can it grow again as chives do, after being cut"; 3) executions destroy sources of potentially useful information; and 4) killing diminishes the labor pool necessary for economic modernization and strengthening national defense.

Even the standard Chinese criminal law text of 1957 expressed the expectation that the death penalty would eventually be abolished.

The Chinese concern for the sanctity of human life, however, has not been expressed in the form of any outspoken opposition to the death penalty. In fact, China currently has no vocal groups advocating its abolition. While Chinese leaders continue to make pronounce-
ments expressing the importance of rehabilitation and cautious use of the death penalty,\textsuperscript{285} such official statements belie the spate of executions that have marked various anti-crime campaigns during the past decade.

The Chinese Communists' innovation of the death sentence with two-year reprieve reflects a traditional Chinese faith in the malleability of man and his potential productive capacities. It also faintly echoes the imperial Chinese rulers' longstanding use of regular amnesties that pardoned prisoners or reduced their sentences. While abolition of the death penalty does not appear to be part of this tradition, the suspended death sentence does serve to blunt the rigidity and brutality of criminal punishment.

CONCLUSION: CONTINUITIES AND CHANGE

A review of the Qing dynasty's often despotic, yet in some ways, merciful approach to the death penalty offers an illustrative backdrop to the legal reforms of the Dengist leadership, as well as the setbacks for the role of law suffered in the aftermath of Tiananmen.

One explanation for China's evolving policies towards the death penalty can be traced to domestic or societal factors, such as Marxist-Leninist ideology, historical legacy, or traditional attitudes towards the function of the criminal law. Reflecting the perceived needs of the state, these factors have strongly influenced the state's determinations about what type of policies would most effectively implement its desired goals. The Chinese leaders appointed with the task of governance — an elite assemblage stretching from the imperial emperors to the modern day emperors of Chiang, Mao, and Deng — have all recognized the importance of criminal punishment, including the death penalty, as a means of social control, promoting the aims of the state, eliminating the opposition, and deterring others. The present Dengist leadership, whose impressive steps towards legal reform during the past decade seemed reminiscent of the earlier Guomindang modernization efforts, has since retreated in the aftermath of Tiananmen to a more retrenched, ideological, and politicized position.

In many ways, the government response to the 1989 student movement recalls the earlier repressive episodes in Communist China's history. The harsh treatment of political prisoners, the reappearance of

\textsuperscript{285} See, e.g., Director Peng Zhen Explains Draft Laws at the NPC Plenary Session, Beijing Xinhua, June 26, 1979, in FBIS June 27, 1979, at L-7. For instance, Peng Zhen, former mayor of Beijing and then director of the Commission of Legislative Affairs at the National People's Congress Standing Committee, said at the Fifth Congress in June, 1979, that China "cannot and should not abolish capital punishment but will use it only when absolutely necessary."
counterrevolutionary terminology, the public forms of humiliation, the widespread purge of participating students and supportive officials, the recurrence of torture and summary executions all suggest a pattern of social control that dates back to the more doctrinaire and dogmatic periods of Chinese Communist history. Yet, the violent forms of punishment are hardly unique to Communist China. Chiang Kai-shek and the late Qing emperors also borrowed from traditional China's harsh Legalist legacy, and they, too, proved unwilling to have their authority challenged or endangered in any way.

Another explanation for the shifts in China's administration of criminal justice and use of the death penalty can be found in the various external pressures impinging upon the regime's power. Such exogenous pressures might include political or economic instability, military threats, geographic constraints, or even international condemnation. These pressures often coincided with and determined changes in China's use of the death penalty. During times of stability, China's leadership has been more likely to lean towards a more formalized criminal process with more lenient punishment. During periods of internal turmoil or stress, however, adherence to laws and procedures has been undermined by the regime's need to consolidate control or promote its political policies.

China's use of the death penalty reflects not only state ideology or the extent to which the state perceives challenges to its power, but also the basic aims of penological theory - those of deterrence and retribution. Over the centuries, the state has exploited the deterrence function by carrying out brutal methods of execution, widely publicizing death sentences and executions, and altering the frequency of such sentences in order to meet its needs through campaigns or other movements. The Chinese use of capital punishment has also been marked by retribution, whether expressed through notions of vengeance and anger or through the principle of just requital.

The continuities with the past associated with China's implementation of the death penalty are revealed in a number of indigenous traditions. First, China's penchant for hierarchy, which has long been viewed as natural and cosmological, is reflected in the intricate review process that aimed to prevent arbitrariness and capriciousness. Second, the concept of elite privilege has resonated throughout Chinese history, having been both formally codified and informally observed in the legal process. Third, the notion of amnesty, reflected most recently in the form of the death sentence with a two-year reprieve, exemplifies the Chinese faith in the re-educability of man. Deeply rooted
in China's traditional political culture, these practices and preferences endure, even amidst China's continued efforts at legal reform.

China's long history of arbitrary justice anticipated the events that transpired in Tiananmen Square in June, 1989, and the harsh crackdown on pro-democracy participants that ensued. The use of capital punishment in a political context has been a typical pattern in the Chinese criminal system for centuries, and particularly during the past four decades under the Communist regime. Yet, until the Beijing Spring, 1989, the legal reforms of the past decade represented a substantial improvement over the bloody years of the early 1950s, when several hundred thousand landlords and other members of the old ruling elite were shot or beaten to death without trial, and the decade-long Cultural Revolution, which witnessed the brutal killings of thousands by Red Guards without any pretense of due process. In 1979, a detailed criminal code and a code of criminal procedure finally replaced police administrative rules and vague statutes on "counter-revolution" that once served to justify death sentences. Formal legal institutions were revived, and development of the rule of law was hailed as an urgent task of modernization.

The massacre in Beijing, however, marked a turning point in China's path toward legal reform and modernization. Not only did the massive use of lethal force that evening demonstrate the leaders' willingness to employ the full repressive apparatus of the military to serve their needs, but it also revealed the intensity of their determination to quash any threats to their power. Their resort to execution against political opponents in the aftermath of the Tiananmen Massacre indicates that they still regard the legal system as a tool with which to consolidate and ensure control. As long as the present hard-line leadership is determined to hold on to its power, it seems unlikely that the spirit of legal reform cultivated over the past decade has the strength and support that will be necessary to build a system of justice that is more systematic, regularized, and humane.