Chapter 9
The Death Penalty in China:
Towards the Rule of Law
Nicola Macbean

Introduction

In the run up to the 2008 Olympics in Beijing, international criticism of China’s human rights record has highlighted the use of the death penalty (Amnesty International 2007). While calls for a worldwide moratorium on executions have become louder, capital punishment for a large number of offences remains an integral part of Chinese criminal justice and the state executes more people than the rest of the world put together. Although global activists may try to internationalise China’s use of the death penalty, capital punishment is a domestic issue.

At the March 2007 meeting of the United Nations Human Rights Council, China’s representative, La Yifan, summed up the official position on the death penalty. He claimed that China was a country with a rule of law where the death penalty was only applied to the worst offences in compliance with the International Covenant on Civil and Political Rights.1 Responding to criticism of China’s use of the death penalty, Mr La explained that the scope of the application of the death penalty was shortly to be reviewed and that this was expected to be reduced ‘with the final aim of abolition’ (UN Human Rights Council 2007). The Chinese representative, echoing views presented by Singapore, rejected suggestions that an international consensus on abolition existed and criticised international pressure on governments regarding the death penalty, in particular, the politicisation of the death penalty in relation to China’s hosting of the Olympics.

In the Second Five Year Reform Programme for the People’s Courts (2004–2008), the Supreme People’s Court stated its intention to reform the death penalty system. Since then, measures have been introduced to require appeals, in cases involving the death penalty with immediate execution, to be held in open court and to restore the power of the Supreme People’s Court to review all death penalty cases. Despite such moves to ‘kill fewer and kill carefully’, the death penalty remains central to the expression of state power. The recent execution of the disgraced head of the State Food and Drug Administration, Zheng Xiaoyu, was

1 (1976) 999 UNTS 171.
presented as a warning to top officials. In a commentary the party’s official paper, the People’s Daily, stated that:

As a case study of a party member and leading official breaking the law and committing crime, the Zheng Xiaoyu case offers profound lessons that all public servants, especially leading officials at every level, should take to heart (China Daily 2007a).

The international trend towards abolition of the death penalty is framed globally within a discourse of human rights. Although the number of abolitionist countries has increased rapidly in recent years, the globalisation of the abolitionist movement has not yet resulted in establishing a ‘stable and universal standard’ (Asad 1997) regarding the use of the death penalty. Europe has been keen to promote abolition as a diplomatic objective (European Union 1998, Council of Europe 2004) with the result that for many poorer countries, keen to access European funding and support, abolition is a pragmatic policy and may not necessarily reflect a significant shift in normative values. The introduction of democracy, the end of civil war and the rejection of previous regimes have also been factors in states’ decisions to abolish the death penalty (Hood 2002). That two of the world’s major democracies, and its largest one, retain capital punishment indicates, however, no obvious correlation between democracy and abolition (Boulanger and Sarat 2005). Despite the international abolitionist trend and the progressive development of legal norms, abolition of the death penalty has not yet become a customary norm in international law (Schabas 2002).

Although many countries are resisting international pressure for a moratorium on executions and abolition, international human rights standards are influencing domestic debates on the death penalty (Schabas 2004). This chapter explores the application of the death penalty within the Chinese criminal justice system and how the emerging domestic debate is framed within overlapping, and sometimes competing, narratives of retribution and rule of law. Traditional support for the death penalty is expressed in terms of the popular talionic maxim, ‘a life for a life’, but critical voices within the legal community – reformist scholars and officials and weiquan ‘rights-protecting’ lawyers – are challenging the status quo and advocating for the death penalty to be more strongly rooted in the rule of law and international standards.

Commitment to the rule of law has become an important legitimising strategy for the current post-Deng leadership. This officially sanctioned discourse also allows critics to frame their resistance with reference to an ideology conferred by policy makers (O’Brien and Li 2006). Growing rights consciousness and the development of a legal ideology are enabling a number of actors within China’s expanding legal community to criticise the state’s use of capital punishment and exert domestic pressure for reform. Although there are lone voices calling for immediate abolition, there is no evidence of widespread support for this position among lawyers and academics. Instead, legal reformers and the government, alike, declare a shared commitment to eventual abolition when China’s ‘national
The terms of China’s death penalty debate, such as it exists, are about the pace of abolition and the due process protections safeguarding those facing the risk of capital punishment.

A Historical Perspective

The legitimacy of the death penalty in China draws on a long history. It was one of the ‘Five Punishments’ in imperial China with harsh and precise measures listed for different offences (Scobell 1990). By the time of the Yuan Dynasty there were three officially prescribed methods of execution: decapitation, strangulation and ‘death by slicing’ (Bodde and Morris 1967). Some flexibility existed, however, in the way punishments could be carried out, including clemency and commutation for cash (Spence 1999). By the nineteenth century, Western governments were demanding that a weakened China grant them separate powers to try and punish their own nationals. Although the resultant concession of extraterritoriality was deeply resented by Chinese mandarins, it was an impetus for reform. In treaties marking the end of the Boxer Rebellion, Britain, the United States and Japan called for the abolition of corporal punishment and the setting up of modern prisons. The introduction of a modern prison system, at the end of the nineteenth century, led to greater emphasis on the possibility of moral rehabilitation of criminals, an approach which chimed both with Confucian ideas of self-cultivation and modern Western penology (Dikötter 2001). Capital punishment, however, continued to be applicable for the most serious offences and it remained part of the Criminal Code of the Republican government which came to power with the collapse of the Qing dynasty in 1911.

A belief in the deterrent effect of the death penalty has deep roots in China; ‘kill the chicken to scare the monkeys’ is a popular traditional saying. The Legalists placed a strong emphasis on the importance of laws and rights and the deterrence value of punishment. Executions in dynastic China were public events reflecting traditional beliefs that parading evil will lead to a decrease in crime (Bakken 1993). Although public executions were made illegal in the 1979 Criminal Law, public arrest and sentencing rallies have continued to be a feature of police campaigns. A recent directive, jointly issued by the Court, Procuratorate and Ministries of Justice and Public Security, banning the ‘parading of convicts and other inhumane treatment of prisoners’ (China Daily 2007b) is indicative of changing attitudes.

Maoist China

On coming to power in 1949, Mao Zedong abolished all laws of the Republican period, and the fitful construction of a socialist legal system began. Early efforts to draft a comprehensive criminal code, however, floundered in the political climate of the 1950s and the Anti-Rightists campaign. In a brief period of reform, a criminal procedure code with 200 articles was drafted in 1963, but then suspended.
Against the Death Penalty

in the Cultural Revolution. Criminal justice in the Maoist era was dominated by the political context and punishments were influenced by the offender’s class status, his attitude to his offence and the prevailing political line (Leng and Chiu 1985). The severest punishments, including execution, were reserved for those, defined by Mao, in his 1957 speech, ‘On the Correct Handling of Contradictions among the People’, as ‘the enemy’. These included, ‘reactionaries, exploiters, counterrevolutionaries, landlords, bureaucrat-capitalists, robbers, swindlers, murderers, arsonists, hooligans and other scoundrels who seriously disrupt social order’. Applying the death penalty to such criminals would, Mao argued, ‘assuage the people’s anger’.

Chinese official policy on the death penalty was similar to that put forward by the Soviet Union. While capital punishment was, in principle, incompatible with socialist ideals, it was justified, they argued, as an ‘exceptional measure of punishment which is temporarily applied pending its complete abolition’ (Hood 2002). A 1957 Chinese legal textbook explained, ‘We are retaining the death penalty while in the process of gradually abolishing it, and we are reducing the scope of the application of the death penalty to a minimum’. In the early years of the People’s Republic the government argued that the death penalty should be ‘applied to those counterrevolutionaries whose crimes were persistently hostile to the people, and who adamantly refused to repent and reform’ (Cohen 1968).

Trial and punishment in the Chinese criminal justice system remain a ‘dramatisation for the masses of the ancient theme of retribution and repentance’ (Bakken 1993). Nowhere is this expressed more forcefully than in the targeting of drug dealing in the annual campaigns coinciding with International Drug Awareness Day. For years, around the 26th June, death sentences and executions for drugs offences have been publicised to ensure maximum impact and promote anti-drugs awareness (Amnesty International 2007). Retribution must, however, always be tempered by necessity. Although under Mao, China increased its use of the death penalty (Lu and Miethe 2007), scholars critical of excesses in the 1980s and 1990s, still quote approvingly his admonition to use the measure sparingly in that, ‘[w]e should only kill a few, and in all cases in which there is a choice whether or not to execute, we should not execute’ (Howie 1996).

1979 Criminal Justice Reforms

The Cultural Revolution left a legacy of arbitrary arrests, detention and torture, extrajudicial executions and the abolition of most legal institutions (Chu 2000). The modernising programme, launched by Deng Xiaoping at the 3rd Plenary of the 11th Central Committee in 1979, envisioned ‘rule by law’ as a central pillar and was a marked shift in policy from the chaos of the Cultural Revolution. Legal scholars acquired new prominence. Many had trained overseas pre-1949 and some had suffered considerably during the previous decade of political upheaval.

Drawing on drafts from the early 1950s and the short-lived Code of 1963, one of the first laws to be passed, following the death of Mao, was the Criminal
Procedure Law. The purpose of legislators was to signal an end to the arbitrary punishments and widespread abuse which marked the earlier period. The law drew on the European civil law inquisitorial system which had influenced earlier Republican lawmaker. The promise of more rigorous procedural protection was soon undermined, however, by the lack of legal professionals. Time constraints for detention and charging were immediately challenged and relaxed in subsequent amendments (Chu 2000).

Defence lawyers historically played a marginal role in Chinese criminal justice. Criminal laws were a tool of class struggle and there was nothing heroic in representing a client who had been labelled a class enemy. The introduction in the 1979 Criminal Law (Article 3) of the statement, that the criminal law is applicable to everyone signalled an end to this policy. The 1979 Criminal Procedure Law, however, failed to give defence lawyers the rights and protections they needed to effectively defend their client. In this very minimalist interpretation of the role of defence counsel, Chinese lawyers could only consult the case files and interview the defendant (Article 29). The defendant was only informed of his right to appoint counsel seven days before the court session (Article 110) and there was no requirement for a lawyer in death penalty cases. The new law set out the procedures in which the court should sentence, allow appeals and approve the death penalty. The suspended death sentence, a traditional feature of capital punishment in China, is introduced as an alternative sentence to immediate execution. Prisoners sentenced to the death penalty with a two year suspension normally have their sentences commuted to fixed term sentences of 15 to 20 years provided that they have demonstrated ‘sufficient remorse’ and not re-offended while in prison.

In spite of the modernising agenda, the political nature of many offences remained in the new Criminal Law. Of the 28 capital crimes listed in the 1979 Law, 15 were defined as counter-revolutionary offences, a further eight were crimes endangering public security, three were offences against the security of the person and two were property offences, including robbery and corruption. Despite the prominence of counter-revolutionary crimes in the text, government statistics showed that such crimes were insignificant in number (Clarke and Feinerman 1995). More significantly, the 1982 Decision of the Standing Committee of the National People’s Congress ‘Regarding the Severe Punishment of Criminals who Seriously Undermine the Economy’ illustrated the growing severity with which China was prepared to deal with economic crimes. This Decision made heavier sentences available in cases of theft: ‘when the circumstances are particularly serious, the sentence is to be not less than ten years of fixed-term imprisonment, life imprisonment or death’. Serious circumstances generally implied particularly large sums of money. In a 1984 explanation, published by the Supreme People’s Court and the Supreme People’s Procuratorate, the death penalty was recommended for theft of money or articles with a value exceeding 30,000 RMB.
It was not long before the political agenda of modernisation came into conflict with the Party’s overriding imperative to ensure stability. The first ‘Strike Hard’ (Yanda) campaign was launched in September 1983 and lasted until January 1987. The campaign reintroduced the tactics of popular mobilisation and was a significant setback for legal reformers who had been promoting greater legal restraint. In an effort to restore what Tanner calls the ‘balance of awe’, in response to a perception of growing social disorder and public anxiety about a string of high profile crimes, a nationwide crackdown on crime was announced (Tanner 2000).

Throughout the 1980s the number of capital crimes increased, reflecting public anxieties at rising crime and the incidence of specific offences, including the trafficking of women and children (Tanner 2000), with mandatory death sentences introduced for kidnapping and trafficking. Although the 1979 reforms no longer allowed for the immediate execution of juveniles, anxiety at rising youth crime and fear of gangs led to considerable use, during the first Strike Hard, of the suspended death sentence for those aged below eighteen (Bakken 1993).

The Strike Hard campaign undermined efforts to reinstate the authority of the courts and the law. The National People’s Congress was called on to approve measures to relax procedural protections for those facing the death penalty. In its decision, ‘Regarding the Rapid Adjudication of Cases Involving Criminal Elements Who Seriously Endanger Public Security’ the Standing Committee of the National People’s Congress called for the speedy adjudication of capital cases where ‘the main criminal facts are clear and the evidence irrefutable and the people’s indignation is very great’. In dealing with such cases, the Decision released courts from various provisions regarding the delivery of court notices and the time limit for lodging an appeal. The time limit for dealing with criminal cases became a criterion for success during Strike Hard campaigns, with the death sentence often being carried out on the same day as the court judgement.

Judicial oversight was reduced with the lowest tier of China’s courts given the authority to hear first instance capital cases. This measure was rescinded three months later as the extent of judicial incompetence in the lower level people’s courts became apparent (Trevaskes 2002). In a parallel move, the Supreme People’s Court was also required to delegate its authority to give the final approval for execution in all violent capital cases to the Higher Courts based at the provincial level. This measure was only rescinded in January 2007 when the Supreme People’s Court took back this power.

Major national Strike Hard campaigns took place in 1996 and 2001 and local campaigns continued until an end to the policy was announced in work reports to the 2007 meeting of the National People’s Congress (Xinhua 2007). The frequent resort to campaign policing, since the beginning of the reform period, illustrates the extent to which the rational, procedural discourse of the rule of law has been so easily undermined by the imperative to maintain public order. Although in 2001 greater emphasis was placed on ‘handling cases according to the law’, the campaign
agenda of 'severity and swiftness' (côngzhòng côngluài) placed the courts and the police in an impossible position of balancing their growing professionalism with the political demands of the Party-state (Trevaskes 2000). The new slogan, in the current period, of ‘balancing severe punishment with leniency’ (kuànyàn xiàngjì) reflects the same tensions, but signals an attempt to find a new balance and a style of policing that is more appropriate to the construction of Premier Wen Jiabao’s ‘harmonious society’.

The summary justice of the Strike Hard campaign reportedly resulted in a huge use of the death penalty although the lack of official data has made it impossible to provide a definitive picture. While one scholar estimated that 10,000 executions took place over the three and a half year period of the first Strike Hard (Tanner 2000), estimates for later periods have exceeded this. Although Amnesty International monitors public reports of executions, others, drawing on information provided by contacts, have published claims of annual rates as high as 15,000 executions (Bruce and Gilley 2002). Over the last couple of years a number of reports have claimed the current rate is about 7,500–8,000 (Dui Hua Foundation and personal communications) a year.

Engagement with the International Community

In May and June 1989 demonstrations by students, workers and ordinary citizens took place, first, in the heart of Beijing on Tiananmen Square and, subsequently, in hundreds of other cities across China. Deng Xiaoping labelled the demonstrations ‘counter-revolutionary’ and gave orders to the army to bring the protests to a close. The massacre brought condemnation from around the world and set back China’s international relations.

Prior to Tiananmen, as early as 1985, Chinese leaders had begun to recognise the deficiencies of the newly instated legal system (Chu 2000). The events of 1989, however, provided an impetus in China to the study of human rights and public debate on the ‘rights and interests’ of citizens. In the 1990s, scholars were given official encouragement to study international human rights law and history and to engage with the international scholarly community (Zhou 1995). Diplomatically, China was under pressure to demonstrate human rights progress to maintain its most favoured nation trading status with the United States. The politicisation of human rights in the 1990s coincided with the articulation of a distinct set of Asian values, in the run up to the UN Conference on Human Rights in Vienna. This provided Chinese diplomats with a regionally legitimated language in which to respond to criticism of its human rights record by the international community. Bilateral monitoring of human rights, even by a country as powerful as the US, provided at most ‘temporary, superficial and instrumental change’ and did not lead to deep-rooted internalisation of human rights norms evidenced by ‘continued excessive use of the death penalty’ and other human rights violations (Kent 2001).
An outcome of this official attention was the publication of China’s first White Paper on Human Rights in 1991 (State Council). Directed at an international rather than domestic audience, the paper emphasises the centrality of the right to subsistence and the government’s priority to maintain ‘national stability’. In a section on the justice system emphasis is placed on the need to protect the legal rights and interests of ‘the whole people’ and punish the ‘small number of criminals’. With reference to the death penalty China acknowledges that, ‘like most countries in the world’, it maintains capital punishment, but claims that the death penalty is only applied to those ‘guilty of the most heinous crimes’. The paper highlights the use of the two year suspended death sentence as ‘an original creation’ and an ‘effective system by which strict control is exercised over the use of capital punishment’. Subsequent White Papers on Human Rights, published every couple of years and most recently in 2004, provide no further justification on the use of the death penalty. Since that first White Paper, the number of capital offences in China has increased while the international trend on the death penalty has moved in the opposite direction.

1996 Criminal Justice Reforms

The criminal justice institutions have always been an important tool for the Chinese Communist Party to justify theories of social order and disorder. Traditionally, the law was strongly associated with punishment (Clarke and Feinerman 1995), but, following the death of Mao, the new Party leadership had begun to recognise the rights of criminal suspects against the interests of the state. By the mid 1990s, further reforms of the criminal justice system were being proposed. A scholarly draft of a revised Criminal Procedure Law was circulated with strengthened provisions to protect the rights of defendants (Lawyers Committee for Human Rights 1996). Revision to the law was a lengthy and contentious process involving consultations with a number of powerful state organs, but the need for reform had become essential if the Party were to respond to growing dissatisfaction among the general public, the scholarly community and even officials (Chu 2000).

The revised Criminal Procedure Law was approved in March 1996. The new legislation provided defendants with a number of improved procedural safeguards, including the right of defence counsel to participate earlier in the criminal proceedings, and measures to strengthen the trial stage and move away from the practice of ‘decision first, trial later’. A requirement for a defence lawyer to be appointed in all death penalty cases was introduced. The same year the Lawyers’ Law was adopted, providing a clearer statement of the lawyer’s professional status, but failing to further the lawyer’s ability to defend the rights and interests of their clients (Lawyers Committee for Human Rights 1998).

While growing rights awareness can be seen in the revised criminal procedures, further changes to the substantive law took place against the backdrop of the second Strike Hard campaign (Zhao 2005). During the drafting stage of the revised
The Dearh

Penalty in China: Toward the Rule of Law

In Criminal Law, several prominent scholars argued for a reduction in capital crimes and, in particular, for ending the death penalty for non-violent offences. The impact of market-based reforms in the 1980s had, however, led to growing public concern at the increase not only of violent crime, but also corruption and fraud. In the end, the revised legislation reflected current use of the death penalty, codifying the ad hoc introduction of new capital offences that had occurred throughout the 1980s and early 1990s, during which the number of capital crimes increased from 28 to some sixty eight. A number of offences were re-categorised: many counter-revolutionary crimes became the new offence of 'endangering national security', while others became public order crimes. Probably the most notable change in the revised legislation was the removal of theft from the list of capital crimes.

Critical Voices

While the criminal procedure law revisions were welcomed by the legal community, critical voices were soon raised, questioning both the extent of legal reform and the implementation of the revised laws. It was not long before scholars and lawyers were talking openly again of the need for further reform.

Criticism over the past decade, of both the law and practice, reflects greater international awareness resulting from increased overseas study, contacts and professional exchanges. Signature of the ICCPR in 1998 gave reformers an added impetus. In contrast, however, to the speed with which China has ratified other conventions following signature, ratification of the ICCPR has still not been approved by the National People’s Congress. Although in bilateral human rights dialogues the Chinese government has argued that domestic law largely complies with the ICCPR, some lawyers and legal scholars have been vocal in linking their calls for further reform to the obligations of international human rights law.

China’s compliance with article 6 of the ICCPR, that the death penalty be restricted to 'the most serious crimes', has been questioned by several scholars. The less inflammatory language of the revised Criminal Law in which the death penalty can only be applied for 'exceptionally serious crimes,' has been welcomed by some as proof of a more 'scientific' or rational approach to criminal justice. Others argue, however, that the wording is less restrictive than the 1979 language which limited the death penalty to the 'most heinous crimes' (Xia 2000). The use of the death penalty for economic crimes has also come under criticism with scholars highlighting both international trends and the view of the United Nations, to argue that economic crimes should no longer attract the death penalty (Zhao 2005). While a revised Criminal Law is not currently on the legislative agenda, legal scholars have argued that ratification of the ICCPR will require China to reduce its number of capital crimes, provide clearer sentencing guidelines and a definition of what constitutes 'exceptionally serious crimes'.

While scholars and lawyers demonstrate growing awareness of international human rights standards, the government remains sensitive to any perception of
weakness in the face of international pressure on China. Most scholars and lawyers, therefore, frame their calls for legal reform in the context of a domestic agenda for reform. Although traditionally substantive, rather than procedural, claims have taken priority in Chinese conceptions of justice, the experience of Chinese defence lawyers with the law in practice has drawn attention to the procedural deficiencies in the legal system. The failure of the Criminal Procedure Law to protect the rights of suspects and prevent miscarriages of justice has been highlighted by some high profile cases of torture which have recently come to light, in several of which the defendant had been given the death penalty (Kahn 2005). One of the most widely discussed cases concerned She Xianglin. She was serving a prison sentence in Hubei for the murder of his wife, but, some 11 years after her disappearance, she reappeared having married someone in another province. On his release from prison She Xianglin accused the police of torturing him into confessing to a crime that had not taken place (China Daily 2005b). Concern at the prevalence of forced confessions (xingxunhigong) and incidents of torture has now become the overriding justification for further revisions to the Criminal Procedure Law (Chen 2005).

Official recognition of the problem of torture has led to training initiatives and support for a number of pilot projects to reduce the opportunities for the police to abuse their power. The notoriety of the She Xianglin case prompted Hubei province to issue provisional regulations requiring the video and tape recording of all potential death penalty cases. The Chinese government's willingness to acknowledge publicly that torture is a problem paved the way for the invitation of the UN Special Rapporteur on Torture to visit China in November 2005 (UN Human Rights Commission 2006). Although China was displeased with the final report's inclusion of a large number of cases alleging torture against members of the Falun Gong and the conclusion that torture 'remains widespread', the government has continued to allow international cooperation in this area (Great Britain China Centre).

The problem of forced confessions and the use of torture, reveals deep underlying problems within the Chinese criminal justice system. Although the revised Criminal Procedure Law made convictions on confession evidence alone inadmissible, unrealistic targets for 100% clear-up rates in homicide cases, and the lack of skills and resources within the police, have continued to make confessions an important tool for securing forensic evidence. The confession is also critical in validating the state's role in maintaining public security and the reintegrative functions of the criminal justice system (Rojek 2001). In the words of one defence lawyer, 'they (the police) pay a much higher price for failing to maintain the appearance of social order than for torturing suspects' (Kahn 2005). Although suspects have the right not to answer 'irrelevant' questions during interrogation, some local jurisdictions, at the instigation of legal scholars, have recently been experimenting with a more general right to silence or the absence of confession.

For the Chinese government, emerging popular rights awareness and public unease at official complicity in torture and ill-treatment of fellow citizens cannot
be as easily ignored as the reports of international NGOs. The centrality of criminal justice to Party-State power, however, makes the government a cautious reformer and reluctant to sanction the wide-ranging changes which critics urge. For some years lawyers have been arguing for the right to be allowed to attend police interrogations of suspects and the All China Lawyers’ Association has made this an important campaigning issue in its submission on further criminal procedure reform. Despite successful pilot projects and overwhelming international evidence of the effectiveness of the measure in preventing police abuse, the government remains reluctant to force through reform in the face of opposition from the Ministry of Public Security. To bolster their position, the police have been quick, in today’s more ‘rights’ conscious environment, to voice their concern for the victim’s rights in opposing increased protection for the suspects. Long-awaited revisions to the Criminal Procedure Law, may reveal how far the government is prepared to go to enable a stronger role for defence counsel and to challenge the supremacy of the prosecution.

Legal Assistance

Despite the rule of law rhetoric and growing awareness of international standards, Chinese criminal cases are skewed heavily in favour of the prosecution. The reforms of the late 1990s introduced elements of the adversarial Anglo-American model, but, with its foundations in the continental inquisitorial system, the trial still plays a minimal role and there is little official traction for the notion of equality of arms. The procedural focus is on the pre-trial investigation carried out by the police and the procuratorate, and by the time a case reaches the courts it is widely assumed that ‘the facts are clear’ and there is very little scope for these to be challenged by defence counsel. Trials are often little more than sentencing hearings with lawyers seeing their best hope in influencing the sentence with a plea of mitigating circumstances. For lawyers in capital cases, success is more often than not securing for their clients a fixed term prison sentence or, at worst, a suspended death sentence.

The supply of qualified lawyers across the country has become a litmus test for the development of a legal culture in China. Despite impressive figures for people taking the Bar exams, the number of qualified lawyers is still low for the size of the population. The shortage of lawyers is most acute in the poorer central and western regions as qualified lawyers flock to the cities in the east for well paid jobs in commercial law. The Chinese Communist Party’s intolerance for autonomous entities has hampered the development of a professional Bar association which can promote the independence, professionalism and autonomy of the legal profession with the result that the competence and ‘professional responsibility’ of many Chinese lawyers has been called into question (Alford 1995). With the profession in China still in its infancy, many lawyers struggle to represent a client whose interests are distinct from those of the state.
Traditional hostility to the law and the politicisation of criminality under Mao have meant, in practice, many defence lawyers still face prejudice for defending a client accused of serious crimes, such as murder or rape. This suspicion towards the defence lawyer finds expression in article 306 of China’s Criminal Law which makes it a criminal offence for a lawyer to forge evidence or entice or coerce a witness into ‘changing his testimony in defiance of the facts or give false testimony’. Article 306, with its exclusive focus on perjury by lawyers, is often cited as indicative of the challenges facing the profession. Clearly the threat of prosecution has cast a chill over the legal profession (Congressional-Executive Commission on China 2006). But, following a detailed study of cases and interviews with all parties, Fu (2006) suggests that the real reason the police and procuratorate pursue prosecutions under article 306 is that the position and role of defence lawyers in China is now beginning to matter and is frustrating the prosecution’s traditional reliance on confessions.

Legal aid for defendants in criminal cases is the poor relation in a profession dominated by the well-paid commercial lawyers in China’s business centres (Smith and Gompers 2007). The 1996 Lawyers Law led to the setting up of a legal aid system requiring all practising lawyers to provide free legal assistance for up to two cases a year. While some legal aid is discretionary, and reflects local availability of resources, legal assistance is now mandatory for all defendants facing the death penalty. The provision of legal aid is the responsibility of the provincial and county level legal aid offices which will either appoint one of their own lawyers, or require a local firm to provide pro bono services. The financing of legal aid, like most social services in China, is the responsibility of local government and central government subsidy for the poorest counties is minimal. Legal aid centres in poorer regions lack sufficient funds to reimburse case-related expenditure and lawyers complain that they must finance their own travel and photocopying of case documents. There are no public funds to pay for expert witnesses for the defence or the defence’s own investigation expenses.

Ten days before trial in a death penalty case the court must provide legal aid for any defendant who has not privately appointed defence counsel. Since legal aid centres, however, are given three days to appoint someone, the lawyer usually has just a week to prepare the defence. While the 2003 Legal Aid Rules allow suspects, without financial means, to apply for legal aid following the first interrogation by the police or the beginning of ‘compulsory measures’, the application process can be slow and approval will reflect the local ability to fund legal assistance. Despite the serious shortcomings in the legal aid available for those facing the death penalty, there has been little serious public attention of this topic. Most domestic and international attention has focused on the appeals and approval process for the death penalty.
Appeals and Approval of the Death Penalty

Despite efforts to modernise and build confidence in the legal system, the educative and propaganda functions of the criminal trial, ‘directed at the citizens, to condemn vice and praise justice’, remain important (Clarke and Feinerman 1995). China’s trial adjudication committees (shenpan weiyuanhui) bring together the most senior members of the court to ensure quality control and decide major or complicated cases, including most involving the death penalty. Although the independence of individual judges is not an accepted principle, the collective independence of the judiciary as a whole is, even though, in practice, there are many shortcomings with respect to any form of judicial independence in China (Peerenboom 2002). Local political influence is articulated by the Political-Legal Committee, which is instrumental in promoting Strike Hard targets and local party priorities, and the local People’s Congress. Lawyers, police, prosecutors and judges all openly admit the pressure of satisfying local political and public opinion.

In China’s two-trial system, a judgement in the court of first instance can be appealed within ten days to the next higher level court. Since the court considering the appeal can review both the facts and the law relating to the initial judgement, death penalty cases face frequent appeals. Appeals are considered by a collegial panel which will review the case file, but could decide not to hear the case in court. If the court had concluded that ‘the facts are clear’ then no court hearing was required and, in practice, most appeals were no more than a review of the files and interviews with the relevant parties. Policy changes at the end of 2005 now require appeals in cases involving the death penalty, with immediate execution, to be considered in an open court (China Daily 2005c).

Research reveals that the outcome of a successful appeal is rarely a verdict of not guilty or dismissal of the case. The most common result, where miscarriages of justice are alleged, is a retrial at the lower court level, often involving the same panel of judges. Cases have been reported involving as many as four retrials until the Higher Court finally ordered a verdict of not guilty (Lu and Miethe 2007). The value of the appeals process is undermined by the fact that it is normal practice with serious cases, such as capital crimes, for the Intermediate Court to discuss the case with the Higher Court and seek their approval of the lower court judgement. Under the ‘erroneous cases investigation system’ lower level court judges are reluctant to make independent decisions and later be held responsible for a wrongful conviction. As a result, it is rare for the Higher Court to overturn an Intermediate Court judgement on which it has already been consulted.

Managerial measures introduced to improve accountability in the judicial system have had a number of unfortunate, apparently unintended, consequences on the appeals process. The introduction of the ‘responsibility’ system in the courts and other parts of the judicial system has resulted in disciplinary measures, including fines, against judges and procurators where cases have been successfully appealed. Under the State Compensation Law, individuals may also be compensated
for unlawful detention in the event of a verdict of not guilty, with the costs of compensation borne by the responsible units rather than the state.

The 1979 Criminal Law, article 43, and Criminal Procedure Law, article 144, both provided that death sentences should be verified and approved by the Supreme People’s Court. Approval by the Supreme People’s Court was also stipulated in the Organic Law of the Courts under article 13. However, not long after the promulgation of this legislation, the National People’s Congress Standing Committee ruled that, during 1980, the Supreme People’s Court would delegate the approval of death sentences in cases of murder, rape, robbery and arson to Higher Courts in the provinces, municipalities and autonomous regions. In 1981 this measure was extended for a further two years, and then formalised in a revision to the Court Organisation Law approved by the National People’s Congress Standing Committee at the outset of the first Strike Hard campaign.

Revision of the criminal laws in the late 1990s maintained the power of the Supreme People’s Court to give final approval before execution. A Notice from the Supreme People’s Court, from the same period, however, continued to refer to the legal delegation of authority to approve certain death sentences to the Higher Courts. Chinese legal experts have long highlighted the fact that the delegation of authority was a temporary policy, introduced in response to an increase in serious crime and a lack of sufficient personnel in the Special People’s Court to review death penalty decisions. The continuation of the policy was, they argued, in violation of Chinese legislative procedures (Congressional-Executive Commission on China 2003).

Delegating the approval of most death sentences to the Higher Courts had resulted in both the appeal and the approval taking place in the same court with the risk that the two procedures became a single process. This risk was compounded by a Supreme People’s Court decision, in a move to improve Higher Court efficiency, that there was no need to separately approve a death sentence where the court had already rejected an appeal against the judgement of the Intermediate Court. Concern over the potential lack of rigour in the approvals process also highlighted the shortcomings in China’s appeals proceedings.

The restoration of the Supreme People’s Court authority over the execution of death sentences became a campaigning issue for both domestic reformers and international human rights organisations. The issue was uncontroversial and had clear legal, procedural and traditional legitimacy. Some Chinese scholars even emphasised its historical roots, arguing that in imperial times even the emperor had been required to approve execution of the death sentence. It was also assumed, if not publicly argued, that the restoration of the Special People’s Court’s power over approval would reduce the number of executions and address the alleged inconsistencies in provincial death penalty sentencing patterns.

Despite the force of the arguments it was nevertheless not until December 2006 that the Government announced the change of policy. Post-Deng decision-making has become more consensual and negotiated, requiring the support of all influential parties. Opposition from provincial Higher Courts and a shortage of
qualified personnel in Beijing were some of the justifications given for the slow pace of reform. Re-establishing the approval of the death penalty as a formal procedure is likely to result in the provincial courts enforcing higher standards on the first and second instance courts to avoid the ramifications of having their decisions overturned. Locating the decision-making in Beijing should also result in more consistent use of the death penalty, and should help defuse the political pressure on Higher Courts, particularly during anti-crime campaigns and in high profile cases. Recent official reports already claim a reduction in the number of executions (China Daily 2007c).

Such government claims cannot be challenged. Anyone who wants to examine the government’s position that ‘strict control’ is applied to the use of the death penalty or recent claims of a decline in the number of executions is hindered by the lack of official data at either the local or national level. In response to international demands for greater transparency, the government has prevaricated on the grounds that the data would be impractical to collect although it does publish a composite figure for the number of people sentenced to prison terms of five years and more. A report from Human Rights in China, however, confirms that national and provincial statistics on the numbers of executions are classified as highly secret (Human Rights in China 2007). Some Chinese scholars have called for publication of the data and acknowledge the secrecy is because there ‘are too many death sentences and making the number available to the public would undermine the international image of China’ (Chen 2002).

The Death Penalty Debate

Claiming cultural exceptionalism, East Asian countries have been among the most vocal at the United Nations in opposing resolutions against the use of the death penalty. In reality, cultural arguments for and against the death penalty are more complex. Not only is the Asian values thesis undermined by the pro-abolitionist position of the Asian Charter on Human Rights, but Confucianism is no longer a living tradition in China; its influence can only be understood in a concrete institutional context (Chan 1999). With the decline in influence of Marxism and Maoism, the rising tide of nationalism provides considerable scope for state officials to manipulate Confucian traditions for political purposes.

A study of Chinese views on capital punishment reveals public reluctance to express an opinion and a general willingness to concur with an image of the state that is ‘caring, careful, impartial and restrained’ in its use of the death penalty (Ho 2005). Through its control of information, China continues to present the death penalty as an unfortunate necessity. Reports in the media, highlighting the most extreme examples of cold-blooded killers, serve to endorse capital punishment and promote the view that only the deserving die (Liebman 2005).

The government continues to closely monitor and repress dissent, but it remains vulnerable domestically to revelations of serious rights violations. While Chinese
journalists enjoy little freedom of expression, some stories, such as recent reports of slave labour in Shanxi brick kilns, become too big to ignore. The case of Sun Zhigang, a student killed in police detention, led to swift and sweeping changes to the old ‘shelter and investigation’ system under which migrants had regularly been detained (China Digital Times 2005). Revelations about the torture and wrongful conviction of innocent suspects have undoubtedly contributed to the current high level concern at coerced confessions and wrongful executions (Lu and Miethe 2007) and may help account for some of the recent reforms. Traditional attitudes and the constraints on public debate, however, mean that, in the short term, concerns of miscarriages of justice are unlikely to result in a groundswell of popular opinion supporting abolition. China’s ‘iron fist’ policy has been a popular response to the fear of rising crime and instability as the country rapidly modernises.

China’s growing engagement with the international human rights regime reflects a diplomatic objective to be perceived as a constructive member of the international community (Foot 2000). But, international pressure on an ascendant China arguably has limited impact. The main impetus for improved protection of human rights lies within the domestic arena (Harris 2002). Nationalism is a potent force. Any perception that Chinese sovereignty is undermined by foreign governments and international organisations risks a populist backlash. In the aftermath of the ‘colour’ revolutions in the former Soviet Union, there has been increased suspicion on the part of the authorities of international NGO activity and the role of foreign governments, particularly that of the United States. Although civil society and non-governmental organisations in China continue to grow in number, no independent national human rights organisations are registered. In the absence of an organised human rights community in China, legal scholars and weiquan lawyers provide the only significant alternative perspective on the protection of a citizen’s right to a fair trial and safeguards when facing the death penalty.

Known as ‘rights-protecting’ or weiquan lawyers, a small number of activist lawyers have been using their position as independent professionals, not only to provide a quality defence to their clients, but also, to speak out for improved implementation of the law in practice and to draw attention to its shortcomings. Much of the work of weiquan lawyers has been in relation to land rights and ensuring adequate levels of compensation for the appropriation of farmers’ land, bringing them into frequent conflict with local officials. But, a number of criminal defence lawyers have also been drawing attention publicly to the conduct of death penalty cases and highlighting failings in safeguarding the defendant’s rights (Teng 2007). But, with activist lawyers under attack and all lawyers facing restrictions from local regulations on handling ‘important, difficult or sensitive’ cases (Human Rights in China 2006), the pressures on the legal profession undermine the emergence of a collective voice to challenge the more gross violations of fair trial rights.

Chinese academics believe that, in the long term, given international trends, China will abolish the death penalty. Qiu Xinglong, Dean of the Law School
at Hunan Xiangtan University, which hosted a seminal conference on the death penalty in 2002, has been one of the most prominent scholars to propose complete abolition of the death penalty in China. He has also been critical of the timidity of most Chinese academics in challenging the dominant view that the death penalty is needed because of the current political-social conditions (Lu and Miethe 2007).

The majority scholarly view supports a step-by-step process of reducing the numbers of capital crimes and restricting the conditions in which the death sentence would be given. It has been suggested that in taking the long view on abolition some academics are thinking in terms of at least a hundred years, referring to the several centuries it took before eventual abolition in Europe (Nowak and Xin 2000). Many scholars subscribe to the opinion, articulated by Professor Chen Xingliang of Beijing University, that the relatively low level of economic development in China provides support for capital punishment since the relative value placed on human life is low. With limited economic resources, the death penalty appears for many people to be a cheap and effective way of responding to growing levels of crime (Lu and Miethe 2007). Arguments supporting such a correlation between wealth and human rights are persuasive in China and some scholars have suggested that abolition could be achieved by 2020, by which time China would be a middle income country. Nevertheless, comparative data reveals that China, like many other countries with a Confucian heritage, still scores low relative to income with respect to the protection of civil and political rights (Peerenboom 2007).

Conclusion

In developing its distinctive discourse on human rights China has drawn on a traditional cultural repertoire which values social relationships and respect for authority. The Confucian overtones provide cultural legitimacy and in the asymmetries of power relations the government perspective on human rights has a hegemonic status. The majority of Chinese reformists operate within this framework drawing on culturally acceptable patterns of behaviour and the language of law to advance human rights understanding. The rule of law has become the principal trope for reformers as they seek to develop a new narrative of a just and modern society. In contrast with the earlier reformist narrative of democracy and political reform, this is a discourse that is state sanctioned (Wang 2006); both government and reformers agree that the rule of law is a desirable alternative to its opposite, a state of lawlessness or luan (chaos). To the state’s ‘thin’ concept of law as scientific and rational, lawyers and legal scholars have been adding layers of meaning building a richer, more moral and ethical framework for judging state actions. It is difficult for the government to openly contest this ‘thicker’ rule of law concept without undermining its own rhetorical commitment to law and the development of a ‘harmonious’ society.

Working within this framework of ideas, and traditional values of hierarchy, the importance of personal relationships and giving face (usually reinforced by
Chinese reformers participate in a dialogue with the state on the death penalty through conferences and seminars rather than through conflictual discourse and action. Calls for abolition and criticism of current practice can be tolerated politically as individual acts of resistance so long as there is no organised attempt to challenge the dominant party line.

For the time being, reformers are focusing their efforts on revising the Criminal Procedure Law to bring it more closely in line with China’s obligations under international law. Since the end of the Cultural Revolution China has come a long way in developing a rule-based criminal justice system and international attention, including pressure in relation to extradition requests, has helped to put the death penalty on the domestic agenda. The recent decision to restore the power of the Supreme People’s Court to give final approval of death sentences and the requirement that appeals are held in open court strengthen the state approved discourse of law and provide improved safeguards for those accused of capital offences. But these steps are not a move towards abolition. As Vice Minister of Justice Zhang Jun is quoted saying with respect to sentencing, ‘The focus of reforming the punishment system is not to abolish the death penalty, but to set up more long-term prison sentences – for example, 20- or 30-year sentences – to reduce the use of the death penalty’ (China Daily 2005a).

As an advocate for abolition in China, Europe’s potential moral influence has been strengthened by its vocal condemnation of the death penalty in the United States (European Union 2007). But China is just too powerful to be bullied into abolishing the death penalty and in the long term it is the moral arguments for abolition which will need to be persuasive: already there is an influential view that abolition is a mark of a civilised country. However, while challenging international use of the death penalty has become a defining project for the European Union (Girling 2005), for the Chinese government pursuing abolition promises few perceived benefits to the current Party-State.

The salience of the death penalty lies in its symbolic importance as an expression of sovereign power (Sarat 2001). While in the United States this may, as Sarat suggests, lie in local democracy; in China power resides with the Communist Party. In staking its claim to legitimacy, to both an international and domestic audience, the Chinese government can no longer ignore the dominant discourse of human rights. Operating within a broad internationally shared normative framework, China still presents a culturally relativist perspective which appeals to nationalist aspirations at home and associates it with an anti neo-colonialist policy abroad (Tang 1995). Presenting the image of a state that kills only when absolutely necessary, permits China to endorse a language of law while acquiring legitimacy from carrying out a punishment which is still very widely supported by the public (Lu and Miethe 2007). Growing use of the suspended death sentence may, in the years ahead, pave the way for introducing a moratorium on executions while further delaying the politically sensitive decision to abolish the death penalty. A recent Supreme People’s Court document said that, ‘All criminals that can be sentenced without the need for immediate execution should be given a death sentence with
a two-year reprieve’ (China Daily 2007c). The experience with abolition of the
death penalty for juveniles has suggested just such a way ahead for reformers (Yao
forthcoming).

References

Tension in the World of Chinese Legal Workers’, China Quarterly 141.
Amnesty International (2007), ‘The Olympics Countdown: Repression of
Activists Overshadows Death Penalty and Media Reforms’ (30 April 2007)
<http://web.amnesty.org/library/Index/ENGASA170152007>, AI Index: ASA
Asad, T. (1997), ‘On Torture, or Cruel, Inhuman and Degrading Treatment’, in
Wilson (ed.).
Bauer, J. and Bell, D. (eds.) (1999), The East Asian Challenge for Human Rights
(Cambridge: Cambridge University Press).
Bodde, D. and Morris, C. (1967). Law in Imperial China: Exemplified by 190
Ch'ing Dynasty Cases (Cambridge, Mass: Harvard University Press).
Boulanger, C. and Sarat, A. (2005), ‘Putting Culture into the Picture: Toward a
Comparative Analysis of State Killings’, in Sarat and Boulanger (eds.).
Chan, J. (1999), ‘A Confucian Perspective on Human Rights for Contemporary
China’, in Bauer and Bell (eds.).
Chen, W. (2005), ‘Prevention of Coerced Confessions will be Key Issue in Next
Year’s Expected NPC Revisions to Criminal Procedure Law’ (originally
on website of Institute of Law) <http://www.iolaw.org.cn/shownews.
China Daily (2005a), ‘China Questions Death Penalty’ (online publication 27
content_412758.htm>.
———(2005b), ‘Wronged Man Demands Compensation’ (online publication 12
———(2005c), ‘Death Penalty Appeals to be Heard in Open Court’ (published
12/08/content_501671.htm>.
———(2007a), ‘Procedures Detailed for Death Penalties’ (Originally published
peopledaily.com.cn/200703/12/eng20070312_356528.html>.


Cho, B. (2004), ‘The Death Penalty in South Korea and Japan: “Asian Values” and the debate about capital punishment?’, in Hodgkinson and Schabas (eds.).


Council of Europe (2004), The Death Penalty: Beyond Abolition (Strasbourg: Council of Europe).


Girling, E. (2005), ‘European Identity and the Mission Against the Death Penalty in the United States’ in Sarat and Boulanger (eds.).


Ho, Y. (2005), ‘Capital Punishment in China’ in Boulanger and Sarat (eds.).


———(2007), State Secrets: China’s Legal Labyrinth (published online 11 June 2007) <http://hrichina.org/public/contents/article?revision%5fid=41506&item%5fid=41421#TOC>.


(2004), ‘International Law and the Death Penalty: Reflecting or Promoting Change?’ in Hodgkinson and Schabas (eds.).


Spence, J. (1999), The Search for Modern China (New York: W.W. Norton & Company Inc.) 125.


