

THE POLITICS OF CHINA'S DEATH PENALTY REFORM IN THE CONTEXT OF GLOBAL ABOLITIONISM

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This paper explores the influences of worldwide anti-death penalty campaigns in the local institutional environment in China and its implications for China's capital punishment reforms in recent years. It found a 'concentric pattern' of the dissemination of human rights values and anti-death penalty activism may explain the varying attitudes towards human rights and international activism among different social groups across the Chinese society. Divergent interests of and perceptions held by national-level and lower-level legal elites are likely to be one of the causes for China to adopt an incremental reformist stance. Further, this study shows that the Chinese legal elites were poorly informed of the current status of public opinion on capital punishment. A populist-sentiment-driven administration of capital punishment is closely tied to reliance on capital punishment.

Keywords: human rights, capital punishment reform, populism

Introduction

Inspired by the worldwide campaign against the death penalty spearheaded by European countries, the reforms of capital punishment law and policies in the People's Republic of China (hereinafter China) in recent years have caught the attention of global media. These reform initiatives, launched around 2006–07, signified a cautious and incremental attitudinal shift away from this country's previous habitual reliance on capital punishment as the most important penal instrument to maintain social order and tackle crime problems in China's post-1978 market reform. Compared to the body of extensive literature on the use of the death penalty in retentionist jurisdictions such as the United States, research on Asian capital punishment law and practices in general (Johnson and Zimring 2006: 91) and especially China (Oberwittler and Qi 2009: 4) is relatively thin. In particular, there has been little theoretical or empirical work focusing on the impact and implications of 'international human rights dynamics' (Hood and Hoyle 2008) calling for restrictions on the use of capital punishment in China.

China's reforms of its capital punishment policies, law and practices in recent years invite us to examine the global transfer and cultivation of reformist as well as abolitionist sensibilities in the local institutional and cultural environment in China. This necessitates an understanding of not only global abolitionist values and initiatives against the death penalty, but also of the local politics of reform and the existing institutional as well as ideological constraints on reform in China. For instance, the current official policy towards capital punishment in China is aimed at civilizing its capital punishment machinery, rather than fully embracing abolitionist aspirations (Xinhua News 2011). What motivates China's focus on incremental reform, rather than abolition?

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Based on 36 semi-structured elite interviews with legislators, judges and prosecutors, this article concludes that China's attitudes towards capital punishment have been the product of clashes and compromises between global forces and China's local predicament; they are also an outcome of domestic conflicts and communications between various individuals, institutions and interest groups. This article explores how the attitudinal preferences of legal elites form and change through complex interactions among existing processes, institutions and policies not only at the national level, but also at the lower levels within Chinese society. It argues that ideological and institutional restraints influence China's elite-led reform on its capital punishment regime.¹ Specifically, it is argued that the limited pace, strength and breadth of death penalty reform can be explained by three interrelated issues, namely the unique pattern of the dissemination of international human rights values in China, the diverging interests and priorities between central-level and lower-level legal authorities, and the vulnerability of penal decision-making bodies to populist pressures.

Part One. Elite Interviews: Methodological Issues

To expose the myths and paradoxes surrounding China's capital punishment reform, I interviewed 36 legal professionals—judges, prosecutors, legislators—whose work is closely related to the administration of the death penalty in China in 2010. Eighteen of them were members of national-level legal authorities: namely the Supreme People's Court (the SPC), the Legislative Affairs Commission of the National People's Congress Standing Committee, and the Supreme People's Procuratorates. The other half of the respondents came from provincial-level courts² and procuratorates in four provinces across China, namely Shanghai, Guangdong, Henan and Hubei.

The relatively small size of my sample is due to three major difficulties that social researchers conducting empirical research in Western liberal democracies do not commonly face, namely the importance of interpersonal networks (*Guanxi*) in accessing the sample population of interviewees in China, the political sensitivity of the subjects of human rights and capital punishment in the Chinese political environment, and the Chinese legal elites' unfamiliarity with qualitative interviews as a research method of knowledge production in social science. Interpersonal networks—fundamental to the Chinese social life (Hwang 1987: 959)—are highly useful for mapping out potential interviewee populations, given the difficulties of getting contact information through publicly accessible channels. As building up such personal connections requires reciprocity and indebtedness among actors (Yang 1994: 139–45; Smart and Smart 1998: 103–29), relying on referrals and endorsements from my acquaintances—persons well connected to elites within the legal circles—seemed to be the most fruitful and efficient method to gain access to the target population (Biernacki and Waldorf 1981: 141).

In general, elite groups may not want to share information that could undermine their position or status with researchers on a politically sensitive subject (Dexter 1964; Desmond 2004). This is especially so when a researcher from a foreign-affiliated academic institution approaches them, asking them to respond to politically

¹ The focus in the article is on the use of capital punishment for murder, and the issues of the political uses of the death penalty in China and the exact numbers of executions were not explored in the elite interviews.

² Provincial-level courts are also called Higher People's Courts or High People's Courts in China.

sensitive questions in a research methodology they are unfamiliar with. Predictably, my efforts generated only a relatively limited cohort of participants willing to cooperate. Nevertheless, such elite interviews are valuable in eliciting how, and to what extent, the opinions of legal elites are reflected in policies and processes concerning the administration of capital punishment in China.

The semi-structured interviews ranged in duration from 30 minutes to an hour, and most were conducted by telephone rather than face to face, although some of the earlier exploratory interviews were carried out in person. While face-to-face interviews may be ideal for capturing non-verbal cues such as facial expressions and body language (Dexter 2006; Stephens 2007: 210), my experience suggests that telephone interviews are a viable alternative, as the interviewer will find it easier to record accurate notes, without needing to maintain the eye contact and appropriate body language necessary for successful face-to-face social interaction.

Furthermore, telephone interviews have their own advantages for researchers on limited budgets, especially when interviewees are widely dispersed across various provinces in China (Hagan 1997: 168; Shuy 2002: 538). In this particular case, it proved to be impossible to persuade most interviewees to meet up because of their busy schedules. Most importantly, for a research project on politically sensitive topics with nervous respondents, the distance and lack of intimacy of telephone interviewing seemed to help my respondents to feel less anxious about answering difficult questions (Bryman 2008: 457).

Part Two. China's Capital Punishment Reform Inspired by International Influences

The use of capital punishment during the first three decades of contemporary Chinese penal history and the ensuing two decades of Strike Hard Campaigns (*Yanda Campaigns*)³ was characterized by a fluctuating pattern between extremes of harshness and relative leniency. State-sponsored killings peaked during Mao Zedong's special mass-line political major campaigns and the reform-era Strike Hard Campaigns, declining during intermittent periods between major campaigns. Most notably, during the Campaign to Suppress Counterrevolutionaries from 1950 to 1953 alone, around 710,000 counterrevolutionaries were executed (Ma *et al.* 1989: 55). This contrasts with the relatively smaller-scale and lower-volume judicial executions in the first half of the 1960s. According to a tally kept by Western journalists based on regular governmental announcements in provincial newspapers, the total varied from eight to 12 per month, mostly cases of Nationalist spies (Snow 1962: 347).

This vacillating use of capital punishment was a continuation of pre-1949 penal practices of the Communist Party in its early-time revolutionary bases (Griffin 1976: 4; Leng 1967: 26). It remained a hallmark of capital punishment practices in China in the latter years of the twentieth century. Towards the end of the 1970s, a new 'reform and open-up' policy replaced political campaigns as the official national policy. Fear of social disorder and political instability began to loom large on China's political as well as penal policy

³ To distinguish the general patterns of China's use of capital punishment during its various historical periods, I hereby arbitrarily divide the contemporary Chinese penal history into three stages: the first three decades (1949–79), the Strike Hard era (1980–2003) and the Hu-Wen era (2004–12).

making with the market capitalization process. Strike Hard Campaigns—particularly the first round taking place in the early 1980s—led to sharp increases in the number of death sentences and executions, as well as relaxations of due process procedures (Tanner 1999: 93–9; Trevaskes 2008: 395–7). During the first year of the 1983–85 Strike Hard Campaign—the most intensive infliction of state-sanctioned deaths since the 1950 Campaign to Suppress Counterrevolutionaries—approximately 24,000 offenders were sentenced to death and around 1,027,000 were convicted of criminal offences (Ma *et al.* 1989: 525). Again, the volume of executions in non-hard-strike periods was relatively low and capital offenders were afforded stronger due process safeguards.

This pattern of ebb and flow in the past can be explained partly by the constant tension between a utilitarian view that the death penalty is an expedient instrument to achieve short-term political goals and a stricter adherence to the rule of law, penal regulation and due process when dealing with capital cases. In the most recent Hu-Wen era, such an uneasy relationship in penal ideology takes the form of contradictions between the populist impulses of revenge and retribution and a serious commitment to restrain and civilized the use of capital punishment. Although drafters of China's 1997 Criminal Law took a first step to restrain the wanton use of capital punishment during the Strike Hard era (Davis 1987: 312–13; Cai 1997: 217–18), it was not until 2004 that a series of reforms on capital punishment were planned and prioritized by the SPC.

China's capital punishment reforms: initiatives and significance

The first-stage reform initiatives, fleshed out in the Second Five-Year Reform Plan of the People's Courts, proposed open trials in provincial-level courts in China and a return of the review power in capital cases to the SPC (Grimheden 2006: 1010; Scott 2010: 65–6). The president of the SPC, Xiao Yang, announced in 2006 that China's official policy was to retain the death penalty but use it cautiously (Trevaskes 2008: 395). By July 2006, the SPC required all second-instance capital trials must be held in open courts. Starting from January 2007, the SPC's final review power over capital cases nationwide was restored. Reportedly, these first-stage reforms yielded significant decline in death sentences and executions. Jiang Xingchang, vice president of the SPC, disclosed in September 2007 that the nationwide total of death sentences in 2006 was the lowest over about ten years; this figure during the first half of the year 2007 continued to decline compared to the same period of 2006 (Dong 2007: 9). In early 2007, the SPC reinstated its power to review all capital cases from the Higher People's Courts nationwide.

Following the first-stage reform initiatives, two evidentiary rules promulgated in June 2010—Rules to Exclude Illegal Evidence in Criminal Cases and Guidelines to Scrutinize and Analyse Evidence in Capital Cases—aimed to provide better due process protection for capital defendants (Lewis 2011: 660–7). In February 2011, China's legislature removed 13 capital offences from its Criminal Law and exempted old people above the age of 75 from capital punishment in principle.⁴ Meanwhile, aims to make the administration of capital punishment more civilized included a gradual nationwide shift of

⁴ Old people above the age of 75 are nevertheless subject to immediate execution if convicted of 'committing murder with exceptionally cruel methods'. The National People's Congress (2011), *The Eighth Amendment to the Criminal Law*, Beijing, Order of the President of the People's Republic of China (41).

execution method from shooting to lethal injection. By December 2011, it was revealed at a seminar jointly organized by the United Nations Office of the High Commissioner for Human Rights and China's Foreign Ministry that, since the SPC regained the final review power over death sentences in January 2007, the number of executions has dropped by approximately 50 per cent (Dui Hua Foundation 2011), although, given that the execution rate is a state secret, this figure cannot be confirmed.

The practical significance of these reform measures should not be underestimated, yet the most significant initiative to date is the recall of review power by the SPC. Evidence from my interviews with legislators, judges and prosecutors suggests that the major decline in China's use of capital punishment depends primarily on the painstaking efforts made by China's judiciary to bring down the number of death sentences, rather than a concerted endeavour by all branches of the legal authorities. Reform measures including the abolition of 13 non-violent capital offences by the legislature were mainly of symbolic significance, rather than of practical value. My elite interviewees confirmed that most of these offences were rarely subject to the death penalty before the reform. Further, they revealed that those aged over 75 accounted for only a very small percentage of capital offenders. Exempting them from the death penalty in principle, therefore, was incapable of yielding a significant decline in capital sentences or executions.

The impact of worldwide anti-death penalty activism on human rights grounds

The UN Secretary General's Eighth Quinquennial Report accepted that the decline in the total number of death sentences and executions since 2007 could possibly be attributed to 'new perspectives on the death penalty' in general (UN Secretary General 2009: 23). As Roger Hood (2009: 16) observes, China's official attitude towards capital punishment underwent a distinctive shift from vigorous defence of its capital punishment policies and institutions in the face of international disapprobation, to growing openness and willingness to engage in dialogues and research with countries, organizations and individuals campaigning against capital punishment. This attitudinal transformation, to a large degree, has been the outcome of international intervention on the basis of human rights.

Specifically, the recent movement towards restriction of the application of the death penalty in China has been a product of the 'glocalization' (Robertson 1992) process, namely China's adapting of European penal sensibilities and norms to local conditions. In the field of international human rights law, in order to foster a target state's compliance with international norms and standards, the global force can adopt various mechanisms ranging from coercion to persuasion to acculturation (Goodman and Jinks 2004: 630–3; Patterson 2006). China's rise to the status of a prominent member in international politics and the changing power dynamics between China and Europe in recent years made outright coercion less viable as a means of influencing capital punishment practices in China. Central to the translocal exchanges of capital punishment law, ideologies and practices between China and the 'European community of sentiment' (Girling 2005; 2006) were the mechanisms of persuasion and acculturation.

Since the late 1990s, the EU has been engaged with China in wide-ranging initiatives, dialogues, seminars and projects to create and then develop discourses promoting the

restriction and eventual abolition of the death penalty (Hood 2009: 16–19). China's changing attitudes towards capital punishment and its efforts to reform its capital punishment apparatus have been partly receptive to these social and cognitive pressures generated by the international community, and particularly from Europe. My interviews showed that the Chinese legal elites generally recognize the effects of these techniques.

All but four of my interview respondents considered that the international pressure has been an indispensable factor in fostering positive changes in China. In particular, the Chinese authorities seem to be responsive to external pressures harming or threatening to harm China's reputation or image before the international community. One interviewee explained: '... as the idea of international human rights disseminated into our society, the political leaders of our country and the elites at the SPC became willing to improve China's international image by launching reforms of our capital punishment regime.' Another respondent put it succinctly: '... we implement international standards (on the administration of capital punishment) to avoid losing face in front of other members of the international community.'

These interview responses seem to suggest that the imposition of cognitive and social pressures on China through shaming via global media exposure has had some success. In fact, in the field of human rights, processes of persuasion and acculturation often involve strategies of shaming, shunning and denunciation (Risse and Sikink 1999; Goodman and Jinks 2004). For instance, shaming has been used by European activists to motivate the United States to curtail the use of capital punishment (Patterson 2006; Girling 2006). Indeed, the transnational anti-death penalty network, led by European organizations and institutions, promotes the international abolitionist movement as a war of civilization versus barbarity (Girling 2005). The moral imperatives associated with abolitionism therefore require nation-states aspiring for legitimacy, reputation and status in the global community to restrict or abandon the stigmatized and pathologized practices of capital punishment. Shaming is clearly a viable leverage to induce behavioural compliance.

Nevertheless, in the absence of a shared cultural, intellectual and traditional affinity, Europe's transcontinental promotion of anti-death penalty norms and values in China—a jurisdiction that lacks democratic credentials, is geographically distant, politically volatile and culturally different from Europe—encountered significant local predicaments. Although the interviewees broadly agreed that China should 'strictly control and prudently use the death penalty, and gradually implement international standards', further exploration found that their understanding of and knowledge about the international human rights norms was limited. For instance, only three of my interviewees knew the full name of more than one international covenant or treaty in pursuit of restricting and abolishing the use of the death penalty. Quite a few of them even admitted that they had little relevant knowledge and they believed that such knowledge was not desirable for their role within the administration of capital punishment in China.

Moreover, respondents shared discernible degrees of cognitive discomfort when talking about the concept of 'human rights'. Varying levels of distrust, scepticism, suspiciousness and hostility could be easily detected from their responses. This psychological uneasiness can be regarded as a response to the critical nature of China–global penal communications on Chinese human rights practice and its administration of capital punishment. The international human rights community, mainly comprising

foreign media and highly publicized NGOs such as Amnesty International, has relied heavily on approaches such as criticisms, condemnations and shaming, routinely portraying China in a very negative light (Cooper and Lee 1997; Peerenboom 2005: 72–7). While promoting conformity and compliance by threats to stain target states' national image and reputation, these confrontational and exclusive strategies can also be counterproductive (Wachman 2001).

In particular, the century-long history of China's encounter with Western colonizing forces made it more likely that Chinese authorities and public alike would react with acute sensitivity to Western concepts such as human rights (Weatherley 1999: 155). In fact, international pressure is arguably one of the main reasons that the numbers of executions and death sentences remain China's most closely guarded state secret (Foot 2000: 85–7). Besides convincing nation-states to align their practices with those of 'civilized nations' (Risse and Sikkink 1999), strong cognitive and social pressures could also force states to be secretive about practices that are the focus of shaming and denunciation. Indeed, some of my elite interviewees showed discernible negative attitudes towards human rights influences, frequently associating the concept of human rights with 'pressure', 'condemnation', 'criticism', 'accusation' while emphasizing that China needs to 'revamp', 'restore', 'improve' and 'strengthen' its 'image', 'reputation' and 'face'. These responses suggest that, while the abolitionist strategy of appealing to human rights rationales could be efficacious in pressing target states to take seriously the rights of its citizens, such a strategy may prove to be a double-edged sword.

Furthermore, apart from either forcing states to rationally calculate how non-compliance could hurt their self-interests and thereafter comply with international rules (Koh 2005: 978–9), increasing external pressure could also lead states to develop coping mechanisms. China has attacked the concept of 'human rights' with a great deal of political propaganda to defend its policies and practices before its domestic audience. State-controlled media repeatedly state that the concept of human rights is closely linked to anti-China sentiments and foreign hostile forces. State information and media censorship greatly reinforced the politicization of the issues and the manipulation of public discourses on the topic (Nathan 1994: 638–42). The subjects of human rights and capital punishment were once taboos in public discourse and remain of high political sensitivity. One of the respondents explained his understanding of the subject:

... to me, 'human rights' is a pretext used by foreign hostile forces to impose their own will; bullying us into obeying international human rights standards is a wanton interference with the domestic administration of criminal justice by a sovereign state.

Similar views were held by most other elites who refused to be interviewed.

Part Three. Explaining the Limitations of Capital Punishment Reforms in China

It has been observed that:

China has made dramatic progress in reducing the number of executions, but the number is still far too high and declining far too slowly At the present rate of decline it will take many years for the government to reach its goal of abolishing the death penalty. (Dui Hua Foundation 2011)

The Chinese Government's current attitude towards the death penalty appears to be one of progressive reformism rather than abolitionism. On the one hand, the ruling party-state, at various occasions, has voiced its willingness to bring down the number of capital sentences and executions (Hood and Hoyle 2008: 100–1) with certain reservations. On the other hand, there remain significant gaps between the international legal standards regarding the administration of capital punishment and the existing capital punishment procedures, policies and law in China. What are the causes and implications of this ambivalent attitude towards anti-death penalty reform initiatives?

A 'concentric circle' mode of dissemination of international human rights values in China

The evidence from my elite interviews suggests that the elites at the state-level legal authorities were better informed about international human rights concepts and norms than the elites from one level down. Elites from the provincial-level sample group were inclined to reject international influences and human rights values, compared with those within the central-level sample group. In general, respondents at the central-level authorities held relatively open and receptive attitudes towards international appeals to abolish or limit the death penalty on the basis of human rights values than those working in provincial courts and procuratorates.

This variance in knowledge and attitudes towards anti-death penalty activism on the international level among different levels of legal elites could be explained, subject to some qualifications, by the route of dissemination of politically sensitive information in China. 'Human rights' was an alien concept before the late 1970s and has never been fully or substantially recognized by the mainstream penal discourse until now. Further, the topic of human rights acquired a dimension of domestic political sensitivity as China's human rights conditions were targets of frequent criticism by foreign media and organizations (Wan 2001: 9; Weatherley 1999: 1–2).

As China gradually opened its door to the international community, human rights norms and ideas slowly made their way into the official and public discourses. What I describe here is that the foreign-generated information regarding human rights theories, values and practices has been filtered through different layers of social groups across the Chinese society in a pattern resembling a series of concentric rings. The innermost core consists of important policy makers—politicians, legal elites and academics 'at the top' of the political–legal apparatus. They are among the first few coming into contact with all sorts of 'sensitive' information accessible only within the small circle. The sensitive information comprises classified information, 'internal' publications, foreign news bulletins, etc. (Nathan 1986: 173). Foreign reports and writings about China's human rights, due to their political sensitivity, were within this category of sensitive information.

The outer part of the concentric rings can be further divided into multiple circular columns, depending on the group members' status in the state apparatus and their proximity to the sources of information. The commoner group, namely the general public who obtain their information through state-run or state-controlled media, is at the periphery. The information relating to human rights they obtained via conventional methods has been filtered through multiple barriers and thus restricted and shaped by propaganda and censorship. As a result, the perception of and knowledge of the

international campaign against the death penalty held by various social groups, from the centre towards the periphery, became increasingly limited and biased (see [Figure 1](#)).

Understandably, those who have easier access to, and better chances to develop, comprehensive and objective knowledge of Western criticisms of China's human rights practices and worldwide anti-death penalty movements are likely to embrace human rights norms promoting abolitionism or at least restricting the use of capital punishment. In contrast, it is easier for those who have limited and biased knowledge to develop a certain degree of distrust and hostility towards the idea that China's administration of capital punishment still lags behind minimum human rights standards and therefore should be abided by these standards. Understandably, this 'concentric circles' model although not free from the danger of oversimplification, is of considerable explanatory value in understanding the differing attitudes among legal elites and between elites and public towards China's capital punishment reforms.

The divergence between different levels of legal authorities on capital policies

In contrast with the relevant modest knowledge about international human rights norms among my respondents, particularly those from lower-level legal authorities, evidence from the elite interviews confirmed the important role high-level elite scholars and practitioners have played in promoting reforms. This variance among different hierarchies of legal elites indicates that, like policy making in other social areas, reform policies on China's capital punishment regime were decided by at the top echelons of the party-state, rather than motivated by a fundamental change of attitudes among legal elites from all levels, not to mention the general public. In other words, the recent changes in policy and institutions regarding capital punishment in China is an elite-driven reform implemented in a top-down fashion.

In particular, working closely with legal practitioners and legislators, reform-minded academic elites acted as consultants and think tanks in formulating legislations and devising reform-oriented judicial policies. Discontented with the privileged influences of elite scholars in making reform policies, some of my interviewees from lower-level legal

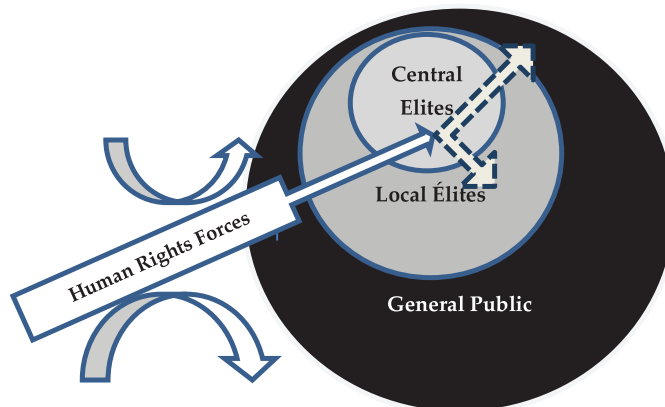


FIG. 1 A 'Concentric Circles' Mode of Dissemination of Human Rights Values in China.

authorities expressed their critical views about China's 'scholar-made law' and 'scholarly administration of justice' on penal affairs in general and capital punishment in particular. A respondent from a provincial court complained:

Law-making in China today—the so-called 'scholarly law-making' or 'elite law-making'—has caused many problems because elites and scholars 'higher up' know little about the social realities or the real public sentiment. The SPC requires, for instance, defendants in capital cases can only be sentenced to death if there is 'object and invariable' evidence supporting the charge of offense. In reality, such evidence is rare because of limited resource or institutional arrangements for the police to carry out investigations. The general public always strongly demands sentencing the defendant to death even without solid evidence. The SPC knew little about ... that being 'soft' (on capital defenders) provokes social stability. They make policies behind the closed cabinet doors. Reforms on the death penalty in China should be based on wisdom obtained from the soil of the Chinese society. Reforms should be promoted in a bottom-up way, rather than in a top-bottom fashion.

Apart from the formulation of capital punishment reform policies, attitudes towards the implementation of these reform policies are also divided among the multiple layers of judicial authorities. Some of my interviewees from the SPC noticed considerable resistance to reform measures among the lower-level legal professionals, particularly soon after the launch of the reform around 2006–07. According to Art. 30 of the Organic Law of the People's Court, the SPC has the supervisory authority to oversee all lower courts across China. While central-level authorities are the most important loci of decision-making power regarding capital punishment policies and law, lower-level judicial organs enjoyed wide discretion while implementing these policies and laws, and frequently stretch the power vested with them to the limit. An interviewee reported that, as early as 2006, lower-level courts and governments nationwide opposed the reform initiative that capital trials would be openly held in second-instance courts. Other interviewees recalled a considerable number of lower-level legal practitioners objecting to the recall of review power in capital cases by the SPC in 2007.

Quite a few provincial-level judges complained about the pressure they faced in capital cases after the launch of the reform aiming at reducing the use of capital punishment. A provincial-level judge reported that his court made an unwritten 'internal' guideline that any offence leading to the loss of more than one life should be punishable by death to prevent the victims' families and friends 'rioting through the streets in front of the court'. Another respondent complained that, almost every day, there were victims' families 'holding banners, claiming that they are aggrieved, and shouting in protest against failure to sentence the offender to death' in front of her court. She explained that concepts such as justice, human rights and due process had little to do with her daily job, while maintaining social stability and appeasing public indignity are the main priorities:

It takes great pain explaining to the victims' family [that the offenders do not deserve the death penalty]. They refused to grant mercy and leniency. They protest by burning themselves to death, committing suicides, carrying the dead bodies of the victims to the SPC in Beijing These guys, they spend years doing nothing but petitioning, know that we are afraid that their conduct may stir up the public indignation and they use this to pressure us. My heart shivers at the thought that the victim family of a case I handled would petition to higher authorities about their grievances on the ground that the defendant is not sentenced to death. I could get into trouble for this ... I try my best not to send people up for petition. Yet the SPC instructs us to bring down the number of capital sentences.

If I sentence someone to death, my verdict may be overturned. It is easier for the people 'at the top' to talk; but it is us who are stuck in a position between the devil and deep blue sea.

In other words, the divergent attitudes between top-level elites and provincial-level elites are possibly a result of their different responsibilities. It is commonly assumed that the Chinese state machinery is a monolith, where, if the authorities at the top decide on a course of action, its agencies act in a uniform and concerted fashion to carry it out. In reality, various tiers of the Chinese legal apparatus fail to speak in one single voice. Decision makers at the top are mainly concerned about alleviating international pressures and preserving China's image as well as reputation by limiting the use of capital punishment. It is further down the chain of the penal apparatus that the administration of capital punishment is closely tied to the political tasks of maintaining social order and stability. The victims' death penalty-seeking families are adept at exploiting these cracks in the facade of bureaucratic machinery to satisfy their desire for revenge.

Despite such divergence over the years, lower courts gradually restrained from meting out death sentences in the absence of legally obtained evidence (Zhang *et al.* 2011), for fear that their cases could be overturned by the top judiciary (Zhao 2011). Evidence suggests that lower courts were increasingly cautious in imposing the ultimate sanction despite their concerns for social stability at the grassroots level. Hu Yunteng, head of the research department under the SPC, reported that the instances of wrongful adjudication by lower courts in capital cases had greatly diminished since review power was recalled by the SPC in 2007 (Zhang *et al.* 2011). Furthermore, it was reported that the annual percentage of capital sentences which were finally overturned by the SPC out of the total under capital review decreased from 15 per cent to 10 per cent from 2007 to 2011 (Zhao 2011; Zhang *et al.* 2011).

How did these changes take place? The review procedure administered by the SPC resulted in a significant decline in death sentences, particularly by overturning capital convictions without sufficient and legal evidence. Yet, commuting capital sentences to lesser punishment through the review procedure is not the sole approach adopted by China's top judiciary to restrict the use of capital punishment; the SPC also put pressure on lower courts to give moderate penal sanctions by tightening its supervision and checks on the discretionary power of provincial and local judicial bodies (Johnson and Zimring 2009: 228). Specifically, my interviews found that the 'ratio of capital cases approved by the SPC'—a ratio calculated by dividing the number of the capital sentences that are eventually approved by the SPC by the total amount of capital sentences meted out by a lower-level court—was adopted by the SPC as a criterion to appraise the willingness and capacity of lower courts to implement the reform policies. In essence, by pegging this ratio to the performance of lower courts as well as judges hearing capital cases, lower courts gained strong incentives to impose death sentences with greater cautiousness.

Overwhelming public opinion in support of the death penalty?

While divorcing transnational penal discourses on the grounds of human rights from the 'messy world of penal populism' (Girling 2006: 77) is possible on the conceptual level, the lines of demarcation could be obscure in reality. This is particularly true in

China's institutional environment, where the social and penal arrangements buffering against populist pressures—commonly seen in European societies—almost do not exist. While many respondents believe China should respond to international influences, all of them insisted that capital punishment policy making in China must closely reflect the 'fundamental national conditions' or 'Chinese characteristics' at the same time, as if the local conditions and foreign pressures are complementary rather than competing. According to one of my respondents:

China has its special national conditions. Although we are not against international human rights standards, the singularity of our fundamental national realities forbids us to accept them indiscriminately. We selectively pick those international standards which are not incompatible with the social realities of our society, rather than accept the whole set of international standards in one move ... critically and gradually accepting those foreign standards that are compatible with our existing institutional arrangements and the psyche of the general public.

Despite the broadness and ambiguity of the concepts of 'Chinese characteristics' or 'fundamental national conditions', further interview findings suggest that these terms are used to describe multifarious factors of Chinese social realities, ranging from political structure to the rising crime rates, to Chinese culture and historical traditions. As an in-depth discussion of all these socio-political conditions of Chinese society is beyond the remit of this article in the following sections, I will focus on the widely claimed 'high public support' (Ogden 2002: 249; Xin 1999) for capital punishment and the populist pressures associated with this public support.

That China's 'public opinion' is in favour of the death penalty was identified by most of the respondents (34 of 36) as one of the causal factors for China's inability to fully embrace abolitionism in the short term. To prove this point, many of them described their personal encounters with murder victims' family members who insisted on punishing the offenders with the ultimate sanction to heal their pain. Yet, some respondents did not believe legal elites in China were well informed of public opinion on the issue of capital punishment. A higher people's court judge, for instance, considered elites 'at the top' are out of touch with the real public opinion. A SPC judge, however, believed that the government and legal authorities stay well informed of the status of public opinion. She said 'we legal professionals have widely-share consensus on the state of public opinion in China, that there is overwhelming support for retaining capital punishment for a wide range of capital offences'.

The findings from the elite interviews show that legal elites in China, regardless of their positions in the hierarchy of legal apparatus, shared common sources of public opinion. To them, the internet is the most commonly used channel to obtain information regarding public attitudes towards capital punishment. Their understandings about public opinion on capital punishment were also heavily reliant on their own experience in dealing with individual capital cases. Further channels of information used by legal elites include state media reports (newspapers, television, and the online news reports) on high-profile cases or controversial legislation, their knowledge of the opinions of those directly involved in individual cases that they dealt with (particularly the victims' family members), general opinions of their acquaintances (family, friends, colleagues, etc.) and, in some instances, the results from small-scale surveys among residents of local areas. In the absence of a nationwide, systematic quantitative

measurement of public opinion, the alleged 'public opinion' on capital punishment is at best a widely shared *perception* of the public opinion. Opinions are formed from the emotionally charged comments posted on BBS forums, online discussion boards, blogs, microblogs, etc. regarding a few high-profile capital cases and cannot be thought to be 'rational' or informed.

Thus, the near-consensus among legal elites that 'the general public in China has a strong desire for capital punishment' seems to be formed on an aggregation of the sketchy thoughts of those who are only vaguely aware of the real complexities of a serious policy matter, fleeting emotions shown online and expressions of personal anger and revenge by the victims' family members. At best, this 'consensus' is a blind assumption taken for granted by legal professionals, reinforced by state propaganda and left unchallenged by empirical studies. Of course, admitting the 'overwhelming public support for capital punishment in China' is a fiction does not prove that it is a false reflection of the reality; rather, the data are inadequate for understanding public opinion.

While Chinese legal elites desperately seek possible sources of information in order to better understand the puzzling, unpredictable and elusive 'public opinion', they find themselves baffled by the lack of accessible and transparent channels of information. Predicting public sentiments and emotions and aligning the outcome of capital cases to achieve the optimal 'social effect' (Supreme People's Court 2010) is therefore a considerable challenge. The possibility of conducting an official nationwide survey on public opinion toward capital punishment is overshadowed by the fact that the Chinese authorities continue to maintain a tight control on the public discourse on capital punishment. Concerned about the possible social instability that public discontent could trigger once the country loosens its grip on information control in this regard, a legislator exclaimed 'How dare you think about the possibility of doing a nation-wide public opinion poll? That's unthinkable and intimidating to me!'

The politics of populist trends in China's capital punishment reforms

It has been shown above that the perception that the general public in China has an insatiable appetite for the death penalty is insufficiently founded. Questioning this unsound presumption, however, does not contradict a possible claim that populist ideas, rituals and practices have far-reaching repercussions on death penalty practices in China. In fact, the Chinese legal authorities are hypersensitive and susceptible to populist influences, including the pressures from victim groups and those who claim to speak 'on behalf of the people' in the mass media. This is particularly true in China's political and legal environment, where judicial organs at all levels lack sufficient independence (Peerenboom 2002: 280–342; Liebman 2007) and individual judges can hardly resist populist punitive impulses.

There are numerous examples of the triumph of public sentiments over 'inappropriate' court decisions in high-profile criminal cases in general and capital cases in particular, when the prevailing public moods are inconsistent with the judicial decision. In such cases, the judicial decision would be overturned and the professional careers of these judges put on the line for offending the 'public opinion' expressed through cyberspace or the mass media (Liebman 2005). Although it is widely believed that

greater scrutiny of and checks on judges' behaviours could help to curb widespread judicial corruption in China, outright populist intervention in penal decision making can also result in arbitrary and excessive penalties. As one of my interviewees said, 'sometimes the defendants do not deserve a death sentence; however, under mounting public pressure, he could be sentenced to death and executed. This is not right'.

This was true even in cases in which the media deliberately misrepresented the facts of the cases, such as the case of Yao Jiaxin (Watts 2011). Yao, a 21-year-old student, hit a pedestrian with his Chevrolet. Afraid that the victim would blackmail him, he took out a knife and stabbed her to death. The media, misled by the victims' family and counsel, portrayed Yao as a 'rich second generation' young person (those whose parents have power and privilege to help them escape from being punished). Yao was sentenced to immediate execution due to the public frenzy demanding him to be executed. According to an online survey about whether Yao should get the death penalty by Yahoo, 96.5 per cent (10,710 out of 11,100) of the respondents said that he should (Lin 2011). After Yao's execution, it became clear that the victim's counsel fabricated the story that Yao's father was a 'government official' and successfully aroused online resentment against Yao and his family (Mo 2011).

The predicament Yunan High People's Court faced in the case of Li Changkui provides another illustration of how judges can be straightjacketed by both populist sentiment and political pressures. The defendant, Li, raped an 18-year-old girl before killing her and her three-year-old brother. After immediate execution was granted at the first instance trial, an appellant judge at the provincial level commuted the sentence to suspended death on the basis of several mitigating factors. After Li's family posted the case facts to popular internet forums, Li's case sparked public outrage across China. Under the huge public pressure demanding Li be executed and the appellant judge be disciplined despite that the fact that his second-instance decision did not err in law or in fact, the second-instance verdict was overturned and Li was sentenced to immediate execution in August 2011 (Wen 2011).

Yao and Li's executions, hailed as victories of public opinion in China, seem to set dangerous precedents that capital decisions are based on manipulated, non-rational, arbitrary and biased sentiment of the unaccountable public, rather than the authoritative professional discretion of legally trained practitioners. Surging tides of public sentiments generated real pressure to spread across the whole society at unusually fast speed, forcing legal authorities sentencing the defendant to the ultimate sanction to appease public indignation.

Populist influences in penal decision making are not new to Chinese society. Since the early years of the Communist regime, populist influences have plagued the administration of capital punishment in Communist border regions (Leng 1967; Griffin 1976). State-encouraged public involvement in penal procedures during mass-line political campaigns over the first three decades of the penal history of China and state-designed populist rituals, policies and practices associated with the Hard Strike anti-crime campaigns in the latter years of the twentieth century serve as excellent examples of the resilience of populist ideologies and practices in the administration of criminal justice in China.⁵ The notion of 'popular justice' is often used by scholars to describe these

⁵ For a more detailed discussion of the populist use of capital punishment in China, please refer to M Miao (forthcoming 2013), 'Capital punishment in China: A Populist Instrument of Social Governance', *Theoretical Criminology*.

forms of state-initiated public engagement with penal processes in revolutionary socialist states, including China (Merry 1993: 31–2; Vogler 2005: 197).

Yet, the populist influences permeating penal administration today differ from the revolutionary-era mode of ‘popular justice’ in two ways. First, popular sentiments influencing penal decision-making processes in today’s China are no longer *aroused* or *mobilized* by the state authorities. Under China’s mass-line popular justice, populist policies were initiated by the state and implemented by penal institutions in a *top-down* fashion. In the lack of social resources and institutional channels to form their opinions on political and penal matters, citizens had to accept the state-designed policies. The advent of the internet era (Yang 2009) and the commercialization of the mass media (Winfield and Peng 2005; Shirk 2007) provide ordinary people with virtual spaces to disseminate information, share emotional and social bonds, and develop and express relatively independent opinions on political and penal matters. Populist sentiments are formed and developed among the people at the grassroots level and are largely genuine⁶ reflections of their will and desires. The expression of public opinions and desires is no longer in the exclusive grip of state propaganda and control.

Second, populist pressures in contemporary China are channelled through established penal institutions and practices, in stark contrast with the non-professional, non-bureaucratic and informal characteristic of the popular justice mode of penal administration in the first three decades of PRC’s penal history. The processes of modernization and institutionalization of Chinese legal system launched in the late 1970s have resulted in a profound shift towards professionalism and formality (Liebman 2011). Although populist pressures remain central to the functioning of penal machinery, the transformations in domestic criminal justice landscapes have fundamentally changed the way in which populist pressures affect capital punishment policies and practices. Over the years, ideologies and practices of popular justice have gradually been replaced by populist arrangements which resemble the institutional arrangements of ‘penal populism’ (Roberts *et al.* 2003; Pratt 2009) in Western liberal democracies.

The term of ‘penal populism’ denotes mechanisms which allow penal policies and practices to be influenced by the prevailing expectations of the general public, or at least the perception of such public aspirations. It responds to the *ground-up* populist pressures forced upon established state penal institutions. In the current institutional environment, capital trials serve as public forums where social forces interact and compete with each other—victims’ families’ needs for revenge and retribution, the general public seeks to express their will and exercise their political power which is disallowed via other public channels under China’s authoritarian governance, the ruling party-state searches for regime legitimacy and stability, local politicians and judges are after lucrative opportunities for personal gains through judicial corruption. In particular, by pressuring courts to bring their decisions into line with volatile outbursts of public sentiments, the party-state thus successfully eases public discontent and resentment which could possibly result in social disorder and undermine the public confidence in the ruling regime.

Undoubtedly, public sentiment does not always prevail over other countervailing forces. Where the nature and fact of a certain capital case fail to capture nationwide

⁶ Admittedly, the formation and development of public sentiments are not entirely free from state censorship and propaganda, which may have reinforced stereotypes, biases, hatred and desires for revenge among people at the grassroots level towards certain social groups, such as criminal offenders, corrupted officials, and those of wealth and privilege.

public attention of sufficient intensity and scale to form a high-profile case, a shift of power balance among various parties may result in more lenient verdicts. A provincial-court judge explained the complex dilemmas associated with capital trials:

We must follow the leadership of the party-state on the one hand, and keep an eye on the elusive public opinion. These two are sometimes competing rather than complementary. Judges need to respond to the prevailing public opinions in high-profile cases to pacify public indignation. While in other cases our decisions must satisfy the instructions from our leaders. This is called ‘the unification of the social effects and the legal effects’. Imposing well-balanced sentences in capital cases is a crucial test for a judge’s political wisdom. It is really no easy job [to be a judge] these days (sigh).

Conclusion

The empirical evidence from my elite interviews confirms that China has been responsive to the influences of worldwide anti-death penalty campaigns led by Europe over the past decade. In particular, shaming strategies threatening to hurt China’s image and reputation have helped to create positive changes, but also enhanced China’s sense of distrust and hostility and forced the government to adopt defensive measures such as creating secrecy around the implementation of capital punishment. Despite significant achievements, Chinese reforms of capital punishment inspired by the international community have been limited in scope and in force. There are several reasons for this. For one, international human rights norms and values are disseminated into Chinese society in a top-down fashion, the strength of which has been gradually reduced as they diffuse into the inner layers of social groups. This pattern of dissemination led to varying degrees of commitment to and knowledge about anti-death penalty norms and ideas among different groups of elites and the public.

Second, findings from elite interviews suggest that the Chinese state should not be seen as a monolithic entity, but a multi-layered and multi-sectional institutional complex with different and sometimes competing interests. Therefore, the attitudes held by elites from different hierarchies of the legal authorities form and change through both clashes of foreign concepts and local culture and the complex interactions among domestic political and legal forces and ideologies. When maintaining political stability and supporting the currently shaky political legitimacy at home become the overriding concerns for politicians and legal elites, international human rights get short shrift. Yet, if advancing the cause of human rights is consistent with or even beneficial to the political interests of the ruling regime, China seems to have real commitment to comply with international standards.

This article has also discussed one of the main justifications cited by Chinese legal elites to reject full compliance with international human rights—high public support for capital punishment. It has shown that the legal elites have only modest knowledge about public opinion in China and that the so-called ‘high support’ is at best a general presumption left unchallenged by systemic research. Nevertheless, it is true that the Chinese legal authorities’ thirst for capital punishment is linked to an unhealthy populist impulse for revenge, where the judges are pressured into sentencing offenders to death by unaccountable or irrational feelings and emotions shared by citizens who engage with public media such as the internet.

In sum, to fully understand the impact of and dynamics created by the internationally inspired capital punishment reforms, it is essential to take into consideration a complex web of interactions between actors at the international, national and lower levels (see

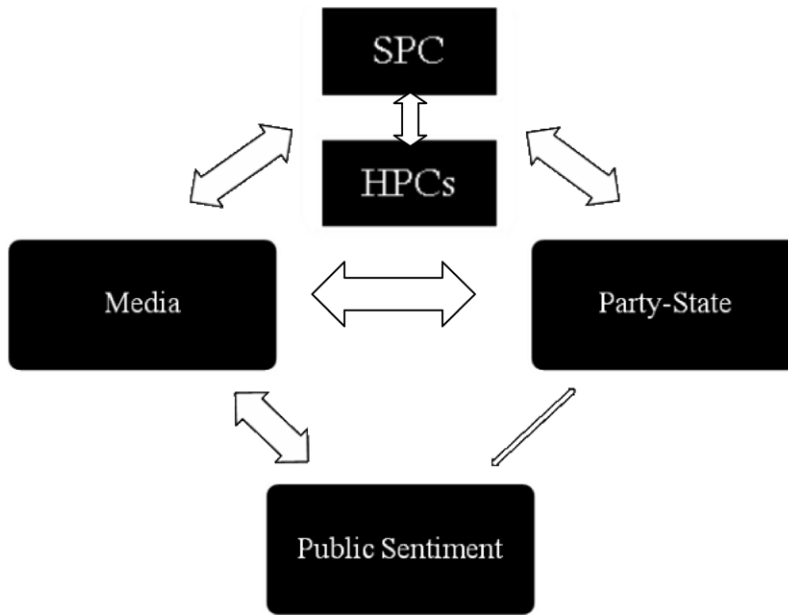


FIG. 2 Interrelated domestic institutions involved in China's capital punishment reform process.

Figure 2). The current status of Chinese capital punishment reforms is the outcome of conflicts, compromises and power plays between various stakeholders involved in the reform processes. On the one hand, it is likely that China will be less vulnerable to external pressures and will have more leverage to do things its own way given its demographic weight and increasing influence in international affairs. Nevertheless, it is equally safe to predict that international human rights forces will continue to pressure China into further reforms to restrict its use of the ultimate penalty in the future. Further, as the Chinese Government is increasingly sensitive to public sentiments and capital punishment reforms can be a source of public discontent, it will be more cautious to make and implement new policies to curtail its use of capital punishment. Structural factors will continue to loom large in China's reform agenda in the future.

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