

Capital Punishment and State Sovereignty in China

Timothy BROOK
University of British Columbia

ABSTRACT

This essay considers the argument that Chinese legal exceptionalism with regard to its use of the death penalty derives from China's Marxist/Maoist rather than its imperial history. Starting from the premise that capital punishment is the purest expression of state sovereignty under any political constitution, the essay inquires first into the general relationship between the state and punishment, then into that relationship as it is represented in the legal rhetoric of imperial law during the Ming dynasty. Reflections on some of the dynamics of debates over appropriate penalties a century ago as well as today lead to the conclusion that, despite the extensive reliance on the death penalty in earlier times, China's legal exceptionalism resides primarily in its experience with Marxist jurisprudence rather than with its own indigenous traditions.

Keywords: capital punishment, Communist Party, death penalty, dictatorship, Jacques Derrida, law, lingchi, sovereignty, state

State Sovereignty as the Condition for Taking Life

Capital punishment is the purest expression of state sovereignty.¹ The state and the state alone is the sole entity deemed legally to possess the authority to take life. No state has ever provided an exception in its laws to this prerogative. Even when a law code specifies a derogation such as killing in self-defense—a concession that acknowledges the sovereignty of the person over his own body—it does so in the confidence that taking life is ultimately within its prerogative alone. Only the state is authorized to end a person's life against his will.

Authorized, but by whom? By itself, of course. How this authorization gets worked out in practice or represented in legal documents depends on the political constitution of the state in question. Regardless of whether that constitution is an open legislative democracy or a dictatorship of the proletariat, every state vests within itself the authority to kill those over whom it claims sovereignty. So long as the state's claim to sovereignty is not in question, it enjoys the exclusive right to take life. Other than as the state's proxy, and then only by explicit delegation, no entity or person other than the state can kill.²

The purity with which capital punishment expresses state sovereignty is not immediately evident to us today, given that executions lack the visibility they used to have. Under earlier penal regimes worldwide until the nineteenth century, that purity was made manifest to a state's subjects without the least ambiguity by

obliterating the condemned at a public execution. Here, as Jacques Derrida has noted, sovereignty found expression in the most unmediated of ways.³ The state gave its judges the privilege of sentencing the condemned to death (dramatized in English law right into the twentieth century by the tradition of donning the black cap, a square of black cloth that the sentencing judge was obliged to place on his head before pronouncing the judgment and sentence). So too the state suspended the usual rules against killing by authorizing the bureaucrats, sub-bureaucrats, jailors, doctors, and executioners employed in the execution to perform all the tasks leading up to the taking of life without incurring the culpability that normally attends such acts. These deputies were thereby othered, removed from themselves. They were endowed with a mystical aura that enabled each to act not as himself but purely as the agent of the state. Furthermore, these agents of execution did not just kill or witness killing; they performed their work of killing in public, and not by accident or oversight. The state needed them to be seen at this pure moment of enacting its sovereignty on the body condemned to obliteration.

This state of publicity was the case until the latter part of the nineteenth century, when executions, at least in Europe, were largely removed from public sight, a process that Michel Foucault famously analyzed as a transition from mere corporal punishment to redemptive psychic discipline.⁴ By a trick of timing, this occlusion was delayed in many places outside Europe, China most notably, until the twentieth century.⁵ The new invisibility in no way diminished the presence of the state that the act of execution projected. Indeed, it may have been enhanced by the secrecy that came subsequently to cloak the judicial taking of life, removing that act from the frequently messy spectacle of actually putting someone to death, thereby purifying it in the minds of subjects/citizens. In the socialist states of Asia, where stand-ins for class struggle have been regarded as instructive execution targets for public education, the process of removal from the public eye has been slow. In China, executions during the Cultural Revolution were intensely public events in which the entire community was expected to take part.⁶ Only in recent decades have executions in China been sequestered from public view. Now they

¹ I wish to thank Professor Park Sohyeon, translator of the Korean edition of *Death by a Thousand Cuts*, for the invitation to present a version of this essay at Sungkyunkwan University in September 2010; and Professor Laura de Giorgi of Ca' Foscari University, Venice, for asking me to present a revised version in November 2010.

² I set aside three issues that could arise and complicate the arguments made in this essay: the killing of external enemies in war, the conscription of citizens to wage war and so risk death, and the rejection of an occupying state's claims to sovereignty by peoples seeking self-determination.

³ Jacques Derrida, "Pardon-Perjure: Peine de mort (1999-2000): Séance du 8 décembre 1999" (unpublished typescript, Paris, 8 December 1999), 3. Jacques Derrida's insights into the moral problems of capital punishment inform much of the thinking in this essay; I wish to thank Professor Zhang Ning for providing me with a transcript of the seminar I cite here.

⁴ Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Pantheon, 1977).

⁵ Timothy Brook, Jérôme Bourgon, and Gregory Blue, *Death by a Thousand Cuts* (Cambridge, Mass.: Harvard University Press, 2008), 25-28.

⁶ Yang Su, *Collective Killings in Rural China during the Cultural Revolution* (New York: Cambridge University Press, 2011).

are the objects of intense secrecy, a secrecy so great that knowledge of statistics about the number of people actually executed at any place or over any period time is treated as a state secret, from which follows criminal liability. Executions nonetheless continued to feature the omnipotent state: at least into the 1970s and probably well beyond, the executing state sent an official to the home of the executed to collect five cents, the price of the bullet expended on the condemned.⁷

Stripped of its visibility, enhanced by its invisibility, capital punishment preserved its essential purity in its consequence: the termination of a life. Death is a permanent sentence, the terms of which cannot be adjusted later. It precludes a more partial way of working off the legal or moral debt for which punishment has been applied. Once done, furthermore, there is no back-tracking and no useful appeal against its having been executed. Chinese courts in the 1980s did hand down posthumous rehabilitations that reversed capital sentences imposed during the Cultural Revolution and before, but this hardly constitutes a serious legal limitation on state sovereignty. For the relatives of someone whose death sentence has already been carried out, a successful appeal may restore confidence in the state's capacity to deliver justice; on the other hand, it may just as easily inspire nothing but contempt for the entire judicial apparatus that allowed the original sentence to be handed down and carried out in the first place.

The indivisibility of state sovereignty and capital punishment has not impeded some states from abolishing the penalty. The fact that such abolitions can proceed only on a state-by-state basis further underscores the indivisibility of capital punishment from sovereignty: only the state can forego what is the state's alone to forego. The tiny European country of San Marino has the distinction of being the first to outlaw capital punishment, which it did in 1848, followed by Venezuela in 1863, Portugal in 1867, the Netherlands in 1870, and Costa Rica in 1877. Others gradually followed suit, though not until the 1980s did the abolition of capital punishment approach the status of a global legal norm. Currently ninety-six states have abolished it entirely, nine have ruled it out for ordinary crimes but have reserved it for military or other extraordinary crimes, and another thirty-four have discontinued its practice while keeping the penalty on the books. Even though the statistics by state suggest that over two-thirds of the world's governments eschew the killing of the condemned, Asia emerges as a zone of stark exception, for roughly 95% of Asians live in jurisdictions in which capital punishment is either still used or on the books.⁸ While there has been a decline in the use of the death penalty in Asia since the 1990s, the overall trend away from capital punishment worldwide is not irreversible. In 2010, death sentences were handed down in at least sixty-seven

⁷ Zhang Ning, "The Political Origins of Death Penalty Exceptionalism: Mao Zedong and the Practice of Capital Punishment in Contemporary China," *Punishment and Society* 10, no. 2 (April 2008), 130-31.

⁸ David T. Johnson, "Asia's Declining Death Penalty," *Journal of Asian Studies* 69, no. 2 (May 2010), 338.

states and carried out in at least twenty-three, up from nineteen the previous year.⁹

The reasons why a state might divest itself of the option of putting its own citizens to death are many, not least of which since the 1980s has been the desire to appear to cleave to international judicial standards in order to appease allies and placate aid donors. China has resisted this logic, yet it has conceded the principle, declaring that it will abolish capital punishment in the long run once the surge of criminality in the current transition has dwindled (without explaining why that might be so). An argument can be made that such standards are not organically international but have arisen solely out of European traditions of justice and punishment, and that China need not feel itself bound by cultural imperatives arising from a different history, but this has not been a significant feature of anti-abolitionist discourse in the past two decades and not an argument we need examine closely here. The point is simply that many states, for a variety of reasons and regardless of judicial traditions, have abandoned the use of the death penalty. And yet China, which executed more of its citizens that year than did any other state, remains the prominent exception.

If states are giving up the death penalty, does our axiom linking capital punishment to state sovereignty mean that this sovereignty is compromised by the move away from executions? Not necessarily. One could argue that, while the exclusivity of state sovereignty has certainly come under pressure in the past decade, the non-governmental campaigns against the death penalty by Amnesty International and other organizations have in fact diminished the legitimacy of the claim of states, enshrined in United Nations protocols, that there can be no interference in their internal affairs. Nonetheless, sovereignty has not been jeopardized by the ban. States continue to reserve to themselves the right to decide whether to employ the death penalty or not, and even more tellingly, the right to reverse that decision.

Reversal is always a possibility with any legal or legislative decision. The United States provides the clearest example. In 1972, the Supreme Court in *Furman v. Georgia* declared capital punishment “cruel and unusual” and therefore a violation of the Eighth Amendment of the U.S. Constitution. Several state legislatures were quick to respond to the *Furman* decision by rewriting their death penalty statutes and then going back to the Supreme Court for a new judgment, which they duly obtained four years later. The Court not only allowed the constitutionality of the new statutes but went one step further by reversing itself on the Eighth Amendment, declaring the death penalty not “cruel and unusual.” The ban on capital punishment, much celebrated in some quarters when it was achieved, lasted barely four years.

In separate opinions on the *Furman* case, Justices William Brennan and Thurgood Marshall argued that the death penalty was unconstitutional. Their position as judges obliged them to argue against capital punishment on legal rather

⁹ Information on the current status of the death penalty has been drawn from the website of Amnesty International, accessed August 7, 2011. On the sharp decline in death penalties in Asia since the 1990s, see Johnson, “Asia’s Declining Death Penalty,” 339-40.

than moral or social grounds: it was not an offense against humanity but an offense against the constitution. I mention this to remind us of the obvious fact that legality in a state system derives solely from whether it conforms to that state's constitution. Whether a state executes criminals or not, the authorization of capital punishment relies on legal and political processes internal to the state making this decision, as does its rejection. These processes need never finish, which is why abolition is not the end of capital punishment, simply its suspension until such time as a contrary legal logic might allow for its reinstatement, as happened in the United States in 1976. What this means is that state sovereignty is in no way impaired by the decision of its highest court. Abolition is not achieved in the absolute. It is a legislated political act that confers the right not to be put to death at the time it is enacted. It does not remove the possibility of capital punishment from a state's penal repertoire. Freedom from the death penalty is not a right but a gift: a gift first to those on death row, but as well a gift to those not yet condemned, which is all citizens.

Such a gift is not easy to make when the giver's capacity to assert authority is tenuous or tendentious. State leaders under challenge or constraint will find abolition so much more difficult to permit than those that are not.

Rule of Punishment, Rule of Law

The People's Republic of China currently provides the death penalty for sixty-eight crimes, from high treason to tax fraud. China is thus distinguished not only by the number of people it puts to death but by the number of crimes for which they can be so sentenced. Zhang Ning, the leading historian of capital punishment in modern China, has argued that China's sharp departure from state norms constitutes a significant exception. She traces China's exceptionalism to Mao Zedong, whose conception of capital punishment she argues came mainly from Mao's interpretation of Marxist theory.¹⁰ While I am sympathetic with Zhang's analysis, I would like in this essay to reflect further on where China's current approach to capital punishment comes from by considering contemporary practice in relation to China's long historical experience with the death penalty during the imperial period.

Let us begin with modern history: the creation of a legal system under the so-called dictatorship of the proletariat. The Marxist conception of capital punishment to which Mao subscribed relies on the conviction that the socialist state must always be under threat, whether from bourgeois elements at home or from capitalist states abroad. Facing conditions hostile to the interests of the great mass of the people, the state claiming to represent them arrogated to itself the right to use violence against such threats. Marxist theory declined to distinguish the sovereignty of the state from the sovereignty of the Party at the time of seizing power. Under immediate post-revolutionary conditions, the one was the other. Where Mao and some other Communist leaders went beyond this theory was to insist that the identity of the state and the Party must continue beyond

¹⁰ Zhang Ning, "The Political Origins of Death Penalty Exceptionalism," 119.

the revolutionary seizure of power. The threats were over, but the dictatorship and its means of violence must continue. In practice, right from the beginning of the 1950s, this Party/state dictatorship became *carte blanche* for the Chinese Communist Party to execute whomever it decided was an enemy of the people, regardless of whether judicial procedures were followed.

Although revolutionary ideology has disappeared from state propaganda, the Communist Party continues to treat the state as its exclusive operation, reserving for itself the option of moving state operations whenever necessary onto an emergency footing. Mao's notion that the Marxist state must protect its power at all costs, and that the execution of internal enemies is one of those legitimate costs, remains a fundamental principle of the Chinese judicial system today. And it enjoys broad acceptance well past the revolutionary phase. As Zhang Ning has noted in another essay, the regime's willingness to execute "bad elements" remains generally popular.¹¹ The bad elements may now be corrupt officials rather than capitalist exploiters, but the willingness to condemn people to death draws on the same moral reservoir of righteous indignation that the Communist Party has inculcated in the Chinese people. The fact that many of those sentenced to death are Party members who have used their political power for private gain is not perceived as a contradiction. The Party remains sovereign, and so long as it does, the rule of punishment rather than the rule of law continues in the ascendant.

It is not difficult to discern Chinese precedents collapsing the authority of the ruling elite with the identity of the realm that stretch back well beyond Mao Zedong into the imperial past. The realm was quite literally the possession of the emperor, and it remained so through time by virtue of dynastic logic, which on the death of an emperor passed the realm intact to another male within his family. In the Ming dynasty (1368-1644) on which I will draw for my examples in this essay, the word for both the realm and the dynasty was *guojia*, the term we use today for "nation-state." I would argue that Ming people differentiated these concepts even while they could employ the same word for both, and that which meaning prevailed depended on context. The point is that the dynastic state and the Party state share a similar duality of structure and meaning. My purpose is not to develop a full argument and body of evidence for the existence of an imperial precedent for the Party state, only to offer this proposal as a connective background for thinking about the influence of imperial penal law on the role of capital punishment in China today. It is not difficult, in fact, to argue that Mao Zedong's conception of capital punishment has significant links to the ideology and practice of the death penalty during the imperial era, and that these deserve to be taken seriously.

The Death Penalty in Imperial Law

Imperial legal culture accepted death as the supreme penalty for committing the

¹¹ Zhang Ning, "Public Opinion and the Death Penalty Debate in China," *China Perspectives*, no. 1 (2010).

worst crimes.¹² Most of the death sentences in the successive dynastic codes since the Tang dynasty were for treason, murder, robbery, official malfeasance, and failure to perform military duty. The status of these as capital crimes, at least in the official articles of the Code, remained reasonably stable over time. Adjustments were made in the statutes specifying how an article in the Code should be interpreted based on particular circumstances, though while these proliferated in the Ming and Qing dynasties, they did not affect the supremacy of the death penalty.

Sovereignty occupied a prominent position in imperial law by virtue of the placement of a set of crimes called the Ten Abominations (*shi'e*) in the very front of the Code. These ten categories of crime date back to pre-Tang precedents but were formally enshrined in the Tang Code and then repeated without alteration on the opening page of all subsequent codes. Not all ten were punishable by death, as some were put on the list to stress the importance of certain moral values within society without touching directly on the authority of the emperor and his dynasty. The clear purpose of singling out these ten crimes, capital or otherwise, was to publicize the sanctity of the moral political order that the emperor represented as well as the sanctity of his own person. The first three abominations are plotting sedition in the three guises in which imperial law understood it: *fan*, rebellion, which commentators glossed as overturning the Altars of Grain and Soil that instantiated the dynasty as Heaven's will; *dani*, sedition, glossed as going against the rites and institutions of the imperial household; and *pan*, revolt against one's country or ruler by serving the interests of another. All are capital crimes, as they would be in most premodern law codes and continue to be in some contemporary codes as well. The sixth abomination groups a series of acts disrespecting or otherwise compromising the person of the emperor—some of which are capital crimes and others not. The other abominations have to do with perverting the moral order of the family or defying the authority of officials—not directly threatening state sovereignty but by implication undermining the moral order sustaining the Confucian state.¹³ Most of these were crimes regarded as cutting to the very core of the state's political survival and moral legitimacy, and for that reason had to be highlighted in every edition. But only the worst carried the death penalty.

The link between capital punishment and imperial sovereignty was highlighted not only by the Ten Abominations but by the procedure that required the emperor to sign off on all executions. Every capital case that went through the regular procedures had to end up on his desk for review and final confirmation. The emperor's essential role in the death penalty process signaled that the state regarded capital crimes as touching directly on his rulership, even if the crimes

¹² On the death penalty in late imperial China, see Brook et al., *Death by a Thousand Cuts*, 50-54.

¹³ Lei Menglin, *Dulü suoyan* (Desultory readings notes on the Ming Code), ed. Huai Xiaofeng (Beijing: Falü chubanshe, 2000), 3, 307. Jiang Yonglin, *The Great Ming Code / Da Ming lü* (Seattle: University of Washington Press, 2005), lxvi, 18-19. The Ten Abominations had an ambiguous legal status, as a judge could not decide a case exclusively with reference to them but had to refer to a particular article in the Code to justify his judgment and his sentence.

committed had nothing to do with sedition or other direct threats to the throne. The taking of life was ultimately the unique responsibility of the emperor.

Punishments were of particular interest to Zhu Yuanzhang, the founder of the Ming dynasty (r. 1368-98), and became more so through the course of his troubled reign. In his first dozen years on the throne, Zhu espoused the ideal of reducing punishments in order to lead people to good conduct. As he recalled in the preface he wrote for the last edition of the Ming Code published during his lifetime, in 1397, “When We came to possess the realm, We ruled by imitating the ancients: clarifying rites in order to lead the people, establishing laws in order to restrain the obstinate, and publishing these as regulations to be observed in perpetuity.” His hope that this policy would lead the people toward goodness was dashed by reality, however, causing him in the wake of the great purge of 1380 to abandon moderation for harsh retribution. The preface continues: “Yet somehow criminals continued to appear one after the other, and as a result We had to promulgate the harsh methods of the Five Punishments in order to rule them.”¹⁴

The failure of sagely government to transform the realm genuinely puzzled Zhu. In one of his many requests for instruction from his officials (which cannot be dated to before or after 1380), he asks, “We have heard that the rule of the Three Sovereigns and the Five Emperors consisted in using punishments sparingly but being strict in carrying them out, [with the result that] the people sang to the beat of wooden drums and knew nothing of war. How did they bring them to such a state of happiness?”¹⁵ The answer he wanted was that the rigorous application of well publicized punishments would inhibit wrong-doing and protect the people from those who would exploit them, but this did not work in practice. People insisted on committing crimes under the new order, just as they had under the Yuan regime. Zhu felt he had no choice but to reanimate the Five Punishments, particularly the fifth, the death penalty. In a phrase Zhu much repeated through the second half of his reign, he had “to put X to death to show the masses” (*chusi shizhong*) that the state had carried out the punishment appropriate to the crime, and that the state would do the same again to anyone who committed the same crime.

But that was not all. Zhu Yuanzhang intensified the supreme penalty of death by resorting to some extreme forms of cruelty, including *lingchi*, the so-called death by a thousand cuts that put the condemned to death through an extended procedure of cutting rather than by a single decisive blow. He also intensified the use of the death penalty by rendering it into a regular mechanism of state action, executing vast numbers of officials whom he suspected of corruption.¹⁶ It was

¹⁴ Zhu Yuanzhang, “Yuzhi Da Ming lü xu” (Preface to the imperially authorized edition of the Great Ming Code), in Lei Menglin, *Dulu suoyan*, 1. Two of the Five Punishments were corporal, two were servitude and exile, and the fifth was the death penalty, distinguished between lighter (strangulation) and heavier (decapitation).

¹⁵ Zhu Yuanzhang, “Wen xingshang” (Questions on punishments and rewards), in *Ming taizu ji*, (The writings of the founding Ming emperor), ed. Hu Shi’è (Hefei: Huangshan shushe, 1991), 200.

¹⁶ On Zhu’s reversion to extreme punishments after 1380, see Brook et al., *Death by a Thousand Cuts*, 102-15.

his own officials failing to live up to his moral standards and expectations that exasperated him most, and they more than anyone whose reduction to death should be shown to the masses. We read this sense of exasperation in the diatribes against corrupt officials he collected and published in a series of “extrajudicial” texts known as the *Grand Pronouncements (Dagao)*.¹⁷ Here he represented infractions against the laws of the realm as offenses not just to himself but to the people, he and they united by his ruling on their behalf and in their interest. Their righteous indignation against official corruption was his concern as much as the corruption itself, every act of which was thus construed as an attack on the sovereignty of the dynasty. Their indignation as subjects confirmed his sovereignty as emperor.

Zhu Yuanzhang was in many ways not typical of Chinese emperors. He was keenly involved in the affairs of his state, directly engaged in the work of administration, and intensely vigilant about building and maintaining his authority as a recently enthroned emperor who, a mere peasant, had neither family nor aristocracy to call upon in his support. Of course a founder stands in a different position than a successor—which is what most Chinese emperors were. A new dynasty is far more likely to collapse than to survive, and a founder has to make special efforts to assert his legitimacy. The mandate of Heaven is never unambiguous, and a founder must be adroit at summoning all the cosmic and moral signs he can to assure the people that he is the chosen one and his rule their destiny. The burden is on him to verify the legitimacy of his regime, and to institutionalize his and his family’s rule so thoroughly that the mere idea of another dynasty replacing his and taking away the loyalty of his people is inconceivable. But it is not so inconceivable that *fan*, *dani*, and *pan* could never be imagined. Zhu had the usual founder’s worry that a subordinate would rise up and replace him, and he acted out this anxiety in the great purge of 1380. But he was also attentive to the erosion of his authority that corruption at the interface between his officials and the people could cause. That legitimacy had to be defended at all costs, which in Zhu’s case included not just the supreme Fifth Punishment, decapitation, but the extreme punishment that replaced it, death by a thousand cuts. No death that might serve the survival of his dynasty was too great a price to pay.

The Spectre of Difference

How do these attitudes bear on the widespread use and popularity of capital punishment in contemporary China? It is difficult to prove unambiguously that the popular understanding of the death penalty in China today must flow from earlier attitudes, but it is not so difficult to see it implied. The problem is what assumptions are imported along with this anodyne observation.

One assumption, which I regard as flawed, is that Chinese and Europeans look back to traditions that are fundamentally different. This I suspect will not help us understand either. One can certainly find statements of principle and procedural provisions that distinguish these traditions, and it is not difficult to show that the

¹⁷ Although “extrajudicial” is a distinctly modern concept, the term reasonably approximates the language Zhu used when he declared his pronouncements *fawai fai*, “laws beyond the laws.”

larger political edifice in which each tradition is lodged differs from others. But at least in relation to capital punishment, it is difficult to sustain a difference when we recall that British law early in the nineteenth century had 223 capital crimes on its books—less than twenty fewer than the number of capital crimes in the regular articles of the Ming Code. On this basis at least, it is hard to see any real difference between Chinese uses of the death penalty and British uses. The differences are mostly to be found in subsequent transformations, and most exposed today. As capitalism reorganized European society, a series of revisions stripped the death penalty out of European law to the point that today there are no capital crimes in European law (so long as we exclude Israel, which retains the death penalty for certain extraordinary crimes, and the Russian Federation, which has not abolished the death penalty but has not used it since 1999). Chinese law still has sixty-eight.

In China, the first significant shift in the culture of capital punishment came in 1905, when the Qing dynasty abrogated the use of extreme punishments, most notably *lingchi*. Once the supreme penalty in Chinese law, *lingchi* was declared “irregular” and removed from the Code. The supreme penalty became an extreme penalty and was banished, replaced by simple execution. The abolition of *lingchi* was prompted by the Western perception that Chinese law was inhumane, dismemberment most representing that inhumanity. However, the jurists in the Justice Ministry who dismantled the *lingchi* laws succeeded in doing so by citing well established arguments drawn from an indigenous tradition of opposition to extreme punishments going back to the Song dynasty.¹⁸ The abolition of *lingchi* did not start Chinese jurists on the road to the abolition of capital punishment. For most, death would remain the supreme penalty and not an extreme one. But it did mark the beginning of a transformation away from severe corporal punishments toward the sorts of restraint-based sanctions enshrined in nineteenth-century European law codes. Though it has not brought about the end of capital punishment in all its forms, it did initiate the process of judicial revision that has occupied Chinese jurists down to the present.

Chinese jurists today continue to be engaged in strident debates over laws and punishments. Let me exemplify these debates by choosing one from last year dealing with capital punishment. Jurists inside the Ministry of Justice have been arguing the place of the death penalty in China’s punishment system since at least 2005, and in August 2010, Xinhua News Agency reported that the State Council had forwarded a draft amendment to the criminal code proposed by the Ministry to the National People’s Congress. Among its proposals was that the number of capital crimes be reduced from sixty-eight to fifty-five. The crimes taken off the list were mostly white collar crimes, such issuing false value-added tax invoices or fraudulent letters of credit. The revision also proposed that the death penalty be excluded as a punishment for those over seventy-five years of age.

Shortly after the story was released, Tsinghua University law professor Zhou Guangquan gave an interview in the popular magazine *Southern Weekend*. In this interview he both called for greater limitations on the death penalty and at the

¹⁸ Brook et al., *Death by a Thousand Cuts*, 95-96.

same time dampened expectations. Since 1997, he noted, almost no one has been sentenced to death for the thirteen offenses up for removal. From one point of view, then, downgrading these crimes from capital status could be regarded as little more than bureaucratic house-cleaning. Amnesty International at the time suggested as much, doubting that the change would make a dent in the actual rate at which Chinese are sentenced to death. Subsequent events have borne this out.¹⁹ Zhou also acknowledged that the reduction was “to a certain degree a response to foreign concerns.”²⁰

Cynics could conclude that the revision was intended merely as window dressing, an attempt to appease foreign critics of capital punishment without really addressing its role in the punishment system. Yet as I have just argued with regard to the 1905 reforms, it may be that the concern over foreign disapproval was to some extent a feint designed to distract law-and-order fanatics from blocking the change. In truth, Professor Zhou and his law school colleagues at Tsinghua University have for some years been advocating sweeping changes to China’s justice system, very much against the opposition of politicians who play to popular sentiments and understand little about the law. Given the opposition they face, these jurists need all the arguments they can muster, including the placation of foreign critics, to push reforms forward.

Zhou was right to be concerned. Immediately after the announcement, some delegates of the National People’s Congress came out in public to oppose the reform. One delegate, a medical professor named Cong Bin, insisted that the death penalty was the only way “to ease public indignation for financial crime.” From the perspective I seek to present in this essay, this comment is a quintessential piece of rhetoric about law that can be traced back at least to Zhu Yuanzhang, who would have agreed that public indignation is the best way to resurrect the bond between a dynasty and its people. He too understood the death penalty as an aid to sovereignty.

The Imperative of State Sovereignty under Socialism

How might these various historical perspectives shape how we think about Chinese legal exceptionalism? I believe that they encourage us, from a certain perspective, to ease China out of the purdah of judicial exceptionality. As I have noted, imperial penal practices show little significant difference from European practices. Europe may not have separated out a set of Ten Abominations, but by assigning capital punishment to the most serious crimes, especially those pertaining to the sanctity of the ruler’s person, the underlying logic of political crime in both systems—that attacks on the person and symbols of the sovereign were by extension attacks on the sovereignty of his realm—was roughly the same. Only in the nineteenth

¹⁹ Amnesty International, “China Death Penalty Reforms to Have Little Impact” (accessed August 24, 2010), online @ <http://www.amnesty.org.au/news/comments/23570/>.

²⁰ Zhou Guangquan, “Greater Steps can be Taken to Reduce the Death Penalty,” translated from *Southern Weekend*, 26 August 2010, in *Dui Hua Human Rights Journal*, 1 September 2010, online @ <http://www.duihuahrjournal.org/2010/09/translation-commentary-greater-steps.html>.

century did the Chinese and European traditions part company. The Qing dynasty soon found itself out of step, but after the humiliation of the Boxer Rebellion, agreed to let the Justice Ministry revise its legal code in what at the time was called a “civilized” direction.

Today in the People’s Republic, not dissimilarly, the Justice Ministry is engaged in its own round of revisions, prompted in part by international norms, in part by its own legal experience, and in part—pace Cong Bin—by demands from within society for a less draconian, more responsive justice system. This gives me reason to believe that Chinese legal culture today contains within it traditions that enable it to adapt to influences, both domestic and from beyond its borders, rather than simply reject them.

If China appears exceptional, it might be more profitably seen to be so by virtue of occupying an exceptional moment in the long-term evolution of Chinese law. To condemn China out of hand for its legal failures risks indulging in the “legal Orientalism” that has plagued the comparison between Chinese and Western law for two centuries.²¹ It is more helpful to recall that law in every culture is an ongoing and unfinished process, affected not only by the legal reasoning of jurists but by the evolving juridical consciousness of ordinary people in dialogue with a wide range of influences, foreign as well as indigenous.²² This is not to assume that Chinese law must eventually converge with Western law. It is to suggest that as China engages more deeply with the rest of the world, particularly in relation to the issue of capital punishment (an issue over which Western law, if the United States may be included in that category, remains divided), its laws will adapt to a range of circumstances whose outcomes we cannot perceive in the present. There is nonetheless a gap between Chinese and Western law, and its core feature is not so much penal law as the sovereignty from which the law derives.

Let us return to the problem of state sovereignty. I proposed in the opening sentence of this essay that capital punishment is state sovereignty’s purest expression. I offered this axiom not simply to question the extensive use of the death penalty in the People’s Republic so much as to situate that use within a broader frame of analysis. I have proposed that all states deal with capital punishment in the context of sovereignty, and that abolition is never a permanent entitlement of citizens, only a gift, and one that may be withdrawn if political circumstances changes. It is from this theoretical position that I want to offer closing comments on capital punishment in the People’s Republic.

The issue of capital punishment is not purely a legal question. In China it is intimately connected to the political construction of the People’s Republic as a Communist Party state. The sovereignty of this state as presently constituted is

²¹ See Teemu Ruskola, “Legal Orientalism,” *Michigan Law Review* 101, no. 1 (October 2010), 179-234. On the formation of legal Orientalism in the nineteenth century, see Li Chen, “Law and Sensibility of Empire in the Making of Modern China, 1750-1900” (Ph.D. diss., Columbia University, 2009).

²² On the juridical consciousness of ordinary people in China, see Mireille Delmas-Marty, “Le Laboratoire chinois,” in *La Chine et la démocratie*, ed. Mireille Delmas-Marty and Pierre-Étienne Will (Paris: Fayard, 2007), 803-36. I might note that Delmas-Marty is perhaps more prepared than I am to recognize legal practices and attitudes from the imperial era as active in contemporary Chinese law.

entirely conditional on the hegemony of the Party. The Party has explicitly ruled out the supersession of this constitution, a view expressed in the old and much-repeated Maoist slogan, “Without the Chinese Communist Party, there would be no New China.” It is perhaps time to see this as a claim rather than a historical necessity. China has managed constitutional transitions in the past without a loss of sovereignty, notably the transition from dynasty to republic in 1912. The Communist Party nonetheless insists that it furnishes the People’s Republic with the necessary condition of its existence. When sovereignty is cast in this form, the state’s core operations pertaining to political, military, and judicial power cannot be separated from Party control. This model was widely experimented with through the twentieth century, but survives today only in North Korea and two or three other socialist states.

So if Chinese exceptionalism appears to characterize the field of law, I argue that it derives from the relationship of the Communist Party to the state rather than from traditions of Chinese law. Zhang Ning is therefore correct in arguing that if we are to look for the source of legal exceptionalism, we should do so in Mao’s tutelage in Marxist theory. Imperial judicial habits may have made easier Mao’s embrace of the Marxist commitment to monopolize state power, yet that historical condition cannot be assigned unique responsibility for the operation of Chinese law today, given that other Communist parties around the world took the same approach during their revolutionary phases, and that most chose to operate a dictatorship of the proletariat even after attaining power, and that capital punishment was universally embraced as a just way of dealing with counterrevolutionaries.

It is in this context that China’s use of the death penalty may be understood. The gift of its abolition has to come from the Party. But when the Party is unwilling to relinquish supreme power, it must preserve a supreme penalty that is capable of expressing its sovereignty over the Chinese state. Only the death penalty has that quality, which is why it must remain a gift permanently withheld. The Party of course has other ways of killing its citizens, as happened in Beijing in 1989 at the end of the Democracy Movement, or to choose an event closer to the present, when it suppressed the street demonstrations in Urumqi two years ago. Despite pleas from many, Chinese courts have refused to hear any legal cases concerning deaths arising from either suppression. Given the zero-sum logic of Marxist justice, the law cannot be permitted to make any concession to an alternative judicial construction of what happened. Someone who dies during an event that challenges the sovereign position of the Communist Party has forfeited the opportunity for legal action. The onus of fault is always on the subject and never the state. Capital punishment is thus but one of several forms that the socialist state’s right to put its citizens to death can take.

While I have pursued this inquiry from the position that the abolition of state killing is a political rather than a legal ideal, it is not my intention to isolate China for its failure to establish the rule of law. Rather, it is to situate the most extreme penalty available in Chinese law in theoretical relationship to evolving global norms, and by so doing, to find it along a spectrum rather than in a separate category. From this perspective, China need not be seen not as fundamentally

aberrant in law, but as operating with a political constitution that cannot operate, at least in the medium term, without the death penalty. What distinguishes the Chinese case is therefore less some sort of essential cultural Chineseness—although the language of sovereignty in Chinese imperial law is difficult not to hear at times in the legal rhetoric used in contemporary China—than the Marxist origins of contemporary Chinese jurisprudence. So long as the state represents itself as an embattled bastion of socialism—today a theoretically incoherent polemic utterly at odds with China’s rise as the central player in global capitalism—the sovereignty that capital punishment expresses will therefore continue to be an anxious and fragile one. Short of creating fundamentally different legal institutions and revising the conditions of state sovereignty, the abolition of capital punishment is inconceivable under current conditions. But that need not prevent us from using the extreme case on the spectrum of capital punishment, as I have done, to peer into the relationship with state sovereignty. If I have suggested that the gift of abolition is secure nowhere, even in China it might still be to come.

GLOSSARY

chusi shizhong	处死示众	Mao Zedong	毛澤東
Dagao	大誥	Ming taizu ji	明太祖集
dani	大逆	pan	叛
Dulü suoyan	讀律瑣言	shì'è	十惡
fan	反	Wen xingshang	問刑賞
fawai fa	法外法	“Yuzhi Da Ming lü xu”	御製大明律序
guojia	國家	Zhang Ning	張寧
Lei Menglin	雷夢鱗	Zhou Guangquan	周光杈
lingchi	凌遲	Zhu Yuanzhang	朱元璋

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