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Strung Up or Shot Down?: The Death Penalty in Hong Kong and China and Implications for Post-1997

*Andrew Scobell**

I. INTRODUCTION

The death penalty has long been viewed as the most severe form of punishment any society can inflict on a person found guilty of a criminal offense. The severity is tempered by the fact that many countries have reduced the number of crimes that carry the death penalty. Few states, however, have gone so far as to abolish its use altogether:¹ the death penalty is still retained by the majority of governments in the world and enjoys healthy use by the judicial systems in the bulk of these states.

Today, while capital punishment officially remains an option to courts in Hong Kong, no one has been executed in the territory for more than 20 years. Since 1966 individuals sentenced to death have had this punishment commuted to life imprisonment. In China, however, the death penalty currently enjoys extensive usage.²

This article addresses the implications the death penalty in the Hong Kong Special Administrative Region ("HKSAR") law may have for the territory's citizens. First it is pertinent to ask if the HKSAR will contain provisions for capital punishment in its criminal law. Presently the death penalty is retained in the legal systems of both Hong Kong and the People's Republic of China ("PRC"). The draft agreement signed in December 1984 by London and Beijing specifies that the current legal system shall be "maintained" until 2047.³ Thus, criminal law statutes and procedures, including those pertaining to the death penalty, should remain

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¹ As of 1979 some fifteen states reportedly no longer employ capital punishment. See AMNESTY INTERNATIONAL, *THE DEATH PENALTY: AMNESTY INTERNATIONAL REPORT 130* (1979) [hereinafter AMNESTY INTERNATIONAL, *THE DEATH PENALTY*].

² This is one of the chief areas of concern about human rights violations in China expressed by Amnesty International. See AMNESTY INTERNATIONAL, *CHINA: VIOLATIONS OF HUMAN RIGHTS: PRISONERS OF CONSCIENCE AND THE DEATH PENALTY IN THE PEOPLE'S REPUBLIC OF CHINA 1* (1984) [hereinafter AMNESTY INTERNATIONAL, *CHINA: VIOLATIONS OF HUMAN RIGHTS*].

³ A DRAFT AGREEMENT BETWEEN GREAT BRITAIN AND NORTHERN IRELAND AND THE PEOPLE'S REPUBLIC OF CHINA ON THE FUTURE OF HONG KONG, Sept. 1984, Misc. No. 20, Cmnd 9352 (1984) (British White Paper containing the Joint Declaration on the Future of Hong Kong), reprinted in 23 I.L.M. 1366.

unchanged. If any changes occur in Hong Kong's criminal justice system after 1997, they will be in the direction of the system operating in the PRC. Accordingly, attention should focus on the extent to which capital punishment would be viable after sovereignty transfers in 1997.

Before the death penalty in post-1997 Hong Kong can be assessed, its current status in both the territory and the PRC must be considered. First, rationales for the use of capital punishment are examined and crimes that carry the death penalty in the respective administrative entities are surveyed. Legal procedures associated with capital punishment and actual use of the death penalty in both Hong Kong and China are considered. Finally, implications for post-1997 law are discussed.

II. RATIONALES FOR, AND CRIMES THAT CARRY, THE DEATH PENALTY

A. *Hong Kong*

Capital punishment for a small number of particularly grave crimes in British law rests on its deterrence value. Punishment is retribution in that it avenges the wrong suffered by the victim(s); it also registers the state's disapproval of serious crimes.⁴ The death penalty emphasizes the severity of those infractions a society considers most abhorrent.

Currently, three crimes carry the death penalty in Hong Kong: murder, treason and "piracy with violence." Murder is traditionally defined in British law as "when a man of sound memory and the age of discretion unlawfully kills any reasonable creature in being, under the King's peace, with malice aforethought, either express or implied by the law, the death taking place within a year and a day."⁵ One is considered to have committed murder if 1) the general intent was to kill, 2) death occurred as a result of an intent to commit grievous bodily harm, or 3) if one intentionally committed an act from which death would likely result.⁶

A person commits treason by "imprisoning or restraining," wounding or killing the British sovereign. In addition, anyone who "levies war against Her Majesty" or assists either the enemy during time of war, or foreigners to invade British territory, is guilty of treason.⁷

The crime of "piracy with violence" refers specifically to piracy at sea. Section 119 of the Crimes Ordinance states: "Any person who with

⁴ There is, however, no way to conclusively prove or disprove the deterrence value of capital punishment. Further, many feel that retribution is a "primitive" concept that has no place in modern society. See, e.g., ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-1953 REPORT 17-24.

⁵ *Id.* at 26.

⁶ *Id.* at 28. Murder is listed as a capital offense in Offenses Against the Person, Laws of Hong Kong, ch. 212, § 2 (rev. ed. 1972).

⁷ *Id.* ch. 200, § 2 [hereinafter Crimes Ordinance].

intent to commit or at the time of or immediately before or immediately after committing the offense of piracy in respect of any vessel: a) assaults with intent to murder any person on board of or belonging to the vessel; or b) wounds any such person; or c) unlawfully does any act by which the life of any such person may be endangered, shall be guilty of an offense and on conviction upon indictment shall be sentenced to death.”⁸

B. China

The death penalty rests in an interesting niche, representing a unique contradiction in Marxist-Leninist legal philosophy: no possibility of reform for a convicted criminal. Communist theoreticians tend to stress the reformist and reeducational goals of socialist legal codes. In the Soviet Union, upon whose legal system the PRC is based, death penalty regulations are conspicuous: theirs is a treatment separate from the main body of punishments available under the law.⁹ This ideological dilemma in socialist legal doctrine is further illustrated by the fact that the Soviet Union has thrice abolished and then reintroduced the death penalty since 1917. The death penalty was most recently reinstated in 1950 and may be imposed for 18 different offenses in peacetime.¹⁰

The rationale in post-1949 Chinese law for the retention of the death penalty is that in the short term it is a necessary tool of a socialist government. One authoritative Chinese legal publication stated in 1957, “[w]e are retaining the death penalty while in the process of gradually abolishing it, and we are reducing the scope of the application of the death penalty to a minimum. But at present we are still using this punishment.”¹¹

Capital punishment is vital when “death alone can satisfy the people’s anger,”¹² and, according to the publication, “if the death penalty were not applied, state law and discipline could not be dignified, social justice could not be extended, and the anger of the masses could not be pacified.”¹³ Most authoritative statements on the subject stress that capital punishment is a temporary expedient needed to deal with only the most serious threats to the survival of the socialist system,¹⁴ or those that

⁸ *Id.* § 19.

⁹ L. Lipsen, *Execution: Hallmark of “Socialist Legality”*, PROBLEMS OF COMMUNISM, Sept.-Oct. 1962, at 23.

¹⁰ *Id.* at 21-26. *But see* AMNESTY INTERNATIONAL, THE DEATH PENALTY, *supra* note 1, at 130-39.

¹¹ L. MENG, C. YU-HUANG, C. TSE-CHIEH, & L. CHIEH, CHUNG-HUA JEN-MIN KUNG-HO-KUO HSING-FA TSUNG-TSE CHIANG-YI, [Lectures on General Principles of Criminal Law of the People’s Republic of China], *reprinted in* COHEN, THE CRIMINAL PROCESS IN THE PEOPLE’S REPUBLIC OF CHINA 1949-1963: AN INTRODUCTION 538 (1968).

¹² COHEN, *supra* note 11, at 535.

¹³ *Id.* at 536.

¹⁴ *See, e.g.*, AMNESTY INTERNATIONAL, CHINA: VIOLATIONS OF HUMAN RIGHTS, *supra* note 2, at 77-78.

have greatly "aroused the people's anger,"¹⁵ and emphasize the "humane" nature of PRC law.¹⁶ The Chinese government claims its crime crackdown since 1983 has resulted in a substantial drop in the crime rate—by about one third according to one official.¹⁷

Nothing points to imminent abolition of capital punishment; on the contrary, usage of the death penalty in China appears to be escalating. In a January 1986 speech, Deng Xiaoping told the Standing Committee of the Communist Party Politburo that, "the death penalty cannot be abolished, and some criminals must be sentenced to death."¹⁸ He called execution, "one of the indispensable means of education" available to Chinese authorities. If anything, Deng reportedly said, the courts are "too soft on criminals." He called for the death penalty for recidivists, corrupt officials who cost the state serious financial losses, managers of brothels and "some of those" who, "play on people's superstitions or who organize reactionary secret societies."

Still, the Beijing government is sensitive to foreign criticism of China's widespread use of the death penalty. A 1984 article in *People's Daily* noted, "Some foreign bourgeois 'humanitarians' object to our condemning those felons to the death penalty, holding that such practice is 'inhumane.' However, can it be considered 'humane' if we just stop condemning those felons to death but let them continue to kill good people?"¹⁹

Presently, forty-four crimes in the PRC are punishable by death.

¹⁵ COHEN, *supra* note 11, at 538.

¹⁶ See, e.g., *People's Daily*, Sept. 28, 1959 (article by the Minister of Public Security). The Minister wrote:

Among the criminal punishments of our country there is one which prescribes, "sentencing to death, suspending execution of sentence for two years, compelling labor, and observing the consequences." Imperialists have denounced this as the great cruelty. We say this is the greatest humaneness. The criminals themselves understand this. Sentencing them to death and suspending execution of their sentence gives these persons, allowed to live under the sword of the people's government, a last opportunity to reform. In fact most of the criminals who are dealt with this way are spared. Where was there ever in ancient or modern times, in China or abroad, so great an innovation? Where could one find in the capitalist world so humane a law?

Id., reprinted in COHEN, *supra* note 11, at 539.

¹⁷ *Anti-Crime Drive Jails 624,000 Since 1983* (Hong Kong AFP, Nov. 9, 1986) in FOREIGN BROADCAST INFORMATION SERVICE, CHINA DAILY REPORT [hereinafter FBIS], Nov. 10, 1986, at K2.

¹⁸ Deng appears to be echoing the words of Mao Zedong. According to a law textbook published in 1986, Mao said, "[w]e must insist on a few executions, while strictly guarding against indiscriminate executions." WUHAN UNIVERSITY LAW DEP'T, FAXUE ZHISHI; SHOUCE, [Handbook of Legal Studies] (3d ed. 1986), at 217. All of the quotes in this paragraph come from a new published collection of Deng's speeches. See Southerland, *Chinese Police Execute 8 Criminals in One Day: More Expected as Party Congress Nears*, Washington Post, Sept. 15, 1987, at A17.

¹⁹ Zhou Jianren *Discusses Cracking Down on Criminals*, *People's Daily*, Jan. 18, 1984, in FBIS, Jan. 23, 1984 at K7.

Twenty-one of these are set out in the Criminal Code of 1979. Further legislation since then includes twenty-three more offenses punishable by death. The Criminal Law of the People's Republic of China adopted by the National People's Congress in July 1979 made fourteen counterrevolutionary crimes and seven ordinary crimes punishable by death.²⁰

1. Counterrevolutionary crimes

"Counterrevolutionary crimes" are defined as "all acts endangering the PRC committed with the goal of overthrowing the political power of the dictatorship of the proletariat and the socialist system."²¹ These crimes are roughly analogous to "treasonable offenses" in Western countries.²² Mao Zedong clearly felt that counterrevolutionaries posed a serious threat to the consolidation of the infant Chinese communist state, and in the years following the founding of the PRC, many counterrevolutionaries were "rooted out," and "some were sentenced to death."²³ While Mao believed this step had been "absolutely necessary" in order to fully free the masses from "long years of oppression," by 1957 he believed the "bulk" of counterrevolutionary elements on the mainland had been "eliminated."²⁴ Twenty-two years later, however, Deng Xiaoping reported that dangerous counterrevolutionaries still existed, in addition to "enemy agents, criminals and other bad elements of all kinds who undermine socialist public order."²⁵ PRC officials have estimated that counterrevolutionaries comprise 1% or 2% of the population.²⁶

Fourteen counterrevolutionary infractions carry the death penalty if circumstances are "especially serious" or "odious."²⁷ These crimes include colluding "with foreign states in plotting to harm the sovereignty, territorial integrity and security of the motherland" (article 91); plotting to "subvert the government or dismember the state" (article 92); incitement of state employees to defect or rebel (article 93); defection (article

²⁰ See AMNESTY INTERNATIONAL, CHINA: VIOLATIONS OF HUMAN RIGHTS, *supra* note 2, at 56-57.

²¹ The Criminal Law of the People's Republic of China, art. 90 [hereinafter Criminal Law of China], reprinted in THE CRIMINAL LAW AND THE CRIMINAL PROCEDURE LAW OF CHINA (1984) [hereinafter CRIMINAL LAW AND PROCEDURE OF CHINA] (published by the Foreign Languages Press in Beijing).

²² This analogy was also drawn by a senior official in China's Bureau of Reform Through Labor during an interview with an Agence France Presse reporter. *Anti-Crime Drive Jails 624,000 Since 1983*, *supra* note 17, at K1-K2.

²³ *On Correct Handling of Contradictions Among the People*, in 5 SELECTED WORKS OF MAO TSE-TUNG 397 (1977).

²⁴ *Id.*

²⁵ *Uphold the Four Cardinal Principles*, in SELECTED WORKS OF DENG XIAOPING (1975-1982) 166 (1984).

²⁶ *Anti-Crime Drive Jails 624,000 Since 1983*, *supra* note 17, at K1.

²⁷ Criminal Law of China, art. 103.

94); organizing an "armed mass rebellion" (article 95); organizing a "mass prison raid" or jailbreak (article 96); espionage or supplying "military material" to the enemy (article 97); sabotage to public buildings or installations; hijacking; stealing "state records" and other items of public property; manufacturing or stealing weapons and ammunition; "pointing out bombing or shelling targets to the enemy" (article 100); murder or injury by poisoning or attempting to do so (article 101).²⁸

2. Crimes endangering public security, infringing on personal rights, violating property and disrupting social order

Crimes endangering public security and punishable by death in the Criminal Law of 1979 include setting fires, breaching dikes, causing explosions, spreading poison, or "other dangerous means" causing serious injury, death or "major losses" to property (article 106); sabotaging transportation equipment, electrical power or gas equipment "causing serious consequences" (article 110).²⁹

Two crimes "infringing upon the rights of the person" listed in the 1979 law carry the death sentence. These include "intentional murder" (article 132); and rape—if the victim is under age 14, or if the act is "especially serious" or if the victim is injured or killed (article 139).³⁰

The law lists two property infringements that carry the death penalty. These include stealing in "serious" circumstances or stealing which causes the injury or death of a person (article 150); and in "serious" cases of corruption involving state personnel where "huge" amounts of state property are concerned (article 155).³¹ In addition, one crime of "disrupting the order of social administration:" intentionally sabotaging boundary markers along the borders "for the purpose of treason" carries the death penalty (article 175).³²

Amendments were introduced when the Standing Committee of the National People's Congress passed the "Decision on the Severe Punishment of Criminal Elements Who Seriously Endanger Public Security" in September 1983. This measure added seven new offenses: "criminal hooligan activities" by ringleaders of "criminal hooligan groups" or others who cause "especially serious harm"; assault and battery; organizing a "counter-revolutionary" secret society; stealing or trafficking in weapons or ammunition; pimping; abducting and selling human beings; and passing on "criminal methods."³³

²⁸ *Id.* arts. 91-97, 100-01.

²⁹ *Id.* arts. 106, 110.

³⁰ *Id.* arts. 132, 139.

³¹ *Id.* arts. 150, 155.

³² *Id.* art. 175.

³³ Decision of the Standing Committee of the National People's Congress Regarding the Severe

3. Economic crimes

In the early 1980s the government launched a campaign to crack down on its perceived rise in economic crimes. In 1982 the *People's Daily* commented that, "[t]he government and the Party have always advocated using capital punishment as little as possible but the shocking incidence of economic crimes has reached such proportions that they must be seriously punished. A small minority of extremely serious criminals must be punished by means of the ultimate penalty in order to serve as a warning to others."³⁴

The following month, Deng Xiaoping called attention to the growing problem of economic crime. In a speech to the Politburo, Deng said that in order to, "break the force of this ill wind," the authorities must take "prompt, strict and stern measures," including, in the case of "particularly grave" crimes, the "ultimate penalty."³⁵ The emergence of these "new exploiters" who began to "engage in corruption, embezzlement, speculation and profiteering," had come to Deng's notice first in 1979.³⁶

Because economic crimes had become "rampant," an amendment to the Criminal Law adopted in March 1982 decreed, when the circumstances are "particularly serious," heavier punishment (including the death penalty) was required for smuggling; speculation; habitual theft or swindling; drug-trafficking; bribery; and the theft and illegal export of "precious cultural relics."³⁷ As a result of this campaign and new law, death penalties were reportedly handed out in a "few" serious cases; one party official in a Guangdong prefecture embezzled large quantities of goods and accepted bribes worth almost 70,000 *yuan*.³⁸ Interestingly, this campaign in China mirrored the Soviet Union's effort against economic crimes in the early 1960s. During that campaign the courts also issued death sentences quite readily, and the seriousness of the crimes involved varied significantly.³⁹

Punishment of Criminal Elements Who Seriously Endanger Public Security, *reprinted in CRIMINAL LAW AND PROCEDURE OF CHINA*, *supra* note 21, at 241-42.

³⁴ See AMNESTY INTERNATIONAL, CHINA: VIOLATIONS OF HUMAN RIGHTS, *supra* note 2, at 57 (1984).

³⁵ *Combat Economic Crime*, SELECTED WORKS OF DENG XIAOPING (1975-1982) 381 (1984).

³⁶ *Uphold the Four Cardinal Principles*, *supra* note 25, at 176.

³⁷ Decision of the Standing Committee of the National People's Congress Regarding the Severe Punishment of Criminals Who Seriously Erode the Economy, *reprinted in CRIMINAL LAW AND PROCEDURE OF CHINA*, *supra* note 21, at 229-30.

³⁸ *Jiang Hua 6th NPC Work Report on Court* (Beijing Xinhua Domestic Service Report), June 25, 1983 [hereinafter *Sixth NPC Work Report*], in FBIS, June 27, 1983, at K2-K3.

³⁹ See Willets, *The Wages of Economic Sin*, PROBLEMS OF COMMUNISM, Sept.-Oct. 1962, at 26-32.

4. Offenses by the military

Ten crimes that carry the death penalty refer specifically to members of the armed forces. Under the Provisional Regulations of the PRC on "Punishing Servicemen Who Commit Offenses Against Their Duties" passed by the Standing Committee of the National People's Congress in June 1981 these include providing military secrets to enemies or foreigners; threats or violence against army personnel on duty; weapons or equipment thievery; sabotage; spreading rumors undermining army morale; desertion; disobedience; making false reports; assisting the enemy after surrendering; and robbing and harming civilians.⁴⁰

III. CRIMINAL PROCEDURE AND USE OF THE DEATH PENALTY

A. *Hong Kong*

The legality of criminal charges is assessed before individuals are arraigned before a judge. A barrister and solicitor represent individuals charged with a crime carrying the death penalty; their case is then heard by a jury of their peers. In Hong Kong a jury consists of seven or nine persons who must speak and understand English (which is presently the official language of the court system in the territory). The jury must reach a unanimous verdict of guilt "beyond a reasonable doubt" in such cases before a judge can mete out capital punishment.⁴¹

The defendant may appeal the decision to the Court of Appeals of the Supreme Court in Hong Kong. Anytime the death penalty is passed, the territory's Executive Council—comprised of some dozen members of the Hong Kong government's most senior officials and presided over by the Governor—reviews the sentence with the help of a report prepared by the judge who passed the sentence.⁴² The Governor may grant a condemned man a pardon or reprieve "upon receiving the advice of the Executive Council," but the final decision is made "according to his own deliberate judgment." Thus, the Governor is free to take or leave council members' views. In the event that he reaches a decision that a majority of the Executive Council opposes, the Governor must enter "at length" into the minutes of the meeting the reasons for the decision.⁴³

If the Governor-in-Council upholds a death sentence, the condemned can lodge an appeal in London with the Queen-in-Council, the British sovereign in consultation with the Judicial Committee of the

⁴⁰ See AMNESTY INTERNATIONAL, CHINA: VIOLATIONS OF HUMAN RIGHTS, *supra* note 2, at 57.

⁴¹ 2 V. A. PENLINGTON, LAW IN HONG KONG: AN INTRODUCTION 48 (2d ed. 1986).

⁴² See N. MINERS, THE GOVERNMENT AND POLITICS OF HONG KONG 81, 86 (3d ed. 1984) [hereinafter N. MINERS, GOVERNMENT AND POLITICS].

⁴³ *Id.*

Privy Council.⁴⁴ As a last resort, the condemned may directly appeal for mercy to the Queen. The British head-of-state then acts on the advice of the Secretary of State for Foreign and Commonwealth Affairs, who must take into consideration the sense of Parliament—the body to which the minister is answerable.⁴⁵

The *modus operandi* is hanging, although the last hanging in Hong Kong occurred in November 1966.⁴⁶ As a rule, the Governor commutes all death sentences passed by the courts in the territory.⁴⁷ In one instance in 1973, however, he refused to grant such a reprieve. Twenty-nine year old Tsoi Kwok-cheong was convicted of fatally stabbing an off-duty auxiliary police constable during a botched robbery. At the time Hong Kong was in midst of a government-sponsored anti-crime campaign, and the Governor almost certainly felt a reprieve would make a mockery of the campaign and probably result in a serious loss of confidence and respect for the government by the people of the territory. Tsoi, assisted by his solicitor, appealed directly to the Queen for mercy. The British sovereign, upon the advice of her Foreign Secretary, commuted Tsoi's sentence to life imprisonment.⁴⁸

There have been 128 death sentences passed in Hong Kong since 1976 (Table 1); all were for murder. The annual proportion of the total criminal cases in which the death penalty has been invoked in the territory since 1978 has remained constant at approximately 1%. During the past eleven years, approximately 11 criminals per year have received death sentences. The death sentences handed out during the past nine years have fluctuated between .13 per 100,000 inhabitants and .35 per 100,000 inhabitants. The last person to hang in Hong Kong was Wong Kai-kei, who was convicted of murdering a department store security guard.⁴⁹ Following Wong's execution on November 16, 1966 at Stanley Prison, all persons condemned to death have had their sentences commuted. The British Parliament passed the Murder (Abolition of the Death Penalty) Act of 1965 that abolished the death penalty for murder in the United Kingdom.⁵⁰ Two years later the British Labour government made it clear to the Hong Kong administration it would no longer

⁴⁴ V.A. PENLINGTON, *supra* note 41, at 50.

⁴⁵ N. MINERS, GOVERNMENT AND POLITICS, *supra* note 42, at 90-91.

⁴⁶ See AMNESTY INTERNATIONAL, THE DEATH PENALTY, *supra* note 10, at 79.

⁴⁷ N. MINERS, GOVERNMENT AND POLITICS, *supra* note 42, at 87.

⁴⁸ For details of the incident, see *id.* at 86-87, 290. The action of the Foreign Secretary in overruling the Governor's decision was "completely unprecedented." See Miners, *The Governor, The Secretary of State and the Perogative of Mercy*, 17 HONG KONG L.J. 77, 86-89 (1987) [hereinafter Miners, *The Governor*].

⁴⁹ S. China Morning Post (Hong Kong), Nov. 17, 1966, at 8, col. 3.

⁵⁰ The death penalty still exists in the United Kingdom for treason and certain forms of piracy, as well as for acts committed by members of the armed forces during times of war. See AMNESTY INTERNATIONAL, THE DEATH PENALTY, *supra* note 1, at 139.

TABLE 1
Death Sentences in Hong Kong and Related Statistics, 1976-1987

<u>year</u>	<u>death sentences</u>	<u>population¹</u>	<u>criminal cases</u>	<u>death sentences per 100,000 inhabitants</u>	<u>death sentences as percent of criminal cases</u>
1976	13	4,379,000	1,099	0.30	1.2
1977	8	4,477,600	987	0.18	0.8
1978	10	4,566,900	982	0.22	1.0
1979	8	4,720,200	1,124	0.17	0.7
1980	8	5,017,000	1,321	0.16	0.6
1981	18	5,147,900	1,453	0.35	1.2
1982	14	5,207,000	1,438	0.27	1.0
1983	11	5,287,800	1,585	0.21	0.7
1984	7	5,344,400	1,582	0.13	0.4
1985	12	5,397,500	1,621	0.22	0.7
1986	15	5,466,900	1,749	0.27	0.9
1987	4				

(Jan.-June.)

¹ End of year figures for previous year.

SOURCE: Statistics for population and criminal cases see HONG KONG 1978, HONG KONG 1979, HONG KONG 1980, HONG KONG 1981, HONG KONG 1982, HONG KONG 1983, HONG KONG 1984, HONG KONG 1985, HONG KONG 1986, AND HONG KONG 1987 (Hong Kong: Government Printer, 1979 - 1987). Criminal cases are the total of high court civil sessions and criminal jurisdictions of the district courts. I am indebted to Hong Kong Supreme Court Justice, Judge J.E. Hopkinson for statistics on the number of death sentences.

permit executions to be carried out in the territory. All major political parties in the United Kingdom are against the death penalty and in 1975 the Governor at the time, Sir Murray MacLehose (today Lord MacLehose), set an important precedent when he indicated—through his Colonial Secretary—that in the future, when a Governor commutes a death sentence, a lesser sentence of life imprisonment without possibility of parole will always be imposed.⁵¹

B. China

The public security bureau is responsible for “investigation, detention and preparatory examination of criminal cases.” The people’s procuratorate approves the arrest, conducts investigations and prosecutes the suspect. Under article 3 of the Criminal Procedure Law, the people’s courts adjudicate cases. This entails four stages: investigation, debate,

⁵¹ N. MINERS, GOVERNMENT AND POLITICS, *supra* note 42, at 87, 90-91 n.30.

appraisal by the collegiate bench and the judgment.⁵² According to article 125 of the Constitution of the People's Republic of China, the accused has the right to defend himself.⁵³ The Criminal Procedure Law allows the defendant, a lawyer or layman to represent him (articles 26 and 27). However, the burden of proof lies with the defendant who must prove his innocence, or lack of criminal responsibility or guilt for a lesser crime (article 28).⁵⁴ A lawyer is expected to "be loyal to the interest of the socialist cause and the people,"⁵⁵; defense lawyers in China, as Shao-Chuan Leng and Hungdah Chiu conclude, "generally play a passive role in court proceedings."⁵⁶

The intermediate people's courts have original jurisdiction over cases where there may be a sentence of life imprisonment or death.⁵⁷ Cases are tried by a panel of one judge and two people's assessors; in cases of appeal or protest three to five judges preside.⁵⁸ The panel reviews the evidence, hears witnesses and then adjourns to deliberate. The verdict should be pronounced within six weeks after the start of the trial⁵⁹ but from 1981 to 1983 the amount of time was waived in certain circumstances.⁶⁰ Execution occurs by shooting.⁶¹ From 1981 to 1983, where the accused had been sentenced to death—except for counterrevolutionary offenses and crimes of corruption—the Standing Committee of the National People's Congress decided that the Supreme People's Court need not approve if the high people's court of the province, autonomous region or municipality gave its approval, or if the defendant did not appeal.⁶²

In June 1981 the Standing Committee of the National People's Congress passed legislation amending article 13 of the Criminal Procedure

⁵² S.C. LENG & H. CHIU, *CRIMINAL JUSTICE IN POST-MAO CHINA: ANALYSIS AND DOCUMENTS* 91 (1985).

⁵³ XIANFA (Constitution) art. 125 (People's Republic of China) [hereinafter P.R.C. CONST.] (adopted on Dec. 4, 1982 by the Fifth National People's Congress at its Fifth Session).

⁵⁴ Criminal Procedure Law of the People's Republic of China, art. 15 [hereinafter Criminal Procedure of China], reprinted in *CRIMINAL LAW AND PROCEDURE OF CHINA*, *supra* note 21.

⁵⁵ S.C. LENG & H. CHIU, *supra* note 52, at 272; see also Address by Vice Premier Qiao Shi, Strive to Build a Socialist Lawyer System with Chinese Characteristics (July 5, 1986, First National Congress of Lawyers), reprinted in *FBIS*, July 14, 1986, at K26-K28.

⁵⁶ S.C. LENG & H. CHIU, *supra* note 52, at 95.

⁵⁷ Criminal Procedure Law of China, art. 15.

⁵⁸ *Id.* art. 105.

⁵⁹ *Id.* art. 125.

⁶⁰ Decision of the Standing Committee of the National People's Congress Regarding the Question of the Time Limits for Handling Criminal Cases, reprinted in *CRIMINAL LAW AND PROCEDURE OF CHINA*, *supra* note 21, at 226-27.

⁶¹ Criminal Law of China, art. 45.

⁶² Decision of the Standing Committee of the National People's Congress Regarding the Question of Approval of Cases Involving Death Sentences, reprinted in *CRIMINAL LAW AND PROCEDURE OF CHINA*, *supra* note 21, at 217-18.

Law, making permanent the above reform of the approval process. This change allows the Supreme People's Court to defer its approval power of death sentences "when necessary" to supreme courts of the respective provinces, autonomous regions or municipalities.⁶³ Amnesty International cites two cases in which execution occurred in an incredibly swift manner.⁶⁴

In September 1983, the Standing Committee shortened the time limit for an appeal by death row inmates from the ten days stipulated by article 131 of the Criminal Procedure Law of 1979 to three days.⁶⁵ According to the Law of Criminal Procedure, the accused has the right to an appeal (article 129). Only one death sentence case known to Amnesty International was successfully appealed since the law became effective in 1980.⁶⁶ Further, article 80 of the Constitution of the People's Republic of China bestows upon the State president the power to issue pardons to convicted criminals,⁶⁷ but there is no record of any such appeal ever being made to the highest office in the land.⁶⁸

Condemned criminals have received degrading treatment prior to execution, with scant regard shown for basic human dignity. Death row prisoners are often paraded through streets in flatbed trucks, heads cowed with signs hanging around their necks listing their names, crimes and capital sentences.⁶⁹ According to the Criminal Procedure Law of 1979, death sentences are to be announced publicly but should not be implemented in "public view."⁷⁰ However, reports have detailed cases of public executions, some even shown on television.⁷¹ At the height of the anti-crime campaign some prisoners were removed from their cells for

⁶³ *Id.*

⁶⁴ In 1983 a man was executed only eight days after he was supposed to have committed the crime. In another case that same year, two men were executed less than a week after their arrest. Within six days, they were tried and sentenced, had their sentences approved by the Provincial High People's Court and were then executed. See AMNESTY INTERNATIONAL, CHINA: VIOLATIONS OF HUMAN RIGHTS, *supra* note 2, at 69.

⁶⁵ See Decision of the Standing Committee of the National People's Congress Regarding the Procedure for Rapid Adjudication of Cases Involving Criminal Elements who Seriously Endanger Public Security, *reprinted in* CRIMINAL LAW AND PROCEDURE OF CHINA, *supra* note 21, at 246-47.

⁶⁶ See AMNESTY INTERNATIONAL, CHINA: VIOLATIONS OF HUMAN RIGHTS *supra* note 2, at 66-67.

⁶⁷ See P.R.C. CONST. art. 80.

⁶⁸ See AMNESTY INTERNATIONAL, CHINA: VIOLATIONS OF HUMAN RIGHTS, *supra* note 2, at 71.

⁶⁹ See, e.g., *A Glimpse of China's Hidden Face of Fear in the Killing Fields*, S. China Morning Post, July 19, 1987, at 9. The "humiliating treatment of condemned prisoners" in China is a serious concern of Amnesty International. See AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 1987, at 227-28 (1987).

⁷⁰ See Criminal Procedure Law of China, art. 155.

⁷¹ See AMNESTY INTERNATIONAL, CHINA: VIOLATIONS OF HUMAN RIGHTS, *supra* note 2, at 73.

execution without being informed of their imminent demise. Some death row inmates reportedly left their belongings, including half-eaten or untouched food, expecting to consume these morsels upon returning.⁷²

In addition, Chinese courts have applied new death penalty regulations retroactively. Thus in some instances, as Amnesty International has documented, a person convicted of a crime committed prior to the crime being designated as a capital offense has been sentenced to death and executed. In 1983, for example, four men were convicted of robbing a Guangdong store in July and they were executed for the crime on September 4th. The amendment under which they had apparently been sentenced to die had only been approved by the Standing Committee of the National People's Congress on September 2nd.⁷³

A unique feature of Chinese law, as outlined in article 43 of the Criminal Law of 1979, is the suspended death sentence.⁷⁴ Under this provision a convicted criminal can be given a death sentence that is suspended for two years. If, at the end of that time period, the prisoner has shown remorse and proper attitude, the sentence can be reduced in the collegiate panel's discretion. If the condemned "truly repents," his sentence can be reduced to life imprisonment. In addition, if the prisoner demonstrates "meritorious service," he can be sentenced to fifteen to twenty years behind bars. However, if there is "verified evidence" that the prisoner has during the course of two years, "resisted reform in an odious manner," upon approval of the Supreme People's Court, the execution can be carried out.⁷⁵

The suspended death sentence emphasizes the crime's magnitude—that it is heinous enough to merit execution—while at the same time demonstrating the court's mercy. Apparently a suspended death sentence rarely is carried out following the two year period of assessment of the individual's behavior and attitude. Evidence suggests that the suspended death sentence enjoys extensive usage.⁷⁶ Article 46 of the Criminal Law and article 153 of the Criminal Procedure law are written in such a way that even if the prisoner resists reform, he can avoid execution. The only requirement is that the prisoner should not resist in an "odious manner."⁷⁷

⁷² Z. Zhang, *A Look Back to Forget—A Record of the 1983 Anti-Crime Campaign*, CHINA SPRING DIG., July-Aug. 1974, at 31-33.

⁷³ AMNESTY INTERNATIONAL, CHINA: VIOLATIONS OF HUMAN RIGHTS, *supra* note 2, at 61 (1984).

⁷⁴ See Criminal Procedure Law of China, art. 43.

⁷⁵ Criminal Law of China, art. 46.

⁷⁶ See, e.g., Z.G. An, *On Capital Punishment*, BEIJING REV., Nov. 7, 1983, at 4 (editorial); S.C. LENG & H. CHIU, *supra* note 52, at 132.

⁷⁷ Criminal Law of China, art. 46; Criminal Procedure Law of China, art. 153. See also COHEN, *supra* note 11, at 537-38.

Those who have not attained age eighteen cannot be given the straight sentence of death, but youths sixteen and seventeen can receive a suspended death sentence if the crime committed is "particularly grave."⁷⁸ It is not clear if, under certain circumstances, the same could be true for a pregnant woman. Execution might be permitted after her child is born.⁷⁹

The best known cases of suspended death sentences are those of Mao's widow, Jiang Qing, and Zhang Chunqiao, a former Vice Premier—both got suspended death sentences in 1981. These two members of the Gang of Four were assessed to have repented and had their sentences commuted two years later to life imprisonment.

According to the judgment handed down against the group of ten defendants, the Gang of Four and six other former senior officials in the government, Communist Party and army, were convicted of crimes including plotting to "subvert the government and overthrow the people's democratic dictatorship," and responsibility for the murders of more than thirty persons identified individually by name as well as for the death of many others.⁸⁰ Jiang and Zhang were given death sentences "with a two year reprieve and permanent deprivation of political rights."⁸¹ Political crimes, particularly those committed by high level leaders appear to be dealt with less severely than those of lower officials. Regarding Jiang and Zhang, it is unclear whether there existed, in Leo Goodstadt's words, "evidence of repentance."⁸² Upon the expiration of the two year suspended sentences in January 1983, the "collegiate bench" formed by the Supreme People's Court found that both defendants "did not in any flagrant way resist reform."⁸³ Ross Terrill concludes in his biography of Jiang Qing that despite the ruling by the bench, she had "not repented."⁸⁴

This raises the question of whether individuals convicted of crimes carrying the death penalty can expect equality before the law. In post-Mao China, treatment of a convicted criminal is no longer determined by his class background. Rather, he is to be judged by the "extent of harm

⁷⁸ Criminal Law of China, art. 44.

⁷⁹ According to the lectures given in 1957, there is a precedent for a pregnant woman being sentenced to death with her execution being delayed until one year following the birth of her child. See COHEN, *supra* note 11, at 538.

⁸⁰ A GREAT TRIAL IN CHINESE HISTORY: THE TRIAL OF THE LIN BIAO AND JIANG QING COUNTERREVOLUTIONARY CLIQUES, NOV. 1980-JAN. 1981 219 (1981).

⁸¹ *Id.* at 233.

⁸² L. Goodstadt, *The Trial of the Lin-Jiang Cliques: China's Return to Rule of Law?*, 12 HONG KONG L.J. 53 (1982).

⁸³ *Sixth NPC Work Report*, *supra* note 38, at K2-K3.

⁸⁴ R. TERRILL, *THE WHITE-BONED DEMON: A BIOGRAPHY OF MADAM MAO ZEDONG* 393 (1984).

to society and by the nature of the crime."⁸⁵ Article 4 of the Criminal Procedure Law states that, "The law is equally applicable to all citizens, and no special privilege whatever is permissible."⁸⁶ The evidence, particularly with regard to the use of the death penalty, is not convincing. If convicted of crimes carrying the death penalty, high level government and party officials and their offspring are treated more leniently than common criminals.⁸⁷ Aside from a few highly publicized executions, e.g., the grandson of Marshal Zhu De in 1983 for rape and other offenses,⁸⁸ there seems to be one set of laws for officials and another for others.

Beijing does not make public the official number of death sentences and executions in China. Available figures are sporadic, and rough estimates are made by such organizations as Amnesty International and the U.S. Department of State. These estimates are compiled from formal and informal remarks by PRC officials, specific cases reported in the mainland media, public notices of executions posted in Chinese cities and eyewitness accounts of public executions and sentencings. The Associate Director of China's Bureau of Reform Through Labor divulged in November 1986 to an Agence France Presse correspondent that since the start of the anti-crime campaign in 1983, 624,000 offenders had been executed or sentenced to prison terms of five or more years. The official refused to disclose the exact number of executions; the AFP report resorted to citing figures of between 10,000 and 30,000 executions during the past three years—these are Western diplomats' estimates.⁸⁹

Amnesty International recorded 600 executions from August 1983 to October 1983 (the initial phase of the anti-crime campaign) and believes that the actual number of executions for the entire country during that period was "far higher."⁹⁰ According to a report on the work of Supreme People's Court, more than 2,900 death sentences were appealed to the court from 1978-1982.⁹¹ If one assumes all of these appeals were unsuccessful and that this number represents all cases in China during this period involving crimes punishable by death (i.e. all were appealed to the Supreme People's Court), then one can estimate the proportion of criminal cases in which the death penalty was employed. On this basis,

⁸⁵ S.C. LENG & H. CHIU, *supra* note 52, at 104 (excerpt from 1979 HONGQI article).

⁸⁶ Criminal Procedure Law of China, art. 4.

⁸⁷ This is also the general conclusion of S. Leng and H. Chiu. See S.C. LENG & H. CHIU, *supra* note 52, at 108.

⁸⁸ See *id.*; *Beijing Mayor Confirms Execution of Zhu De's Grandson*, Hsin Pao, Nov. 30, 1983, in FBIS, Dec. 1, 1983 at W3-W4.

⁸⁹ *Anti-Crime Drive Jails 624,000 Since 1983*, *supra* note 17, at K1.

⁹⁰ See AMNESTY INTERNATIONAL, CHINA: VIOLATIONS OF HUMAN RIGHTS, *supra* note 2, at 54-55.

⁹¹ *Sixth NPC Work Report*, *supra* note 38, at K3.

only 0.3% of total criminals tried during 1978-1982 received the death penalty.⁹² From 1983-1986 the U.S. Department of State estimates executions at between 7,000 and 14,000.⁹³ During this five year period, the rate of executions—and death sentences if one assumes that that all death sentences were carried out—was between 0.17 executions per 100,000 inhabitants and 0.34 per 100,000 inhabitants.⁹⁴

A majority of the crimes committed by those executed in the PRC were violent. Statistics collected during 1979-80 reveal that “most” executions during that period were for the crimes of rape and murder.⁹⁵ A Taiwan source collected data on more than 250 executions carried out on the PRC from August 23, 1983 to September 30, 1983. Some 80% of the executions for which adequate data were given, the crimes committed were of a violent nature.⁹⁶

But there have also been executions for non-violent crimes. During the past three years there have been executions for such crimes as fraud, drug smuggling, and holding “dance and sex parties.”⁹⁷ In October 1987 a man was sentenced to death by the Taiyuan City Intermediate Court after being convicted of snatching a woman’s purse in a park.⁹⁸

IV. IMPLICATIONS FOR POST-1997 HONG KONG

Will the uneven and extensive use of the death penalty in China today be “reflected” in the HKSAR of tomorrow? Basic Law planners can play an instrumental role in determining how much, if any, continuity or change there will be from the current Hong Kong criminal justice system in the new HKSAR. After that, it will essentially be up to whether Beijing stands by the letter of the Draft Agreement and the Basic Law. Three basic factors should determine the scope of the death penalty in post-1997 Hong Kong: meddling by Beijing, the influence of Chinese cultural values and the legacy of British law.

⁹² See also J. DOMES, *THE GOVERNMENT AND POLITICS OF THE PRC: A TIME OF TRANSITION* 226 (1985).

⁹³ STATE DEPT., *COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1986*, 100TH CONG., 1ST SESS. 684 (J. Comm. Print 1987).

⁹⁴ These rates should be considered rough estimates since they were calculated from the State Department estimates, *id.* and figures cited in STATE STATISTICAL BUREAU, *ZHONGGUO TONGJI ZHAIYAO*, 1987, at 16 (1987).

⁹⁵ S.C. LENG & H. CHIU, *supra* note 52, at 132.

⁹⁶ *Recent Wave of Executions in Red China*, *INSIDE MAINLAND CHINA*, Nov. 1983, at 11-14.

⁹⁷ See, e.g., *Criminal Executed For “Profiteering” in Guangdong* (Xinhua News Agency, June 8, 1987) in FBIS, June 9, 1987 at P1; AMNESTY INTERNATIONAL, *AMNESTY INTERNATIONAL REPORT*, 1986, at 1 (1986).

⁹⁸ J.M. Zhou, *Taibao Luo Peiliang Taiyuan Zaoyu Jishi*, *Renmin Ribao* (People’s Daily overseas ed.), Dec. 11, 1987, at 4.

A. *The Meddling Factor*

Although Beijing insists that Hong Kong's criminal law will remain unchanged, currently legal matters in all autonomous counties, prefectures and regions in China are circumscribed by the application of constitution and law of the PRC.⁹⁹ How autonomous the HKSAR will be is open to debate, but certainly there is bound to be some degree of meddling by Beijing in the territory's affair, whether it be of a subtle or not-so-subtle nature. Quite possibly, the Chinese government will encourage vigorous use of the death penalty for violent crimes and serious cases of white collar (economic) crimes. One reason is to appease the conservatives in the Beijing leadership who are unsympathetic to the "one country, two systems" policy that allows Hong Kong to remain a capitalist enclave. This encouragement would materialize, if at all, subtly and would probably not meet with much opposition in the HKSAR legislature.

Political crimes (or in PRC terminology, "counterrevolutionary crimes") are another matter. Few of the recent death sentences and executions in China were for political crimes,¹⁰⁰ but rather for violent or severe ones. Many of the death sentences were handed out for what also would be considered grave offenses in Western countries. In 1986, the U.S. Department of State estimated that the "great majority" of those thought to have been executed by the mainland authorities since August 1983 were convicted of "serious nonpolitical crimes."¹⁰¹ The most glaring example of counterrevolutionaries receiving the death sentence are the two members of the Gang of Four already noted above—and these were both commuted. While few of the crimes committed on the mainland are counterrevolutionary types—reportedly less than 1%¹⁰²—and there are far more likely to be greater numbers of such persons in Hong Kong. There are many Taiwan sympathizers and numerous residents with ties overseas, and thriving religious communities in the territory,¹⁰³

⁹⁹ A. Chen, *Further Aspects of the Autonomy of Hong Kong under the PRC Constitution*, 14 HONG KONG L.J. 341, 346-47 (1984).

¹⁰⁰ However, for several examples of counterrevolutionaries who received the death penalty, see S.C. LANG & H. CHIU, *supra* note 52, at 146.

¹⁰¹ STATE DEP'T, *supra* note 93, at 738.

¹⁰² This was the figure for 1982 given by Jiang Hua, president of the Supreme People's court. *Sixth NPC Work Report*, *supra* note 38, at K9. For a concise discussion of statistics for the number of political crimes and an estimate of the number of political prisoners in China in the mid-1980s, see AMNESTY INTERNATIONAL, CHINA: VIOLATIONS OF HUMAN RIGHTS, *supra* note 2, at 5-6.

¹⁰³ What implications 1997 will have for Hong Kong clergy and religious adherents, particularly for Roman Catholics, is a provocative question. The church's obedience to a foreign head of state, the Pope, is at the root of the matter. The Catholic Church in the PRC officially severed all ties with the Vatican more than thirty years ago. Under government supervision, Chinese Catholics formed a separate organization called the Chinese Catholic Patriotic Association, which is independent of the Vatican. One of the most persecuted religious groups in communist China has been the

not to mention well entrenched and sophisticated organized crime networks.

The vital question is how far Beijing will insist on increased vigilance against counterrevolutionaries in the region and increased severity against convicted offenders. Beijing values its image in the West as a rational, mature member of the world community and is particularly sensitive to criticism of human rights violations—witness defensiveness over criticism about the tactics used in the aggressive birth control campaign, and more recently, over resolutions passed in the U.S. Congress to crack-down on counterrevolutionaries in Hong Kong concerning Tibet.¹⁰⁴ Thus any efforts should be limited in scope and focused on particularly heinous cases.

Further, Beijing would like to make reunification more attractive to the Nationalist government on Taiwan. By appearing moderate, tolerant, and adhering to a hands-off policy toward Hong Kong, it strengthens this image. Reunification is one of three major national goals identified by Deng Xiaoping,¹⁰⁵ and the likelihood of Taiwan confederating itself with the mainland will weigh in any decision by Beijing to visibly intervene in Hong Kong in any sphere. Also, the Beijing leadership would not want to damage the confidence of the Hong Kong business community that has presided over the territory's phenomenal economic success. Meddling in laws and the legal process of the HKSAR to crack down on counterrevolutionaries would likely lead to a flight of entrepreneurial talent and capital, severely crippling the territory and lessening its value to Beijing's efforts at economic modernization. Indeed, some members of the business community might consider themselves a prime candidate—under Beijing's definitions—for prosecution as counterrevolutionaries.¹⁰⁶

Catholic clergy and laymen who have refused to renounce their allegiance to the Pope. While none of these appear to have been sentenced to death, many may have endured long prison terms. See AMNESTY INTERNATIONAL, CHINA: VIOLATIONS OF HUMAN RIGHTS, *supra* note 2, at 14-15, 19-20, 45-48, 50-51.

¹⁰⁴ For an earlier example of Beijing's concern about world opinion, see Z.G. An, *Truth of Executing Criminals in Tibet*, BEIJING REV., Oct. 17, 1983, at 5 (editorial). This piece stresses that six persons, including two members of the Tibetan nationality executed in Lhasa just prior to Oct. 1, 1983, were not dissidents as claimed by the Tibetan government-in-exile, but in fact hardened criminals.

¹⁰⁵ See *Opening Speech At The Twelfth National Congress of the CPC*, in SELECTED WORKS OF DENG XIAOPING (1975-1982) 396.

¹⁰⁶ A number of Hong Kong residents have been arrested during visits to the mainland for allegedly committing crimes in China. Apparently some of these arrests have been for counterrevolutionary offenses. Relatives of these persons in Hong Kong typically have not been informed of the arrests, the charges against the accused, or the dates of their trials. See, e.g., AMNESTY INTERNATIONAL, CHINA: VIOLATIONS OF HUMAN RIGHTS, *supra* note 2, at 49-50 (the case of Liu Shuqing).

B. *The Culture Factor*

Chinese civilization possesses a strongly held cultural value of maintaining social order and harmony. While this characteristic is not unique to Chinese culture, Chinese society and governments have historically been particularly intent on perpetuating this. China boasts one of the oldest legal traditions in the world, and imperial China had a very comprehensive set of punishments covering almost every conceivable infraction. Some penalties were particularly brutal and capital punishment was an integral part of the criminal code.¹⁰⁷

How is the death penalty likely to be utilized? As more and more expatriate judges, barristers and solicitors retire and are replaced, will the attitudes of the Hong Kong legal community shift increasingly toward vigorous use of the death penalty? There is every indication that the death penalty will be readily sought after and implemented, especially for violent crimes.

Who is to say whether of their own initiative or under pressure from the mainland, Hong Kong lawmakers might revise the statutes pertaining to the death penalty or add new crimes to those already punishable by a sentence of death. Perhaps, merely the evolution of the legal code in Hong Kong will alter the status of the death penalty. Albert Chen concludes that apart from constitutional law, "other areas," including criminal law "will remain basically unchanged in framework" and will experience only "normal and natural growth"¹⁰⁸—that which is necessary to adapt to "changing conditions."¹⁰⁹ Also, if the Chinese language is raised on par with English in the legal system and comes to dominate all proceedings, will this alter the atmosphere of common law in Hong Kong?¹¹⁰

A general consensus exists among Hong Kong people of capital punishment's suitability for particularly violent crimes. Most unofficial members of the Legislative Council—Hong Kong's lawmaking body—favor the death penalty for murder. A postal survey conducted by the University of Hong Kong in the mid-1970s showed that an overwhelming majority of the respondents favored the death penalty for premeditated murder. Of 500 responses, more than 90% voted for capital

¹⁰⁷ The so-called "Ten Abominations," for example (which included such crimes as treason and "unfilial conduct"), carried the severest punishment known in the criminal code of Qing Dynasty: death by slicing. R. SMITH, *CHINA'S CULTURAL HERITAGE: THE CH'ING DYNASTY, 1644-1912*, at 240 (1983). See also D. BODDE & C. MORRIS, *LAW IN IMPERIAL CHINA* (1967) (an overview of the criminal punishment system in Imperial China).

¹⁰⁸ A. Chen, *Preliminary Suggestions on the Political System of the Hong Kong Special Administrative Region*, in *HONG KONG IN TRANSITION* 116 (J. Cheng ed. 1986).

¹⁰⁹ Joint Declaration, *supra* note 3, Annex I, § II.

¹¹⁰ For a discussion of the issue of language and law, see A. Chen, 1997: *The Language of the Law in Hong Kong*, 15 *HONG KONG L.J.* 19 (1985).

punishment; a majority also supported extending the death penalty for bodily harm, armed robbery and rape.¹¹¹

C. *The British Legacy Factor*

Will such principles as the independence of the judiciary or the presumption of innocence—long established in British legal tradition—survive in post-1997 Hong Kong? One would hope that one legacy of the British presence in the territory will be its legal tradition that has formed the bedrock of the law in so many former British possessions around the world. As regards the death penalty, there will be a major change in the appeals procedure that since 1966 has ensured all death sentences are not implemented. Annex I of the Joint Declaration states that the system of appeal to the Privy Council in London will be abolished and the “power of the final adjudication” will rest with an appeals court within the HKSAR.¹¹²

While what might be regarded as the best safeguard to vigorous use of the death penalty will be gone after 1997, there are other possible means through which British legal tradition may exert a moderating influence. Legal experts and workers from Commonwealth countries and other states will be permitted to participate in the HKSAR legal system. The draft agreement states that the final court of appeal in post-1997 Hong Kong “may as required invite judges from other common law jurisdictions” to sit on this appellate court, and that the government of the HKSAR can permit lawyers from “outside” Hong Kong to “work and practice” in the territory. Further, the courts are permitted by the draft

¹¹¹ See MINERS, GOVERNMENT AND POLITICS, *supra* note 42, at 185, 189. See also Joint Declaration, *supra* note 3, Annex I, § III. A small sample of Hong Kong people surveyed on the subject in 1973 indicated that residents were “strongly in favor” of retaining and utilizing the death penalty for convicted murderers. See Choy, *Survey Shows What People Think: Death for Killers*, S. China Morning Post, Apr. 29, 1973, at 2. In 1975, the Colonial Secretary stated that the Governor was aware of the “fierceness of the conviction” that Hong Kong residents held concerning the necessity of using the death penalty. See MINERS, GOVERNMENT AND POLITICS, *supra* note 42, at 90.

¹¹² For the view of unofficial Legislative Councillors, see MINERS, GOVERNMENT AND POLITICS, *supra* note 42, at 185. On public opinion, see *id.* at 189; P. B. Harris, *The British Parliament, The University of Hong Kong and the Death Penalty*, (unpublished manuscript, 1975). Although the survey sample consists solely of university students, Harris concludes that the attitudes of the general public would, if anything, be harsher (more disposed toward employing capital punishment). See *id.* at 4, 7. (I am indebted to Professor N.J. Miners of the Department of Political Science at the University of Hong Kong for bringing the above manuscript to my attention.) A small sample of Hong Kong people surveyed on the subject in 1973 also found that residents were “strongly in favor” of retaining and using the death penalty for convicted murderers. See P. Choy, *Survey Shows What The Public Thinks: “Death for Killers”*, Sunday Post-Herald, Apr. 29, 1973, at 2. In 1975 the Colonial Secretary stated that the Governor was aware of the “fierceness of the conviction” that Hong Kong residents held concerning the necessity of using the death penalty. See MINERS, GOVERNMENT AND POLITICS, *supra* note 42, at 90 n.30.

agreement to decide cases with reference to "precedents in other common law jurisdictions."¹¹³

V. CONCLUSION

There is no question that the difference between British-style and PRC-style justice in Hong Kong has been significant. It has probably meant the difference between life and death for 128 convicted criminals (and possibly more) since 1976. One can estimate the number of death sentences that might have been passed in the territory during 1983-1986 by using the rates of executions per 100,000 persons calculated above for China. This means of comparison focuses attention on the crux of this article's issue: what would be the real difference in life and death terms between Hong Kong under the present legal system and the territory under socialist PRC law? Using the lowest figure of executions estimated by the Department of State, thirty-six executions would have taken place between 1983-1986. Using the highest estimate, seventy-two executions would have occurred. If all of those sentenced to hang in Hong Kong during the same period had actually been executed, then forty-five individuals would have been put to death in the territory. The low estimate is nine less than what the actual figure would have been, while the high estimate is seventeen above this.¹¹⁴ It is important to remember, of course, that the key factor in avoiding any executions was the constitutional link between Hong Kong and the United Kingdom. That link will be severed in 1997.

A survey of the status of the death penalty in contemporary Hong Kong and China serves as an interesting case study, demonstrating the contrast between two different legal systems and philosophies of law. Undoubtedly, as the HKSAR government is "unlikely to share Hong Kong's present reservations on capitol punishment", the HKSAR legal system will contain provisions for the use of capital punishment and it will almost certainly be utilized.¹¹⁵ With or without pressure from mainland sources, if the wishes of the people of the HKSAR are taken into account, the death penalty will enjoy new life in post-1997 Hong Kong. Perhaps only the instrument of execution to be used in the HKSAR may be in doubt: a rope or a revolver?

¹¹³ *Id.*

¹¹⁴ These projected rates for Hong Kong are calculated by using the rates of executions per 100,000 inhabitants discussed *supra* note 86 as applied to the population figures of the STATE STATISTICAL BUREAU, *supra* note 94, at 16 (Table 1).

¹¹⁵ *Death Sentence Shock for HK*, S. China Morning Post, May 27, 1986, at 2.

