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Minas, Stephen

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# “KILL FEWER, KILL CAREFULLY”: AN ANALYSIS OF THE 2006 TO 2007 DEATH PENALTY REFORMS IN CHINA

Stephen Minas\*

## ABSTRACT

*Starting on January 1, 2007, the Supreme People’s Court has been charged with reviewing every death sentence pronounced by lower courts in the People’s Republic of China. This reform, together with provisions instituted in January 2007 that address death penalty review, are dramatic moves to strengthen procedural justice in death penalty cases. There are indications that these reforms have significantly decreased the execution rate in China. The reforms are not a move toward the Chinese government’s abolition of capital punishment, however. Nor are they a response to international abolitionist pressure. Rather, they reflect the current “legalization” agenda of the central government, maintaining the instrumentalist link between overarching state policy and death penalty application. This “legalization” agenda will not necessarily prompt further limitations to death penalty practice. Instead, if overall policy settings change, it is possible that the government may again privilege “campaign justice” over “procedural justice” and wind back the reforms.*

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\* BA(Hons), LLB(Hons) (Melb), MSc (LSE), Honorary Fellow at the Centre for International Mental Health, University of Melbourne. The author is grateful to Professor David Wood of the Melbourne Law School for supervising an earlier version of this article, as well as to the reviewers for their helpful comments. The author can be reached at [sminas@unimelb.edu.au](mailto:sminas@unimelb.edu.au).

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## I. INTRODUCTION

In the only nation that executes thousands of its citizens each year, any change to death penalty law is significant and worthy of study. In 2006 and 2007, the government of the People's Republic of China ("PRC") promulgated reforms that mandated Supreme People's Court ("SPC") review of every death sentence. Under the previous system, there was no mandatory review of each sentence by the SPC. These reforms are the most dramatic move to strengthen procedural justice in capital punishment since the reconstitution of the legal system under Deng Xiaoping. This paper attempts a preliminary study of the reforms to identify their policy context, make an interim assessment, and comment on possible future directions.

This paper argues that, following the 2006 to 2007 reforms, death penalty policy remains subordinate to the People's Republic of China's overall policy. The reforms do *not* break the instrumentalist link between overarching state policy and death penalty application: capital punishment remains an instrument of state policy. Instead, they reflect the government's current "legalization" agenda and the overall "harmonious society" framework.

This argument has three components: The first is that the death penalty in the PRC, historically, has been pressed into the service of overall state goals, with frequent changes in practice to suit policy, but no trend toward abolition of the death penalty.

Second, the 2006 to 2007 reforms are designed to serve the current goal of legalization (i.e., promoting law as a means of advancing state policy), which prioritizes procedural justice. Legalization, in turn, serves the Chinese government's overall state goal of building a "harmonious society." The reforms are not a move towards abolition of the death penalty. Instead, there is weak support for abolition in the PRC, and neither has foreign abolitionist criticism prompted the changes. Finally, the reforms have not broken the instrumentalist link between capital punishment and overall state policy. Thus, future directions in death penalty practice will be determined by overall policy. While the "peaceful development" policy of ongoing institutional reform and prevention of discontent obtains, and due process measures legitimize Chinese Communist Party ("CCP") rule, the recent reforms are likely to remain, and may even be extended. There are threats to this policy trajectory, however, which are discussed below, and it is possible that the government's attitude toward the reforms could change.

My intention is to place the 2006 to 2007 reforms in the policy context of legalization and procedural justice; to provide evidence that, while the reforms represent substantial procedural change, they do not displace the long-standing characteristics of death penalty practice and therefore should not be seen as preparing for abolition; and to dispel assumptions that China is taking its cues from abolitionist foreign critics.

While there is substantial academic commentary in English on legal reform in the PRC generally and China's experience with capital punishment specifically, much of the information regarding the details of the reforms and their operations has come from Chinese press articles. Information from state-controlled newspapers such as Xinhua and the People's Daily has been particularly useful in tracking the official government narrative of the reforms. This is because the mainstream press in China is under close government supervision. Official statements by the SPC and the National People's Congress ("NPC") have been useful. The reports of United Nations ("UN") bodies and of several non-governmental organizations ("NGOs") concerned with human rights in the PRC also have been of use (although the declared agendas of such organizations must be kept in mind).

## II. DECENTRALIZING REVIEW POWERS: A "TEMPORARY" POLICY WITH LASTING EFFECTS

Some analysts have argued that further limitations to death penalty practice are inevitable within the context of China's ongoing modernization. However, during the 1980s—the first

full decade of economic and legal modernization in the country—the Chinese government used capital punishment as a tool of campaign justice, just as it had in earlier years.

Following the death of Mao Zedong in 1976, the “Gang of Four” radical clique within the CCP was purged and the new Deng Xiaoping administration moved to restore the CCP’s legitimacy, following the turbulence of the Cultural Revolution.<sup>1</sup> This reform campaign involved, in part, creating a “new language of governance, privileging the rhetoric of law and promoting political legitimacy as residing in notions of order and progress.”<sup>2</sup> On January 1, 1980, the Chinese government promulgated the Criminal Law and the Criminal Procedure Law,<sup>3</sup> both of which served to reassert “the state’s monopoly on legitimate use of coercive force.”<sup>4</sup> These laws required the SPC to review every death sentence.

Within months of these laws coming into effect, however, the Standing Committee of the National People’s Congress (“SCNPC”, which has responsibility to make authoritative interpretations of law) authorized the SPC to delegate the approval of death sentences for “homicide, arson, robbery and rape and other serious crime” to the provincial higher people’s courts (which sit directly beneath the SPC in the judicial hierarchy) for the remainder of 1980.<sup>5</sup> Crime rates had risen sharply during the immediate post-Mao period, and courts handed down a correspondingly larger number of death sentences in 1979 and 1980.<sup>6</sup> The reason behind this authorization was that the SPC did not have the resources to review the “surging death penalty [sentences]” emanating from the local courts.<sup>7</sup> The SPC delegated death penalty review to the higher people’s courts. In June 1981, the SCNPC extended this delegation of authority through

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1. Meaghan Sunderland, *Criminal Law Reform in the People’s Republic of China: Any Hope for Those Facing the Death Penalty?*, 8 *APPEAL* 18, 22 (2002).

2. SUSAN TREVASKES, *COURTS AND CRIMINAL JUSTICE IN CONTEMPORARY CHINA* 2 (2006).

3. Feng Jianhua, *Taking Back the Power*, *BEIJING REVIEW*, Feb. 8, 2007, available at [http://www.bjreview.com.cn/quotes/txt/2007-02/05/content\\_54982.htm](http://www.bjreview.com.cn/quotes/txt/2007-02/05/content_54982.htm) (last visited Sept. 9, 2007).

4. Pitman Potter, *The Chinese Legal System: Continuing Commitment to the Primacy of State Power*, 159 *CHINA Q.* 673, 681 (1999).

5. *Notice of the Supreme People’s Court Concerning Some Concrete Provisions on Authorization to Judicial Review of the Death Penalty against Several Kinds of Active Criminal*, Mar. 18, 1980. Effective as of Mar. 18, 1980. Repealed as of Jan. 1, 2007; Susan Finder, *The Supreme People’s Court of the People’s Republic of China*, 7 *J. CHINESE L.* 145, 195 (1993).

6. Alan Lepp, *The Death Penalty in Late Imperial, Modern, and Post-Tiananmen China*, 11 *MICH. J. INT’L L.* 987, 1018 (1990).

7. Feng, *supra* note 3.

the end of 1983,<sup>8</sup> “[i]n order promptly to suppress active criminals who seriously undermine public security.”<sup>9</sup> An authoritative notice of the SPC added the requirements that the records of all death sentences passed by higher people’s courts be lodged with the SPC, and that each higher people’s court provide monthly death sentence figures to the SPC.<sup>10</sup>

The government completed its erosion of SPC death sentence review in 1983. In August 1983, the central government began its first “strike hard” campaign against crime and, as a result, carried out an estimated 5,000 executions over the first three months.<sup>11</sup> An amendment to Article 13 of the Organic Law of the People’s Courts made indefinite the 1981 delegation of review powers from the SPC to the higher people’s courts.<sup>12</sup> (There were instances during the “strike hard” campaigns when even this lowered review requirement appears to have been ignored, with reports of people executed without higher people’s court approval as required by the amended Article 13).<sup>13</sup>

These developments illustrate a paradox of the modern Chinese death penalty experience. The paradox is this: In the context of codification and “regularizing procedures” in all areas of law,<sup>14</sup> the PRC loosened procedural restrictions to allow the state to more efficiently execute targets of the “strike hard” campaigns. Decentralizing approval of death sentences allowed provincial authorities to better coordinate their local “strike hard” campaigns.<sup>15</sup> The reforms of 1981 and 1983 were both initiated by the Political-Legal Committee of the CCP Central Commit-

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8. TREVASKES, *supra* note 2, at 91.

9. Decision of the Standing Committee of the National People’s Congress on the Examination and Approval of a Case Involving the Death Sentence (adopted at the 19th Session of the Standing Comm. of the 5th Nat’l People’s Cong., June 10, 1981, repealed as of Jan. 1, 1984) NOVEXCN (last visited Oct. 18, 2009) (P.R.C.), available at [http://www.novexc.cn/stand\\_commite\\_death\\_senten.html](http://www.novexc.cn/stand_commite_death_senten.html). However, the SCNPC amended Sections 144 and 145 of the Criminal Procedure Law, reserving to the SPC the task of reviewing death sentences for “counterrevolutionary crimes or corruption.”

10. *Notice of the Supreme People’s Court on Implementing the Decision of the Standing Committee of the National People’s Congress on the Examination and Approval of a Case Involving Death Penalty* (adopted June 11, 1981, repealed as of Jan. 1, 2007).

11. Lepp, *supra* note 6, at 1018. “Strike Hard” campaigns are crackdowns on specific crimes or on crime generally that the central government has periodically launched. Campaigns have been both national and localized.

12. *Id.* at 1028.

13. Margaret Y.K. Woo, *The Right to a Criminal Appeal in the People’s Republic of China*, 14 YALE J. INT’L L. 118, 147 n.187 (1989).

14. Stephen B. Davis, *The Death Penalty and Legal Reform in the PRC*, J. CHINESE L. 303, 329 (1987).

15. TREVASKES, *supra* note 2, at 123; John T. Boxer, *China’s Death Penalty: Undermining Legal Reform and Threatening National Economic Interest*, 22 SUF-FOLK TRANSNAT’L L. REV. 593, 605-06 (1999).

tee, which led the campaign justice policy of "strike hard."<sup>16</sup> In 1987, Stephen Davis identified what this author posits is still the true relationship between China's modernization and its death penalty regime:

[I]f legal reform can be viewed solely as a component of China's plan for modernization, the policy of severely and quickly punishing criminals may successfully serve the leadership's goal of China entering the twenty-first century as a modernized and stable society. In the Chinese context, both legal reform and coercive social control might concurrently be means to that end.<sup>17</sup>

These reforms also show that procedural constraints on death sentencing, such as those provided by the 1980 Criminal Law and the Criminal Procedure Law, are always vulnerable to changing political imperatives. The 1980s ended with the post-Tiananmen incident crackdown, during which "[n]umerous unannounced executions"—many for property crimes—took place.<sup>18</sup> According to Jiang Xingchang, a Vice President of the SPC under President Xiao Yang, the initial decentralization of authority was "an irregular policy" to address increased crime early in the reform and opening period.<sup>19</sup> Gao Mingxuan of Renmin University of China recently noted that "[n]o one had expected the temporary decision tailored for one year to last over 20 years."<sup>20</sup>

Developments during the 1990s further entrenched the paradox of Chinese death penalty practice. In March 1996, the NPC revised the 1980 Criminal Procedure Law. The amended Article 200 of that Law tasked the SPC with reviewing all death sentences.<sup>21</sup> Critics raised doubts about whether the SPC would effectively implement this reform.<sup>22</sup> John Boxer, for instance, warned that "as a façade to internal governmental operations . . . the judiciary has had little power in the past to implement politically sensitive revisions."<sup>23</sup>

Such concerns proved well-founded. In April 1996, the CCP Central Committee began a new "strike hard" campaign,<sup>24</sup> and in May, the SPC responded by calling for "wider use of the death penalty regardless of extenuating circumstances or prior criminal

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16. Woo, *supra* note 13, at 146.

17. Davis, *supra* note 14, at 330.

18. Lepp, *supra* note 6, at 1000.

19. Feng, *supra* note 3.

20. *Id.*

21. Boxer, *supra* note 15, at 608-10.

22. *Id.* at 613.

23. *Id.*

24. *Id.* at 603-05.

record.”<sup>25</sup> In September 1997, just before the reforms took effect, the SPC issued an order to “maintain the division of review tasks between the [SPC] and provincial courts,” effectively retaining the 1983 decentralization.<sup>26</sup>

A subsequent “strike hard” campaign from 2001 to 2003 brought with it the familiar sharp increase in death sentences,<sup>27</sup> and CCP officials still exhorted judges to implement campaign justice principles. For example, the Shanghai Party Secretary told the Shanghai Higher People’s Court to approve death sentences “as swiftly as possible, in order to ensure that the legal effectiveness and social effectiveness of court work are one and the same.”<sup>28</sup>

### III. THE 2006 TO 2007 REFORMS

#### 1. THE OCTOBER 2006 DECISION

In October 2006 the SCNPC decided, effective January 1, 2007, to:

“[R]evise the “Organic Law of the People’s Courts of the People’s Republic of China” as follows: Article 13 shall be revised as: “Apart from the death penalty being lawfully sentenced by the Supreme People’s Court, other death penalties pronounced shall be submitted to the Supreme People’s Court for approval.”<sup>29</sup>

This decision, tasking the SPC to approve all death sentences, was widely anticipated. Stakeholders had been intermittently suggesting such a move since the late 1990s, and then SPC President Xiao Yang raised the possibility at the 2004 session of the NPC.<sup>30</sup> Also at the 2004 session, Beijing and Shanxi representatives proposed the SPC’s resumption of the review power, receiving some support.<sup>31</sup> Finally, in 2005, Premier Wen

25. Jeremy T. Monthly, *International Perspectives on Chinese Human Rights Reform: The Death Penalty in the PRC*, 33 *TEX. INT’L L.J.* 189, 204 (1998).

26. Feng, *supra* note 3.

27. TREVASKES, *supra* note 2, at 1.

28. *Id.* at 179.

29. Decision of the Standing Committee of the National People’s Congress on Revising the ‘Organic Law of the People’s Courts of the People’s Republic of China’ (adopted at the 24th Session of the Standing Comm. of the 10th Nat’l People’s Cong., Order 59 of the President of the People’s Republic of China, Oct. 31, 2006, effective as of Jan. 1, 2007) *ASIAN LII* (last visited Oct. 18, 2009) (P.R.C.), available at <http://www.asianlii.org/cn/legis/cen/laws/dotscotnpccaotolotpcotproc1384>.

30. *Death Penalty Reform Should Bring Drop in Chinese Executions*, *DIALOGUE* (Dui Hua Found., San Francisco, CA.), Winter 2007, at 1, available at [http://www.duihua.org/work/publications/nl/nl\\_pdf/nl\\_26\\_2.pdf](http://www.duihua.org/work/publications/nl/nl_pdf/nl_26_2.pdf).

31. HONG LU & TERANCE D. MIETHE, *CHINA’S DEATH PENALTY: HISTORY, LAW, AND CONTEMPORARY PRACTICES* 130 n.61 (2007).



Jiabao flagged the re-centralizing of death sentence reviews as an upcoming judicial reform.<sup>32</sup>

A year prior to the October 2006 Decision, the SPC published its second five-year reform plan, requiring higher people's courts to hold open court hearings when reviewing death sentences where crucial facts or evidence are disputed.<sup>33</sup> Chen Weidong of Renmin University of China described this new requirement of open court hearings as a "practical choice to separate trial and review of death penalty cases, which will promote full-scale judicial reform."<sup>34</sup>

This "full-scale judicial reform" came in October 2006 with the SCNPC Decision. The SPC responded with a Decision in December 2006, noting that the October 2006 Decision "repealed. . . empowerment to the higher people's courts . . . to ratify certain cases in which death penalty is imposed."<sup>35</sup> In other words, apart from death sentences handed down by the SPC at first instance, all "death penalties lawfully sentenced or pronounced by all higher people's courts . . . shall be submitted to the Supreme People's Court for ratification."<sup>36</sup> The effect of the October 2006 Decision was to revive the SPC's mandatory death sentence review competence.

## 2. THE REFORMS IN PRACTICE

The October 2006 SCNPC Decision and the December 2006 SPC Decision did not address the practicalities of how the SPC would exercise its review powers. The Chinese government released the details of the new regime when the SPC released its January 22, 2007 "Provisions of the Supreme People's Court on Several Issues Concerning Review of Death Penalty Cases," or only after the reforms took effect. The Provisions, which became effective on 28 February 2007, set out the criteria upon which the SPC, in exercising its review power, may approve or disapprove each death sentence: "If the finding of fact and application of law are correct, the sentence is appropriate, and the criminal proce-

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32. *Id.* at 130.

33. Feng, *supra* note 3; U.N. Econ. & Soc. Council, Commission on Human Rights, *Civil and Political Rights, Including the Question of Torture and Detention: Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak: Mission to China*, ¶ 51 n.59, U.N. Doc. E/CN.4/2006/6/Add.6, (Mar. 10, 2006) [hereinafter *Report of the Special Rapporteur*].

34. Feng, *supra* note 3.

35. *Decision of the Sup. People's Ct. on the Issues Concerning Unification Exercise of Ratification Power on Death Penalty Cases* (promulgated by the 1409th Meeting of the Judicial Comm. of the Sup. People's Ct., Dec. 28, 2006, effective Jan. 1, 2007) FA SHI [2006] No. 12 at (I).

36. *Id.* at (II).

dure applied is lawful in the first instance, the ruling shall be approved.”<sup>37</sup> The SPC may rule that the death penalty may not be imposed as a matter of law, and remit the matter for retrial.<sup>38</sup> The SPC may also consider the fairness of the trial at first instance, and may quash a conviction if it deems that the lower court “breached the Criminal Procedure Law.”<sup>39</sup> The SPC is empowered to approve death sentences after “rectification” of any finding of fact or law by the court below that is “not completely accurate and correct.”<sup>40</sup>

If, during review, the SPC deems the subordinate court’s finding of fact “not clear,” or evidence is insufficient, “the ruling shall be disapproved and quashed” and the matter “remitted for retrial.”<sup>41</sup> Where the death sentence is “disapproved,” the matter is remitted either to a people’s court (beneath higher people’s courts in the judicial hierarchy) at first or second instance, or to a higher people’s court “based on the particular circumstance of the case.”<sup>42</sup> Where the SPC has disapproved of a higher people’s court sentence ratification, the higher people’s court may either retry the case itself or remit it to the first instance people’s court for retrial.<sup>43</sup> Where a matter has been remitted to a people’s court at the second instance (appellate) level, the court may “directly change the ruling,” but must “open a trial” if it is “necessary” to “investigate the fact and verify the evidence” or to “rectify the procedural error arising from the first instance.”<sup>44</sup> A people’s court at first instance must “open a trial” for all matters remitted for retrial.<sup>45</sup> For all SPC reviews, there must be a “written judgement.”<sup>46</sup>

On March 9, 2007, the SPC, the Supreme People’s Procuratorate and the Ministries of Public Security and Justice supplemented these provisions through a joint notice. The Joint Notice, which locates the reforms in their policy context, was titled “Opinions on Further Strengthening the Strict Adherence to Law in Handling Cases and Ensuring the Quality in Handling Death Penalty Cases” (“Joint Notice”). The Notice places the re-

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37. *Provisions of the Sup. People’s Ct. on Several Issues Concerning Review of Death Penalty Cases*, (adopted at the 1414th Meeting of the Judicial Committee of the Sup. People’s Ct., Jan. 22, 2007, effective Feb. 28, 2007) FA SHI [2007] No. 4 at Article 2.

38. Art. 3.

39. Art. 5.

40. Art. 2.

41. Art. 3.

42. Art. 8.

43. *Id.*

44. Art. 9.

45. Art. 10.

46. Art. 12.

forms in their policy context, describing the centralization of review power as "of great significance for building up a socialist harmonious society, fulfilling the basic strategy of governing the country according to law, [and] a major measure for respecting and protecting human rights. It also maintains social and political stability . . . ."47

According to the Joint Notice, the SPC's uniform review power "sets . . . new and higher demands for the work of the people's courts, the people's procuratorates, the public security departments and the judicial administrative departments."<sup>48</sup> It describes "retaining the death penalty but with strict control" as the:

[B]asic policy of China . . . . At present, China may not abolish death penalty but shall gradually reduce its application . . . . In handling death penalty cases, it shall be based on the requirement of building up a socialist harmonious society and safeguarding social stability . . . [and] prevent[ing] the occurrence of miscarriage [sic] of justice. . . .<sup>49</sup>

The reforms, then, do not prepare for abolition of the death penalty, but are intended to further the government's "legalization" agenda (discussed in section IV below), under the overall banner of maintaining a "harmonious society." Capital punishment remains an instrument of overall state policy, but is implemented with a greater commitment to procedural justice. The Notice further provides for, among other things, the "strengthen[ing]" of evidence practices, and the "strict prohibit[ion]" of torture and illegally obtained statements.<sup>50</sup>

The Notice also contains practice notes on death penalty review at each judicial level. During each review there must be "full scrutiny" of the "application of . . . litigation procedures" in the judgment of the court of first instance.<sup>51</sup> The "opinions" of the defending lawyer must, if requested, be heard, transcribed, and attached to the case file, alongside any written defence opinions.<sup>52</sup> Amnesty International notes a lack of evidence that defence lawyers are, in fact, allowed to make representations.<sup>53</sup>

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47. Joint Notice of the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and the Ministry of Justice Concerning Issuance of the "Opinions on Further Strengthening the Strict Adherence to Law in Handling Cases and Ensuring the Quality in Handling Death Penalty Cases", Section 1.2.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. Amnesty Int'l, *People's Republic of China: The Olympics Countdown—repression of activists overshadows death penalty and media reforms*, at 6 (2007).

Reviewing judges may make “on-site investigation[s]” in the case of “[a]ny doubt on the evidence.”<sup>54</sup> The Notice further specifies that a higher people’s court “shall examine the defendant when reviewing a death penalty case,” whereas the SPC “shall, in principle, examine the defendant when reviewing a death penalty case.”<sup>55</sup>

Details of how the reforms have worked in practice have been made available only through the state-controlled press agencies. Xinhua News Agency, the official press agency of the Chinese government, published an article on February 28, 2007, in which an “SPC spokesman” elaborated on the January provisions. According to the article, the spokesman stressed that the SPC will generally order retrials in the provincial courts where an error is found, and will “only change original death penalty sentences [directly] in cases involving individual criminals facing multiple death sentences, or multiple criminals facing death penalties.”<sup>56</sup> This method of operation could limit the effectiveness of the review power. Amnesty International has commented that “there appears to be no limit to the number of times this can be ordered . . . . [T]his could result in recurring retrials in capital cases, thereby perpetuating the anguish of those under sentence of death.”<sup>57</sup>

According to the state-owned Beijing Review magazine, following the announcement of the reforms the number of criminal tribunals within the SPC has increased from two to five, and new reviewing judges have been recruited from subordinate courts and law schools.<sup>58</sup> A Xinhua article, quoting an anonymous SPC official, explains the procedure for each review: A panel of three judges examines written files and may also question the defendant personally or “make investigations” at a crime scene.<sup>59</sup> This report suggests that, despite the October 2005 order requiring higher people’s courts to conduct reviews in open court where there is contesting of facts or law, room remains for the SPC to review death sentences, at least partly, by reviewing the case files.<sup>60</sup>

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54. Joint Notice, at Section 3.

55. *Id.*

56. *China’s Supreme People’s Court to order provinces to retry death sentences*, XINHUA, Feb. 28, 2007, available at <http://en.chinacourt.org/public/detail.php?id=4134> (last visited Sept. 30, 2009).

57. Amnesty Int’l, *supra* note 54, at 5.

58. *Top Court Reviews All Death Sentences*, BEIJING REVIEW, Feb. 6, 2007, available at [http://www.bjreview.com.cn/quotes/txt/2007-02/06/content\\_54998.htm](http://www.bjreview.com.cn/quotes/txt/2007-02/06/content_54998.htm).

59. ‘Top Court: Review of Death Penalty Cautious, Strict’, *Xinhua*, 13/3/2007.

60. Feng Jianhua, *A Matter of Life and Death*, BEIJING REVIEW, Feb. 8, 2007, available at [http://www.bjreview.com.cn/quotes/txt/2007-02/06/content\\_54996.htm](http://www.bjreview.com.cn/quotes/txt/2007-02/06/content_54996.htm).

## IV. IMPERATIVES FOR REFORM

### 1. LEGALIZATION

The reforms of 2006 to 2007 are part of the ongoing modernization of the PRC's legal system. They constitute part of the legalization reform programme: a push to raise judicial standards and promote procedural justice, while maintaining CCP control and legitimacy.<sup>61</sup>

The reform period, which began in 1978, has seen the creation of an entirely new legal system. Following the defeat of occupying Japan in World War Two, China's civil war between the CCP and the Nationalists continued until the Nationalists were defeated in 1949. The CCP<sup>62</sup> then abrogated all Nationalist laws and ruled directly through policies.<sup>63</sup> The period from 1966 to 1976 saw the full application of Maoist legal nihilism. The CCP denounced lawyers<sup>64</sup> and dismissed law itself as "an instrument of one class oppressing the other."<sup>65</sup>

By 1978, therefore, the establishment of a viable legal order was fundamental to the development of the PRC economy.<sup>66</sup> In a "legislative frenzy," the National People's Congress passed more than 250 laws between 1979 and 2000, and issued over 100 NPC and SCNPC decisions and over 800 administrative schedules.<sup>67</sup> The busiest period of reform followed the 1992 proclamation of the "socialist market economy," when promoting confidence in China's emerging economy became a key part of the central government's agenda.<sup>68</sup>

Criminal law reform has been an integral part of the CCP's drive to strengthen "legality."<sup>69</sup> The *Criminal Law* and *Criminal*

61. The term 'legalization' as used in this paper is distinct both from the general notion of 'rule of law' and from the 'legalism' of the Chinese historical context.

62. Since 1949, the government of China has been under the leadership of the CCP. Most important government positions are held by CCP members.

63. Paul C. Yuan, *China's Challenge to Traditional International Law: An Exposition and Analysis of Chinese Views and Behavior in International Law and Politics*, 10 DALHOUSIE L.J. 9, 32 (1987).

64. See Jerome A. Cohen, *Reforming China's Civil Procedure: Judging the Courts*, 45 AM. J. COMP. L. 793, 793 (1997).

65. Yuan, *supra* note 64, at 31-32.

66. Potter, *supra* note 4, at 678.

67. Unlike NPC laws, NPC and SCNPC decisions are not legislation.

68. Mireille Delmas-Marty, *Present-day China and the Rule of Law: Progress and Resistance*, 2 CHINESE J. INT'L L. 11, 11-12 (2003); see also John P. Burns, *The People's Republic of China at 50: National Political Reform*, 159 CHINA Q. 580, 589-90 (1999). See generally Albert H.Y. Chen, *Toward a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law*, 17 UCLA PAC. BASIN L.J. 125, 127 (1999).

69. See generally KONG QINGJIANG, CHINA AND THE WORLD TRADE ORGANIZATION: A LEGAL PERSPECTIVE 43 (World Scientific Publishing Co. 2002) (discussing the substitution of *fa zhi*, "legality" for *ren zhi*, "the rule of man").

*Procedure Law*, introduced in 1979-1980 and overhauled in 1996-1997, are hallmarks of both the initiation and acceleration of reforms.<sup>70</sup> Each of the organs of criminal justice—the police, the procuratorate and the judiciary—has been subject to reform.<sup>71</sup> Regarding death penalty practice, changes in the law before 2007 included restricting capital punishment to those aged 18 and over, and requiring legal representation for all defendants charged with death-eligible offences.<sup>72</sup>

The “edifice of legality” that the CCP has constructed since 1978 does not displace the centrality of CCP policy.<sup>73</sup> Rather, the CCP has embraced law as a “means for advancing policy,” chiefly, the policies of pursuing economic development and promoting CCP legitimacy.<sup>74</sup> Former SPC President Xiao Yang has stated that “as reform and openness is . . . implemented, economic construction shall always be the focus of nationwide endeavour. During the process of economic system transition . . . we are urgently required to intensify legal system construction . . . .”<sup>75</sup> This article argues that death sentence procedural reform within a retentionist framework is designed to both enhance “legality” and to secure the CCP’s political legitimacy.

The “legalization” drive in general, and the 2006 to 2007 reforms in particular, can be understood as part of the emerging “social contract” between the CCP and its subjects, one that “abolishe[s] most curbs on the personal and economic freedom of ordinary citizens in exchange for their tacit acceptance of the CCP’s authority.”<sup>76</sup> At least theoretically, the uneven, impugnable application of the death penalty (and what greater restriction than that could there be on the freedom of citizens?) has been abolished. But as Pei Minxin also recognized, this amounts to a “strategic shift from mass to selective repression,” rather than an embrace of rule of law for its own sake.<sup>77</sup> In adopting procedural

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70. Boxer, *supra* note 15, at 593-94.

71. LU & MIETHE, *supra* note 31, at 127.

72. *Id.* at ix.

73. See WILLIAM P. ALFORD, *A Second Great Wall? China's Post-Cultural Revolution Project of Legal Construction*, in CHINESE LAW AND LEGAL THEORY 215, 216-21 (Perry Keller ed., 2001).

74. Christopher Duncan, *Out of Conformity: China's Capacity to Implement World Trade Organization Dispute Settlement Body Decisions After Accession*, 18 AM. U. INT'L L. REV. 399, 411 (2002); see generally Randall Peerenboom, *The X-Files: Past and Present Portrayals of China's Alien "Legal System,"* 2 WASH. U. GLOBAL STUD. L. REV. 37, 58 (2003).

75. XIAO YANG, *A New Chapter in Constructing China's Legal System*, in CHINA'S CENTURY: THE AWAKENING OF THE NEXT ECONOMIC POWERHOUSE 218, 222 (Laurence Brahm ed., John Wiley & Sons 2001).

76. Pei Minxin, *Is China Democratizing?*, 77 FOREIGN AFF., Jan.-Feb. 1998, at 68, 78.

77. *Id.*

justice measures, the CCP is planning for the ongoing development of China and for the perpetuation of its own rule. Bringing Chinese criminal sanctions into conformity with those of Western Europe is not its goal.

## 2. JUDICIAL REFORM AND CENTRALIZATION

Judicial reform has been a major component of the modernization of the PRC's legal system. This modernization programme ultimately serves the CCP goal of maintaining its legitimacy to govern. The CCP initiated the first five-year plan for the judiciary in 1999, with the aim of formalizing trial processes and improving the professionalism of judges.<sup>78</sup> The plan emphasized judicial fairness and efficiency over judicial independence, keeping the courts subject to "populism-orientated Party leadership."<sup>79</sup>

In 2002, then-President Jiang Zemin reported to the Sixteenth Party Congress that procedural justice, as well as substantive justice, is necessary to protect citizens' rights.<sup>80</sup> This statement broke with the old notion that procedure should yield to state objectives.<sup>81</sup> Jiang Bixin, Director of the SPC's Administrative Department, has echoed Jiang Zemin's pronouncement: "Where there is a dispute between a citizen and the government, there must be a due process for the resolution of such disputes through litigation. Without such premises, there will be no foundation for a democratic body politic."<sup>82</sup> In other words, the new principle is that "substantive justice can only be realized through procedural justice."<sup>83</sup> According to Miron and Roda Mushkat, this new emphasis on procedural justice reflects a belief that:

The residual decisions should be handled by means of processes that are insensitive to outcomes. This is the new superior rational norm guiding China's agents of modernization. Law and regulations are expected to function like a Hobbesian sovereign, imposing order on a system of self-seeking operators, with unavoidably beneficial consequences.<sup>84</sup>

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78. TREVASKES, *supra* note 2, at 11-12.

79. Shen Kui, *Commentary on "China's Courts: Restricted Reform,"* 191 CHINA Q. 639, 640-41 (2007).

80. Chris X. Lin, *A Quiet Revolution: An Overview of China's Judicial Reform,* 4 ASIAN-PAC. L. & POL'Y J. 255, 262 (2003).

81. Mo Zhang & Paul J. Zwier, *Burden of Proof: Developments in Modern Chinese Evidence Rules,* 10 TULSA J. COMP. & INT'L L. 419, 424 (2003).

82. Lin, *supra* note 81, at 267.

83. Chen Xing Liang, *The Criminal Legal Culture of A State Ruled by Law,* 7 SING. J. INT'L & COMP. L. 15, 27 (Lynette J. Chua & Jean Chan trans., 2003).

84. Miron Mushkat & Roda Mushkat, *Economic Growth, Democracy, the Rule of Law, and China's Future,* 29 FORDHAM INT'L L.J. 229, 257 (2005).

Thus, the notion of due process, which had long been antithetical to Chinese practice, has become a reform goal in itself.<sup>85</sup>

Judicial reform gained fresh impetus with the PRC's accession to the World Trade Organization ("WTO") in 2002,<sup>86</sup> which has been described as the "toughest test that China's weak legal system has ever faced."<sup>87</sup> The WTO's *Accession Protocol* required the PRC to provide for "impartial," "independent," and "prompt" review of "all administrative actions relating to the implementation of laws, regulations, judicial decisions and administrative ruling of general application referred to in" the WTO agreements.<sup>88</sup>

Construed narrowly, WTO accession only requires particular judicial standards regarding application of WTO agreements.<sup>89</sup> As a practical matter, however, this necessitates higher standards across the range of judicial practice.<sup>90</sup> The PRC leadership clearly recognized this, when it introduced national judicial examinations to coincide with WTO accession.<sup>91</sup> As Vice-President Mi Jian of the Qinghai Higher People's Court has noted, without "impartial judicial review," the PRC will lose "credibility" within the WTO.<sup>92</sup> Naturally, WTO membership also places the PRC's judiciary under "greater scrutiny."<sup>93</sup> The WTO requirements, therefore, can serve as a "comprehensive framework" for ongoing judicial reform.<sup>94</sup>

The political impact of China's WTO accession has been just as important as the judicial impact of the *Accession Protocol* requirements. In 2002, Professor Randall Peerenboom speculated that WTO membership would provide the "political capital necessary" for continued judicial reform,<sup>95</sup> and Kong Qingjian iden-

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85. See Liqun Cao & Francis T. Cullen, *Thinking About Crime and Control: A Comparative Study of Chinese and American Ideology*, 11 INT'L CRIM. JUST. REV. 58, 60 (2001).

86. See generally Ignazio Castellucci, *Rule of Law with Chinese Characteristics*, 13 ANN. SURV. INT'L & COMP. L. 35, 91 (2007).

87. SUPACHAI PANITCHPAKDI & MARK L. CLIFFORD, *CHINA AND THE WTO: CHANGING CHINA, CHANGING WORLD TRADE* 147 (John Wiley & Sons 2002).

88. Protocol on the Accession of the People's Republic of China, Nov. 10, 2001, at Part I, Article 2(D).

89. See Donald C. Clarke, *China's Legal System and the WTO: Prospects for Compliance*, 2 WASH. U. GLOBAL STUD. L. REV. 97, 111 (2003).

90. Julia Ya Qin, *Trade, Investment and Beyond: The Impact of WTO Accession on China's Legal System*, 191 CHINA Q. 720, 736 (2007).

91. Bradley Milkwick, *Feeling the Rocks while Crossing the River: The Gradual Evolution of Chinese Law*, 14 J. TRANSNAT'L L. & POL'Y 289, 303 (2005).

92. Lin, *supra* note 81, at 298.

93. Veron Mei-Ying Hung, *China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform*, 52 AM. J. COMP. L. 77, 127 (2004).

94. KONG, *supra* note 70, at 61.

95. RANDALL PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW*, 495 (2002).



tified "new incentives" created by membership for "institution-building in the judicial system."<sup>96</sup> As Julia Ya Qin noted in 2007, "China pursued WTO membership because it was consistent with its domestic reform agenda."<sup>97</sup> The accession, coinciding with Jiang Zemin's elevation of procedural justice, has reinforced the message that "an effective . . . judicial system is not a luxury, but a central component of a well-functioning state and an essential ingredient in long-term development."<sup>98</sup>

In centralizing the ratification of death sentences, the PRC government arguably has two objectives. It seeks, first, to ensure quality and consistency in death penalty decisions; and second, to stimulate improvements in local practices via the SPC's now-inescapable oversight role. In this regard, the October 2006 decision is emblematic of the post-WTO accession reform wave, which seeks to minimize local differences and controls regarding the courts.<sup>99</sup>

Requiring the SPC to ratify all death sentences also guards against inconsistent review of the death penalty resulting from national policies or administrative reasons. Such inconsistencies were prevalent during the 1990s. In 1991, for instance, the SPC charged the Yunnan Higher People's Court with ratifying all death sentences for drug-related convictions. A local lawyer attributed this decision to the central government's "particular concern" toward the "skyrocketing" rate of drug offences in Yunnan, and the significant burden the resulting death sentences placed upon the SPC. Indeed, the SPC allocated an entire working group to handling death sentences from Yunnan.<sup>100</sup>

In 1993, the SPC granted the Guangdong Higher People's Court final authority to ratify death sentences in similar circumstances.<sup>101</sup> Xiao Shengxi identified the inherently political nature of such decisions:

When criminal activity diminishes and there is better social order, generally the authority to review and approve capital cases is carried out by the [SPC] . . . . At times when criminal activity increases greatly and . . . [criminals] are swollen with arrogance, the masses' sense of security is not guaranteed. We then generally employ a line of severe measures against criminal elements. At this time the number of cases in which death sentences are imposed increases. In these cases

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96. KONG, *supra* note 70, at 111.

97. Qin, *supra* note 91, at 721.

98. PANITCHPAKDI & CLIFFORD, *supra* note 88, at 147, (quoting former World Bank President James Wolfensohn).

99. See PANITCHPAKDI & CLIFFORD, *supra* note 88, at 162.

100. Interview, February 1992 in Susan Finder, *The Supreme People's Court of the People's Republic of China*, 7 J. CHINESE L. 145, 196-97 (1993).

101. *Id.* at 196.

... it is more appropriate for the authority to review and approve capital cases to be transferred to higher people's courts, in order to strike at criminal elements in a timely manner.<sup>102</sup>

Such arrangements are no longer possible due to the 2006 Decision. According to Feng's sources, the 2006 and 2007 reforms aim to "avoid having too many reviewers" applying "different criteria" to death sentence reviews."<sup>103</sup>

### 3. CCP LEGITIMACY

Improving procedure within a retentionist framework serves the goal of maintaining the legitimacy of CCP rule. It helps achieve this goal in two ways. First, improving death sentence review procedure creates a more reliable and stable legal system, and thus encourages economic growth and facilitates "peaceful development." The link between procedural justice and preserving CCP legitimacy was identified by Luo Gan, chairman of the CCP Central Political-Legal Committee, in a 2006 speech launching a "socialist rule of law theory" campaign. According to Luo, "ruling the country by law" and "maintaining fairness and justice" were elements of the campaign, but so were "serving the overall situation" and "following the leadership of the Party."<sup>104</sup> The campaign's goal was to maintain the legal system's "political color," which refers to the continuing primacy of CCP leadership.<sup>105</sup>

Second, reforms to the death sentence review procedure maintain CCP legitimacy by reflecting the appropriate punishment of official corruption while displaying due process that was lacking in the executions of officials during the Mao era. The CCP uses the death penalty to deter government corruption,<sup>106</sup> which damages the CCP's reputation.<sup>107</sup> In 2000, former NPC Vice-Chairman Cheng Kejie was executed for accepting bribes.<sup>108</sup> In 2007, drug regulator Zheng Xiaoyu was sentenced to death for taking bribes to approve products without subjecting the products to the prescribed safety checks. The CCP's position is that it applies the death penalty rigorously to government officials high and low, punishing "flies and tigers" with equal re-

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102. Xiao Shengxi, *A Discussion of Death Sentence Reporting Procedure (Sixing fuhe chengxu lun)* 74-76 (1989), translated in *Id.* at 197.

103. Feng, *supra* note 61.

104. Luo Gan, *China Court Web*, Apr. 14, 2006; translated in Benjamin Liebman, *China's Courts: Restricted Reform*, 191 *CHINA Q.* 620, 628 (2007).

105. *Id.*

106. David Lague, *China Moves to Put Brake on Use of Death Penalty*, *SYDNEY MORNING HERALD*, Nov. 2, 2006, at 13.

107. *Id.*

108. Sunderland, *supra* note 1, at 29; Mary-Anne Toy, *Death Sentence for Corrupt Food and Drug Boss*, *SYDNEY MORNING HERALD*, Jun. 30, 2007, at A.

solve.<sup>109</sup> By improving death sentence review procedure, the CCP can satisfy "the public's indignation" over corruption while distinguishing contemporary executions of officials from the Mao-era political purges,<sup>110</sup> and can argue that "governance according to the law" applies equally to all.<sup>111</sup>

#### 4. OFFICIAL AND ACADEMIC SUPPORT FOR RETAINING THE DEATH PENALTY

The "kill fewer" component of the policy does not refer to abolition. Rather, it reflects the drive to limit death sentences by insisting on uniform procedure in each case. Statements by CCP and SPC officials strongly indicate that the 2006 to 2007 reforms have the goal of improving procedure, rather than preparing for eventual death penalty abolition. The policy, as enunciated by Cao Jianmin, then-SPC Vice-President, is "kill fewer, kill carefully."<sup>112</sup> Then-SPC President Xiao Yang explained: "A case involving a human life is a matter of vital importance . . . . We can never be [too] careful in this regard."<sup>113</sup> Xiao reported to the 2007 NPC that the SPC had trained 5,500 judges empowered to issue death sentences, with the goal that every decision "will be able to stand the test of time."<sup>114</sup>

The CCP occasionally invokes abolition as a long-term goal. Li Yifan, the PRC representative to the UN Human Rights Council, said of the reforms: "[W]e are seeking to limit the application of the death penalty in China. I'm confident that with the development and progress in my country, the application of the death penalty will be further reduced and it will finally be abolished."<sup>115</sup> NPC spokesperson Ni Shouming has declared that "[a]bolishing capital punishment has been a global trend, and we will eventually work towards that direction."<sup>116</sup> Ni admitted, however, that the Chinese government has "no timetable" for abolition.<sup>117</sup>

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109. Sunderland, *supra* note 1, at 29.

110. Lepp, *supra* note 6, at 1002-22.

111. LU & MIETHE, *supra* note 31, at 138.

112. Jiang Zhuqing, *Meeting Hears Calls for Death Penalty Reform*, CHINA DAILY, Jul. 23, 2005, available at [http://www.chinadaily.com.cn/english/doc/2005-07/23/content\\_462667.htm](http://www.chinadaily.com.cn/english/doc/2005-07/23/content_462667.htm) (last visited Jan. 29, 2009).

113. *Chief Justice Vows 'Extreme Caution' in Death Penalty Cases*, BEIJING REVIEW, Mar. 15, 2007, available at [http://www.bjreview.com.cn/headline/txt/2007-03/15/content\\_59293.htm](http://www.bjreview.com.cn/headline/txt/2007-03/15/content_59293.htm) (last visited Sept. 4, 2007).

114. *Id.*

115. La Yifan, *Chinese Representative, Statements to the U.N. Human Rights Council* (Mar. 12, 2007), quoted in *Amnesty Int'l*, *supra* note 54, at 3.

116. BEIJING REVIEW, *supra* note 115.

117. *Id.*

The reality is that the PRC leadership has rejected abolition. In 2005, Premier Wen Jiabao stated that abolition is impossible given current social conditions in the PRC, although he added that more care in death sentencing was necessary.<sup>118</sup> In 2006, President Hu Jintao stated that the death penalty is still an “effective” way of dealing with the “most serious offenders,”<sup>119</sup> and Xiao Yang told the NPC that present social conditions do not even permit abolishing the death penalty for non-lethal offenses.<sup>120</sup> Aspirational statements identifying abolition as a target do not reflect policy, and carry no more weight than similar aspirations expressed in the PRC’s standard criminal law textbook in 1957: “A correct estimate of the death penalty’s active role in the struggle against crime by no means implies the need to retain the death penalty forever. On the contrary, our country is in the process of creating conditions for the gradual abolition of this penalty.”<sup>121</sup> It is significant that when such statements are made, they include words such as “eventually”, “finally”, and “gradual.”

Academic consensus in the PRC favors retention of the death penalty. This further indicates that the reforms are procedural, rather than abolitionist, in their goals – i.e. they are not driven by an internal, abolitionist intelligentsia. The “most popular” view among academics, as enunciated by Peking University’s Chen Xingliang, reflects the government position: that abolition is not appropriate given current conditions.<sup>122</sup> According to Hong Lu and Terance Miethe’s survey, “[r]ecent scholarly discussions . . . have revolved around how to improve the current system.”<sup>123</sup> “Improving the current system” is precisely what the Chinese government has attempted with its reforms. Qiu Xinglong of Hunan Xiangtan University is a notable exception,

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118. LU & MIETHE, *supra* note 31, at 126.

119. *Id.*

120. *Id.*

121. Li Meng, Chu Yü-huang, Ch'en Tse-chieh & Li Chieh, *Lectures on the General Principles of Criminal Law of the People's Republic of China (Chung-hua jen-min kung-ho-kuo hsing-fa tsung-tse chiang-i)* 201-202 (1957), translated in JEROME COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949-1963: AN INTRODUCTION* 536 (1968).

122. CHEN XINGLIANG, *The Purpose of Rule of Law* 218-21 (2003); translated in LU & MIETHE, *supra* note 31, at 124-25.

123. *Id.* at 125; Zhu Jianhua, *On the Conflict of Law Regarding the Stipulation of the Final Approval of the Death Penalty*, [all in translation] 1 *CONTEMPORARY LEGAL STUDIES* (1999); Liang Genlin & Zhang Wen, *Discussions on the Imposition of the Death Penalty on Economic Offenses*, 1 *LEGAL STUDIES* (1997); Zhao Bingzhi, *Issues Involving the Revision of the Criminal Law*, 5 *LEGAL STUDIES* (1996); Chu Huizhi, *Modernizing Punishment*, 1 *LEGAL STUDIES* (1997); ZHANG WEN & LIAN GENLIN, *AN EXAMINATION OF THE CURRENT ECONOMIC CRIME* (1996); ZHANG MINGKAI, *CRIMINAL LAW* (2nd ed, 2003); CHEN WEIDONG (ED.), *JURISDICTIONAL JUSTICE AND INNOVATION* (2002); cited in *Id.* at 125 note 33.

favoring abolition and remarking in 2001 that "there has not been one scholar who was a steadfast believer in the complete abolition of the death penalty" in China."<sup>124</sup>

##### 5. PUBLIC SUPPORT FOR RETAINING THE DEATH PENALTY

Ongoing public support for the death penalty in China is an additional reason to dismiss the 2007 reform as a transition to eventual abolition. As noted above, there has been no trend to more limited death penalty use over recent decades. Even though the 2006 to 2007 reforms (theoretically) impose a uniform standard for sentence ratification, the number of offenses leading to death sentences has more than doubled since 1980.<sup>125</sup> Thus, while the Chinese government has tightened death penalty procedure, it has greatly expanded its application.<sup>126</sup>

The majority of Chinese citizens apparently do not object to this expansion. While no reliable national survey exists,<sup>127</sup> smaller, non-random samples and Internet polling indicate strong public support for the death penalty. A 2005 study found that 72 percent of Chinese university students favor retention of the death penalty.<sup>128</sup> While a 2001 study of both Chinese and American students found a comparable level of support for the death penalty across the samples, it also found that the Chinese students "showed a faith in state power by firmly endorsing . . . the right of the government to 'take away another's life.'"<sup>129</sup>

The level of public support for capital punishment in the PRC is similar to that in a number of Western countries that have abolished capital punishment, and lower than the rate of support in, for example, the United Kingdom at the time of abolition there.<sup>130</sup> The rational conclusion is that public opinion is a poor guide to national death penalty policy. Nevertheless, the CCP, faced with the constant challenge of maintaining its legitimacy to govern in a non-democratic system, is unlikely to move far ahead of public opinion on capital punishment even if it that was a desire. The constant refrain of public officials and academics, that "social conditions" do not permit abolition, bespeaks both public support for capital punishment and the widespread anxiety about

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124. Qiu Xinglong, *COMPARATIVE CRIMINAL LAW*, 13 (2001), translated in LU & MIETHE, *supra* note 31, at 124.

125. Cai Dingjian, *China's Major Reform of Criminal Law*, 11 COLUM. J. ASIAN L. 213, 217 (1997).

126. Monthly, *supra* note 25, at 210.

127. LU & MIETHE, *supra* note 31, at 122.

128. *Id.* at 122-23.

129. Cao and Cullen, *supra* note 86, at 77.

130. LU & MIETHE, *supra* note 31, at 123-24.

crime which has persisted during the post-1978 period.<sup>131</sup> As Dong Likun of Shenzhen University observes, “the state’s actions show it wants to quell a rising sense of insecurity among the growing numbers of middle-class Chinese.”<sup>132</sup> If, as Peerenboom has argued, many of the PRC’s legal reforms have been successful in part because they have enjoyed “strong domestic support,”<sup>133</sup> then moving toward abolition would be a risk for the CCP, and one that it currently has no reason to take.

## V. INTERNATIONAL PRESSURE

### 1. IS CHINA LISTENING?

The post-2007 regime—characterized by a widely applied death penalty with procedural limitations—is not a radical departure from longstanding PRC practices. The 2006 to 2007 reforms are part of the ongoing planning for judicial reform and “legalization,”<sup>134</sup> a program given renewed impetus by the PRC’s WTO accession. But are the reforms also a response to foreign pressure and criticism? This is an important question. If China has acceded to international pressure regarding its execution rate, then future concessions on death penalty practice can be expected. If, however, the reforms have come irrespective of abolitionist criticisms, then analysts should be far more cautious when predicting further death penalty reform. This article argues that while China’s relatively newfound recognition of procedural justice is a key driver of change, the PRC leadership has signally ignored abolitionist critics, and has not implemented the reforms to placate them.<sup>135</sup>

### 2. FOREIGN CRITICISM IGNORED

During the last 60 years, there has been an undisputed global trend in favor of abolishing the death penalty and further restricting its use where it is not abolished.<sup>136</sup> UN instruments

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131. Cai, *supra* note 127, at 217.

132. Michael Sheridan, *Death for City’s Purse-Snatchers*, THE AUSTRALIAN, Mar. 6, 2006, at 12.

133. Randall Peerenboom, *What Have We Learned About Law and Development? Describing, Predicting, and Assessing Legal Reforms in China*, 27 MICH. J. INT’L L. 823, 865 (2006).

134. Monthly, *supra* note 25, at 205.

135. Pitman Potter, *China and the International Legal System: Challenges of Participation*, 191 CHINA Q. 699, 700-01 (2007). More expansively, the reforms constitute powerful evidence that “selective adaptation” of international norms, whereby “interpretive communities selectively adapt non-local standards . . . in light of their own normative perspectives,” is a far more reliable guide to state behaviour than asserted templates of “development towards a globally unified system of institutional practices and values.”

136. LU & MIETHE, *supra* note 31, at 138.

have progressively reflected this trend, from the *Universal Declaration of Human Rights* (1948) and the *International Covenant on Civil and Political Rights* (1966) to the *Second Optional Protocol on Abolishing the Death Penalty* (1989), which provides for complete abolition in peacetime.<sup>137</sup> Bacre Waly Ndiaye, the UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions during the 1990s, has argued that international human rights law "seeks" full abolition.<sup>138</sup> Regarding the global trend to abolition, it is clear that "[f]ew more dramatic examples of the spread and success of human rights law can be found."<sup>139</sup>

As the world leader in the number of executions it carries out, the PRC has been a natural target of criticism, and all the more so because the death penalty is only one of a number of Chinese practices that raise legitimate human rights concerns.<sup>140</sup> Following the 1989 Tiananmen incident, members of the international community roundly criticized the PRC for "abandoning procedural safeguards" to punish those involved.<sup>141</sup> Since 1990, foreign nations have brought 11 censure motions against the PRC at the UN Commission on Human Rights, and each failed.<sup>142</sup> In 2006, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment labelled the circumstances of condemned persons on death row in the PRC as "inhuman and degrading."<sup>143</sup> Practical issues have arisen as well, with abolitionist states refusing to extradite suspects who might face execution.<sup>144</sup>

Given the weight and vehemence of this criticism, it is understandable that many would see the 2006 to 2007 reforms as a

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137. Monthly, *supra* note 25, at 195 (citing Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, U.N. GAOR, 44th Sess., Annex, Supp. No. 49, art. 2, U.N. Doc. A/44/49 (1989)).

138. William Schabas, *International Law, Politics, Diplomacy and the Abolition of the Death Penalty*, 13 WM & MARY BILL OF RTS. J. 417, 433 (2004).

139. *Id.* at 419.

140. Frank Frost, *Directions in China's Foreign Relations – Implications for East Asia and Australia*, PARLIAMENTARY LIBRARY RESEARCH BRIEF NO. 9, 2005-06, Dec. 5, 2005, 11; Potter, *supra* note 137, at 709.

141. Sunderland, *supra* note 1, at 23.

142. Randall Peerenboom, *Assessing Human Rights in China: Why the Double Standard?*, 38 CORNELL INT'L L.J. 71, 72 (2005).

143. *Report of the Special Rapporteur*, *supra* note 33, at ¶ 68. Somewhat ironically given the high rate of executions in the US, criticism from the U.S. has been particularly harsh, with the Department of State reporting: "Trials involving capital offenses sometimes took place under circumstances where the lack of due process or a meaningful appeal bordered on extrajudicial killing." U.S. DEP'T ST., *China*, in 2003 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2004), <http://www.state.gov/g/drl/rls/hrrpt/2003/27768.htm>; Monthly, *supra* note 25, at 196.

144. LU & MIETHE, *supra* note 31, at 138 note 84; Schabas, *supra* note 140, at 422.

natural response. The *Melbourne Age* welcomed the reforms, stating that “China’s recognition of the need to amend its policy is evidence that a concerted effort by the international community can effect significant change.”<sup>145</sup> David Lampton, former President of the National Committee on United States-China Relations, hailed the reforms as “evidence” of the policy of successive U.S. administrations to promote “more humane governance” in the PRC.<sup>146</sup> These linkages, though readily assumed, are not confirmed by evidence, and China’s record of behavior suggests that they are false linkages.

First, as argued above, there are sufficient and compelling internal reasons that explain the reforms without any need to reference foreign, abolitionist criticism.

Second, the PRC’s longstanding practice has been to deflect such criticism by acknowledging the international movement toward abolition while emphasizing the need to consider China’s own circumstances. In 2002, the Chinese government replied to the Special Rapporteur on Extrajudicial, Summary or Arbitration Executions that “ultimate worldwide abolition [of the death penalty] will be the inevitable consequence of historical development,” but that “[e]ach country should decide whether to retain or abolish the death sentence on the basis of its own actual circumstances and the aspirations of its people.”<sup>147</sup> In the past, even the PRC’s support for a UN General Assembly resolution to “progressively [restrict] the number of offenses for which the death penalty may be imposed with a view to the desirability of abolishing this punishment” did not prevent it from *increasing* the number of death-eligible offenses, both in the decade following the motion and again in the next decade.<sup>148</sup> It would therefore be naïve to attribute any promissory intent to such statements by the PRC.

Third, the fact that the PRC has emphatically rejected much of the criticism should not be overlooked. In 2003, the State Council Information Office responded to the U.S. State Department allegation of extrajudicial killings, made in that year’s Human Rights Report, with a missive on “an amateurish collection of distortions and rumors” peddled by “anti-China forces

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145. Editorial, *China Must Face More Pressure on Executions*, THE AGE, Nov. 3, 2006, <http://www.theage.com.au/news/editorial/good-deal-or-bad-secrecy-keeps-voters-in-the-dark/2006/11/02/1162339983979.html?page=fullpage#contentSwap1>.

146. David Lampton, *The China Fantasy*, *Fantasy*, 191 CHINA Q. 745, 747 (2007).

147. Special Rapporteur, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶ 58, *delivered to the Comm’n on Human Rights*, U.N. Doc. E/CN.4/2005/7, 18 (Dec. 22, 2004).

148. G.A. Res 32/61, 32 UN GAOR Supp (No 45) at 136, UN Doc A/32/45 (Dec. 8, 1977); Davis, *supra* note 14, at 332-33.



who don't want to see the existence of an increasingly wealthy and developed socialist state."<sup>149</sup> Peerenboom has argued that the more strident criticisms of Chinese practices may actually discourage human rights reforms, because the PRC feels that there are double standards at work.<sup>150</sup>

Following China's WTO accession and Jiang Zemin's 2002 speech, the Chinese government indeed has accepted the need to improve procedural justice. As argued above, however, there is no evidence that the Chinese government instituted the 2006 to 2007 reforms, even in part, to appease foreign abolitionists.

### 3. SECRECY MAINTAINED

The 2006 to 2007 reforms have not changed the Chinese government's policy of not releasing the number of people executed in China each year. This is further evidence that the reforms are not a concession to international opinion, since this secrecy is one of the primary concerns of abolitionists. NGOs such as Amnesty International have long dedicated resources to estimating how many people are executed in the PRC each year.<sup>151</sup> Amnesty has criticized the Chinese government's refusal to release these figures as part of the reforms, and quoted in its report an NPC delegate also found fault with the SPC for lack of transparency.<sup>152</sup> Another NGO, Human Rights in China, has argued that maintaining secrecy undermines the reforms, because it makes it difficult "to gain a sense of how far the reform process might go in reducing executions in the future."<sup>153</sup>

PRC officials have continued to reject both these criticisms and Amnesty International's estimates of people executed. SPC spokesman Ni Shouming labeled a *South China Morning Post* estimate of 10,000 people annually as "unreasonable and groundless,"<sup>154</sup> and former SPC Vice-President Liu Jiachen insisted that the number of death sentences meted out in 2006 "hit a record low," while refusing to provide an actual figure.<sup>155</sup> Despite its implementation of some reforms, the Chinese government does not see a need to remove the "top secret" label and let the inter-

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149. John Esterbrook, *U.S. Won't Rap China on Rights Abuses*, CBS NEWS, Apr. 11, 2003, <http://www.cbsnews.com/stories/2003/04/11/politics/main548860.shtml?cmp=em8706>; Peerenboom, *supra* note 144, at 73-74. The PRC now releases its own reports on human rights in the US (2008 full text at [http://news.xinhuanet.com/english/2009-02/26/content\\_10904741.htm](http://news.xinhuanet.com/english/2009-02/26/content_10904741.htm)).

150. Peerenboom, *supra* note 144, at 73; Potter, *supra* note 137, at 712-13.

151. Amnesty Int'l, *supra* note 54, at 2.

152. Amnesty Int'l, *supra* note 54, at 8.

153. Human Rights in China, *China's Death Penalty Reforms: An HRIC Issues Brief*, 2 CHINA RTS. F. 26, 30 (2007).

154. BEIJING REVIEW, *supra* note 61.

155. Amnesty Int'l, *supra* note 54, at 8.

national community judge the results; the official response to criticisms regarding the figures remains defensive rather than placatory. According to Wang Shizhou of Peking University, “the reason that nationwide statistics on the death penalty could damage national security and interests is that the number is too great.”<sup>156</sup>

## VI. ASSESSING THE IMPACT OF THE REFORMS

Although it would be premature to speculate on the long-term significance of the reforms, some preliminary observations may be made. In his March 2008 work report to the NPC, Xiao Yang noted that the “transition work has been smooth,” and that “[t]he SPC has been working to ensure that the capital punishment only applies to the very few number of felons who committed extremely serious, atrocious crimes that lead to grave social consequences.”<sup>157</sup> No execution figures were given, confounding the predictions of some commentators,<sup>158</sup> but Huang Ermei of the SPC’s First Criminal Law Court said that the SPC had rejected 15 percent of death sentences since the beginning of 2007.<sup>159</sup> Responding to the work report, the San Francisco-based Dui Hua Foundation estimated that there were 25 to 30 percent fewer executions in 2007 than in 2006.<sup>160</sup> This estimation is not far from the official SPC position of December 2007 that the rate fell by thirty-three percent in 2007.<sup>161</sup> If either figure is correct, the reforms have significantly reduced the execution rate.

The claimed “smooth transition” may even have encouraged further measures to strengthen procedures. In December 2008, the SPC confirmed that it will produce a “guideline to unify standards for the issuing of the death penalty” in order to “unify standards across the county.”<sup>162</sup> The guideline would apply to five categories of crime: murder, robbery, abduction, drug trafficking and intentional injury. Such a measure would continue

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156. Wang Guangze, *The Mystery of China’s Death Penalty Figures*, 2 CHINA RTS. F. 39, 42 (2007) (Wang Ai, trans.).

157. *Top Judge: Death Sentence Meted Out Only to ‘Tiny Number of Felons’ in China*, XINHUA, Mar. 10, 2008, available at [http://news.xinhuanet.com/english/2008-03/10/content\\_7755664.htm](http://news.xinhuanet.com/english/2008-03/10/content_7755664.htm) (last visited Nov. 8, 2008).

158. Katie Lee, *China and the International Covenant on Civil and Political Rights: Prospects and challenges*, 6 CHINESE J. INT’L L. 445, 465 (2007).

159. XINHUA, *supra* note 159.

160. *Rare Look at China’s Death Penalty*, CBS NEWS, Mar. 10, 2008, available at [http://www.cbsnews.com/stories/2008/03/10/world/main3920936.shtml?source=RSS&tt=world\\_3920936](http://www.cbsnews.com/stories/2008/03/10/world/main3920936.shtml?source=RSS&tt=world_3920936) (last visited Nov. 6, 2008).

161. Susan Trevaskes, *The Death Penalty in China Today: Kill Fewer, Kill Cautiously*, 48 ASIAN SURV. 393, 413 (2008).

162. Xie Chuanjiao, *New Guideline on Death Penalty*, CHINA DAILY, Dec. 23, 2008, available at [http://www.chinadaily.com.cn/china/2008-12/23/content\\_7331191.htm](http://www.chinadaily.com.cn/china/2008-12/23/content_7331191.htm) (last visited Jan. 15, 2009).

the Chinese government's program of "legalization" and maintain its objective of increasing public confidence in the legal system.

The reforms, however, have not prevented capital cases from continuing to attract controversy regarding procedural justice. In the case of recently executed Wo Weihang, for example, foreign diplomats concerned that Wo had not received a fair trial lobbied the Chinese government on his behalf.<sup>163</sup> Review centralization also has not dispelled suspicions that private citizens are put to death far more readily than corrupt government officials.<sup>164</sup>

There are also reasons for caution regarding the actual implementation of the reforms. A *People's Daily* report in March 2007 quoted an anonymous SPC judge who claimed that the SPC had approved four death sentences since the beginning of 2007, but "would not say how many death sentences had been reviewed . . . so far."<sup>165</sup> Amnesty International responded with evidence that at least 13 other people had been executed during this period without having their sentences ratified by the SPC. Amnesty acknowledged uncertainty, however, over whether cases beginning prior to January 1, 2007, were subject to the SPC's new review power.<sup>166</sup>

## VII. FUTURE DIRECTIONS

### 1. THIS FAR, BUT NO FURTHER

This paper has argued that although the 2006 to 2007 reforms do not displace the key facets of PRC death penalty practice—liberal application and political motivation—they improve procedural justice in capital sentencing. The reforms are a significant development in the continuing program of legalization. They entrench procedural justice in death penalty practice. These changes, however, are not the result of abolitionist pressure.

If these observations are accepted, the task of analyzing the prospects for further reform, or the undoing of existing reforms,

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163. Maureen Fan & Arian Eunjung Cha, *China's Capital Cases Still Secret, Arbitrary*, WASH. POST, Dec. 24, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/23/AR2008122392795.html> (last visited Jan. 15, 2009).

164. E.g. Wu Zhong, *No Rhyme or Reason to China's Rule of Law*, ASIA TIMES ONLINE, Jan. 14, 2009, available at <http://www.atimes.com/atimes/China/KA14Ad01.html> (last visited Jan. 15, 2009).

165. *China's Supreme People's Court Approves Four Death Sentences*, PEOPLE'S DAILY ONLINE, Mar. 19, 2007, available at [http://english.peopledaily.com.cn/200703/19/eng20070319\\_359084.html](http://english.peopledaily.com.cn/200703/19/eng20070319_359084.html) (last visited Sept. 4, 2007).

166. Amnesty Int'l, *supra* note 54, at 6-7.

becomes complex. Future directions will be determined in an uncertain policy context.

Some foreign observers have premised their reaction to the reforms on the basis that they are a welcome start, but that much more change is required. The *Melbourne Age* stresses that the reforms are “just the beginning.”<sup>167</sup> Amnesty International notes its concern that “these reforms will only have a limited impact unless they are broadened and accompanied by other essential measures.”<sup>168</sup> Human Rights Watch takes the position that “[t]his is a positive step, but it falls well short of what is needed.”<sup>169</sup> Human Rights in China notes that “[k]ey systemic challenges remain . . . in ensuring that the criminally accused are not arbitrarily deprived of their inherent right to life,”<sup>170</sup> and that “[e]ffective implementation will further require a series of concrete measures,” including: release of execution statistics to enable monitoring; requiring the appearance of “key witnesses” in trials of death-eligible defendants; and improving defendant access to legal representation.<sup>171</sup>

Such observers are likely to be disappointed. Apart from the proposed sentencing guidelines, there are no indications that the PRC will further restrict the operation of the death penalty, at least in the short term. The official Xinhua News Agency has already reported that foreign observers will not be allowed to monitor SPC reviews, rejecting the 2006 recommendation of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>172</sup> The PRC has also rejected the 2005 recommendations of the UN Special Rapporteur on Summary, Arbitrary or Extrajudicial Executions that details of executions be declassified and that the number of death-eligible offenses be reduced.<sup>173</sup> Moreover, there is evidence that, since 2003, the SPC has “urged” provincial authorities to invest in “execution vans,” which are mobile and require fewer personnel per execution than the old method of shooting condemned

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167. *THE AGE*, *supra* note 147.

168. Amnesty Int'l, *supra* note 54, at 4.

169. Nicholas Bequelin, *Human Rights Watch in Lague*, *supra* note 108.

170. *Human Rights in China*, *supra* note 155, at 26.

171. *Id.* at 33-34.

172. *Top Court: Review of Death Penalty Cautious, Strict*, XINHUA, Mar. 13, 2007, available at [http://news.xinhuanet.com/english/2007-03/13/content\\_5842687.htm](http://news.xinhuanet.com/english/2007-03/13/content_5842687.htm) (last visited Sept. 4, 2007).

173. SPECIAL RAPPORTEUR ON SUMMARY, ARBITRARY OR EXTRAJUDICIAL EXECUTIONS, REPORT TO THE COMMISSION ON HUMAN RIGHTS, E/CN.4/2005/7, paras 57-58; Special Rapporteur, *supra* note 33, at [69] p 20.

persons.<sup>174</sup> This last development strongly indicates that the PRC government will continue to use capital punishment extensively.

In fact, it may well be that the 2006 to 2007 reforms have the "effect of shoring up the death penalty system," as Amnesty International has recognized.<sup>175</sup> Academics Carol Steiker and Jordan Steiker, from Harvard and UT Law respectively, claim that "[p]opular support for the death penalty depends crucially on the perception that those . . . executed are in fact guilty of the underlying offense," with cases of wrongful executions figuring prominently in several national abolitionist movements.<sup>176</sup> The reforms followed several highly publicized cases where persons of doubtful guilt were executed in the PRC.<sup>177</sup> However, the PRC leadership remains wary of the media's ability, and inclination, to "stir up popular sentiment" over such injustices.<sup>178</sup> Former SPC President Xiao Yang has said that the reforms would allow each death sentence "to withstand any scrutiny" and would prevent wrongful executions.<sup>179</sup> By strengthening procedural justice and confidence in the system, the reforms may act as a "safety valve" for discontent,<sup>180</sup> dampening internal demands for further safeguards and preserving "grass-roots support" for the death penalty, which remains a means of social control.<sup>181</sup>

## 2. HARMONIOUS SOCIETY. . .

The long-term direction of death penalty practices in the PRC will depend on broader events and policy decisions. It is important for all analysts, including those who study human rights or criminal justice, to understand this reality. The attitude of the PRC leadership to legal modernization, and death penalty reform in particular, remains overwhelmingly instrumentalist. Criminal law, according to Peking University's Chen Xingliang, remains "a means of social control and governance,"<sup>182</sup> and as

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174. *Id.*; Antoaneta Bezlova, *China's Mobile Death Fleet*, ASIA TIMES, Jul. 21, 2006, available at <http://www.atimes.com/atimes/China/HG21Ad01.html> (last visited Oct. 28, 2007).

175. Amnesty Int'l, *supra* note 54, at 4.

176. Carol Steiker & Jordan Steiker, *Should Abolitionists Support Legislative "Reform" of the Death Penalty?*, 63 OHIO ST. L.J. 417, 422 (2002).

177. *Death Penalty Reform Should Bring Drop in Chinese Executions*, 26 DIALOGUE (NEWSLETTER OF THE DUI HUA FOUNDATION) 1 (2007).

178. Luo Gan, *China Court Web*, Apr. 14, 2006; translated in Liebman, *supra* note 106, at 629.

179. Feng, *supra* note 3.

180. Luo Gan, *China Court Web*, Apr. 14, 2006; translated in Liebman, *supra* note 106, at 635.

181. LU & MIETHE, *supra* note 31, at 121.

182. Chen, *supra* note 69, at 15.

George Washington University's Donald Clarke noted in 2007, the PRC's nation-building project is "not law-centred"—both legal and non-legal institutions have been utilized where expedient.<sup>183</sup>

Death penalty safeguards have changed frequently and dramatically since the founding of the PRC in 1949. As long as the "peaceful development" policy framework of China continues to obtain, current safeguards can be expected to remain, and further limitations may eventually be implemented, because "legalization" and procedural justice support overall policy. Any number of factors, however, could knock this policy off course.

From 1978 to the present, China has been characterized by rapid economic reform.<sup>184</sup> The last 20 years have seen strong economic growth, averaging over nine percent annually.<sup>185</sup> As noted above, economic growth has been accompanied by legal reforms, designed to strengthen "legality" and combat the old perception that "rule of man" prevails in China. In 1997, the 15th Party Congress committed itself to "governing the country according to law" and to "establishing Socialist rule of law" by 2010.<sup>186</sup> By 2005, the PRC was already reported as outperforming the averages for states in its income class on "rule of law" and "good governance."<sup>187</sup>

This trajectory of development has been explained by the concept of the "peaceful rise" of China, developed by Zheng Bijian of the China Reform Forum and adopted by Hu Jintao. According to Zheng, a "peaceful rise" (later termed "peaceful development") requires continuing institutional reform to promote a "socialist market economy," and balancing various sectional interests to ensure "co-ordinated development" and to avoid discontent.<sup>188</sup> This concept of a "peaceful rise" is part of the PRC leadership's commitment to creating a "harmonious society," which was inserted into the CCP Constitution at the 17th Party Congress in 2007.<sup>189</sup>

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183. Donald Clarke, *Legislating for a Market Economy in China*, 191 CHINA Q. 567, 568 (2007).

184. LU & MIETHE, *supra* note 31, at 138.

185. Frost, *supra* note 142, at 1.

186. Lin, *supra* note 81, at 261; Mushkat & Mushkat, *supra* note 85, at 251; Larry Catá Backer, *The Rule of Law, the Chinese Communist Party, and Ideological Campaigns: Sange Daibiao (The Three Represents), Socialist Rule of Law, and Modern Chinese Constitutionalism*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 29, 69 (2007).

187. Peerenboom, *supra* note 144, at 156.

188. Bonnie Glaser & Evan Medeiros, *The Changing Ecology of Foreign Policy-Making in China: The Ascension and Demise of the Theory of "Peaceful Rise"*, 190 CHINA Q. 291, 294-95 (2007).

189. Guo Likun, *CPC Constitution Makes Key Revisions on Economic, Democratic, Social Development*, XINHUA, Oct. 25, 2007, available at [http://news.xinhuanet.com/english/2007-10/25/content\\_6947362.htm](http://news.xinhuanet.com/english/2007-10/25/content_6947362.htm) (last visited Oct. 28, 2007).

The "harmonious society" agenda broadly endorses "legalization" as a way of addressing the public's grievances against the government and thereby warding off political instability. To this end, the notion of the "legal (or legitimate) rights and interests" of the people has been emphasised in official statements.<sup>190</sup> In 2007, Hu Jintao directed the CCP to "[c]omprehensively implement the rule of law as a fundamental principle," and spoke of the "need to deepen the reform of the judiciary system, optimize the distribution of judicial functions and powers, [and] standardize judicial practices."<sup>191</sup> To the extent that "legalization" can increase trust in government, furthering Hu's goal of "an ever closer relationship between the people and the government,"<sup>192</sup> the government has shown itself willing to pursue serious legal reform across a range of issues.<sup>193</sup>

Essentially, the concepts of a "peaceful rise" and "harmonious society" describe a period when incremental reforms continue, internal discontent is manageable and tensions regarding Taiwan and Hong Kong remain latent, not overt. As long as these conditions exist, it is unlikely that the Chinese government will wind back the 2006 to 2007 reforms. In 1999, John Boxer warned that "China's continued reliance on capital punishment not only threatens the validity of the progressive legal reforms, but also threatens the country's future economic development."<sup>194</sup> The PRC's leaders were sufficiently concerned about due process issues to mandate SPC review.

Procedural justice has been a key element of the modernization project since 2002, serving the twin goals of "establishing socialist rule of law" and, especially since WTO accession, creating the "socialist market economy." Significantly, procedural justice is recognized as necessary by many death penalty supporters; as Peking University's Chen Xingliang—a leading retentionist—has argued: "the criminal legal culture of a state ruled by law objects to autocratically imposed criminal law and forbids tyrannical ar-

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190. *Hefa quanyi*. Graham Young and Guo Yingjie, *Managing Rights Talk in the 'Harmonious Society'*, in CHALLENGES AND POLICY PROGRAMMES OF CHINA'S NEW LEADERSHIP, 97, 99 (Joseph Y.S. Cheng, ed., 2007).

191. Hu Jintao, *Hold High the Great Banner of Socialism With Chinese Characteristics and Strive For New Victories in Building a Moderately Prosperous Society in All Respects*, REPORT TO THE SEVENTEENTH NATIONAL CONGRESS OF THE COMMUNIST PARTY OF CHINA, Oct. 15, 2007, CHINA DAILY, available at [http://www.chinadaily.com.cn/china/2007-10/24/content\\_6204564.htm](http://www.chinadaily.com.cn/china/2007-10/24/content_6204564.htm) (last visited Jan. 15, 2009).

192. *Building Harmonious Society Important Task for CPC: President Hu*, PEOPLE'S DAILY ONLINE, Feb. 21, 2005, available at [http://english.peopledaily.com.cn/200502/20/eng20050220\\_174036.html](http://english.peopledaily.com.cn/200502/20/eng20050220_174036.html) (last visited Jan. 24, 2009).

193. There have been well-publicized exceptions to this willingness across a range of issue areas.

194. Boxer, *supra* note 15, at 394.

bitrariness.”<sup>195</sup> While the goal of improving procedural justice remains, the current death penalty review procedure, which emphasizes the “fair and impartial implementation of capital punishment,” is unlikely to be repealed.<sup>196</sup>

Further reforms are entirely possible if the current conditions continue. In early 2007, the *Beijing Review* reported that many academics expect the 2006 to 2007 reforms to be followed by “full-scale criminal trial reform.”<sup>197</sup> Also in early 2007, the SPC was reportedly considering sentencing guidelines for the offenses of murder, aggravated assault, robbery, and drug trafficking, which together account for ninety percent of death sentences.<sup>198</sup> The move toward sentencing guidelines was confirmed by SPC Vice President Shen Deyong in June 2008, and in December 2008, a senior SPC judge announced that the guidelines were being prepared.<sup>199</sup> If the CCP remains secure in its rule and the development of China continues unabated, there could well be further reforms to improve procedural justice.<sup>200</sup>

This is not to say that the policies of “peaceful development” and “harmonious society” necessitate a softening attitude to criminal justice. The “harmonious society” agenda suggests limitations to (as well as the rationale of) “legalization.” The government has set itself the goal of reducing and avoiding popular discontent. It is unlikely to overreach by, for example, dramatically changing the role of capital punishment in a society overwhelmingly supportive of capital punishment. The well-publicized instances of public outrage regarding capital cases concern procedural injustice rather than the legitimacy of capital punishment *per se*. Thus far, the government has shown no inclination to exceed its “harmonious society” goal by widening death penalty reform beyond areas of public concern.

In 2007, the Minister of Public Security stated that “[w]e must make efforts to create a harmonious society and a good social environment . . . . We must strike hard at hostile forces at home and abroad.”<sup>201</sup> The goal of procedural justice remains subservient to the ‘peaceful development’ agenda. Hitotsubashi

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195. Chen, *supra* note 69, at 18.

196. Lu & Miethe, *supra* note 31, at 140.

197. Feng, *supra* note 3.

198. Human Rights in China, *supra* note 155.

199. Xie Chuanjiao, *Judges Will Be Punished for Trial Errors*, CHINA DAILY, Jun. 24, 2008, available at [http://www.chinadaily.com.cn/china/2008-06/24/content\\_6788001.htm](http://www.chinadaily.com.cn/china/2008-06/24/content_6788001.htm) (last visited Nov. 8, 2008); Xie Chuanjiao, *New Guideline on Death Penalty*, CHINA DAILY, Dec. 23, 2008, available at [http://www.chinadaily.com.cn/china/2008-12/23/content\\_7331191.html](http://www.chinadaily.com.cn/china/2008-12/23/content_7331191.html) (last visited Jan. 15, 2009).

200. BEIJING REVIEW, *supra* note 61.

201. Zhou Yongkang, Minister of Public Security; cited in Amnesty Int’l, *supra* note 54, at 1.



University Professor Wang Yunhai contends that the "harmonious society" program is "fundamentally at odds with punitive policies, especially the death penalty. If the Chinese government continues to advocate its policy of 'harmony,' the time will come for it to reconsider its death penalty system."<sup>202</sup> The March 2007 Joint Notice of the SPC, the Supreme People's Procuratorate, and the Ministries of Public Security and Justice, however, explicitly dismissed that argument: "The duty of maintaining social harmony and stability is very heavy, therefore [China] must continue adhering to the principle of 'strike hard,' [and] the correct use of death penalty to fight against serious crimes. . . ."<sup>203</sup> Additionally, the PRC leadership may come to find the degree of inflexibility mandated by the 2006 to 2007 reforms disagreeable because, "institutions that make it difficult for government to change policy rapidly may help economic development by making government commitments credible; they may also hurt it by hindering the government's ability to respond effectively to . . . crises or rapid change."<sup>204</sup> As Chen Duanhong of Peking University explains: "ultimately, the expansion of freedom will depend on how it promotes the goal of national prosperity."<sup>205</sup>

### 3. . . . OR COMING COLLAPSE?

Procedural justice is an important element in developing a "harmonious society," and the 2006 to 2007 reforms constitute one of the major advances in procedural justice. However, if something causes the overarching policy imperatives to change, then campaign justice may once again be emphasized over procedural justice. The old link between swift, severe, mass punishment and social stability may then be resurrected, and the 2006 to 2007 reforms repealed.<sup>206</sup> This scenario is unlikely, but possible, and thus cannot be discounted. Ongoing "peaceful development," like democratization, is not inevitable.<sup>207</sup>

In the past, the government has relaxed death penalty safeguards in response to social instability. Examples include the post-Mao crime waves, the 1989 Tiananmen incident, and the local drug problems in Yunnan and Guangdong in the 1990s. If similarly grave threats to social order emerge in the future, the

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202. Wang Yunhai, *The Death Penalty and Society in Contemporary China*, 10 PUNISHMENT & SOC'Y 137, 145.

203. Joint Notice, at Section 2.1.

204. Clarke, *supra* note 185, at 578.

205. Chen Duanhong, *Prosperity is the Fundamental Value underlying China's Constitution*, FAZHI RIBAO, Dec. 6, 2002; translated in Lin, *supra* note 81, at 278.

206. Davis, *supra* note 14, at 330.

207. James Mann, *Rejoinder to David M. Lampton*, 191 CHINA Q. 750, 754 (2007).

government may well continue the pattern of abrogating procedural justice in favor of campaign justice.

Today, the PRC leadership remains acutely sensitive to popular sentiment. In April 2008, the SPC's new Chief Justice, Wang Shengjun, ordered the courts to heed "the feelings of the masses" when deciding capital cases: "Courts at all levels should severely punish those violent criminals that seriously jeopardize public security . . . Courts should actively treat various demand[s] of the public."<sup>208</sup> These comments drew widespread criticism from practicing and academic lawyers in China.<sup>209</sup> While Wang also noted that those found guilty in capital cases should be sentenced "in line with the law," his comments are a warning that the PRC leadership retains the prerogative to relax procedural restrictions to deal with social unrest. Wang continued down this instrumentalist path in December 2008, identifying "social stability" as a SPC priority and arguing that "[t]he most urgent task is to resolve economic, civil and administrative disputes caused by the financial crisis."<sup>210</sup> As the global financial crisis affects Chinese society, the SPC under Wang may respond vigorously to any upsurge in instability, with possible erosion of procedural justice.

There have already been signs of rising discontent. A 2003 People's Daily survey of 98 senior government officials and academics found ten major perceived "risk factors" threatening CCP rule, including corruption, banking collapses, and a widening gap between rich and poor.<sup>211</sup> During the 17th Party Congress in 2007, 12,000 petitioners sent Hu Jintao a letter asking that he prevent "illegal land grabs" by local authorities, and that he improve judicial independence.<sup>212</sup>

In addition to corruption and increasing disparities in wealth, a rapidly changing economy has brought massive uncertainty. In 2006, there were an estimated 114 million farmers

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208. *Top Judge Vows to Severely Punish Violent Criminals*, CHINESE GOVERNMENT'S OFFICIAL WEB PORTAL, Apr. 13, 2008, available at [http://www.china.org.cn/government/central\\_government/2008-04/13/content\\_14944045.htm](http://www.china.org.cn/government/central_government/2008-04/13/content_14944045.htm) (last visited Jan. 24, 2009); Jerome A. Cohen, *China's Reform Era Legal Odyssey*, FAR E. ECON. REV., Dec. 5, 2008, available at <http://www.feer.com/essays/2008/december/chinas-reform-era-legal-odyssey> (last visited Jan. 24, 2009).

209. Antoaneta Bezlova, *China Mulls Death Penalty Reform*, ASIA TIMES ONLINE, Jun. 18, 2008, available at <http://www.atimes.com/atimes/China/JF18Ad01.html> (last visited Jan. 24, 2009).

210. Xie Chuanjiao, *Maintaining Stability Key – Top Judge*, CHINA DAILY, Dec. 20, 2008, available at [http://www.chinadaily.com.cn/china/2008-12/20/content\\_7324861.htm](http://www.chinadaily.com.cn/china/2008-12/20/content_7324861.htm) (last visited Jan. 24, 2009).

211. Catherine Armitage, *Burst-Case Scenario – China Rush*, WEEKEND AUSTRALIAN, Apr. 16, 2005, at 27.

212. Mary-Anne Toy, *Farmer's Grievances Test China's Fragile Stability*, THE AGE, Oct. 13, 2007, at 17.

working, or looking for work, in urban areas.<sup>213</sup> Also in 2006, of four million new university graduates, it was estimated that 40 percent would have difficulty finding work.<sup>214</sup> There are tens of thousands of protests every year: evidence, according to Hu Xingdou of the Beijing Institute of Technology, that China is in a period of "fragile stability."<sup>215</sup> The ultimate question may be how the CCP judges it can best preserve its legitimacy. As Lee Kuan Yew has noted, continuing economic change may threaten this legitimacy: "It's a new game for them and they're nervous. Their legitimacy depends upon solving the economic problems and not having riots in the cities even as their old state-owned enterprises retrench."<sup>216</sup>

While this section highlights a few worst-case scenarios, the "atrophying of the state's capacity to cope" with the social consequences of development,<sup>217</sup> as predicted by Gordon Chang in *The Coming Collapse of China*, remains unlikely.<sup>218</sup> A more balanced view is put forth by Lu Xiaowen of the Shanghai Academy of Social Sciences:

[T]he current anger is not strong enough to affect the political system. But it is a serious problem that more and more people are increasingly dissatisfied with this issue. Many social problems will be brought if we do not pay enough attention on it. Now many people hate the rich people.<sup>219</sup>

If the current anger is not addressed, the economic problems not solved, and the riots continue, China's "peaceful development" may be knocked off course. In this situation, the CCP could be expected to defend its position in power, and at the expense of procedural justice reforms, if necessary. If this happened, the government could once again wield the death penalty—as well as its other criminal sanctions—as a "discretionary instrument of the Communist Party to institute social and political order."<sup>220</sup>

## VIII. CONCLUSION

In 1990, Tsai Tun-Ming noted that:

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213. Colleen Ryan, *Is Time Running Out for China?*, AUSTRALIAN FIN. REV., Aug. 12, 2006, at 17.

214. *Id.*

215. Toy, *supra* note 214.

216. Tom Plate, *Full Transcript: Tom Plate and Jeffrey Cole interview Lee Kuan Yew*, ASIA MEDIA, Oct. 9, 2007, available at <http://www.asiamedia.ucla.edu/article-southeastasia.asp?parentid=79541> (last visited Oct. 28, 2007).

217. Frost, *supra* note 142, at 13.

218. Armitage, *supra* note 213.

219. Lu Xiaowen, Shanghai Academy of Social Sciences; cited in *Id.*

220. Mike P.H. Chu, *Criminal Procedure Reform in the People's Republic of China: The Dilemma of Crime Control and Regime Legitimacy*, 18 PAC. BASIN L.J. 157 (2000).

[A]lthough abolition of capital punishment has been discussed, it remains a part of the government's legal regime . . . . [This is because], according to Marxist-Leninist doctrine, there is a need for class struggle and using the death penalty is a legitimate means to eliminate class enemies of the people . . . . [T]he death penalty is viewed as a temporary measure which will only be required until the class struggle is complete. At that time, the conditions which made the death penalty necessary will have been eliminated.<sup>221</sup>

Although the substance of Marxist-Leninist doctrine has long been discarded in China, the shell of this utopian argument remains. Currently, the PRC government occasionally asserts that it is committed to phasing out the death penalty when social conditions permit, just as the government was in 1957. In practice, the death penalty remains a vital instrument of CCP policy. What has changed is that CCP policy now requires the appearance and, to a degree, the substance of procedural justice. This is the key to understanding the 2006 to 2007 reforms, and also to predicting their longevity and what might come after them.

Due to the importance of legalization policy and the nomination of procedural justice as important, the PRC has indeed adopted legal concepts long since recognized in the West. The temptation of some foreign observers to impose an abolitionist narrative on events is therefore understandable. However, the narrative is inaccurate. The PRC is developing its legal system for its own reasons. While the present policy favors maintenance, and perhaps even extension, of the 2006 to 2007 reforms, it is indeed "too early to say" whether the present policy will survive or change.<sup>222</sup> The CCP has repeatedly demonstrated a capacity to surprise.

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221. Tsai Tun-Ming, *The Death Penalty in Taiwan and Mainland China: Should it be Abolished?*, 4 J. CHINESE L. 173, 175-76 (1990).

222. To borrow from former Premier Zhou Enlai's famous verdict on the French Revolution.