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NOTE DE L'ÉDITEUR

Translated from the French original by Peter Brown

- 1 Research on the death penalty in China today encounters a good many difficulties. Some aspects of the question are regarded as a state secret. It is a taboo subject that does not lend itself easily to open discussion. As a consequence, the available information is mostly in the form of piecemeal and disparate documents and rumours. These factors feed into an ethical and political debate that is not greatly amenable to scholarly study. This article does not claim to analyse the way the death penalty is applied, but intends rather to refocus the discussion that is currently exercising the minds of certain Chinese legal scholars. In doing so, it offers some insight into a developing consciousness.
- 2 If the issue of the death penalty is a particularly serious one in China, it is so by virtue of the systematic way in which it is applied. Whilst the exact figure is shrouded in secrecy, one often hears of a minimum of several hundred, even several thousand, executions a year, and it is common to see estimates whereby China alone carries out more executions than all other countries combined. According to Amnesty International, from 1990 to 1999, 27,599 people were sentenced to capital punishment in China, and 18,194 of these were executed. The average annual number of sentences is therefore estimated to be at least 2,759, 1,802 of which are put into effect¹. Another report by this organisation notes that of the 1,526 people executed in 31 countries in 2002, 1,060 were conducted by the Chinese legal system, which is thus thought to represent two-thirds of the number of capital punishments carried out worldwide².
- 3 This situation regularly gives rise to criticism by the international community that makes an appeal to ethics and human rights, without always being well informed about

the historical and cultural conditions in the case of China. An entirely new situation has come about in recent times (the year 2000 seems to mark a turning-point, as that was the moment in China itself when serious discussion of the death penalty began, a debate that is led by a new generation of legal scholars³.

- 4 In April 2000, a debate was organised by the Law Institute at Peking University on “the morality of the death penalty”. This initial debate, which dealt especially with principles, was followed by another, in November 2002, based on one particular case. In December of the same year, an international symposium on the death penalty was jointly organised by the Institute of Legal Studies of the Chinese Academy of Social Sciences, the Danish Centre for Human Rights and the University of Xiangtan (Hunan), a meeting which allowed for the airing of broader international perspectives.

- 5 My approach in this article is two-pronged. I will begin by characterising the new spirit that presides over the current discussions. I will then attempt, through a presentation of some concrete cases, to indicate how the burden of the Maoist legacy continues to bear on the penal situation in China, and more particularly on the application of the death penalty.

The new spirit of debate

- 6 A first change of great significance was the emergence of an openly abolitionist approach. In the spring of 2000, during the debate on the “morality of the death penalty” held at Peking University, this distinctly minority approach was represented in particular by Qiu Xinglong, a Law Professor⁴. His argument broadly took up Western themes that have become classic among abolitionists. These concern the limits of a conception of justice seeking retribution and the utilitarian critique of the effectiveness of the death penalty. But it also includes reflection on the particular barriers in the way of abolition in the case of China. First of all, there is the weight of a cultural tradition that supposedly places less importance on the individual person than does the Western “humanist” tradition. According to Qiu Xinglong, China is still waiting for its Beccaria, and the arguments advanced by the Chinese jurists are less based on a principled approach than on considerations of opportunity. Account must also be taken of the effects of an anti-religious policy undertaken in mainland China in the twentieth century. History shows that the abolitionist gains in the West and Japan were made possible by the existence of a religious undercurrent, be it Christian or Buddhist⁵. But in China today there is no longer any belief (*xinyang*) in the particular dignity of human life, which has only one value calculable in money terms. These circumstances are aggravated by the legal mindset and by the country’s current judicial practice of having recourse to the death penalty as a matter of routine. Such a situation makes any abolitionist education of the Chinese public difficult.

- 7 Opposed to this radical position, expressed with passionate conviction, is an attitude that is more representative of the new generation of Chinese legal experts. Chen Xingliang⁶, a Professor at Peking University, is one of the leading exponents of this approach, thanks to his active role in promoting debate and publications⁷. He defends the principle of the abolitionist ideal, at the same time as judging it to be impracticable in the current situation. The moral necessity of abolishing the death penalty cannot be undermined in the name of considerations based on the existence of criminality. Accordingly, Chen Xingliang, asks whether the Europe of Beccaria was any less violent than today’s China. On the other hand, abolition requires conditions which, in his view,

do not yet exist. China remains under-developed, both materially and culturally. The death penalty is regarded by the authorities and the population alike as an economical and efficient measure⁸. What is under discussion therefore is not abolition as such, but the strict limitation of capital punishment. It is a gradual humanisation of the law that will one day make the abolitionist ideal something that can be realised. Chen Xingliang remarks that Europe first outlawed inhumane treatment such as torture before putting an end to capital punishment⁹.

- 8 A second dimension to current debates among Chinese lawyers is that we are starting to see some consideration of the particular historical experience of modern law in China. In fact, we may speak of a gradual reconstruction of judicial memory, in spite of the ongoing existence of many different kinds of amnesia. The example of the great reformers of the late Qing dynasty, in particular Shen Jiaben, who was responsible for the first modernisation of Chinese criminal law, is being put forward¹⁰. Whereas in the 1980s the early signs of modernity were identified with the May 4th 1919 movement, from the 1990s it was the reformist experience of late imperial times that was being positively reassessed¹¹. The attempt to rationalise and humanise the death penalty, which started with Shen Jiaben (with the limitation of crimes liable to attract capital punishment, the end of public executions and the abolition of cruel punishment and legal torture), was regarded as the first stage in a necessary process of self-limitation by the Chinese state, before any possible introduction of an abolitionist policy.
- 9 On the other hand, the republican era, which showed some progress in the codification and implementation of the instruments of a modern judicial system, still remains little discussed. Yet an initial debate on the death penalty, in which abolitionist points of view were aired, did take place¹², and this was taken up on Taiwan in the 1980s¹³. However, despite the points of continuity with the late imperial period¹⁴, this republican heritage is still a long way from being at the surface of the collective memory.
- 10 Nonetheless, the current debate has the merit of providing a thorough re-examination of the Chinese communist experience and of highlighting the contradictions of the current policy.

Current contradictions : some case studies

- 11 Four practices inherited from the Maoist period are the subject of some debate in China at the present time.
An instrumental conception of the legal system
- 12 An initial continuity, and a well-known one, is an instrumental conception of the legal system which makes it subject to ideological and political imperatives in contempt of any procedural conception of justice. This conception, which already appeared at the time of the Jiangxi soviet (1927-1934), was developed during the "correction movement" of the years 1941-1942 in Yan'an and tragically unfolded throughout the Cultural Revolution (1966-1976). It was essentially characterised by an excessive use of the death penalty to eliminate internal enemies according to the political needs of the movement and by its "recourse to trials in which procedures were legally expeditious and politically more elaborate" and to "mass public judgments followed by the physical elimination of people"¹⁵. The Deng Xiaoping era claimed to break with these practices and expressed a willingness to return to a system in which there would be respect for

the law in the management of social affairs. But Maoist habits persisted and the “Strike Hard” campaigns (*yanda*) that began to be introduced from 1983 on remained marked by the Maoist legacy, even if they claimed to be promoting law over ideology.

- 13 To give just one or two examples of this, let us consider the Sun Zhigang affair. This young graduate, who had come to Canton in search of work, was killed whilst being held in a detention centre in the spring of 2003. He had been arrested for failing to produce his identity papers, and died in the centre’s infirmary following an attack on him by fellow detainees that had been encouraged by a nurse. This affair stirred a lively debate, including the participation of academics, on the situation of migrants in society. A dozen people directly implicated were subsequently given various sentences. These included the death penalty for two of those found guilty, one of whom was quickly executed in order to calm “public outrage” (*minfen*)¹⁶.
- 14 Another recent case, that of Sun Yanhui, reported by the journalist Pierre Haski highlighted the lack of separation that persists between the judicial and political functions of the state at the local level. Sun Yanhui was a man in his thirties who belonged to a criminal gang in Suzhou. He was arrested in late 2003 after robbing a businessman, who was a Chinese living abroad, in his hotel room. Sun Yanhui was armed at the time of his police arrest. He was executed on January 10th 2005 in Suzhou. Although there was no physical violence involved and he did not use his weapon against the police, and despite a petition being signed by around fifteen university professors in Peking, the local tribunal wanted to set an example. According to local cadres, it was about “showing that the city in which there has been a good deal of foreign investment is able to deal severely with crimes against businessmen”¹⁷. Such subordination of the judicial to the political remains widespread.
The death sentence with a two-year suspension of execution
- 15 There remain more technical aspects, peculiar to the Maoist period, whose effects are still felt in the judicial sphere. A case in point is the innovation in 1951, attributed to Mao Zedong, of the “death penalty with a two-year suspension of execution”. In 1951, at the height of the Movement to suppress counter-revolutionaries (1950-52), Mao launched his policy whereby “those whose crimes deserve capital punishment but who own no blood debts (*meiyou xiezhai*) and not bitterly hated by the people (*minfen buda*), or who have done serious but not extremely serious harm to the state could be sentenced to death with a two-year suspension of execution and subjected to forced labour in the hope that they will mend their ways”¹⁸. This measure was then applied in order to limit the growing number of people sentenced to death for political reasons and to open up the possibility of a political re-education. It was then gradually generalised and applied to other sorts of crime, for example in 1952 against “corrupt elements” (*tanwu fenzi*), in the course of the “three-antis” campaign. It first figured in the *Project of the guiding principles of criminal law in the People’s Republic of China* (*Zhonghua renmin gongheguo xingfa zhidao caoan*) of 1954 before being integrated, in a modified form, into the criminal Code from 1979¹⁹.
- 16 The particular conditions of the emergence of this practice have led lawyers to debate the following three questions : is this invention unique, peculiar to Chinese criminal law ? Should this practice be retained or abolished today ? Can “the death penalty with a two-year suspension of execution” be considered independently of capital punishment ?

- 17 Some current advocates of retaining this practice are quick to point out that it is part of a judicial system that is peculiarly Chinese, precedents for which could be found in the “Autumn assizes”²⁰ of the Ming and Qing dynasties. Others try to find similarities in the criminal law of other countries in order to confirm its universal character²¹, putting forward five main arguments for this: the existence of the death penalty makes the possibility of a reprieve desirable; this sentence cannot be substituted for one of life or long-term imprisonment; this sentence severely condemns criminals at the same time as allowing them a chance to repent; compared to the death sentence, it reflects a humanitarian concern; it is a sentence with a very distinct character, which means that there is no particular problem arising from its application²².
- 18 Before presenting the opposite view, it will be useful to compare the practice of “the death sentence with a two-year stay of execution” with that of the “autumn assizes”. Both of these practices may be seen as an application of the principle of prudence when having recourse to the death penalty, but for quite different reasons. The spirit of the “death penalty with a two-year stay of execution” was somehow a quantitative measure, of which the goal was merely to limit the number of death sentences, whereas the rationale of the “autumn assizes” was above all to avoid judicial mistakes. Secondly, the definition of crimes subject to the “death penalty with a two-year stay of execution” is still not explicit enough. The criterion that presides over the decision to “kill or not kill” the criminal (*kesha ke busha*) remains indeterminate, as in the case of serious crimes that “do not involve any blood debt or cause any public outrage”. On the other hand, the criteria used for cases that could be heard by the “autumn assizes” were clearly defined. These were: (1) circumstances deserving of the death penalty (*qingshi*) (among the four categories, this alone led to an actual execution); (2) circumstances deserving of a deferred execution (*huanjue*); (3) circumstances deserving of compassion (*kejin*): the elderly, young children, the mentally ill, only children with elderly or sick parents; and (4) suspicious circumstances (*keyi*). Thirdly, a review of cases where the “death penalty with a two-year suspension of execution” can be imposed is much more expeditious than that of the “autumn assizes” where four reviews were required before the execution could take place²³.
- 19 It is therefore quite natural that those in favour of abolishing the “death penalty with a two-year stay of execution” stress the modern character of this practice, introduced in a very different context to that of the imperial tradition. It is meaningful only in a state based on the pre-eminence of ideology over law. They also emphasise its ambiguous nature and the difficulties of its application. Thus, this sentence can scarcely be regarded as humane, since it puts the condemned in a state of anxiety for the two years of their reprieve. Furthermore, it is not an autonomous sentence, as it remains dependent upon a death sentence. It therefore raises problems of assessing the gravity of the crimes and the practical application of the sentence²⁴. Finally, experience shows that it can lead to injustices, in so far as someone who has been condemned to death and who takes advantage of this measure can in the end have their sentence reduced and thus find themselves in a more favourable situation than someone who has simply received a prison sentence.
- 20 Zhao Zuojun²⁵, who is in favour of maintaining this practice, has a critical but pragmatic approach to the question, seeing in it the means of reducing the number of executions. It is true that those who are condemned to immediate execution represent 75 % of

cases, as against 25 % only for sentences with a reprieve. Retaining this measure is therefore seen as desirable by this writer on legal affairs, if it could constitute the means of strictly limiting the application of the death penalty, yet without abolishing it in principle²⁶.

- 21 Many studies have been done on this subject, but they are of a theoretical character. What is lacking is precise data based on specific cases. However, this practice poses some serious problems, in particular if one considers the review procedures that have been laid down. According to Article 146 of the 1979 code of penal procedure and Article 201 of the 1997 code, death sentences with a two-year stay of execution are given by an intermediate tribunal (*zhongji renmin fayuan*) and must be approved by a higher court. In actual fact, the ambiguities of this procedure do not encourage any appeal of the decision, as this would involve taking the risk of receiving a harsher sentence, to wit, the immediate application of the death penalty.

The decentralisation of the power of reviewing the death penalty

- 22 A third legacy of the Maoist era, and a subject of some debate, is the decentralisation of the power of review in cases where the death penalty can be imposed. In a certain way, this is about the question of continuity and discontinuity characteristic of the evolution of judicial practices from the end of the Empire to today, including the republican period, and the Maoist and Deng Xiaoping eras. It is possible to trace formal elements of continuity that are of sufficient importance that I could suggest in another study²⁷ that it was enlightening to bring together such diverse historical experiences under the notion of “exceptional practices”. Thus, it is possible to consider that the practice of the “provincialisation” of the power of review is not a new phenomenon in the legal history of China, since it already appeared under the Qing, most notably during the Taiping insurrection (1851-1864)²⁸. This practice naturally had a different meaning in the modern era under Deng Xiaoping. The question then becomes: what does an imperial power confronted with the dual threat of internal rebellion and foreign intervention have in common with a sovereign communist state assured of holding monopoly on legal violence? A certain continuity can be found in the underlying political culture ever since the crisis of the imperial state: in a context of war or civil conflict that has persisted practically unabated, it leads to a generalisation and radicalisation of state violence in society.
- 23 Naturally, the communist era (which should not be treated in a undifferentiated way, since we need to distinguish between times of radical political mobilisation and times of relative stabilisation) presents particular features. We can talk of a decentralisation of the death penalty, but in a sense that is strictly speaking neither juridical nor administrative. Under Mao, both before and after 1949, we can see the persistent phenomenon whereby there was delegation to the local levels of the power to kill, particularly pronounced during the successive political “movements”. It was a question of spreading this power through the body politic to which no law gave legitimacy but which nonetheless obeyed certain rules. This power was subject to directives that were ideological in nature and were applied (or reinterpreted) by the local levels of a Party structure. This structure continued to exist even when it was contested by internal factionalism.
- 24 The absence of any transparency makes it difficult to understand concretely how such judicial practices, which have yet to be adequately studied, functioned under

communism. The Maoist period distinguished itself in fact by the absence of any legal code. The period ushered in by Deng Xiaoping was formally characterised by a legal dualism that was gradually institutionalised and that makes one think of the republican era: similarly to the Guomindang, the Communist Party promoted, alongside duly elaborated penal codes, a continuous set of exceptional measures aimed at repressing particular categories of criminals. The Maoist legacy no longer took up the whole of the scene, but it did play a decisive role alongside practices and institutions regulated by the new judicial codes. This is particularly in evidence through the recourse to targeted campaigns like those aimed at economic criminality. Although a Penal Code was adopted in 1979 (for the first time under the communist regime), these anti-crime campaigns were based on statutory provisions that sometimes contradicted the letter of the law and thus had an exceptional character. In particular, the “Decision of the Standing Committee of the National People’s Congress regarding the question of approval of cases involving death sentences” subsequently became a document whose role has been decisive. It has not only allowed a broadening of the application of the death penalty, but also a decentralisation of the review of cases concerning murder, looting, rape, etc. On the other hand, the power of review for counter-revolutionary and corruption cases has remained centralised²⁹. An understanding of this phenomenon of centralisation or decentralisation of state violence would require a subtle interpretation of the relations between “the institutional” and “the exceptional”, which goes beyond the scope of the present article.

- 25 One case which recently gave rise to a lively debate was that of a condemned man by the name of Dong Wei. This case clearly illustrates the weak authority of the Supreme Court in review procedures. Dong Wei, a migrant worker, was sentenced to death for murder by the intermediate tribunal of the municipality of Yan’an on December 21st 2001. His lawyer, Zhu Zhanping engaged during a second court’s judgment, disagreed with this decision and addressed an urgent appeal on April 27th 2002 to the Supreme Court which ordered an immediate stay of execution. But on August 26th 2002, the High Court of the province of Shaanxi insisted on the upholding of the original sentence of the first instance. Dong Wei was executed 129 days after the stay of sentence ordered by the Supreme Court³⁰.
- 26 What was he accused of? Dong Wei was a 26 year-old peasant farmer from Zizhou in Shaanxi province, who found work in Yan’an. According to his statement, at dawn on May 2nd 2001, he went with two girls to a local dance hall. The girls went in with their tickets, but before he could do so he was stopped by a certain Song Yang who said to him: “You have two girls, give me the tall one for the night”, to which Dong Wei responded: “Go home and sleep with your own”. Song then took off his leather belt and started striking Dong with it. They were pulled apart by bouncers, whereupon Song went off. Dong then called the two girls on their mobile to ask them to leave the hall with him. Just then, Song came back with his friends. They grabbed hold of Dong Wei who, despite being on his knees, found a brick with which he smashed Song Yang on the head. With the second blow, Song went limp and Dong managed to escape.
- 27 The sole witness to this scene was a motorcyclist, Jin Yansheng, who claimed to have seen Dong smash Song’s head several times over. This detail was used as a main argument in the first trial, the upshot being that Dong Wei was sentenced to death for murder³¹. Dong appealed, but this was rejected by the Higher Court which confirmed the earlier judgment.

- 28 Zhu Zhanping, Dong Wei's lawyer insists on the deficiencies of the case : the evidence was not sufficient to prove that the act was deliberate ; some witnesses could not even be found and the testimony of the sole witness was riddled with contradictions ; the homicide was a reaction to the humiliating and violent behaviour of the victim. In spite of the Supreme Court's judgment, which accepted these arguments, Dong Wei was put to death in conformity with the judgment of the local court.
- 29 This relatively banal case highlights the arbitrary character of the considerations presiding over the application of the death penalty in China. Thus, a single witness decides on someone's life and death. It also indirectly illustrates the problematic status of lawyers in the legal system. Generally speaking, the majority of lawyers in China do not want to be involved with cases that are liable to attract the death penalty. Civil cases are less problematic and often more lucrative. The lawyer's defence is not taken seriously into account by the court. Thus, in the case in question, other witnesses called by the defence were not summoned by the second court.
- 30 This trial illustrates above all the danger of one of the innovations of the communist era, the decentralisation of the review of the death penalty, henceforth decided by local magistrates rather than by the Supreme Court. This practice goes against the imperial tradition of the centralisation of the death penalty, which had been maintained by the republican regime. It causes confusion between the second court's judgment and the appeal and is a source of arbitrariness.
- Exceptional practices, such as the "Strike Hard" campaigns
- 31 More broadly—and this is a fourth legacy of the communist practice—the concern of those engaging in the current debate is manifest faced with what they recognise as a fundamental contradiction in official policy. The appeal to a "government by law" (*fazhi*), something that is indispensable to economic and social development, is incompatible with the continuation of exceptional practices symbolised by the various waves of "Strike Hard" campaigns launched in 1983, 1996, 2001 and 2004³².
- 32 This practice originally aimed to eliminate expeditiously those who were threatening public order or were responsible for economic crimes. It was underpinned by special statutory provisions which enabled the fast-tracking of procedures and thus significantly increased the number of cases liable to attract the death penalty.
- 33 In an internet article that has been available since May 15th 2004, Zhao Zuojun is critical of the following phenomenon : "Certain local courts have gone as far as to turn the number of death sentences made public into the litmus test of their seriousness in the application of the 'Strike Hard' policy". He regrets the fact that there has been little hesitation in applying capital punishment systematically to crimes liable to attract this sentence, leaving it up to the appeal courts to review and commute them. This interpretation leads to abuse. Thus, at the time of the "Strike Hard" campaign, the capital of one province (which is not named) executed 31 people in three days (between January 13th and 15th 1999), at the municipal level alone³³.
- 34 In a paper delivered at Peking University in 2003, Qu Xinjiu, a Professor of Legal and Political Science at the university, points out the arbitrariness of this system and its dangers for Chinese society due to the confusion between judicial procedure and political campaigning, the retention of practices theoretically banned (the parading of the condemned in public), the threat to human rights, the absence of any control over the instrument of repression³⁴.

- 35 Finally, this “Strike Hard” practice contributes to maintaining, in spite of official appeals to questions of legality, a fundamental characteristic of the modern Chinese legal system, which is the duality between the normative texts (like the penal Codes) and special statutory provisions suspending the application of ordinary laws according to the needs of those in power. This double structure, which goes back to late imperial times, was institutionalised during the civil wars of the republican era and remains at the core of the current legal system³⁵.
- 36 The preservation of these exceptional practices is all the more worrying in that they complement provisions that have been made even harsher in the new Criminal Code. Thus, as Chen Xingliang points out, the 1997 Code is from this point of view a regression with respect to the 1979 one (for example, 68 crimes instead of 28 are today liable to attract the death penalty)³⁶. This increased repression is also aggravated by the ambiguous nature of the provisions : for example, the application of the death penalty can be extended in cases of “extremely serious crimes” (*zuixing jiqi yanzhong*).
- 37 The debates on the abolition or limitation of the death penalty in which the new generation of Chinese jurists are engaged are therefore occurring in a difficult context. They remain circumscribed, but the open and public nature of them, and the critical reflection that they are fostering on the history of penal practices in China, constitute a development worthy of note. The report presented this year by the head of the People’s Supreme Court on improving the process of review of the death penalty³⁷ is not unrelated to these debates. The People’s Supreme Court intends to improve the judgments handed down in the court of appeal for criminal cases and to take back the power of final review in cases of capital punishment. According to an official estimate, these two measures could quickly reduce the number of executions by 30%. To achieve this goal, the central government has suggested that the Supreme Court set up a special tribunal for reviewing cases liable to attract the death penalty, with offices in the major administrative regions. Several initiatives have already been taken in this direction. According to Chen Weidong, a Law professor at the People’s University, three courts have been established to deal countrywide with the review of cases where the death sentence has been handed down, and 300 provincial court judges have been transferred to the central judicial corps to work on the implementation of this reform³⁸.
- 38 Over the past few years, debate has not been confined to intellectual circles. There are many people in official positions in the field of law who have been actively engaged in it by making their opinions (albeit their personal opinions) known on the abolition or limitation of the death penalty. Notable cases in point are those of Hu Yanteng, an expert in the theory and practice of the death penalty and Deputy-Director of the Research Institute for Judicial Policy at the Supreme Court ; Cao Kangtai, the director of the office of legal affairs at the Council for State Affairs ; Zhou Daoluan, a Professor at the National College for Magistrates, and Huang Songyou, Vice-President of the People’s Supreme Court. Following the expression of these various positions, Zhang Jun, Deputy-Minister of Justice, declared on January 16th 2005, at a national forum of young criminal lawyers on “the contemporary criminal code and the protection of human rights”, that “the important thing is to reform the penal system so that the death penalty can be replaced by long prison sentences”³⁹.
- 39 Some jurists and legislators therefore acknowledge the need to abolish the death penalty over the long term, at the same time as strictly confining it in its current form.

But this consciousness is still far removed from the great bulk of the population, 88% of which say that they are in favour of the death penalty, according to a poll carried out in 2002⁴⁰. Faced with an increase in criminality, and given a largely hostile public opinion, these experts propose various scenarios to bring about the gradual victory of the abolitionist position. Hu Yunteng thus talks about the possibility of abolition in a very distant future (a hundred years), while suggesting that 15 categories of crime should no longer be subject to the death penalty. Others propose a process of abolition in stages, by making distinctions between various categories of crime. Such a step would first apply to white-collar crimes, then to non-violent criminal acts (*feibaoli fanzui*), before finally involving the generalised abolition of the death penalty in China.

NOTES

1. Amnesty International People's Republic of China. *Death Penalty* 1999, February 2001, London.

2. Overview of the death penalty worldwide in 2003, <http://www.richard.clark32.btinternet.co.uk/overview.html>. In virtue of the rules observed by Amnesty International, these statistics are minimum estimates only, listing duly identified cases. My own observations and those of Chinese legal experts do not contradict the general conclusion that can be deduced from these reports. Thus, Chen Zhonglin, the Head of the Law Faculty at the Political Science and Law University of the South-West and a member of the National People's Assembly, declared on March 15th 2004 that China executes "about 10,000 people a year" (AFP, March 15th 2004). In the absence of any official figures provided by the central government and in virtue of the decentralised nature of the review of the death penalty since 1981, it is only possible to collect data from the local press. That does not of course diminish the responsibility of the central government in this penal practice. The international community is not wrong to criticise the lack of transparency of official data. Indeed, contrary to the practices of the nationalist government in mainland China before 1949 and on Taiwan subsequently, the present Chinese state does not publish national figures. This does not mean, however, that the death penalty is a "secret" in China, since, according to the penal procedure in place from 1979 to 1997, "Execution of sentences of death shall be publicly announced but shall not take place in public view" (Article 155 from 1979 and Article 212 from 1997). See *The Criminal Law and the Criminal Procedure Law of China*, Peking, Foreign Languages Press, 1984, p. 165 ; *Zhonghua renmin gongheguo xingshi susong fa* (Penal Procedural Code), Peking, Zhongguo fazhi chubanshe, 2000, p. 41.

3. The first modern study in China on the death penalty was by Shen Jiaben (1840-1913), a law reformer of the late Qing dynasty. Among his contributions to the reform of the death penalty can be cited the abolition of capital punishment such as *lingchi* (WW, death by slicing), the reduction of capital offences subject to the death penalty and the abolition of public executions. The debate between Shen Jiaben and Okada Asatarô on the reduction of the death penalty to a single type informs us that he was aware of the abolitionist movement in the West, although he himself was not in

favour of abolition. See “Sixing weiyi shuo” (On the reduction of the death penalty to a single type), *Jiyi wencun*, Vol. 1, Taipei, Shangwu, 1976.

4. Qiu Xinglong, who was born in Xiangxiang in Hunan province in 1963, is currently Dean of the Law Faculty at the University of Xiangtan in Hunan province. A committed abolitionist, he is one of the few intellectuals to come out publicly in favour of the abolition of the death penalty.

5. Even though it existed in law, the death penalty was not actually implemented during the last one hundred years of Ancient Rome. In China, the death penalty was rarely used during the reign of Tang Emperor Xuanzong (712-756). It is especially worth noting that in Japan at about the same time, beginning in 724, the death penalty was actually abolished, and miraculously, it was not used for 347 years after that. The reason for this was the influence of Christianity on the late Roman Empire, on the one hand, and of Buddhism in eighth century China and Japan on the other. In the West, the thinkers of the Enlightenment integrated Christian beliefs into the sacred character of life (granted by God) in the doctrine of the social contract, thereby laying an important basis for the abolition of the death penalty. See Qiu Xinglong, “Sixing de dexing” (The morality of the death penalty), in Qiu Xinglong (ed.), *Comparative Criminal Law*, special issue on the death penalty, Vol. 1, 2001, pp. 1-15. The English version was published in Zhang Ning (ed.), “The Debate over the Death Penalty in China Today”, *Contemporary Chinese Thought*, Vol. 36, No. 3, Spring 2005, pp. 9-25.

6. Born in 1957 in Yiwu in Zhejiang province, Chen Xingliang, who holds a doctorate in legal science from the People's University, is currently Sub-Dean of the Law Faculty at Peking University and the Vice-President of its Law Institute. He regularly organises high quality debates within his Institute.

7. Since 1999, Chen Xingliang and his legal colleagues Chen Ruihua, Bai Jianjun and Liang Genlin have been organising a forum called “Beijing daxue xingshifa luntan” or “Deheng xingshifa luntan” (Deheng Forum on criminal law organised by the Law Institute of Peking University) for the discussion of theoretical and practical issues of criminal law, the transcription of these discussions being subsequently published. *Fazhi de shiming* (The Mission of the Rule of Law), Peking, Falü chubanshe, 2003, was the first of the 12 debates on penal questions : the reform of the legal system (WWWWWW, *sifa zhidu gaige*), procedural justice (WWWW, *chengxu zhengyi*), the limits of social control, responses to criminality (WWWWWWWWWW, *helidi zuzhi dui fanzui de fanying*), judicial reform, the morality of the death penalty, the role of judges, lawyers, legislators, the public prosecutor, the police, academics, etc. *Fazhi de jiemian* (Aspects of the Rule of Law), Peking, Falü chubanshe, 2003, brought together accounts of the 12 subsequent discussions on concrete aspects of the current Chinese legal system, for example, the system of education through work//re-education through labour ?, the penal policy of “Strike Hard”, case studies, etc. The forthcoming volume is to be entitled *Fazhi de yanshuo* (Discourse on the Rule of Law).

8. Chen Xingliang emphasises the fact that “the idea that execution is an adequate response to a murder can be traced back to distant times past, especially in the traditional legal culture in China. This has become both a major component of the social psychology of the Chinese nation and a major hurdle in the path of the abolition of the death penalty”. Chen Xingliang, “Opinions on Retention versus Abolition of the Death Penalty”, in Zhang Ning (ed.), 2005, *op. cit.*, pp. 26-34. It is problematic to consider, as often happens in China, that the traditional expression “a murderer must be put to death” is so deep-rooted in Chinese culture ever since Antiquity that it would

constitute in itself an obstacle to an abolitionist position : one may doubt the grounds for such culturalist approaches. See Zhang Ning, “Kaolun sixing” (A critical examination of the death penalty), in *Niandu xueshu 2004* (Theoria 2004), Peking, Zhongguo renmin daxue chubanshe, pp. 119-169. See also Jérôme Bourgon, “‘Sauver la vie’. De la fraude judiciaire en Chine à la fin de l’empire” (‘Saving Life’. On judicial fraud in China in the late imperial period), in *Actes de la recherche en sciences sociales*, No. 133, June 2000, pp. 32-39.

9. Chen Xingliang, “Sixing cunfei zhiyi” (Opinions on retention versus abolition of the death penalty), preface to Chen Xingliang (ed.), *Zhongguo sixing jiantao : yi ‘qiangxia liuren an’ wei shijiao* (An examination of the death penalty in China from the perspective of the “hold the execution” case), Peking, Zhongguo jiancha chubanshe, 2003. An English version of this preface is to be found in Zhang Ning (ed.), 2005, *op. cit.*, pp. 26-34.

10. Li Guilian, *Shen Jiaben zhuan* (Biography of Shen Jiaben), Peking, Falü chubanshe, 2000 ; Jérôme Bourgon, “Shen Jiaben et le droit chinois à la fin des Qing” (Shen Jiaben and Chinese law in the late Qing dynasty), doctoral thesis completed at the Ecole des hautes études en sciences sociales (EHESS), Paris, 1994.

11. Joël Thoraval, “Conscience historique et imaginaire social : Le débat intellectuel des décennies 1980 et 1990” (Historical Consciousness and Social Imagination : Intellectual Debate in the 1980s and 1990s), *Esprit*, No. 303, February 2004, pp. 171-183.

12. Frank Dikötter, *Crime, Punishment and the Prison in Modern China*, London, Hurst and Co., 2002, pp. 178-181.

13. See *Sixing cunfei zhi yanjiu* (Studies on the abolition and retention of the death penalty), Taipei, Fawubu fanzui wenti yanjiu zhongxin, 1991, 190 p.

14. Philip Huang, *Code, Custom and Legal Practice in China : The Qing and the Republic Compared*, Stanford, Stanford University Press, 2001.

15. Jean-Luc Domenach, *Chine : l’archipel oublié* (China : The forgotten archipelago), Paris, Fayard, 1992, pp. 37-57.

16. “Sun Zhigang an jieshen, zhufan zhixing sixing” (End of the judgment in the Sun Zhigang case, execution of the principal guilty party), See *Ouzhou shibao* (European News), June 27th 2003, p. 9.

17. Pierre Haski, “Silence, on exécute” (Silence, an execution is underway), *Libération*, February 3rd 2005.

18. Mao Zedong, *Mao Zedong xuanji* (Selected Works by Mao Zedong), Vol. 5, Peking, Renmin chubanshe, 1977, p. 43.

19. Articles 50 and 51 of the 1977 Criminal Code stipulate this sentence and the conditions of its reduction. For further information, see Zhang Qiong and Ruan Qilin, *Mao Zedong xingshi falü sixiang chutan* (Preliminary study of Mao Zedong’s thoughts on the penal system), Peking, Zhongguo jiancha chubanshe, 1991 ; Zhao Zuojun, *Sixing xianzhi lun*, (Theory of the limitation of the death sentence), Wuhan, Wuhan daxue chubanshe, 2001 ; Zhang Zhengxin, *Zhongguo sihuan zhidu de lilun yu shijian* (Theory of the system of the death penalty with a two-year suspension of execution in China), Wuhan, Wuhan daxue chubanshe, 2004.

20. The autumn assizes referred to a centralised system of reviewing the death penalty practised during the Ming and Qing dynasties. A distinction was made between autumn assizes (*qiushen*) and Court assizes (*chaoshen*). The former dealt with all capital cases originating in the provinces, which, having passed through the various stages of deliberation, before a sentence of execution was finally pronounced. The latter dealt with cases of the same kind of cases originating in the capital. Both these assizes took

place in the middle of autumn according to the lunar calendar, and were located to the south of Tiananmen, west of the Esplanade of a thousand steps opposite Peking's southern gate.

21. Lu Weiqian, "Sixing de huanxing wenti" (The problem of suspension of execution in the death penalty), *Zhengfa yanjiu* (Political science and law research studies), No. 6, 1956, quoted by Zhao Zuojun, *op. cit.*, p. 280.

22. Zhao Zuojun, *op. cit.*, p. 280.

23. During the Qing dynasty, cases subject to capital punishment were heard at the provincial level by a judicial commissar and ratified by the governor-general or the governor of the province before being referred to the Board of Punishments (*xingbu*). Next, they were verified by the "Three High Courts": the Board of Punishments, the Court of Revision (*Dalisi*), the Censorate (*Duchayuan*), before being sent to the emperor for final ratification.

24. See Chen Xingliang, *Xingzhong tonglun* (General introduction to the categories of penalties), Peking, Renmin fayuan chubanshe, 1993, pp. 85-86; Hu Yunteng, *Sixing tonglun* (General introduction to the death penalty), Peking, Zhongguo zhengfa daxue chubanshe, 1996, pp. 292-293.

25. Born in 1966 in Shangshui in Henan province, Zhao Zuojun, who graduated from the University of Wuhan with a doctorate-of-laws in 1999, has had experience of penal practice at the Henan High Court. He is Associate Professor of law at the Institute for Legal Science at the University of Zhengzhou.

26. Zhao Zuojun, *op. cit.*, p. 306. English translation in Zhang Ning (ed.), 2005, *op. cit.*, pp. 53-76.

27. Cf. Zhang Ning, "Banditisme et peine de mort en Chine : Catégories judiciaires et pratiques d'exception" (Banditry and the death penalty in China) in Pierre-Etienne Will and Mireille Delmas-Marty (eds.), *La Tradition chinoise, la démocratie et le droit* (The Chinese Tradition, Democracy and the Law), Paris, forthcoming with Fayard.

28. Li Guilian, "Wan Qing jiudi zhengfa kaolun" (A study of "executions on the spot" in the late Qing dynasty), in *Jindai Zhongguo fazhi yu faxue* (The judicial system and the science of the law in modern China), Peking, Beijing daxue chubanshe, 2002, pp. 416-436.

29. See "Quanguo renmin daibiao dahui changwu weiyuanhui guanyu sixing anjian hezhun wenti de jue ding", *The Criminal Law and the Criminal Procedure Law of China*, Peking, Foreign Languages Press, 1984, pp. 217-219.

30. See official documents relating to the judgment in this case in Chen Xingliang (ed.), *Zhongguo sixing jiantao : yi "qiangxia liure an" weishijiao* (An examination of the death penalty in China from the perspective of the "hold the execution" case), Peking, Zhongguo jiancha chubanshe, 2003, pp. 302-330.

31. See the debates around this case, in Chen Xingliang (ed.), *Ibidem*.

32. Cf. Harold Tanner, *Strike Hard ! Anti-Crime Campaigns and Chinese Criminal Justice, 1979-1985*, Ithaca, N.Y., Cornell University East Asia Program, 1999.

33. Zhao Zuojun, "Sixing de sifa xianzhuang jiqi zhanwang" (The legal situation of capital punishment and future prospects), http://beizhen.com/article_show.asp?ArticleID=969, March 17th 2005.

34. Qu Xinjiu, "Yanda de xingshi zhengce fenxi" (An analysis of the "Strike Hard" criminal policy), in *Fazhi de shiming*, *op. cit.*, pp. 197-205. English translation in Zhang Ning (ed.), 2005, *op. cit.*, pp. 77-88.

35. On the history of this « double repression » (Mireille Delmas-Marty) in China, cf. Zhang Ning, “Banditisme et peine de mort en Chine : Catégories judiciaires et pratiques d’exception”, *op. cit.*
 36. Chen Xingliang, “Cong ‘qiangxia liuren’ dao ‘faxia liuren’” (From “holding the execution” to “holding the law”), in *Zhongguo sixing jiantao*, *op. cit.*, pp. 12-25. English translation in Zhang Ning (ed.), 2005, *op. cit.*, pp. 35-52.
 37. Report presented to the 3rd session of the 10th NPC and to the 3rd session of the 10th national committee of the CPPCC.
 38. “More courts formed to review death penalties”, *South China Morning Post*, September 8th 2005, p. A9.
 39. “Zhongguo xinwen zhoubao : yijian buyi, sixing gaige lunzheng lingren guanzhu” (According to *Chinanews*, opinion remains divided over the reform of the death penalty), January 31st 2005, see www.Chinanews.com.cn/news/2005/2005-01031/26/535379.shtml.
 40. *Ibid.*
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RÉSUMÉS

Despite the sensitivity of the subject, the death penalty is currently a topic of public discussion among Chinese legal experts who are now openly wondering about its possible abolition. This debate is of interest on three counts. First, it goes hand-in-hand with a retrospective reading of the Chinese penal tradition, highlighting the succession of attempts at modernising criminal law for over a century. It also shows the ever present weight of the Maoist legacy and the contradictions of the present policy, caught between a concern for legality and continuing recourse to exceptional measures. Lastly, legal professionals and theorists alike are engaging in a review—based on specific cases—of the particular features of contemporary Chinese society and culture.