Death Penalty and Nationalism: The Case of China

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I. Introduction

The chartering of human rights as inalienable, equal and inherent to all members of the human family in the Universal Declaration of Human Rights (UDHR) of 1948 marked a key turning point in the way many countries conceive state-citizen relationships. The extent to which the charter reigns universal, however, is very much contended. Literature on human rights generally diverges into two antagonistic camps. The first camp takes the universalistic approach by viewing human rights as absolute and applicable to any culture (Hong 2005: 87; Donnelly 2007: 282). The second camp employs a cultural relativist approach, conceptualising cultures as inherently different from one another. Under this paradigm, the Universal Declaration of Human Rights has no normative force on culture-specific moral ethos (Donnelly 2007: 294).

Much of scholarship cites the observance of human rights and democratisation concurrently, since there is a general assumption that it is only through universal suffrage that human rights can be exercised (Liu 1996: 333; Langlois 2003: 991). This particular brand of human rights usually aligns itself with liberal democratic ideals, where respect for individual rights forms the standard of legitimacy for state rule (Arato and Cohen 1994: 8). It is most commonly subscribed to by Western nations such as Sweden and the United States of America and substantially different from the Chinese political paradigm, which conceptualises society as a web of relationships rather than individuals, and expects citizens to pay great deference to state authorities (Hong 2005: 96). Ideas pertaining to human rights and democracy as envisioned by the West have historically met strong rejection by the Chinese government on grounds that they do not suit Chinese conditions, owing to the great difference in culture (Liu 1996: 333).
Nevertheless, a paradigm shift is certainly in motion, at least in the area of criminal law, and more specifically, the raison d'être and procedure for capital punishment in Chinese society. Once a political tool of the bloody Yanda (Strike Hard) campaign launched by Deng Xiaoping to reduce crime rates in China, capital punishment now takes a softer, less repressive form, following the old revolutionary dictum “kill fewer, kill cautiously” in order to appeal to the changing, more liberal-minded Chinese population (Trevaskes 2008: 393). Evidence, however, suggests that “human rights” remains a foreign concept for most of China. Capital punishment still receives massive support at the grassroots’ level, with victims’ families often protesting the failure of the courts to swiftly sentence offenders to death (Miao 2013a: 509). A historical analysis of Chinese capital punishment further supports a strong link between capital punishment and national identity in China.

II. Capital Punishment and Nation-building in Modern China

The history of capital punishment in modern China shows that death penalty served as an important political role for unifying the country and strengthening the ideological grip of the Chinese Communist Party on the masses. Capital punishment forms a crucial part in the creation of China as a nation, much like how repressive law unites the bonds of mechanical solidarity in Durkheimian theory (Durkheim 1984: 31). Miao (2013b: 234) splits China’s capitalist punishment regime into three phases, each of which saw capital punishment fulfilling different political agendas contributing towards nation-building.

(i) Phase One: Popular justice during Maoist revolution

The first phase began before 1949, during which the Chinese Communist Party appealed to popular justice to gain power. Using capital punishment as a tool for political repression and ideological control,
Mao instated the “Ma Xiwu Mode of Adjudication” to encourage the peasant masses, many of whom were extremely poor, to take justice into their own hands and revolt against predatory landlords who demanded exorbitant rents from them (Chang 1951: 550). Cases were encouraged to be handled in circuit tribunals instead of courtrooms, directly involving locals into the judicial process and creating opportunities for the Party to indoctrinate locals from various provinces with the communist ideology (Miao 2013b: 235). Although the Party eventually did come into power after 1950, Mao’s manipulation of popular justice was so successful that it polarised Chinese society into an us-them dichotomy, with capital punishment being used arbitrarily against those whom the Party designated as counter-revolutionaries and enemies of state (Miao 2013b: 236).

(ii) Phase Two: Economic liberation and crime control

In the second phase, capital punishment was used primarily as a deterrence measure for crime control. The idea promoted by then Chairman Deng Xiaoping was that criminals were enemies of the state, and that it was necessarily to “suppress the enemies” in order to “protect the people” (Miao 2013b: 238). The threat of capital punishment was deemed necessary in controlling the rising crime rates following the opening up of China’s economy in 1979 (Miao 2013b: 237). Although Trevaskes (2008: 397) suggests that a significant proportion of capital crimes such as murder could have first started out as property offenses caused by increasing economic disparity post-1979, this was clearly overlooked by the Party, who instead interpreted the rise in crime rates as a challenge to their authority and responded by increasing the number of capital offences from 28 in 1979 to 74 in 1995, covering transgressions like homicide, rape and robbery (Miao 2013b: 238). Death penalty was also extended to economic crimes such as “the act of seeking to obtain exorbitant profits through smuggling, the illicit purchase of foreign currency and speculation, the theft of public property, the theft and sale of old and precious
objects and the extortion and acceptance of bribes” (Ning 2010: 88). Yanda campaigns made intermittent appearances over the next three decades, targeting different types of crimes each interval. Although the campaigns did not see a sustained dip in crime rates, thousands of criminals were executed as part of the application of the Yanda policy over the years (Trevaskes 2008: 397; Miao 2013b: 238).

The second phase still relied on binary oppositions to push forward the state’s political agenda, pitting “safe” Chinese citizens against “criminals”. Several new developments, however, are worth noting. Whilst Mao’s encouragement of a decentralised judicial system relied greatly on popular justice predicated on retributive justice by peasants against landlords and, later, “counter-revolutionaries”, Phase Two saw increasing institutionalisation of the legal apparatus and codification of China’s criminal law, presumably to better manage the chaotic Chinese society created after the 1979 economic reform and protect property rights (Potter 2004: 480). The increased systemisation of criminal theory meant that legal exercise relied less on retributive, popular justice and more on deterrent thinking so as to protect the social order of the Chinese community. Correspondingly, legal exercise was expected to be detached, neutral and professional — three qualities which certainly did not describe the justice system in Mao’s era (Miao 2013b: 239).

Arguably, one could interpret the shift in legal culture to reflect China’s gradual but move towards more organic solidarity. In this light, the increase in capital offences appear more as a last-ditch attempt to redress the anomie faced by China as a result of rapid modernisation (Oberwittler and Qi 2009: 139). Anomie, as defined by Merton (1938: 674), refers to a phenomena where there is a disjuncture between cultural goals and the legitimate means of attaining them. Oberwittler and Qi (2009: 139) makes the
argument that although anomie can be felt nation-wide, it is the underprivileged who lack the legal means of realising their materialistic ambition who experiences it the most, driving many of them to crime in order achieve their goals.

(iii)  *Phase Three: Kill Fewer, Kill Cautiously*

The third and final phase described by Miao (2013b: 240) is most interesting, since it refers to present time, where, faced with democratising technologies like social media and strengthening civil societies, state monopoly is declining. A softer, less repressive legal approach was in order. On January 1, 2007, the Supreme People’s Court recalled the power to review capital punishment from provincial courts in order to “kill fewer, kill cautiously” and reduce the number of erroneous death sentences happening at the provincial level. In 2010, it was proposed in the Eighth Amendment to the Criminal Law to remove 13 non-violent economic crimes from the list of capital offences, as well as exclude all elderly aged above 75 years old from ever receiving a death sentence. The humanitarian turn in China’s legal development complements emerging political discourse calling for a more “harmonious society”, despite growing economic inequality in society. Given the varied social fabric of China, this is an apt slogan. Harmony, after all, signifies the balanced connectedness of all things within a system (Angle 2008: 79). In contrast to Chairmen Mao and Deng’s binary politics which tends to paint “good” Chinese citizens as undifferentiated and united against an Other, present state politics seems to have slowly come to terms with the idea of a China unified through difference, rather than sameness (Holbig 2006: 27).

Ironically, the reforms have set in motion a revivalism of popular justice amongst Chinese citizens, albeit different from that experienced during the Maoist era, since this was not a consequence intended
or foreseen by the state. Because reviewing power has been transferred to the Supreme People’s Court, provincial courts cannot mete capital punishment as swiftly, causing victims’ families to protest against the failure to sentence the offender to death quickly, or even at all (Miao 2013a: 509). Elsewhere, citizens jaded by rampant corruption amongst state officials disapproved the proposal to exclude the elderly from capital punishment for fear that the law might encourage bureaucrats above the age of 75 to act corruptly, or escape capital punishment even if they have committed very serious crimes (Miao 2013b: 241). Even though Article 3 of the Eighth Amendment eventually made elderly above the age of 75 ineligible for capital punishment, the sign is clear: in supporting the death penalty for serious crimes like corruption, Chinese citizens are actually exercising their rights to political fair play. This is of course not the perspective shared by the international human rights community, as will be covered in the section below.

III. Capital Punishment Not Contradictory to Democracy

As of early 2008, 92 countries had abolished death penalty for all crimes, and ten more had ruled it out for ordinary crimes (Amnesty International 2008, as cited in McGann and Sandholtz 2012: 276). Amnesty International describes the death penalty as “the ultimate denial of human rights”, going so far as to say that all forms of capital punishments involves “the premeditated and cold-blooded killing of a human being by the state”, even though it might be done in the name of justice. The taking away of human life as punishment inherently opposes the most basic of all human rights outlined in the UDHR: the right to life (Mathias 2013: 1247).

It has been proposed that only democracies abolish capital punishment, since autocratic governments require capital punishments to eliminate opposition (McGann and Sandholtz 2012: 278). This is a claim
surely worth examining. We can look to Miao’s (2013a: 509; 2013b: 421) work synthesised in the previous section, for instance, since it gives us solid, empirical evidence that some factions in the Chinese grassroots do support the death penalty as an ultimatum because they believe that it helps to keep state authorities in check. A quick analysis of the 1979 Penal Code also reveals the seriousness and caution with which the Chinese government take with respect to capital punishment. Article 43 to 46 of the Penal Code bears striking similarity to the three substantial standards for capital punishment followed by the International Covenant on Civil and Political Rights (ICCPR), a multilateral treaty adopted by the United Nations General Assembly (Su 2011: 433). They safeguard prisoners against draconian sentencing by including a safeguard for the suspension of execution should the prisoner show “true repentance”, explicitly reserving the death capital for only “the most heinous crimes” and excluding minors and pregnant women from death penalty eligibility (Su 2011: 434).

It is interesting to note, too, that abolition of the death penalty often occurred despite solid majorities of public opinion favouring its retention. This was the case in France, Germany, the United Kingdom and Canada (Hood 2002: 234, as cited in McGann and Sandholtz 2012: 278). Once again, the assumption that death penalty is only a political tool used in warfare amongst elites needs to be challenged. Given that China’s population is clearly not alone in wishing to retain the death penalty, capital punishment might bear more relation to how the common man conceptualises safety — and nationhood, in the case of China — as opposed to whether a country is democratic. Indeed, Chan’s (2013: 649) article regarding human rights and democracy pushes us to consider the idea of a Chinese democracy that is unique to itself and overlapping with international human rights norms. This view is supported by Donnell’s (2007: 292) theory of human rights. Rather than insisting that human rights should only be based in one kind of understanding in society, Donnell pushes the idea of an
international body of human rights rooted in multiple and diverse foundations so as to protect human rights, but within the reasonable constraints that cultural differences allow.

China’s preoccupation with economic development also makes it unrealistic to expect many of its citizens to give the “right to life” discourse more attention when there are other more pressing material matters at hand. Hong’s (2005: 92) article comparing human rights policy preferences between the Chinese and Westerners reveal that over two-thirds of the Chinese considered economic growth to be a priority. In the United States of America, Britain and Sweden, the proportion ranged from less than half to a little more than half. Furthermore, less than 3% of the Chinese population felt that being given room to make decisions was a priority. Age was a significant factor for variances in results for China; traditional values such as conformity were valued more by the older generations than young adults (Hong 2005: 99).

IV. Possible Research Areas

A Durkheimian perspective of capital punishment in Chinese society points to the important role the death penalty plays in setting the moral tone for the nation-state as a collective. While initially used as a state-sanctioned tool for manipulating the masses, recent scholarship points to the rise of popular justice amongst Chinese citizens who wish to retain the death penalty to as to keep their state leaders in check. While Miao (2013a; 2013b) did not explicitly state the exact demographics of those who had protested against the legal reforms of 2007, this could be a research area one could look into for the future. Variances in public opinion about capital punishment across key demographic groups based on age, locality and education level could pave the way to understanding how national identity is constructed in China.
References


