

Abolition of the Death Penalty: China in World Perspective

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This article outlines changes that the author has observed in the debate on the death penalty within Chinese academic and judicial circles over the past decade. It seeks to show that the debate has moved from a defensive posture to one which is willing to embrace to a degree the human rights objections to capital punishment that have been created by a 'new dynamic' rooted in international human rights instruments and conventions, and promoted by abolitionist countries in Europe. It outlines the ideology that rejects capital punishment and shows how it has, within a short period of time, transformed the status of capital punishment, so that now there are only a minority of states that cling to it, and most of these have come to recognise that it can only be imposed under restrictive safeguards. The article ends by noting the influence of these ideas on the debate in China, especially on the argument that Chinese people have a different cultural attitude towards the death penalty based on the 'life for a life' principle which makes the public hostile to abolition of capital punishment. The possibility of further reforms leading to the abolition of the death penalty in China is discussed in the light of new data which has emerged from important recent research on public opinion and capital punishment. It concludes that it is not so much the general public that needs to be influenced; rather it is the legal practitioners and political leaders who need to embrace the human rights objections to capital punishment.

I. INTRODUCTION

Since the late 1990s the European Union (EU) has been engaged with China in dialogues, seminars and projects aimed to create and then develop a debate that would be conducive to the abolition of the death penalty in China. It is timely, therefore, to reflect on what has been achieved since then and, in particular, on where China now stands in relation to its justification for retaining the death penalty, its attempts to curtail the use of capital punishment, and the prospects for complete abolition. I have been fortunate to have participated in at least a dozen meetings since 1999 where reform of the death penalty in China has been discussed. This article, therefore, reflects my own perception of how the

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debate has developed over the last decade.¹

It is fair to say that the starting point from the Chinese side was that the death penalty would be abolished sometime in the future ‘when the time is right’. But this was certainly likely to be in the far distant future. Indeed, some Chinese commentators referred to the very long time-span between when the possibility of abolition was first raised in European nations and its final abolition, implying that such a long process, maybe as long as 100 years, was somehow inevitable. Furthermore, they noted that the United States (US) and Japan still retained the death penalty, even though they had achieved a high level of socio-economic development. The reasons put forward both to explain and justify why the death penalty remained essential to the maintenance of order and stability in China were varied, but included the belief that retribution based on the notion of ‘a life for a life’ was deeply embedded in Chinese culture; that it, therefore, had the overwhelming public support of over 95 per cent of the population;² that ignoring this support might cause social instability; and that China was not only the largest and most populous country in the world but also not yet sufficiently economically developed that it could do away with an effective criminal sanction. It was argued that the death penalty was ‘indispensable’ as a deterrent and when increased in use had led to a large fall in crime rates in China (although, as usual, no figures were supplied).³

The early meetings were characterised by a vigorous defense of China’s position, as well as by claims that the new Criminal Code of 1997⁴ already complied with international standards regarding the scope of capital punishment, as set out in Article 6(2) of the International Covenant on Civil and Political Rights (ICCPR), which states that ‘In countries that have not already abolished the death penalty, sentence of death may be

¹ It also draws in part on work previously published jointly with my colleague Dr Carolyn Hoyle. See Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (4th edn OUP, Oxford 2008); Roger Hood and Carolyn Hoyle, ‘Abolishing the Death Penalty Worldwide: The Impact of a “New Dynamic”’ in Michael Tonry (ed) *Crime and Justice: A Review of Research*, vol. 38 (University of Chicago Press, Chicago 2009) (forthcoming). I am grateful to Dr Hoyle for agreeing to my use of this material.

² See Dietrich Oberwittler and Shenghui Qi, *Public Opinion on the Death Penalty in China* (Max-Planck-Institute for Foreign and International Criminal Law, Freiburg 2009) 6, citing Hu Yunteng. See also Hu Yungten, ‘On the Death Penalty at the Turning of the Century’ in M Nowak and Xin Chunying (eds), ‘EU-China Human Rights Dialogue: Proceedings of the Second EU-China Legal Experts’ (2000) (Seminar held in Beijing on 19–20 October 1998) 88–94.

³ According to a Chinese speaker at an EU-China Human Rights Seminar held in 2002. For a useful short historical background to the use of the death penalty in China, see Nicola Macbean, ‘The Death Penalty in China: Towards the Rule of Law’ in Jon Yorke (ed), *Against the Death Penalty: International Initiatives and Implications* (Ashgate, Farnham Surrey 2008) 205–227. A more comprehensive survey is to be found in David T Johnson and Franklin E Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (OUP, New York 2009) 225–286.

⁴ Article 48 of Criminal Law of the People’s Republic of China (as amended 1997): ‘The death penalty is only to be applied to criminal elements who commit the most heinous crimes. In the case of a criminal element who should be sentenced to death, if immediate execution is not essential, a two-year suspension of execution may be announced at the same time the sentence of death is imposed.’

imposed only for the most serious crimes ...⁵ This limitation was subsequently redefined in Safeguard 1 of the *Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty* adopted by the United Nations Economic and Social Council (ECOSOC) in 1984 as ‘intentional crimes with lethal or extremely grave consequences’.⁶ The Chinese scholars were referring to Article 48 of the 1997 Criminal Code which restricted the death penalty to the ‘most serious crimes’ and to the fact that the death penalty no longer applied to hooliganism, petty theft and ‘speculative profiteering’, nor to those who committed a capital crime when under 18 years of age or to pregnant women.⁷ However, the death penalty could still be imposed for a wide range of crimes, 68 to be precise. Although it was often claimed that the category of ‘most serious crimes’ largely encompassed violent offences, there was no doubt that it was also enforced for serious economic offences, corruption, certain sex offences, trading in narcotics, and several other types of non-lethal crime. The debate was stifled by the complete lack of any statistical data to show how many persons were sentenced to death each year in China, how many of them after appeal were executed, and for which categories of offence. No one from the Chinese side that I can recall argued openly at that time for the lifting of the state imposed secrecy that surrounds capital punishment. It may be that scholars saw no hope of publication while the probable number of those executed remained so high — estimates ranged from a few thousand to 15,000 per annum⁸ — that to publish the real number would harm China’s international reputation. The pursuit of vigorous enforcement of the death penalty came home to the European delegates during an EU-China Human Rights Seminar in Beijing in the spring of 2001 at which the death penalty was a major item on the agenda, but during which a ‘strike hard’ campaign was reported to have resulted in over 1,000 executions within one month.⁹

Eight years later, in 2009, I can report that the discussions have in many ways been transformed. The reform of the death penalty is, according to a senior retired judge of the Supreme People’s Court, now ‘at the top of the agenda’. The former defensiveness has largely evaporated and the debate has come to centre on how abolition might be achieved and what lessons can be learned from experiences abroad in this regard; how, pending eventual abolition, pre-trial and fair trial procedures with adequate legal defence in cases liable to the death penalty can be brought into line with international standards to

⁵ UNGA Res 2200A (XXI), GAOR 21st session Supp No 16, 53 UN Doc A/6316 (1966); UNTS 171, entered into force on 23 March 1976.

⁶ ECOSOC Resolution 1984/50.

⁷ ‘The death penalty is not to be applied to persons who have not reached the age of eighteen at the time the crime is committed or to women who are pregnant at the time of adjudication.’ Criminal Law of PRC (n 4) art 49.

⁸ Macbean (n 3) 211, 219; Johnson and Zimring (n 3) 234–242.

⁹ Hood and Hoyle, 2008 (n 1) 99, 144–146. Also see Susan Trevaskes, ‘Severe and Swift Justice in China’ (2007) 47 *British Journal of Criminology* 23.

guarantee procedural justice;¹⁰ how the number of citizens put to death can be restricted and the infliction of the death penalty be based on more rational criteria and made more equitably, again in line with international human rights standards; and how public opinion can be moderated and cultural attitudes changed to make abolition acceptable to Chinese people, both the masses and the legislative and judicial elites. The subject is now being gradually, even if not fully, opened up to research, both on the way in which justice is administered and on public attitudes towards the death penalty. The return of the review of all death penalty verdicts from the provincial High Courts to the Supreme People's Court at the beginning of 2007 has been of particular significance, for it signaled the introduction of measures, including the development of guidelines, aimed to ensure more consistency combined with greater parsimony in the types of crime actually punished by death and the number of persons who are in practice executed — in fact, to replace previous practices with a policy aimed to impose the death penalty 'strictly, cautiously and fairly ... on a tiny number of serious criminal offenders.'¹¹ The implication of this policy statement and the insistence on review finally (in 2007) marked the end of 'strike hard' campaigns (*Yanda*) during which thousands had been put to death,¹² and, as late as March 2007, the inhumane practice of parading condemned criminals through the streets and at sentencing rallies prior to their execution.¹³ This was part of the project for Constructing a Socialist Harmonious Society, the criminal policy of which was to 'Combine Punishment with Leniency'.¹⁴ Furthermore, a firm commitment was made in the UN Human Rights Council in March 2007 by China's representative, Mr La Yifan, that 'The death penalty's scope of application was to be reviewed shortly, and it was expected that this scope would be reduced, with the final aim of abolishment'.¹⁵

Although the Chinese authorities still insist that the death penalty is needed in current socio-economic circumstances and that the issue is one of reform and not abolition at this stage, and although it is impossible to verify the pace of change in the use of the death

¹⁰ See Hans-Jörg Albrecht and Research Unit of the Death Penalty Cases Survey, Institute of Law, Chinese Academy of Social Sciences, *Strengthening the Defence in Death Penalty Cases in the People's Republic of China* (Max Planck Institute for Foreign and International Criminal Law, Freiburg-i-Breisgau 2006).

¹¹ Chief Justice Xiao Yang, President of the Supreme People's Court (Speech to the National Legislature on 10 March 2008) <<http://English.sina.com/china/q/2008/0309/149441.html>> accessed 19 August 2009. He also stated that as few executions as possible should be carried out and as cautiously as possible in order to avoid wrongful executions. See also the directive in 2005 for appeals in death penalty sentences with immediate (rather than suspended) execution to be heard in open court.

¹² See Trevaskes (n 9).

¹³ Macbean (n 3) 207.

¹⁴ Zhao Bingzhi, 'Existing State and Prospect of Death Penalty Reform in China at Present Time', Working Papers of the Launch Seminar of the China-EU Project: *Moving the Debate Forward: China's Use of the Death Penalty* (Seminar held at College for Criminal Law Science, Beijing Normal University and Great Britain-China Centre in June 2007)162–168.

¹⁵ Human Rights Committee, 'Human Rights Council Opens Fourth Session' (12 March 2007) Press Release HRC/07/3, 9.

penalty while the figures remain under the cloud of state secrecy,¹⁶ no one can doubt that a movement towards restriction and eventual abolition has got under way. And even though China has yet to ratify the ICCPR, which it signed in 1998, despite hopes that it would do so in the year of the Olympic Games to mark its commitment to human rights, it does appear to be firmly on the path laid down by the United Nations (UN) in 1971 ‘that, in order fully to guarantee the right to life, provided for in Article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries’.¹⁷

The purpose of this article is to place these developments in China within an international context; to demonstrate that a ‘new dynamic’ is at work, based on human rights principles and their application in international law; to show what lessons may be learned from international developments; and finally to raise the question of what prospects there may be for China to abolish the death penalty sooner rather than later.¹⁸

II. THE MOVEMENT FOR DEATH PENALTY REFORM: HOW FAR AND HOW FAST HAS IT PROGRESSED?

Let us return to the proposition that the road to abolition must inevitably be long and that the goal can only be reached in stages. It is true that the abolitionist movement, which had had its roots in the 18th century European Enlightenment, had spread since the early to mid-19th century rather slowly through the countries of Western Europe, South America and in a minority of states of the US. By the end of 1988, a mere 20 years ago, it still encompassed only 52 of the then 180 member states of the UN, only 35 of whom had eliminated it altogether from their penal and military codes — the remaining 17 reserving it for crimes against the state and under military law in time of war. Yet since the end of the 1980s there has been a transformation in the number of countries that have abolished capital punishment and in the speed with which they have done so. By the end of June 2009, the number of abolitionist nations had reached 103 (95 of them having abolished it for all crimes in civil and military law, in peacetime and in time of war, plus 8 for all ordinary crimes, except military crimes or espionage in time of war). In the US, the states of New Jersey (2007) and New Mexico (2009) abolished capital punishment and the death

¹⁶ It was reported in 2008 that the Chief Justice had announced that the Supreme People’s Court had rejected 15 per cent of all death sentences imposed by lower courts in 2007. See ‘China Court Rejects Death Rulings’ *BBC News* (London 8 March 2008) <<http://news.bbc.co.uk/1/hi/world/asia-pacific/7284831.stm>> accessed 17 July 2009. The author has heard estimates of a reduction of up to 25 per cent mentioned at meetings in China in 2009.

¹⁷ UN GA Res 2857 (XXVI) (20 December 1971) and Resolution A/32/61 (8 December 1977). See United Nations, ‘United Nations Action in the Field of Capital Punishment’ in *United Nations Crime Prevention and Criminal Justice Newsletter*, Nos 12 and 13 (1986) 2; William A Schabas, ‘The United Nations and Abolition of the Death Penalty’ in Yorke (ed) (n 3) 9–41, 15–16.

¹⁸ For a much more detailed review and discussion of these issues, see Hood and Hoyle, 2008 (n 1). A translation into Chinese will be published by The People’s Security University Press in October 2009.

penalty has not been reinstated in New York State after the state Supreme Court had found it to be unconstitutional in 2004.

Among the 93 countries that retain the death penalty in law, only 48 have executed anyone within the past 10 years — only a quarter of all nations. The remaining 45 are classified by the UN as being abolitionist *de facto*, not having executed anyone for at least 10 years. Of these, Amnesty International regards 35 of them as truly ‘abolitionist in practice’, having a settled policy not to carry out executions. Thus, when these 35 are added to the countries that are abolitionist in law, 71 per cent (138) of states no longer inflict or intend to inflict the ultimate penalty.¹⁹ Ninety-two per cent (95) of the 103 abolitionist countries have now completely abolished the death penalty, in peacetime and in wartime, under civil as well as military law, a much higher proportion than at the end of 1988, when only two-thirds of abolitionist countries (35 of 52) had abolished it for all crimes.²⁰ At the UN General Assembly in December 2008, 106 countries voted in favour of a resolution calling for a world-wide moratorium on death sentences and executions, with only 46 countries voting against it (see below page 9).²¹ In short, a new dynamic has been at work.

III. THE IDEOLOGY OF THE ‘NEW DYNAMIC’

So why has this movement towards universal abolition made such headway over the last 20 years? What has been the motivating force and by what political processes has the goal been achieved?

There can be no doubt that the latest wave of abolition has been influenced greatly by the process of democratisation in Europe, including the former Soviet empire, and freedom from colonialism and post-colonial repression in Africa and several other parts of the world, including Cambodia in Asia. Foremost among these influences has been the development of international human rights law through international covenants and treaties

¹⁹ This updates Table 1.1 in Hood and Hoyle, 2008 (n 1) 14. The data has been collated by the author from Amnesty International reports over many years. However, although the total number of countries that are abolitionist in law and practice (138) is the same as that published by Amnesty International in March 2009 (AI-Index ACT 50/003/2009), the breakdown of figures for abolitionist for all crimes, abolitionist for ordinary crimes only, and abolitionist in practice in this paper are slightly different and have been brought up to date.

²⁰ Only five nations which abolished capital punishment since 1961, reintroduced it: Nepal (1985), the Philippines (1987), Gambia (1991), Papua New Guinea (1995), and Liberia (for kidnapping and murder in 2008, despite having ratified in 2005 Protocol No. 2 to the ICCPR abolishing the death penalty and banning its reintroduction). Amnesty International currently classifies Liberia as abolitionist in practice. It was soon abolished again in Nepal. Only one of the other four — the Philippines — resumed executions (7 in 1999 and 2000) but then, after a moratorium, the death penalty was abolished again in June 2006 by overwhelming majorities of both the Senate and Congress with the full support of the President.

²¹ The largest group among the opposition comprised countries with a majority Muslim population, followed by countries of the British Commonwealth. China, Japan, North Korea, Mongolia and Thailand opposed the resolution as did Zimbabwe. In Europe and the Americas, only the US opposed the resolution.

and their extension through protocols to include the abolition of the death penalty, most notably Protocol No. 2 to the ICCPR (1989), Protocols Nos. 6 (1982) and 13 (2002) to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),²² and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990),²³ as well as new democratically inspired constitutions in many countries that embody the right to life. William Schabas, who has provided an excellent account of the role played by the UN in the movement to abolish the death penalty, notes that the adoption of Protocol No. 2 to the ICCPR in 1989, was perhaps ‘influenced by the heady atmosphere that accompanied the end of the Cold War ... that seemed to inaugurate a new era for the promotion of human rights at the United Nations’.²⁴

This new dynamic embraced the view that capital punishment should not be regarded simply as a weapon of national criminal justice policy to be enforced according to a government’s assessment of its value as a crime control measure, nor as an issue to be judged in terms of local cultural or socio-political values. Capital punishment should instead be treated as a fundamental violation of universal human rights: not only the right to life but the right to be free from excessive, repressive and tortuous punishments — including the risk that an innocent or undeserving person may be executed. Altogether, by the beginning of 2009, 77 countries had ratified and a further four had signed one or other of the international treaties or conventions mentioned above which bar the imposition and reintroduction of capital punishment.

But it has needed political leadership and judicial support to bring about abolition. Nowhere has it been led by grassroots public opinion, although opinion favouring capital punishment has been changed once abolition has become established — it becomes defined as a barbarity of the past. A well-known example is the determination of President Mitterrand of France who stood for election in 1981 on a manifesto that included abolition of the death penalty despite 63 per cent of the general public being in favour of capital punishment. He was elected and after abolition, was re-elected. This showed that the public were ready to accept leadership on this issue and subsequently France has become one of the leading nations in Europe to protest against capital punishment wherever it occurs in the world. In many countries in Eastern Europe and former Soviet Central Asia, as well as in Africa, the Head of State has led the way in bringing about abolition. But of even greater significance for the international movement has been the political momentum provided by the commitment of the Council of Europe since 1994 and then of the powerful EU since 1998 not only to a ‘death penalty free’ continent but, through a diplomatic offensive, to work to convince ‘third countries’ that ‘the abolition of the death penalty contributes to

²² European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) Protocol 6 and Protocol 13, <<http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>> accessed 19 August 2009.

²³ Protocol to the American Convention on Human Rights to Abolish Death Penalty (adopted 8 August 1990) OAS Treaty Series No 73 (1990).

²⁴ Schabas (n 17) 9–41.

the enhancement of human dignity and the progressive development of human rights'.²⁵

The premise of the anti-capital punishment movement is that the execution of captive citizens, whatever crimes they had committed and wherever they reside in the world, is a fundamental denial of their humanity and right to existence. Countries of the EU and several others such as Canada and South Africa bar the extradition of persons who might face the death penalty without a solid assurance from the requesting country that the person concerned will not, if convicted, be sentenced to death or executed. In other words, the issue has moved from utilitarian deterrent considerations to the normative rejection of state killing of convicted prisoners as an arm of criminal justice. A striking statement of the primacy of human rights over considerations of public opinion or other utilitarian arguments that a government may put forward for retention of the death penalty was the judgment of Mr Justice Chaskalson in the case of *State v Makwanyane* before the South African Constitutional Court in 1995:

Public opinion may have some relevance to the enquiry, but in itself is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised ... The very reason ... for vesting the power of judicial review in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalized people in our society. It is only if there is a willingness to protect the worst and weakest amongst us that all of us can be secure that our own rights will be protected.²⁶

To the same effect, in 2003, the European Court of Human Rights in the case of *Öcalan v Turkey* declared that the imposition of the death penalty within Europe could no longer be protected by Article 2 of the ECHR,²⁷ but must now be regarded as a cruel, inhuman and degrading punishment banned by Article 3 of the ECHR (which is mirrored in Article 7 of the ICCPR).²⁸

²⁵ Council of the European Union, *Guidelines to EU Policy towards Third Countries on the Death Penalty*, (Brussels, 3 June 1998) and *Death is not Justice: The Council of Europe and the Death Penalty* (Strasbourg, updated March 2004). See also Eva Girling, 'European Identity and the Mission against the Death Penalty in the United States' in A Sarat and C Boulanger (eds), *The Cultural Lives of Capital Punishment: Comparative Perspectives* (Stanford University Press, Stanford California 2005) 112–128.

²⁶ *S v Makwanyane* (1995) (3) SA 391 [88].

²⁷ Article 2 (1) states: 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.'

²⁸ *Öcalan v Turkey* (App no 46221/99) ECHR 12 March 2003 and 12 May 2005. See Saul Lehrfreund, 'International Standards Restricting the Death Penalty and the Impact of International Human Rights Obligations on Domestic Law' (2009), available from The Death Penalty Project, London <<http://www.deathpenaltyproject.org/>> accessed 19 August 2009.

IV. THE IMPACT OF THE 'NEW DYNAMIC'

Largely under the influence of these ideas, the abolitionist movement has spread to a far greater range of nations across the globe. In Europe, only Belarus now retains capital punishment and has continued to carry out executions, although on a diminishing scale. The fact that it abstained on the moratorium resolution at the UN in 2007 and 2008,²⁹ and that it has aspirations to join the Council of Europe indicate that it will probably not be long before capital punishment, already much restricted, is abandoned altogether. The only other country of the former Soviet Union that retains capital punishment is Tajikistan, but there has been a moratorium on all executions since 2004.

In South America only three small countries hang on to it,³⁰ although none have carried out an execution for at least 10 years. There have been no executions in communist Cuba since 2003 and Cuba abstained on the recent moratorium resolution at the UN. In the Central America state of Guatemala, where no executions have taken place since 2000, both the President and Secretary of State for Human Rights have spoken out strongly in favour of abolition and in 2004, the Supreme Court proposed a new Penal Code without capital punishment.³¹

In the African region, there has been a remarkable conversion to abolition. Fifteen countries are now completely abolitionist³² and another 21 are abolitionist *de facto*,³³ whereas 20 years ago only the small island states of Seychelles (in 1979 for ordinary crimes only) and Cape Verde (in 1981) had abolished capital punishment.³⁴ In November of 2008, a resolution calling for a moratorium on all executions in African countries was adopted by the African Commission on Human and Peoples' Rights.³⁵

Although most countries in the Middle East and North Africa, where Islam is the dominant religion, retain the death penalty, several of them — Tunisia, Algeria and Morocco — have not carried out any judicial executions for over 10 years, nor have executions occurred frequently in most of the Arab Gulf States. Abolition is being considered in both Jordan and Morocco (both of which abstained in the moratorium vote at the UN in December 2008 along with five other retentionist Muslim countries,

²⁹ UNGA Res 10678 (18 December 2007) UN Doc A/RES/62/149 and UNGA Res 10801 (18 December 2008) UN Doc A/RES/63/168.

³⁰ Belize, Guyana and Suriname.

³¹ See International Federation of Human Rights (FIDH), *The Death Penalty in Guatemala: On the Road towards Abolition* (July 2005) 422/2.

³² Angola, Burundi, Cape Verde, Côte d'Ivoire, Djibouti, Guinea Bissau, Mauritius, Mozambique, Namibia, Rwanda, Sao Tome and Principe, Senegal, Seychelles, South Africa and Togo.

³³ Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo (Brazzaville), Eritrea, Gabon, Gambia, Ghana, Kenya, Liberia, Lesotho, Madagascar, Malawi, Mali, Mauritania, Niger, Swaziland, Tanzania and Zambia.

³⁴ The African Union member states that still retain the death penalty and have carried out executions within the past 10 years are: Botswana, Chad, Congo (Democratic Republic), Egypt, Equatorial Guinea, Ethiopia, Guinea, Libya, Nigeria, Sierra Leone, Somalia, Sudan, Uganda and Zimbabwe.

³⁵ Amnesty International, 'Growing Calls for End to Executions at UN', <www.amnesty.org/en/news-and-updates/good-news/growing-calls-end-executions-un-20081218> accessed 3 July 2009.

while Somalia voted in favour). It is notable that several secular states with large Muslim majorities have already joined the abolitionist movement such as Albania, Azerbaijan, Bosnia-Herzegovina, Turkey, Turkmenistan and Senegal. Furthermore, only a handful of retentionist Muslim countries make regular and large scale use of capital punishment as a crime control measure: Iran, Saudi Arabia, Pakistan, Iraq and Yemen. Whether and at what speed retentionist Muslim countries will accept the human rights perspective on the death penalty will depend on whether political stability can be achieved, whether governments remain politically and legally dominated by followers of fundamentalist interpretations of Islam, or whether they move towards secular democratic government, which allows for a more modern, 'scientific' and less authoritarian interpretation of Islam.³⁶ Overall, the prospects for a steady movement towards abolition in the Muslim world are not nearly as bleak as some may have imagined.

The death penalty has yet to be abolished in the Anglophone Commonwealth island states of the Caribbean, but all except three of them may be classified as 'thwarted' executioners.³⁷ They have been thwarted by the activities of dedicated human rights lawyers who have challenged the constitutionality of the death penalty, particularly the mandatory death penalty, and many aspects of the procedures leading to conviction, sentence and beyond. But so far, attempts to abolish capital punishment (as in Jamaica in 2008) have been unsuccessful, mainly because of the very high homicide rates that currently blight these countries. Nevertheless, capital punishment is largely symbolic, and the issue now for these countries is to face the fact that experience has shown that the death penalty cannot be applied without the violation not only of the right to life but of freedom from cruel, inhuman, or degrading treatment or punishment, both of which are, in fact, protected by their constitutions.

In Asia and Africa, the Commonwealth countries that retain and wish to continue to execute offenders are now in a minority. When one examines *the incidence of executions*, it becomes clear that only five of the nine 'actively retentionist' Commonwealth non-Muslim countries (Botswana, India, Malaysia, Singapore and Uganda) have carried out any executions within the five years (2003–2007 inclusive) and only *one* of them (Singapore) has conducted an execution in *every one* of these five years. Furthermore, in all these countries the *rate* of executions has been falling: most notable is Singapore where the number of persons put to death fell from a reported 76 in 1994 to 19 in 2003 and to only two in 2007.³⁸ Thus, it appears evident that most retentionist Commonwealth countries maintain the power to sentence to death for local political reasons and that in doing so they believe that it is necessary to reject the view that the issue is one that should be decided by reference to international customary human rights norms. Nevertheless,

³⁶ See M Cherif Bassouini, 'Death as a Penalty in the Shari'a' in Peter Hodgkinson and William A Schabas (eds), *Capital Punishment, Strategies for Abolition* (CUP, Cambridge 2004) 169–185.

³⁷ The exceptions being the still active retentionist Bahamas, St. Kitts and Nevis, and Trinidad and Tobago. The most recent execution in the Bahamas took place in 2000 and in Trinidad and Tobago in 1999, when 10 men were hanged, nine of them on the same occasion. In December 2008, a man was hanged in St. Kitts.

³⁸ See Johnson and Zimring (n 3) 410.

the movement in most of these countries is clearly in the direction of abolition through restriction.³⁹

While only four Asian states (Nepal, Bhutan, Cambodia, and the Philippines) have so far completely abolished the death penalty, six others are now abolitionist *de facto*, including most recently South Korea.⁴⁰ In India — with the second largest population in the world, and thus a useful comparison with China — death penalty is in principle to be imposed in only the ‘rarest of rare’ cases. Although there is a good deal of evidence that this standard is not always strictly interpreted,⁴¹ the fact of the matter is that the executive branch of government has used its power to delay executions through the clemency process so that very few persons have been executed — and then only sporadically. The last execution took place in 2004, the first since 1997.⁴² The death penalty is retained, but purely for symbolic purposes: a few executions now and then cannot be regarded as a tool of criminal justice in such a populous country. It appears that India could easily abolish capital punishment without it having any serious internal political consequences.

Elsewhere in Asia no executions have been carried out in Taiwan since 2006 as it is now officially on the road to abolition.⁴³ As a commitment to a human rights agenda, Taiwan endorsed the ICCPR in May 2009 as part of its domestic law and undertook to ensure that all its practices conformed to the ICCPR.⁴⁴ It may be that Thailand, where there have been no executions since the new constitution was adopted in 2007, will also embrace abolition. Vietnam, like China, has entered into dialogues with the EU, on the scope of capital punishment and it is indicative of a more open mind on the issue, despite the secrecy which surrounds data on executions that Vietnam chose to abstain at the UN on the moratorium resolution in December 2007 and again in 2008.⁴⁵ The Japanese government continues to protest that capital punishment is a matter for its own sovereignty and that it is a criminal justice, not a human rights issue. Nevertheless, abolition is being openly debated and the Japan Federation of Bar Associations, along with an anti-death penalty organisation known as ‘Forum 90’, have brought many human rights abuses associated with the secretive administration of capital punishment to the attention of the Japanese

³⁹ Roger Hood, ‘Capital Punishment: The Commonwealth in World Perspective’ (2008) 17(2) *The Commonwealth Lawyer* 30–35. It should be noted that the Commonwealth Lawyers’ Association, meeting in Hong Kong in April 2009, passed a resolution calling for the abolition of capital punishment in Commonwealth jurisdictions.

⁴⁰ Brunei Darussalam, Laos, Maldives, Myanmar, South Korea and Sri Lanka. For an authoritative review of the situation in Asia, see Johnson and Zimring (n 3) 16.

⁴¹ Bikram Jeet Batra, *Lethal Lottery: The Death Penalty in India* (May 2008) AI-Index ASA 20/006/2008.

⁴² Johnson and Zimring (n 3) 430.

⁴³ International Federation of Human Rights (FIDH), *The Death Penalty in Taiwan: Towards Abolition?* (Report no 450/2, June 2006).

⁴⁴ Taiwan is not a member of the United Nations so could not officially ratify this treaty under international law. See the article by Jerome A. Cohen and Yu-Jie Chen, ‘Taiwan’s Incorporation of the ICCPR and the ICESCR into Domestic Law’ <www.usaisialaw.org/?=1142> accessed 4 July 2009.

⁴⁵ See n 29.

public and parliament.⁴⁶ The fact that the annual relatively small number of executions varies according to the willingness of different Ministers of Justice to sign execution orders, shows how contentious a subject capital punishment has become in Japan. North Korea may well be affected by South Korea's new status as an abolitionist *de facto* nation which is moving clearly in the direction of abolition *de jure*. In Malaysia too, there are signs of change. In 2006, the Malaysian Bar Association called for the abolition of the death penalty and the Malaysian Cabinet Minister in charge of law was reported as saying: 'I welcome the proposal. For me, a life is a life. No one has the right to take someone else's life, even if that person has taken another life'.⁴⁷

The position taken by the US may well have a crucial influence on China's decision whether or not to abolish capital punishment. Despite the fact that many believe, as Franklin Zimring has put it, that: 'the endgame in the effort to purge the United States of the death penalty has already been launched',⁴⁸ the US has, yet to embrace the aspiration, embodied in Article 6 of the ICCPR and UN Resolutions, to abolish the death penalty in due course. So what, briefly, are the prospects that the US will abandon capital punishment?

The government of the US made its position clear in its response to the 7th UN Survey on *Capital Punishment and the Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty* in 2005:

We believe that in democratic societies the criminal justice system — including the punishment prescribed for the most serious and aggravated crimes — should reflect the will of the people freely expressed and appropriately implemented through their elected representatives.⁴⁹

However, there have been some signs of change and recognition of norms that have been established elsewhere in the world. The decisions of the US Supreme Court to ban the execution of the so-called mentally retarded⁵⁰ and of juveniles convicted of murders committed before the age of 18,⁵¹ both cited worldwide condemnation of these practices as embodied in the UN Safeguards. To what extent a perhaps less conservative Supreme Court in the future will build on these judgments, as capital punishment comes under more and more critical scrutiny in the US, remains to be seen. In the meantime, international criticism has continued unabated. Thus, in July 2006, the UN Human Rights Committee, when considering the report by the US under Article 40 of the ICCPR, included in its observations a statement calling for a moratorium to be placed on capital sentences 'bearing

⁴⁶ See Hood and Hoyle, 2008 (n 1) 94 and David T Johnson 'Where the State Kills in Secret: Capital Punishment in Japan', (2006) 8 *Punishment and Society* 251, 263. See also Johnson and Zimring (n 3) 45–101.

⁴⁷ Quoted in Amnesty International, *Asia Death Penalty Blog* (23 March 2006), <<http://asiadeathpenalty.blogspot.com/2006/03/renewed-debate-on-death-penalty-in.html>> accessed 19 August 2009.

⁴⁸ Franklin E Zimring, *The Contradictions of American Capital Punishment* (OUP, New York 2003) 205.

⁴⁹ UN Doc E/2005/3 [17].

⁵⁰ *Atkins v Virginia* 56 US 304 (2002).

⁵¹ *Roper v Simmons* 543 US 551 (2005).

in mind the desirability of abolishing the death penalty'. In fact, there has been a very low incidence of executions in all but a handful of southern states. Fourteen of the 35 states that currently retain the death penalty have executed no more than six people over the past 30 years and two of them have executed no one. Eighty per cent of executions since 1976 have been carried out in just nine states.⁵² No wonder that the death penalty has been described by Carol and Jordan Steiker as 'A Tale of Two Nations'.⁵³ Given the concerns widely expressed about the possibility of error and the impossibility of extinguishing all possibility of arbitrariness and discrimination, given the excessive and costly delays in the administration of capital punishment and the cruelty inherent in the 'death row' phenomenon and the administration of execution, it seems likely that many more states that retain the death penalty but rarely carry out executions will follow the example of New Jersey, New York and New Mexico and abolish it altogether. This would leave a few 'outliers' and maybe in the end only Texas as an executing state. At that stage it would be possible for the US Supreme Court to rule that because the majority of states had abandoned the death penalty, 'the evolving standards of decency that mark the progress of a maturing society'⁵⁴ would no longer tolerate the use of such an inhuman and degrading punishment in the US. If this comes to pass, supporters in the wider world of the view that capital punishment is not inconsistent with respect for human dignity and human rights will receive a body blow.

V. SPEEDY ROUTES TO ABOLITION

When one examines the paths taken by the 54 nations that first abolished the death penalty either for ordinary crime in peacetime or for all crimes since the end of 1988,⁵⁵ one finds that by the end of June 2009, 51 of them (94 per cent) had abolished it for all crimes completely and another three countries solely for murder and other ordinary crimes.⁵⁶ Forty-three of the 51 had gone straight from retaining the death penalty to complete abolition, without first abolishing it for 'ordinary' crimes only. In other words, 84 per cent moved straight from retention of the death penalty for murder and sometimes other 'ordinary' crimes as well as military crimes and crimes against the state to complete abolition 'in one go'. Taking into account those countries that first abolished capital punishment by legislation and later introduced it into the constitution, over half of the countries that have joined the abolitionist movement and abolished capital punishment completely since 1988 have also ensured through their own constitutions, usually related to the article specifying the right to life and/or freedom from cruel and inhuman punishment or treatment, or through

⁵² Texas, Virginia, Oklahoma, Missouri, North Carolina, South Carolina, Georgia, Alabama and Florida.

⁵³ C S Steiker and J M Steiker, 'A Tale of Two Nations: Implementation of the Death Penalty in "Executing" Versus "Symbolic" States in the United States' (2006) 84 *Texas Law Review* 1869.

⁵⁴ *Trop v Dulles* 356 US 86 101 (1958).

⁵⁵ Excluding countries that had previously abolished capital punishment for murder such as the United Kingdom in 1965, although it did not abolish it for all crimes until 1998.

⁵⁶ Chile, Kazakhstan and Latvia.

interpretation of the constitution by the courts, as for example in Hungary and South Africa,⁵⁷ that the death penalty cannot be reintroduced.

How swiftly did abolition follow from the last execution? According to Marc Ancel, writing in the early 1960s, many countries that abolished capital punishment had first suspended executions for a considerable period of time and become abolitionist *de facto* before abolishing it in law.⁵⁸ The theory was that the public had to get used to the law not being enforced in practice before they would accept that executions were not necessary. Yet in the last 20 years, only a minority, 21 (39 per cent) of the 54 countries that *first* abolished the death penalty since the beginning of 1989 (including the three that abolished it for ordinary crimes only) had been through a 10-year abolitionist *de facto* stage. The majority moved much faster to remove capital punishment by law. For example, Turkmenistan abolished capital punishment in 1999, just two years after the last execution; South Africa in 1995 just four years after. Thus, the pattern of a long drawn-out process leading to abolition was *not* observed in *well over half* of those countries that have embraced abolition in the last 20 years.

VI. OTHER INDICATORS OF THE 'NEW DYNAMIC'

Where abolition has not yet been achieved, there has been a movement, in line with Article 6(2) of the ICCPR, to restrict the number of crimes for which the penalty is death, to make it discretionary rather than mandatory (the latest country in the process of doing so being Barbados), and generally to restrict the number of people actually executed. Let me take two examples where there has yet to be a moratorium. The new Belarus Criminal Code of 1999 provides for death penalty for 15 fewer offences (in 14 rather than 29 articles) than the Code of 1960, and it can now only be imposed 'when it is dictated by special aggravating circumstances as well as an exceptional danger posed by the offender'.⁵⁹ Vietnam reduced the number of offences for which the death penalty can be imposed from 44 to 29 in 1999 and plans are in place to revise the Penal Code to reduce the number to 12, excluding economic crimes.⁶⁰ China has yet to take this legislative leap.

About a third (32 of the 94) of the countries that have not yet abolished capital punishment in law still retain it for certain dangerous drugs offences, about 28 for some sexual offences, and about 22 for various non-violent serious property or economic

⁵⁷ Hungary: Constitutional Court Decision No. 23/1990 (X.31) AB. On the constitutionality of capital punishment, see Tibor Horvath, 'L'Abolition de la peine de mort en Hongrie' (1992) *Revue Internationale de Criminologie de la Police Technique* 2, 167–179. South Africa: *State v Makwanyane* [1995] (3) SA 391.

⁵⁸ M Ancel, *The Death Penalty in European Countries* (Council of Europe, Strasbourg 1962) 3.

⁵⁹ Grigory A Vasilevich and Elissa A Sarkisova, 'Prospects for Abolition of the Death Penalty in the Republic of Belarus' in *The Death Penalty in the OSCE Area* (Background Paper) (Office for Democratic Institutions and Human Rights, Warsaw 2006) 9–17.

⁶⁰ Hood and Hoyle, 2008 (n 1) 97; UK Foreign and Commonwealth Office, *Annual Report on Human Rights 2008* (Report) (March 2009) 173 <www.fco.gov.uk/humanrights> accessed 19 August 2009.

offences (including armed robbery not leading to death).⁶¹ But, as far as I have been able to ascertain, there were reports of only 15 countries having carried out at least one execution for one or other of these types of offences in the five years from 2002 to 2006, including China. This suggests that executions for crimes other than murder (except for drug related offences in about seven countries), are now *very* rare events. Indeed, it appears that the norm in retentionist countries is to maintain capital punishment, pending abolition, as an *exceptional* discretionary sentence and for intentional murder only — a limitation laid down by the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.⁶²

Also, the number of countries that carry out executions *regularly* is now very small. In 2008, only 25 countries were known to Amnesty International to have carried out a judicial execution, compared with 40 twelve years earlier in 1997.⁶³ In the US, 42 of the 51 US state jurisdictions had no executions in 2008. While in 1999, 98 persons were executed in the US, only 37 were in 2008, half (18) of them in Texas. With the exception of Iran, Iraq, Saudi Arabia and Pakistan, the number of executions annually recorded appears to be falling almost everywhere. Furthermore, only three nations are known by Amnesty International to have executed at least 100 people in 2008: China (by far the largest number), Iran and Saudi Arabia — and only eight countries had executed more than 15 people.⁶⁴

It is also highly significant that the death penalty was excluded as a punishment by the UN Security Council when it established the International Criminal Tribunals to deal with atrocities in the former Yugoslavia in 1993 and Rwanda in 1994, and later in Sierra Leone, Lebanon and Cambodia. Nor is it available as a sanction for genocide, other grave crimes against humanity and war crimes in the Statute of the International Criminal Court established in 1998.⁶⁵ This has raised the inevitable question: if capital punishment is not available for these atrocious crimes, why should it be the punishment for lesser crimes?

Several attempts had been made by abolitionist states since 1994 to bring a resolution before the UN calling for an international moratorium on death sentences and executions so that the effects could be studied. One indicator of the way in which the debate is moving is the quite dramatic *decrease* in recent years in the number of countries which continue to oppose such resolutions. As recently as 2005 at the UN Commission on Human Rights, 66 countries dissociated themselves from a resolution calling for a world-wide moratorium on executions largely on the grounds that it was ‘divisive’ and an attempt to impose the will of the majority on the minority, even a form of cultural imperialism

⁶¹ Hood and Hoyle, 2008 (n 1) 134–144.

⁶² Professor Philip Alston, UN Doc A/HRC/4/20 [65] (29 January 2007).

⁶³ Amnesty International, ‘Death Sentences and Executions in 2008’ (Report) (March 2009) AI-Index ACT 50/003/2009, 8.

⁶⁴ China, Iran, Saudi Arabia, USA, Pakistan, Iraq, Viet Nam and Afghanistan. Ibid.

⁶⁵ ‘Rome Statute of the International Criminal Court’ (UN Doc A/CONF 183/9 Part 7 Penalties) <[http://untreaty.un.org/cod/icc/statute/english/rome_statute\(e\).pdf](http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf)> accessed 17 July 2009.

and an attack on sovereignty.⁶⁶ Some of these countries denied that the death penalty is a question of ‘human rights’ and insisted that it was one of criminal justice practice, to be decided by citizens of nations and by their political leaders on the basis of local opinion, circumstances and culture. Yet, two years later, in December 2007 at the UN General Assembly only 54 countries voted against a similar resolution, with 104 in favour. A year after that the number of objectors had shrunk to only 46 — eight fewer countries than the year before and 20 fewer countries than a mere three years earlier — and the number that abstained had risen from 29 to 34.⁶⁷

Taken together, the facts reviewed above suggest that many, probably the majority, of retentionist countries are not wedded to, or reliant upon, executions to enforce criminal law. Thus, the remaining retentionist states should not be regarded as a ‘rump’ of states committed to continuing executions: many of them appear to be moving towards a minimal and marginal use of capital punishment where it continues merely to serve a symbolic purpose rather than being regarded as a necessary element of penal practice. This portends a further increase in the number of abolitionist countries as they come in the not too distant future to accept the ideology of the new human rights dynamic.

VI. PROSPECTS IN CHINA

As mentioned in the Introduction, the last few years have witnessed a distinct change in the discourse, evidenced by the willingness of the Chinese authorities to discuss the death penalty in human rights seminars and dialogues with European countries, the gradual opening up of the subject to research, and the attempt to guard against wrongful conviction and control the incidence of executions through review of all death penalty verdicts by the Supreme People’s Court.

But how important has been the impact on China of the ‘new dynamic’ based on an acceptance that the death penalty is a violation of human rights — the right to life and the right to be free of tortuous, cruel and inhuman punishments and treatments? It is true that in the debate at the UN General Assembly in December 2007 on the resolution

⁶⁶ Hood and Hoyle, 2008 (n 1) 32–35.

⁶⁷ Ethiopia and Somalia having moved from against to being in favour and the other six now abstaining — Bahrain, Jordan, Mauritania, Oman, Papua New Guinea and Suriname. Among the 48 countries that were actively retentionist (having executed at least one person in the past 10 years) and the 10 countries that have not executed anyone during that period, but are not regarded by Amnesty International as truly ‘abolitionist in practice’ (a total of 58 nations), 39 opposed the resolution. The largest group (17) were countries with a majority Muslim population, followed by countries of the British Commonwealth (11 of the 15 being island states in the Caribbean, plus Botswana, India, Singapore and Uganda). Five were in non-Muslim or non-Commonwealth Asia (China, Japan, North Korea, Mongolia and Thailand), and one in Africa (Zimbabwe). In Europe and the Americas only the US opposed the resolution. See UN Doc GA/10678 <<http://www.un.org/News/Press/docs/2007/ga10678.doc.htm>> and UN Doc GA/10801 <<http://www.un.org/News/docs/2008/ga1081.doc.htm>> accessed 17 July 2009.

for a world-wide moratorium on death sentences and executions, China voted against the motion. The reason given by the Chinese spokesperson was reported as follows:

... in today's world, the issue was a matter of judicial process to decide on the use of or a moratorium on the death penalty, and not a matter of human rights. It was each country's right, on the basis of cultural background and other factors, when to use that punishment. Each state should be able to exercise that right without interference. The issue should be solved through dialogue.⁶⁸

However, as Nicola Macbean, an expert on China, has stressed: 'In staking its claim to legitimacy, to both an international and domestic audience, the Chinese government can no longer ignore the dominant discourse of human rights.'⁶⁹

At a workshop held in Guangdong and Beijing in June 2009 under the auspices of the Great Britain-China Centre, the Death Penalty Project, and the CCLS of Beijing Normal University, as part of the EU funded 'Moving the Debate Forward' project, it appeared to be widely accepted that the human rights movement to abolish the death penalty in all countries was an 'irreversible trend'. As Professor Zhao Bingzhi put it:

The fast headway of abolition in the globe is amazing and exciting. These latest changes present a clear signal to us: abolition is an inevitable international tide and trend as well as a signal showing the broad-mindedness of civilised countries ... abolition has become an international obligation ... Although such influence will not lead to an instant effect, it facilitates ... restricting the scope of crimes to which death penalty is applicable as much as possible and the execution of a minimum number.⁷⁰

Furthermore, he called for the regular publication of statistics showing the actual number of people sentenced to death and executed alongside vigorous attempts to promote positive attitudes towards abolition among the public. Professor Zhao put forward two more proposals. First, the reduction by the legislature (not simply through the review procedure of the Supreme People's Court) in the crimes subject to capital punishment so as to restrict it to crimes of violence resulting in death, 'highly serious crimes endangering national security' and military crimes committed during a war. Second, the introduction of a system to provide clemency and pardons, as required by the ICCPR and the ECOSOC Safeguards.

⁶⁸ 'General Assembly Adopts Landmark Text Calling for Moratorium on the Death Penalty' (18 December 2007) (News Release, United Nations, New York) UN Doc GA/10678, <www.un.org/News/Press/docs/2007/ga10678.doc.htm> accessed 17 July 2009. For a similar statement of the following year, see UN Doc GA/10801 (18 December 2008), <<http://www.un.org/News/docs/2008/ga1081.doc.htm>> accessed 17 July 2009.

⁶⁹ Macbean (n 3) 222.

⁷⁰ Zhao Bingzhi and Wang Shuiming, 'Development Trend of Death Penalty in Contemporary Era and its Inspiration for China', paper presented in *Workshop on Trend of Death Penalty Reform and Applicable Standard: Experience of International Society and Chinese Practices* (Held in College of Criminal Law Science of Beijing Normal University and Great Britain-China Centre, Beijing on 17–18 June 2009).

It was particularly notable that one of the major factors identified as likely to determine the pace towards abolition was public opinion: it being assumed that there was strong support for the death penalty because the retributive concept of a ‘life for a life’ was deeply embedded in Asian and Chinese cultures. For example, Professor Mo Hongxian of Wuhan University Law School, who also called for the authorities to provide the public with information on the application of the death penalty and insisted that ‘public opinions do not necessarily represent justice’, drew a distinction between what she called an *ought-to-be* point of view in which public opinion ‘should not influence the application of the death penalty’ and a *what-it-is* point of view, ‘that it is almost impossible, politically, to separate the question of the death penalty from the influence of public opinions’. She hoped that the policy of strictly restricting the application of the death penalty ‘would reduce the public’s inclination towards revenging justice against crimes’ and thus ‘when the time is ripe we may temporarily suspend the sentencing of the death penalty’. Then, ‘if the public gradually accepts it and shows no repulsion, we may then abolish the death penalty in the Criminal Law.’⁷¹ How long this process might take became a matter of speculation, with some suggesting that it would be a long process, while others hoped for a more speedy resolution.

The EU-China project on Moving the Debate Forward has shed light on this issue by funding a large scale public opinion survey of nearly 4,500 citizens (a 70 per cent response rate) in three different provinces, devised by the Max Planck Institute for International Criminal Law in Freiburg, Germany, and conducted by the Research Center for Contemporary China at Peking University. The findings from this survey will be published in China and Freiburg alongside a survey of the opinions of criminal justice personnel conducted by Wuhan University Law School.⁷² An outstanding finding from the public opinion survey was the low level of interest and knowledge and the relatively high proportion of respondents who had no firm opinion on the subject of the death penalty. Less than three per cent said they were ‘very interested’ and only 26 per cent were interested at all. Thus, almost three quarters were either ‘not very interested’ or ‘not interested at all’ in the subject. When asked how much knowledge they had about the death penalty in China, only 1.3 per cent said they had a lot of knowledge and less than a third ‘some knowledge’. Therefore, almost seven out of ten citizens had little or no knowledge about the use of the death penalty in their own country and so it was not surprising that no more than 11 per cent had even heard of the ICCPR.

As regards being in favour or opposing the death penalty, 58 per cent were *definitely* in favour — by no means a very high proportion when compared with the experience of European countries when they abolished capital punishment. For example, as already

⁷¹ Mo Hongxian, ‘Analysis of the Interaction between Public Opinions and Judicature on Death Penalty: Paths of Judicial Control over Death Penalty’ in Workshop Proceedings (n 70).

⁷² At the time of writing, the two surveys are being prepared for joint publication, in Chinese by Wuhan University, under the direction of Professor Mo Hongxian and in English by the Max-Planck Institute in Freiburg under the direction of Professor Hans-Jörg Albrecht. The authors of the general population survey are Dietrich Oberwittler and Shenghui Qi.

mentioned, in France, 63 per cent of the general public was opposed to abolition at the time when it was abolished and yet the government was re-elected.⁷³ In China, moreover, while only 14 per cent said they opposed capital punishment, as many as 28 per cent were recorded as being 'unsure'. When asked whether China should speed up the process to abolish the death penalty, only 53 per cent were opposed and a further 33 per cent were 'unsure'. This can hardly be said to indicate a fervent desire for capital punishment of a kind that would make abolition politically impossible to achieve.

More evidence to suggest that attitudes were not hardened and inflexible on this subject came forth when respondents were asked whether they supported the death penalty for specific crimes. For only two crimes, well over half the respondents supported the use of capital punishment: for murder (77 per cent) and intentional injury causing death (60 per cent); and just over a half supported it for drug dealing (54 per cent) and sexual abuse of a girl under the age of 14 (52 per cent). For no other category of offence for which the death penalty can presently be imposed was there a majority in favour of capital punishment, suggesting that the government would not have great opposition to expunging most of the 68 capital offences from the criminal code so as to comply, pending complete abolition, with the meaning and spirit of Article 6(2) of the ICCPR and Safeguard 1 of the ECOSOC Safeguards.

Furthermore, there was evidence that the members of public surveyed, despite their general endorsement of the death penalty, would wish to see it imposed only in the most extreme cases of murder. This was evident when they were provided with 'scenarios' of a crime with various aggravating and mitigating features. For instance, the death penalty was supported by less than 50 per cent of respondents even for a man who had served two previous prison sentences for robbery and who now had robbed a convenience store of 2,000 Yuan and killed the store-owner by shooting him in the head.

Further questions revealed that respondents made greatly varying estimates of the number of persons executed annually in China and two-thirds simply said that they did not know the number. As many as 64 per cent said that the Chinese government should publish the figures and only 16 per cent said they definitely should not. Although Article 212 of China's Criminal Procedure Law of 1996 provides for the publication of every execution of a death sentence and all courts have to prepare written records of the execution, the government has yet to collate and publish this data. No one knows how representative the reports of executions in newspapers are of all executions carried out in the country annually. Such secrecy and lack of transparency and accountability makes it impossible for either the supporters or opponents of capital punishment to debate the issue on the basis of the realities of how often it is administered, for what types of offences and offenders, and under what circumstances. If China were to ratify the ICCPR, it would be more likely to take account of Resolution 1989/64 of the UN Economic and Social Council calling for the publication of such information. The United Nations Special Rapporteur, Professor Philip Alston, has

⁷³ See page 7 (last para) of this article above.

stigmatised the failure of states to do so as a violation of human rights standards.⁷⁴

Increased knowledge could well prove effective in changing attitudes and opinions: the survey showed that a high proportion of the population were concerned about wrongful convictions and only 25 per cent of respondents said that they would support the death penalty if it were proven that innocent people had been executed. Furthermore, almost 70 per cent of the general public thought that the death penalty was not equitably administered, being more likely to be imposed on poor and 'grassroots' people than a rich person or an official or a relative of an official. When, as in surveys in the US, respondents were asked whether they would support the death penalty if various alternatives were available, a substantially lower proportion definitely opposed abolition. If the death penalty were replaced by life imprisonment with the possibility of parole, those who said they would still favour the death penalty accounted for only 38 per cent of the Chinese general population and those in favour of abolition increased from 14 to 31 per cent with 30 per cent remaining undecided. On the other hand, if the alternative maximum sentence was to be the very harsh penalty of life with no possibility of parole and an obligation to make restitution, under a quarter would oppose abolition and half definitely favour it. It seems, therefore, that although 78 per cent of those surveyed said they agreed with the statement 'people who take a life deserve to be punished by having their own life taken', this was more an expression of the idea of proportional punishment than a demand for retributive justice of exactly the same type.

As far as the survey of 455 criminal justice practitioners⁷⁵ was concerned, less than half (48 per cent) agreed with the 'life for a life' principle but they strongly supported the death penalty on grounds of its purported general deterrent effects. As many as 91 per cent supported the death penalty in general and a much lower proportion than in the general population believed that innocent persons had been executed or that the system discriminated against poor or grassroots citizens. However, like the general public, the majority did not support the use of the death penalty for economic offences and would be much more likely to support abolition if the alternative punishment was a more severe form of imprisonment. But in their case, the proportion who would continue to support the death penalty fell below half (to 33 per cent) only if the substituted sentence would be life imprisonment both without parole and an obligation to make restitution. Such a penalty of 'life without hope' would also be challenged on human rights grounds, but the response indicates that these professionals are not wedded to extracting literally a 'life for a life'; they were much more wedded to utilitarian considerations of general deterrence and incapacitation. As might be expected, the findings really indicate that those who are responsible for administering the death penalty have a stronger belief in the legitimacy of what they do. While the majority favoured improvements in the due process provisions of the criminal law in line with the principle of legality, it appears that relatively few of

⁷⁴ UN Doc E/CN.4/2005/7 2004 (17 March 2005).

⁷⁵ 95 judges, 95 prosecutors, 95 policemen, 95 staff of the legislature and judicial administration, and 75 defence counsel.

them have as yet embraced the view of the death penalty as an international human rights issue.

Taken together, the two surveys suggest firstly that public opinion is not likely to be so hostile to further restriction and abolition of the death penalty as has been supposed and that it is the practitioners of criminal justice that need most to be educated further about the realities of capital punishment and the human rights issues that are inevitably involved in administering this cruel, inhuman and degrading punishment. Those who use the 'Asian values' or 'Chinese culture' argument for retaining the death penalty should recognise that there is strong evidence close to hand that Chinese people have been able to live contentedly under penal regimes where there is no capital punishment. The Special Administrative Regions of Hong Kong and Macau prove that amply. Indeed, although the majority of the Hong Kong population favoured capital punishment prior to the abolition of the death penalty by the colonial British regime, there has, as Johnson and Zimring have emphatically shown, been no serious calls or pressure there for its reintroduction and furthermore a continuing decline in the homicide rate.⁷⁶

VII. CONCLUSION

Many Chinese scholars had hoped and some expected that the Chinese government would ratify the ICCPR before the Olympic Games of 2008 as a signal of China's commitment to human rights. Despite this disappointment, pressure continues to grow within China to make further reforms in domestic law so as to ensure that it comes into line with international human rights standards, especially as regards fair trial standards and the limitation of the scope of capital punishment in law and practice so that it complies with the modern interpretation of Article 6(2) of the ICCPR limiting the use of the death penalty solely to wilful murder, pending complete abolition.

Further progress will depend on the extent to which the academic and judicial elite can influence policy makers to accept that the question of whether a modern state should employ the death penalty has advanced to the point when it ought no longer to be conceived narrowly as an acceptable form of crime control governed entirely by national sovereignty. The new human rights dynamic embraces a wider and more and more often internationally accepted conception of the limits of state power over the right of all citizens, including those who have committed the most serious crimes, to respect for their life and freedom from cruel, inhuman and degrading punishment. The experience of other countries shows that once capital punishment is defined as a violation of a human right, it can no longer be justified on other political or utilitarian grounds. Further advancement towards abolition of the death penalty in China will require political leaders to come to understand and accept, as many of its leading scholars are coming to accept, this point of view.

⁷⁶ Johnson and Zimring (n 3), 'Hong Kong and Macau', Appendix B, 365–379.