

# The Norms of Death: On Capital Punishment in China

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Over the last two to three decades the world has seen a virtual revolution in the way in which the death penalty is practiced and perceived. In 1977, only 16 countries had abolished the death penalty for all crimes.<sup>1</sup> By the end of 1988, 35 countries had eliminated the death penalty altogether.<sup>2</sup> Today, more than two-thirds of the countries in the world have abolished the death penalty in law or practice, and among the 58 remaining death-penalty countries, only 18 were known to have carried out executions in 2009.<sup>3</sup> Although the Chinese death penalty numbers are still regarded as “state secrets”, there is no doubt that China alone executes many more individuals than the rest of the world combined. Unofficial Chinese reports counted an average of 15,000 executions per year between 1997 and 2001,<sup>4</sup> and an estimated 5,000 executions in 2009, still more than all other countries combined.<sup>5</sup>

In terms of public opinion, there has been a worldwide revolution over the last ten to twenty years. When President Mitterand stood for election in France in 1981 on a manifesto that included abolishment of the death penalty, 63% of the population supported its use. Today, the figures stand at only 45%, with only 14% who “strongly favour” the death penalty in France, and 31% who are “somewhat in favour”.<sup>6</sup> The European Union was declared “death penalty free” in 1998, and the practice is now banned within its borders.<sup>7</sup> Only the United Kingdom, with a 50% support rate, defies the picture of Western Europe. It is the only country without a majority public opinion against the death penalty. In Australia, opinion has swung even more dramatically,

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<sup>1</sup> Figures on the Death Penalty, <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>, accessed 11.11.2010

<sup>2</sup> Roger Hood, “Abolition of the Death penalty: China in World Perspective”, City University of Hong Kong Law Review, 1, 2009, p.5 of pp. 1-21)

<sup>3</sup> Death Penalty Numbers, <http://www.amnesty.org/en/death-penalty/numbers>, accessed 11.11.2010

<sup>4</sup> Chen Xingliang, “Kuanyan xiangji xingshi zhengci yanjiu (shang)” (Severity and leniency of mutual benefit to criminal policy research (1)), in *Xingshi faxue* (Criminal Law), no. 7, 2006, p. 13 (7-16)

<sup>5</sup> *Dialogue*, Issue 41, Fall 2010, pp. 1, 6.

<sup>6</sup> <http://www.ipsos-mori.com/researchpublications/researcharchive/poll.aspx?oItemId=163>, Sample from 26.4. 2007. Accessed 11.3.2010

<sup>7</sup> Council of the European Union, *Death is not Justice: The Council of Europe and the Death Penalty*, Strasbourg, updated 2004.

from 53% support of capital punishment in 1995, to a mere 23% support in 2009.<sup>8</sup> In contrast, a large death penalty survey done by the Chinese Academy of Social Sciences fifteen years ago, in 1995, showed that 99% of the Chinese population supported the death penalty, the highest rate of support in the world.

When we focus on the majority trend in the world today, the recent rapid change in opinions runs counter to former taken-for-granted assumptions of punitive norms in general. Until recently, it was argued that people's attitudes towards punishment represent a core element of culture, that people's punitive attitudes are an important cultural point of reference. A much used textbook explanation was that, quote: "we learn to react punitively... just as we learn to speak a language"<sup>9</sup> In other words, this statement asserts that punitive norms are strong markers of culture and stick to us in much the same way as our language does. But it will be seen tonight that punitive norms in fact fluctuate much more readily and are much less culturally rooted than the learning of a native language.

Notably, the Chinese government and many Chinese intellectuals share in the assumption that there are deep cultural roots in Chinese death penalty sentiments. China's Premier Wen Jiabao has claimed that China would not abolish the death penalty due to "consideration of China's national conditions".<sup>10</sup> In a recent anthology on the uses of the death penalty in China, Professor Gao Mingxuan argues similarly that execution is based in what he sees as a Chinese retributive culture. Gao goes on to argue that the consequences of such deeply rooted punitive preferences is that "China will not abolish the death penalty at present or in the near future".<sup>11</sup> Again and again, in Chinese journals and books we hear the argument that China has a "5000 year old tradition of death penalty", and that this accounts for why China today adheres to the practice. One may ask, is there any country that doesn't look back at a heritage of thousands of years of "death penalty traditions"?

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<sup>8</sup> <http://www.roymorgan.com/news/polls/2009/4411/> accessed 25.10.2010

<sup>9</sup> Sutherland, Edwin D., Donald R. Cressey, and David F. Luckenbill, *Principles of Criminology*, Eleventh Edition, New York, Boulder, General Hall, Rowman & Littlefield, 1992, p. 328.

<sup>10</sup> Wen Jiabao, <http://english.peopledaily.com.cn/200503/14eng20050314176777.html>, People's Daily Online, 14.03.2005, Visited 03.12.2007.

<sup>11</sup> Gao Mingxuan, "Lüetan wo guo de sixing lifa jiqi fazhi qushi (On Chinese legislation Concerning the Death Penalty)", in Zhao Bingzhi, *Zhongguo feizhi sixing zhi lu tansuo* (The Road of the Abolition of the Death Penalty in China), Beijing, Zhongguo remmin gong'an daxue, 2004, pp.15-20, 23-30 (19, 29).

Of course there is a tradition of retributive “penal populism”, in China as elsewhere, where people believe in the alleged effectiveness of harsh punishment.<sup>12</sup> And yes, there are popular traditions of revenge in China.<sup>13</sup> Of course, there are always cultural links to violence, as in the occasional uprisings in history by poor peasants seeking vengeance for harm visited upon them. Elizabeth Perry has noted that certain policies of the state under Mao Zedong contributed to the survival and strengthening of traditional patterns of violent activity.<sup>14</sup> The early Communist Party had seen the death penalty as a cruel practice, and on June 15<sup>th</sup>, 1922, the Communist Party formally suggested that the death penalty should be abandoned.<sup>15</sup> But Mao saw the notion of people’s revenge as a political tool. He declared that the death penalty – although it should be “used with caution” – must be effectively utilized against “the worst local tyrants and evil gentry” in order to strengthen the class-consciousness of the masses.<sup>16</sup> Mao advocated that the people should have the right to take revenge against their exploiters. He refuted the argument that peasants had “gone too far”, and supported the killing of landlords, claiming that “it is necessary to create terror for a while in every rural area” to be able to fight the rule of the landlords.<sup>17</sup> Mao saw execution as justified on the grounds of retribution to “assuage the people’s anger”.<sup>18</sup> The Maoist argument about appeasing the people’s anger seems to have developed into a basic legal principle that still lingers on, legitimising state violence and capital punishment.

In a survey of legal personnel in China conducted in 2007, 90% of the respondents answered that the principle of *minfen* (vengeance) continued to play a role in the use

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<sup>12</sup> John Pratt, *Penal Populism*, London, New York, Routledge, 2007, Julian V. Roberts, Loretta J. Stalans, David Indermaur, Mike Hough, *Penal Populism and Public Opinion. Lessons from Five countries*, Oxford, Oxford University Press, 2003.

<sup>13</sup> Madsen, Richard, “The Politics of Revenge in Rural China during the Cultural Revolution”, in Jonathan N. Lipman and Steven Harrell, *Violence in China. Essays in Culture and Counterculture*, State University of New York Press, 1990, pp. 175-198.

<sup>14</sup> Elizabeth J. Perry, “Rural Violence in Socialist China”, *The China Quarterly*, No.103, 1985, pp. 414-40.

<sup>15</sup> Zhao Bingzhi, “Cong Zhongguo sixing chengce kan fei moli fanzui sixing de zhubu feizhi wenti” (On the Chinese policy of gradual abolishment of the death penalty for non violent crimes), in Zhao Bingzhi, *Zhongguo feizhi sixing zhi lu tansuo (The Road of the Abolition of the Death Penalty in China)*, Beijing, Zhongguo remnin gong’an daxue, 2004. pp. 11-14, 18-22 (11, 18).

<sup>16</sup> Mao Zedong, “Report on an investigation of the peasant movement in Hunan”, p. 38

<sup>17</sup> Ibid. p. 29

<sup>18</sup> Mao Zedong, “Strike surely, accurately and relentlessly in suppressing counter-revolutionaries”, *Selected Works of Mao Zedong*, Vol.5, 1951/1977, pp. 53–56, (p.56).

of the death penalty. Only two per cent thought the aspect of “people’s anger” had no impact at all.<sup>19</sup> The paradox here is that a society that claims to work for the aim of creating a “harmonious society” (*hexie shuhui* 和谐社会) is based on such basic principles of revenge.

Chinese scholars have picked up on this paradox. Professor Lu Jianping opposes the practice of killing in the name of popular opinion and indignation. It is clear, says Lu with characteristic understatement, that: “killing is not the best way to make people live a better life”. Well aware of the practices of (now fading) public executions and public sentencing rallies (*shenpan dahui* 审判大会), Lu addresses the dark sides of collective behaviour, noting that “(people’s) rationality could be reduced in a public event”, and that in some cases, a “square effect” (*guangchang xiaoying* 广场效应) may occur, and people may just become bewitched and follow others’ instructions; a fact that can be very well demonstrated by the excesses of the Cultural Revolution”.<sup>20</sup>

Let us go back to Professor Chen Xingliang’s argument about revenge. Although he supports a limited use of the death penalty, he argues against the principle of *minfen* or people’s anger. He basically maintains that the anti-crime “hard strike” (*yanda* 严打) campaigns that started in 1983 brutalized the justice system because “we believed too much in the deterrence of punishment, and because the emphasis was given to the masses’ feelings of retribution.”<sup>21</sup> These feelings of retribution, or the masses’ “revenge psychology” (*baoying xinli* 报应心理) has had the unfortunate effect, according to Chen, of increasing resentment and hatred (*yuanhen* 怨恨) among the victims’ families, and potentially vast numbers of people in society. He continues: “We abused the death penalty, and we accumulated hatred and grievances in society

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<sup>19</sup> Kang Junxin, *Lixiang yu xianshi. Zhongguo sixing zhidu baogao* (Ideals and reality. Report on the Chinese death penalty), Beijing, Zhongguo renmin gongan daxue chubanshe, 2005, p. 116.

<sup>20</sup> Lu Jianping, “Sixing shiyong yu minyi” (The use of the death penalty and public opinion), in Zhao Bingzhi (ed.), *Sixing zhidu zhi xianshi kaocha yu wanshan jianyan* (Observing the realities of the death penalty system and suggestions for its improvement), Beijing, Zhongguo renmin gong’an daxue chubanshe, 2006, pp. 149-59. In English in *Chinese Sociology and Anthropology*, Summer 2009, pp. 66-79 (76).

<sup>21</sup> Chen Xingliang, “Cong ‘qiangxia liuren’ dao ‘faxia liuren’” (From saving life from the gun to saving life from the law), in Chen Zexian, *Sixing – Zhongwai meizhu de jiaodian* (Death penalty – The global focus), Zhongguo gong’an daxue chubanshe, Beijing 2005, p. 75 (pp. 71-85)

(*shehui jiyuan* 社会积怨)".<sup>22</sup> The point about accumulated social hatred is very important. The basic argument he uses, and could have used more thoroughly because it concerns the death penalty as such and not its degree only, is that the death penalty sends an example of revenge that is disruptive to the very argument and management of a "harmonious society" Chen touches on the very important theme of the *escalating character* of revenge based principles and hatred. Lu's and Chen's warnings are well founded. It has been pointed out by scholars in the field of revenge and retribution that revenge seems always to tend towards excess and "escalating cycles of violence", where we are "likely to lose control" rather than stay in control; that the appetite for blood is hard to stop when such principles are set in motion.<sup>23</sup> Without going into those details here, we have seen clear examples of *minfen* targeting the government in China lately.<sup>24</sup> Lu's "square effect" of escalating violence is supported by the general literature on revenge. While Lu emphasizes that public opinion is not only backwards, but can be "advanced" as well,<sup>25</sup> Chen Xingliang adds to his "revenge psychology" argument that the relative value of human life is not high in China, and that this is a main argument that the time has not yet come to abolish the death penalty in China.<sup>26</sup> Qiu Xinglong, the most consequent informed abolitionist in Chinese legal circles, opposes this argument. Agreeing that the value of life has been and is still low in China due to a lack of a strong "humanitarian concern" (*renwen guanhuai* 人文关怀), he turns the argument against the elites when he goes on to say that this is mainly due to a general and persistent lack of respect for human life among Chinese scholars (*xuezhe* 学者) and the elite as such.<sup>27</sup> He further claims that his colleagues lack academic independence and professional integrity. If the scholarly community keeps sticking to the dogma that the death penalty could only be abolished

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<sup>22</sup> Chen Xingliang, *Ibid*.

<sup>23</sup> Trudy Govier, *Forgiveness and revenge*, London, New York, Routledge, 2007, pp. 8-9.

<sup>24</sup> Yu Jianrong: Rigid Stability: an Explanatory Framework for China's Social Situation, May 9, 2009, China University of Administration and Law [http://203.208.39.132/search?q=cache:iZoY4Vi9I5wJ:chinadigitaltimes.net/2009/05/you-jianrong-rigid-stability-an-explanatory-framework-for-china%E2%80%99s-social-situation-1/you+jianrong&cd=2&hl=zh-CN&ct=clnk&gl=cn&st\\_usg=ALhdy2-USOAKOnQ3Oza3bPO\\_EXRx6RD6yw](http://203.208.39.132/search?q=cache:iZoY4Vi9I5wJ:chinadigitaltimes.net/2009/05/you-jianrong-rigid-stability-an-explanatory-framework-for-china%E2%80%99s-social-situation-1/you+jianrong&cd=2&hl=zh-CN&ct=clnk&gl=cn&st_usg=ALhdy2-USOAKOnQ3Oza3bPO_EXRx6RD6yw)

<sup>25</sup> Lu Jianping, "Sixing shiyong yu minyi", p. 78.

<sup>26</sup> Chen Xingliang, *Xingfa linian daodu*, Beijing, Falü chubanshe, 2003.

<sup>27</sup> Qiu Xinglong, "Sixing de daoxing" (The moral character of death penalty), *Zhengce yu falü*, No.2, 2002, p. 54 (51-54)

some time in the future, but is needed for the current socio-political conditions as claimed by Chen, the death penalty will never be abolished.<sup>28</sup> We will come back to Lu and Qiu's arguments with concrete survey evidence later. Yuan Bin is right when he sees the public opinion as extremely changeable and unstable, "manageable or malleable" (*keyi yindao de* 可以引导的).<sup>29</sup>

Despite Chen Xingliang's keen observation of the principles of the escalating violent character of revenge, one has to question his very premise of Chinese death penalty core culture based on an all embracing popular "revenge psychology". In particular we have to address this question when it is being used to legitimize the continued use of the death penalty in China.

Is there a strong popular tradition of people's revenge in China by way of executions? Professor Qu Xuewu at the Chinese Academy of Social Sciences in Beijing doubts the cultural argument of a "5000 year long tradition".<sup>30</sup> Qu coins the term Chinese "multi-culture" (文化的多元性 *wenhua de duoyuan xing*) of alternatives to death penalty practices. He notes that Chinese popular culture did not exclusively go by the principles of "paying back a life with a life" (*sharen changming* 杀人偿命) or "blood debt" (*xiezhai* 血债).

For instance, Chinese national minorities instead of practicing "blood debt" used the principle of "life debt" (命债 *mingzhai*) through the practice of monetary "life compensation", so-called *peimingjia* (赔命价), where the murderer had to compensate the family for the killing of their family member.<sup>31</sup> The issue was solved without killing the perpetrator. We know such practices from many pre-industrial societies, not only in China. J.A. Barnes claims that: "the ethnographic evidence shows that, in general, primitive societies are not characterized by repressive laws" and that "*it is*

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<sup>28</sup> Qiu Xinglong, *Bijiao xingfa* (Comparative criminal law), Vol. 1, Zhongguo jiancha chubanshe, 2001, p. 13.

<sup>29</sup> Yuan Bin, "Sixing minyi jiqi neibu chongtu de diaocha yu fenli" (Survey and analysis of the internal conflicts of popular opinion on the death penalty), *Faxue*, No.1, 2009, pp. 99-112 (p. 99).

<sup>30</sup> Qu Xuewu, "Zhongguo sixing wenhua de duoyuan xing yu yibenhua (The multi-culture of Chinese death penalty and , in Chen Zexian, *Sixing – Zhongwai meizhu de jiaodian (Death penalty – The global focus)*, Zhongguo gong'an daxue chubanshe, Beijing 2005, p. 6 (6-16) Qu is referring to the Yi minority in this particular example.

<sup>31</sup> Qu Xuewu, *ibid.*, p. 7

*governmental action that is typically repressive*".<sup>32</sup> The cultural explanation of "people's revenge" is secondary, the governmental practices of the dynastic, bureaucratic machine were primary. The death penalty was always primarily political, not cultural. Today, a culture of popular violence has become the *pretext* for the state to explain and justify the uses of the death penalty.

What about Imperial Chinese history? When we look at the practices of the imperial state, there are no reasons to believe that it was punitive compared to practices in other parts of the world. Historically, China has experienced the brutal legal elite philosophy of the ancient Legalist school (*fajia* 法家), but this was tempered by the approach of the Confucian school (*rujia* 儒家). The Legalists forcefully advocated harsh punishment without mercy, whereas Confucian scholars emphasized virtue (*de* 德), benevolence (*ren* 仁) and mercy (*renci* 仁慈). No doubt the Legalist paradigm has left a lasting legacy of a brutalizing State, but on the whole we cannot find that Chinese history has been more brutal than let us say European history. And let me warn against the concept of "the West" here. In terms of punitive practices and opinions, Europe and America are strikingly different. James Whitman has argued that these differences between Europe and America are due to fundamentally different traditions in legal institutions and thinking.<sup>33</sup>

In short, the state's need for control helps to explain the use of capital punishment, but the state can also show mercy, and that tradition was as strong or stronger in China than it was in Europe, where the concept of mercy also played a role.

The presence of systems of mercy, argues James Whitman, made Europe less punitive than America.<sup>34</sup> Mercy instead of revenge comes *de haut en bas* – from up and down. In some fundamental way, it seems, one has to have the social distinction of high and low to be able to grant mercy to subordinates. Mercy is first and foremost a matter of power, and paradoxically only power seems to be able to grant mercy. Only a strong state could deliver that mercy. Through the French revolution the more lenient punishment used for the upper classes was granted to the common man. One of the

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<sup>32</sup> J.A. Barnes, "Durkheim's Division of Labour in Society", *Man*, No. 1, 1966, pp. 168-9.

<sup>33</sup> James Q. Whitman, *Harsh Justice. Criminal Punishment and the Widening Divide between America and Europe*, Oxford University Press, Oxford, New York, 2003.

<sup>34</sup> James Q. Whitman, *Harsh Justice*.

lasting effects of the revolution was, in other words, a more lenient punishment regime. In America egalitarianism came in another form, and I would call it “violent egalitarianism”. Here, it seems, what was granted to the common man was that a lord should be treated in the same way as a horse thief – they were both hung without mercy. Europe became and stayed far less punitive than America.

Is the lack of legal mercy the reason why China developed such a strong culture of revenge and harshness? China did have a strong state, and it did have status hierarchies the way Whitman described in the case of Germany and France. Did China not develop the institutions of mercy necessary for developing the historical trend of mildness in punishment? The answer is that China historically possessed all the ingredients expected to promote leniency and a milder system of justice. The same status hierarchies were found there as in Europe, lenient punishment for the elite was developed through the *bayi* (八议) system,<sup>35</sup> and a system of legal mercy based on an established status-hierarchy was more developed in China than in any other part of the world. Feudal rule was of course always harsh, but China displayed more mercy than Europe. General amnesties and acts of grace or mercy were granted more frequently in China than anywhere else. Brian McKnight has translated the Chinese expression *she* (赦) as “acts of grace” or “amnesty”.<sup>36</sup> The most extensive forms of mercy were called *dashe* (大赦), “great acts of grace”. These general amnesties applied to the whole empire and were conducted with much ritual pomp and circumstance. While ordinary amnesties merely reduced penalties, the great acts of mercy forgave the offenders entirely. Here it will be enough to point to the existence of an extremely strong Chinese culture of mercy to establish the argument of a legal history favouring milder punishment rather than harsher sanctions. From the founding of the Jin dynasty in 280 A.D. to the fall of the Tang dynasty in 907, a great act of mercy was issued on the average of once every eighteen months. The remarkable system of legal mercy reached its peak during the Song dynasty (960-1279). Executions were reduced extensively by the use of this system. Even during the last and brutal Qing dynasty executions were often suspended, and the system of legal mercy did not disappear

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<sup>35</sup> Jiang Chunfang, *Zhongguo da baike quanshu: Faxue* (Chinese Encyclopedia: Law), Beijing, Beijing da baike quanshu chubanshe, 1992, p.4.

<sup>36</sup> Brian E. McKnight, *The Quality of Mercy. Amnesties and Traditional Chinese Justice*, Honolulu, The University Press of Hawaii, 1981, p. xi.

before the empire disappeared in 1911. This is not to say that the imperial order was not an extremely harsh order, but all the ingredients for a more lenient system existed in China even more than they did in Europe. China is one of the few civilizations (and India is included among them) where the death penalty was abolished in feudal times. From 747-759 AD the Tang dynasty abolished the practice because of the Legalists forcefully advocated harsh punishment without mercy the emperor's strong regard for human life.<sup>37</sup> During other dynasties there were decades where no execution was carried out. Klaus Mühlhahn sums up the essence of penal history in imperial China:

“(E)xecutions in late imperial China were no match for the ferocious events staged in eighteenth-century Europe”. He concludes: “The punishments carried out in imperial China were largely reversible and relatively bloodless, marked by the intention to carefully refine and graduate the use of state violence”.<sup>38</sup>

### **Public opinion surveys and the modern reality of rapid change**

The assumption of an age-old unchangeable revenge culture does not fit the picture of rapid change that is occurring in China and the rest of the world today. Let us go back to where we started, to the massive change in capital punishment practices and opinions throughout the world over the last few decades. The change in global death penalty attitudes and policies is one of the most rapid and unlikely norm reversals of our time. The picture is complex, but the most prominent change has been what is termed the “innocence frame”. The fact that people were innocently convicted and executed, the discovery of forensics, the use of DNA evidence; all of this diverted attention away from theoretical and philosophical issues of morality to focus instead on the possibility of errors in the criminal justice system. A “tipping point” has been reached in the death penalty debate where changes in public opinion has led to further changes in policy, which in turn reinforce those same changes in public opinion.<sup>39</sup>

In sociology, scholars like Mark Granovetter have explained how norms can change suddenly and in spectacular fashion. Granovetter talks about “threshold models of

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<sup>37</sup> Charles Benn, *Daily Life in Traditional China – The Tang Dynasty*, Westport. CT, Greenwood Press, 2002, pp. 209-12.

<sup>38</sup> Klaus Mühlhahn, *Criminal Justice in China. A History*, Cambridge, MA, London, Harvard University Press, 2009, pp. 40, 54

<sup>39</sup> Frank R. Baumgartner, Suzanna L. De Boef, Albert E. Boydstun, *The Decline of the Death Penalty and the Discovery of Innocence*, Cambridge, New York, Cambridge University Press, 2008, p. 10.

collective behaviour”, and explains how a critical number of opinion holders can suddenly challenge a “mainstream” opinion.<sup>40</sup> The journalist Malcolm Gladwell explains the potential rapidity of normative change through the term “tipping point”, “threshold”, or boiling point” where rapid normative change occurs.<sup>41</sup> Such processes have proven to be self-reinforcing. Policies and practices that have been stable for decades, reinforced by an established way of thinking of a problem, can change suddenly and dramatically when new dimensions arise. The mainstream anti-smoking norm burst into what public opinion research calls a “social cascade” of norm change. Studies on social cascades have recently focused on how information disseminates through social links in online social networks.<sup>42</sup> The Internet in China has created a “blogosphere” of great importance for the spread of information and rapid opinion change. The point to be emphasized here is that sociology contradicts the Chinese allegation of slow cultural change in a range of areas. Penal norms in general and death penalty norms in particular are not necessarily core cultural norms, learnt like a language, hard to change. The death penalty norm has changed dramatically worldwide in only a decade or so. We have to look at how the death penalty debate is being publicly framed. What is new is what has been called the “innocence frame”. An “innocence movement” developed in Europe and America among academics and activists in the late 1980s and has exploded into the main frame of death penalty debates today.<sup>43</sup> The former “deterrence frame” has been severely weakened. Gone are the days of 1975 when Isaac Ehrlich, an economics professor, went to congress with “evidence” that one execution could save at least eight future victims.<sup>44</sup> Such arguments are thoroughly dead and buried since then, and the methodology used by Ehrlich has since been condemned as flawed and unscientific by the mainstream

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<sup>40</sup> Mark S. Granovetter, “Threshold Models of Collective Behavior”, *American Journal of Sociology*, 83, No. 6, 1978, pp. 1420-1443.

<sup>41</sup> Malcolm Gladwell, *The Tipping Point: How Little Things Can Make a Big Difference*, Boston, Little Brown, 2000.

<sup>42</sup> Phillip Ball, *Critical mass: How one thing leads to another*, New York, N.Y., Farrar, Straus, and Giroux, 2004, Albert-Laszlo Barabasi (2003), *Linked: How Everything is Connected to Everything Else and What It Means*, New York, N.Y., Plume, 2003. Meeyoung Cha, Alan Mislove, Ben Adams, and Krishna P. Gummadi, *Characterizing Social Cascades in Flickr*, <http://www.mpi-sws.org/~gummadi/papers/Cascades-WOSN.pdf> Accessed 05.11.2010, Duncan J. Watts, *Six Degrees: The Science of a Connected Age*, New York, N.Y., Norton, 2003

<sup>43</sup> Hugo Adam Bedeau, Michael L. Radelet, “Miscarriages of Justice in Potentially capital Cases”, *Stanford Law Review*, 40, No.1, 1987, pp. 21-179.

<sup>44</sup> Isaac Ehrlich, “The Deterrent Effect of Capital Punishment - A Question of Life and Death,” *American Economic Review*, June, 1975, pp. 397-417.

scholarly community.<sup>45</sup> Instead, the framing of the debate is now focusing on an issue of system fallibility, seeping into even the closely controlled Chinese blogosphere.

The innocence frame has affected American sentencing practices. The number of executions has gone down substantially over the last ten years. When attitudes are tied to core values, however, new information does not seem to produce substantial attitude change.<sup>46</sup> Without being pressed for specifics, people tap into their core values. The reason for the slower change in America than in Europe is historical, but is explained by the fact that most Americans' views on the death penalty are closely linked to their religious sentiments. In China, the claim that punishment opinions are based on cultural core values seems to lack substantial evidence other than in the form of anecdotal examples. The support for sayings like "kill the chicken to scare the monkey" (*sha ji jing hou* 杀鸡儆猴) or "scare one to warn a hundred" (*sha yi jing bai* 杀一儆百) are still mere anecdotes of popular retribution, not evidence of a serious core culture of retribution, definitely not evidence for capital punishment support. Like any society that comes out of a rural and authoritarian past, there will be support for such practices, but this does not lead us to understand today's death penalty opinions. If we look at the most recent opinion data from China, we find evidence that death penalty attitudes are all but core values. In the recent representative survey done by the Max Planck Institute in cooperation with Wuhan University only 25% of all respondents were concerned by the issue of death penalty. Many respondents answered: "don't know" or "not sure" to the different questions asked.<sup>47</sup> <sup>48</sup> When the public does not really pay attention to the death penalty question, this may function as a conservative element against change. At the same time, low salience opens up large possibilities for change; it certainly does not show the "strong cultural roots" of

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<sup>45</sup> The controversy over Ehrlich's work was so important that the National Research Council convened a blue ribbon panel of experts to review it. The panel decided that the problem was not just with Ehrlich's model, but with the idea of using of econometric methods to resolve controversies over criminal justice policies. See a short presentation of the debate in Ted Goertzel, "Myths of Murder and Multiple Regression", *The Skeptical Inquirer*, Volume 26, No 1, January/February 2002, pp. 19-23.

<sup>46</sup> Alvarez, R. Michael, John Brehm, *Hard Choices, Easy Answers: Values, Information, and American Public Opinion*, Princeton, N.J., Princeton University Press, 2002.

<sup>47</sup> Oberwittler, Dietrich, Shenghui Qi, "Public Opinion on the Death Penalty in China. Results from a General Population Survey Conducted in Three Provinces in 2007/08", *Max Planck Institute for Foreign and International Criminal Law*. April 2010  
[http://www.mpice.de/shared/data/pdf/forschung\\_aktuell.41.pdf](http://www.mpice.de/shared/data/pdf/forschung_aktuell.41.pdf)

<sup>48</sup> Frank R. Baumgartner, Suzanna L. De Boef, Albert E. Boydstun, *The Decline of the Death Penalty and the Discovery of Innocence*, p. 182.

punitive attitudes among Chinese people as claimed by the culturalist argument. Instead of reflecting core values, this evidence points in the direction of disinterest or confusion, a situation that is highly susceptible to change.

### **The Survey Evidence**

Not until very recently has the degree of support for capital punishment in China been scientifically documented and/or empirically verified properly by research. This is not to say that we have not had interesting data to work with, but only recently has the survey data based on cooperation between the Max Planck Institute and Chinese researchers been able to present a cutting-edge representative survey on capital punishment in China. The survey was conducted in three provinces (Hubei, Guangdong, and Beijing) during 2007 and 2008, and the data was released recently. Parallel to this survey, the University of Wuhan has conducted a survey among legal professionals using a very similar questionnaire.<sup>49</sup> At the same time we have data from the big survey made by the Academy of Social Sciences in Beijing in 1995.<sup>50</sup> In addition, a string of other surveys of greater or lesser importance and methodological stringency has been made available to us over the last decade or so.<sup>51</sup>

We know that survey results can be dramatically altered by the methodology used, the way in which questions are phrased, and even by the questioning sequence used.<sup>52</sup> The most common question used in capital punishment surveys asks respondents if they favour the death penalty “in the case of murder”. As I noted before, it will be easy to support the death penalty in the abstract – in response to a survey question – even if one would be equally easily influenced by the possibility of errors in particular cases. The innocence argument is closely related to the shift from thinking of the issue in the abstract to considering a concrete decision about a particular individual. This

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<sup>49</sup> Kang Junxin, *Lixiang yu xianshi. Zhongguo sixing zhidu baogao* (Ideals and reality. Report on the Chinese death penalty), Beijing, Zhongguo renmin gongan daxue chubanshe, 2005.

<sup>50</sup> Hu Yunteng, *Cun yu fei– sixing jiben lilun yanjiu* (Retain or abolish – Basic theoretical research on the death penalty), Beijing, Zhongguo jianchu chubanshe, 2000.

<sup>51</sup> Yuan Bin, “Sixing minyi jiqi neibu chongtu de diaocha yu fenli”, pp. 99-112. Yuan did his survey in Beijing, Guangdong, Hebei, Gansu, and Jiangxi provinces.

<sup>52</sup> Robert. M. Bohm, “American Death Penalty Attitudes: A Critical Examination of Recent Research”, *Criminal Justice and Behaviour*, Vol. 14, No. 3.1987, (pp. 380-96) pp. 381-2, and Robert M. Bohm and Ronald E. Vogel, “A Comparison of Factors Associated with Uninformed and Informed Death Penalty Opinions”, *Journal of Criminal Justice*, 22, 1994, 125-43.

shift may not be fully reflected in most public opinion surveys, but becomes evident when a question brings a specific case involving execution to the attention of the respondent.<sup>53</sup>

Let us then look at the survey data, and start with that particular question. Normally, public opinion surveys have a lower percentage answering they are for capital punishment in the case of murder than for capital punishment in general. In America, 58% still supported the death penalty in general in 2012 (the lowest support in 40 years), while only 49% supported the death penalty for murder.<sup>54</sup> We find this pattern in other societies as well. The strange result found in China is that 78% uttered support for the death penalty in cases of murder, but that the answer to the general question of support for the death penalty only gave a 59% support in favour, much lower support than in the United States. Whatever the explanation of this finding is, in comparison with the 99.2% support found in 1995, this is a very dramatic development. The “death penalty for murder” group answers “don’t know” or “not sure” on the general question, but in the general survey the abolitionist stand has increased from 0.8% in 1995 to 14% in the recent survey. The debate on reducing the death penalty, however, seems to have made a massive change in opinion. In a Public Security survey from 1992 as many as 60% thought punishments were “too lenient” and only two per cent thought the draconian death penalty regime was “too strict”.<sup>55</sup> In the 1995 survey this number had increased marginally to just over three per cent who thought the death penalty “too strict”, including the 0.8% who wanted the death penalty abolished.

In a 2008-09 survey a lot of groups in China had majority opinions against or restrictive of the death penalty.<sup>56</sup> Among the 1131 students in the survey, nearly 85% wanted to reduce or abolish capital punishment. There was also a majority support for abolishment among jobless people. Most notably, 726 inmates in prisons or reform through labour institutions were surveyed, and 91% of them wanted to abolish or reduce the use of the death penalty. In short, the concrete situation a respondent finds

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<sup>53</sup> Frank R. Baumgartner, Suzanna L. De Boef, Albert E. Boydstun, *The Decline of the Death Penalty and the Discovery of Innocence*, p. 170.

<sup>54</sup> <http://www.gallup.com/poll/1606/Death-Penalty.aspx>, accessed 07/01/2013

<sup>55</sup> Zhonghua renmin gongheguo gonganbu (ed.), (The PRC Ministry of Public Security, ed.) *Nin ganjue anquan ma?* (Do you feel safe?), Beijing, Qunzhong chubanshe, 1992, pp. 42, 60, 250ff.

<sup>56</sup> Yuan Bin, “Sixing minyi jiqi neibu chongtu de diaocha yu fenli”, pp. 99-112.

himself or herself in explains the attitude toward the death penalty, not an alleged popular “core culture”. One third of the inmates wanted the death penalty abolished, not because they were on death row, but because they had seen the injustices in the system at close range. This is called situational norms rather than cultural core norms.

Another piece of evidence that the moralist core argument does not work well is the growing awareness of the class bias of capital punishment. Asked the question: “If a poor or a rich person in China committed the same serious crime for which the death sentence could be imposed, is one more likely to be sentenced to death than the other in real life?”, nearly 70% of the respondents answered “the poor person”.<sup>57</sup> The significance here is that the common man in China has begun to see the flaws of the judicial system. We know from scattered data that the jobless and the poor are victims of capital punishment in China, like anywhere else. Jeffrey Reiman’s famous line: “The rich get richer and the poor get prison” also applies to China, even if we substitute “prison” with “death penalty”.<sup>58</sup> In a survey of executions where the offenders’ occupation was known, it was found that 62% were either unemployed or rural residents. Nearly 70% held a low status job. The vast number of Chinese executed for common street crimes had low status occupations or held no jobs.<sup>59</sup> The sudden doubt in the justice provided by the system, the questions about fallibility and unjust treatment, the accurate description of class bias of capital punishment despite the secrecy of numbers, represent exactly the core of the “innocence frame” that has changed public opinion in so many countries recently. Through the media, and in particular through the Internet, the Chinese public has become aware of the fact that people are innocently sentenced to death because of sloppy procedures, unjust treatment, and a corrupt non-caring justice system. Let us look at a few recent cases that have caught the public’s eye.

In 2005 the Ministry of Public Security ordered court authorities to reopen a rape-murder case where a new suspect was caught ten years after 21-year-old Nie Shubin

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<sup>57</sup> Oberwittler, Dietrich, Shenghui Qi, “Public Opinion on the Death Penalty in China. Results from a General Population Survey Conducted in Three Provinces in 2007/08”, p. 22.

<sup>58</sup> Jeffrey F. Reiman., *The rich get richer and the poor get prison : ideology, class and criminal justice*, New York : Wiley, 1979.

<sup>59</sup> Hong Lu, Terance C. Miethe, *China’s Death Penalty. History, Law, and Contemporary Practices*, New York, London, Routledge, 2007, p. 80.

was executed for the crime. Nie Shubin was convicted of murder and rape in Shijiazhuang in 1994 and was executed after Hebei's Higher People's Court upheld a lower court's ruling to sentence him to death in April 1995.<sup>60</sup> Similarly, a butcher in Mayang County in Central China's Hunan Province, was wrongfully convicted and executed for a crime he did not commit. A local woman's dismembered body was found floating in a river. The authorities investigating the crime claimed at a trial that the murderer must have been someone experienced with a knife – someone like a butcher – because the techniques used to dissect the body were “very professional”.<sup>61</sup> But after the execution, the woman he was supposed to have murdered suddenly reappeared alive. In another well publicized case, a man was sentenced to death with a two-year reprieve in 2000, but his alleged victim, presumed dead for 11 years, turned up at his home earlier this year.<sup>62</sup> Such cases have begun to appear on Internet blogs fairly regularly. In another recent example netizens took an interest in the case where a Henan citizen named Zhao was released from prison thanks to the reappearance of the neighbour he supposedly murdered more than a decade ago.<sup>63</sup>

The Max Planck survey of China addresses the issue of innocence for the first time in China. The findings confirm very well the potential for change in this country. Asked the theoretical question whether innocent people might be wrongly executed, 60% agreed, while only 26% of the respondents disagreed.<sup>64</sup> Of even greater interest is the answer to the concrete question if you would still support the death penalty if there were evidence of executions of innocent persons within the judicial system. As many as 44% of the undecided and pro-death penalty respondents would oppose the death penalty if proof was found that innocent people had been executed. 31% were still undecided, and only 25% would still support the death penalty.<sup>65</sup> This is a level of support lower than in the United Kingdom today. Since the innocence debate is yet to dominate the Chinese media, this is remarkable. Elasticity and change is the picture here, not that of a retributive core culture. We find similar evidence of the potential for rapid change in non-representative surveys. In a survey among 2000 persons in China in 2002, 82% supported the death penalty, while 14 per cent said they wanted it

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<sup>60</sup> *Shanghai Daily*, 18.03.2005, p. 1

<sup>61</sup> *China Daily*, 23.06.2005, p. 4.

<sup>62</sup> *Shanghai Daily*, 08.05.2010, p. A08.

<sup>63</sup> *South China Morning Post*, 14.05.2010, p. A5.

<sup>64</sup> Oberwittler, Dietrich, Shenghui Qi, “Public Opinion on the Death Penalty in China.”, p. 18

<sup>65</sup> *Ibid.*, p. 16.

abolished.<sup>66</sup> When the question was changed, and rephrased on the assumption that the death penalty had already been abolished by the state, only 60 per cent wanted to retain the death penalty, while the number of abolitionists had increased to 33 per cent. This reflects what we already know from death penalty opinion research in other countries, that if the state passes legislation banning the use of the death penalty, as a rule public opinion will follow suit. For our purposes here it is enough to conclude that there are no fixed and culturally strong incentives that force Chinese opinion to routinely support the death penalty.<sup>67</sup>

At this stage more has to be said about opinion change. In many ways, public opinion surveys are fairly conservative since they tend to focus on individuals. When we study individuals, we often see constancy, but when we study aggregates, a new picture of orderly change appears. Some people are fairly constant in their opinions. These are the people with strong core values, political, often religious, and in particular fundamentalist values. America and Poland are countries where core values about capital punishment are linked to a literalist religious belief. Let us put such respondents in the *core value group*. Opinion follows a flat line of stability in groups like this. A small proportion of the public, however, moves systematically in response to the environment and new information. In the death penalty debate in America or Europe, these people were the ones who turned to the innocence frame. In the literature such groups represent systematic change – *the signal* – that will appear clearer only over time. This *signal group* can influence the climate of opinions in a remarkably short period of time. Another group can be termed the *ambivalent group* that fluctuates between the core value group and the signal group. This group is caught between the two other groups, but we can see the trend of change in the way in which this group leans towards one or the other part of the spectrum. The important group to target to see change in the making is the signal group, but also through its impact on the ambivalent group. If the signal group is the instigator of change, the

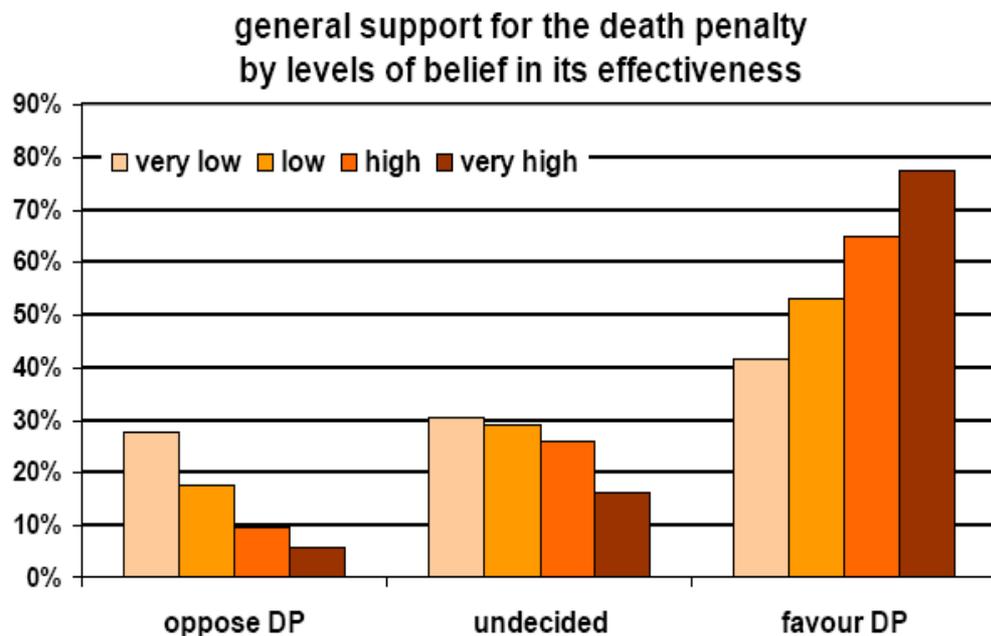
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<sup>66</sup> Zhao Zuojun, “You xianzhi dao feizhi: sixing lujing jiqi jueze” (From restriction to abolishment: choices and approaches for the death penalty), in Chen Zexian (ed.), *Sixing – Zhongwai guanzhu de jiaodian* (Death Penalty – The Global Focus), Zhongguo renmin gong’an daxue chubanshe, Beijing, 2005, pp. 221-236, 226.

<sup>67</sup> Liang Genling, in Chen Xingliang (ed.), *Zhongguo sixing jiantao yi “qiangxia liuren an” wei shijiao* (Review of the death penalty in China from the perspective of “save the life from the gun case”, Zhongguo jiancha chubanshe, Beijing 2003, p. 47.

ambivalent group are their immediate followers, they tell about the direction of general opinion change.<sup>68</sup>

In the Max Planck survey, this group who often answered “don’t know” and “not sure” to the questions asked tended to be fairly large on a lot of the questions asked. On the main question: “In general, do you favour or oppose the use of the death penalty?” 58% were “in favour” of the death penalty, 14% were “opposed”, and 28% were “not sure”.<sup>69</sup> Some people might argue that these people have no clue at all, but this is untrue. It is important to look at where the ambivalent group is moving. In the Chinese death penalty debate we see this group moving towards the signal group, the abolitionist minority. The undecided group may not say yes or no to the use of the death penalty in general, but we still have a clear profile of this group. This is vividly illustrated in the graph showing attitudes towards the perceived efficiency of the death penalty in terms of deterrence. When asked about whether the death penalty is an effective way to prevent crime, the following preferences were shown in the Max Planck survey in the following table:<sup>70</sup>



N=4472 (weighted data), missing values 13.3%.

<sup>68</sup> Frank R. Baumgartner, Suzanna L. De Boef, Albert E. Boydstun, *The Decline of the Death Penalty and the Discovery of Innocence*, p. 168.

<sup>69</sup> Oberwittler, Dietrich, Shenghui Qi, “Public Opinion on the Death Penalty in China.”, p. 10

<sup>70</sup> Oberwittler, Dietrich, Shenghui Qi, “Public Opinion on the Death Penalty in China.”, pp. 17, 18.

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Look at the ambivalent group of “undecided” respondents. In the figure we see graphically a group leaning towards the same profile as the signal group who oppose the death penalty. Deterrence is still a major issue in death penalty opinions in China. Those who are undecided lean towards scepticism, and the largest group within this group of undecided regards the deterrence effect as “very low”. In short, a lot of the undecided respondents lean towards the opposing signal group, the abolitionists. We can find this trend in a lot of the survey questions. The profile of the ambivalent group of “don’t knows” suggests the future of opinion trends in China. The “don’t knows” in China, as in Europe in recent decades, are leaning towards the signal group of abolitionists. Even those not open to change at present will be affected by this trend in the long run if we believe aggregate opinion theory. The survey shows the flexibility and changeability of public opinion on the death penalty, contradicting the assumptions of hard-to-change penal norms and strong core culture of “revenge psychology”

Let us focus again on the latter assumption, that the Chinese common man – the *laobaixing* (老百姓) – is to blame for China’s use of the death penalty, that the people’s “anger” is preventing the abolition of the death penalty in China. It seems that the so-called Chinese masses are not the conservative “deeply rooted retributive” element holding back reforms. The survey data points, rather, in quite an opposite direction. Public opinion seems to have changed faster than legal institutions and the slogans of the government and Communist Party. Let us have a look at these data again. A 1995 survey conducted by the Academy of Social sciences found that by using rather confusing categories of “high class” and “low class” that “high class” respondents were less likely to support the death penalty than respondents from the “low class” category. There were very few in both categories in 1995 who chose abolishment or reduction of the death penalty, but the highest and the lowest class category chose this option more often than the middle class categories.<sup>71</sup> If we look at the different job categories, however, we find the absolute highest support for capital punishment among military personnel, where 43% responded that there was “too

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<sup>71</sup> Hu Yunteng , *Cun yu fei– sixing jiben lilun yanjiu* (Retain or abolish – Basic theoretical research on the death penalty), Beijing, Zhongguo jianchu chubanshe, 2000, p. 342.

little” of it in 1995. There was a long jump down to the second most punitive group, retired officials, where 28% were of this opinion. Personnel in the legal sector were the most liberal among the elites in the 1995 survey. Only nine per cent believed there was “too little” use of the death penalty. Young people under 25 were the most likely group to support abolishment, and those over 61 were most conservative of the age cohorts, with the fewest number of abolitionists.<sup>72</sup> Women were slightly less punitive than men,<sup>73</sup> and the allegedly revengeful people, the category called “masses” (*qunzhong* 群众), saw twice as many ticking off the questionnaire for abolition or reduction of capital punishment compared to the category “central Party cadres” (*zhonggong dangyuan* 中共党员). While only 20% of the “masses” wanted more capital punishment in 1995, 30% of central Party cadres wanted more of it.<sup>74</sup> If the idea is leading by example to overcome the things of the past, then certainly the Party cadres are not standing in the front lines to educate the masses. The same can be said about intellectuals. The survey showed that illiterates and those with primary school education were twice as likely to support abolishment or reduction than respondents with “university” education. The higher the education, the higher was also the percentage in the most pro-death category of answers. Close to 30% of those with the highest education wanted more capital punishment, while only 20% of illiterates and respondents with primary school education were that punitive. In sum, the strongest support for the death penalty was found among military personnel, party cadres, those with the highest education, and the elderly. The lowest support was found among those with the least education, the category called the “masses”, and those under 25 years of age. The only elite groups contradicting the trend towards elite support for the death penalty were legal elites and the richest cohort. Among the legal elites there were few abolitionists, but much more support for reducing the death penalty. High-income respondents’ fear of capital punishment for corruption or economic crime made them liberal confronted with a poorly regulated financial market where the distinction between entrepreneurialism and corruption is not always clear. These facts muddle somewhat the categories “high class” and “low class” in the survey, and leave the findings in that general category somewhat irrelevant.

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<sup>72</sup> Ibid., p. 344.

<sup>73</sup> Ibid., p. 342.

<sup>74</sup> Ibid., p. 345.

Today we have three excellent representative surveys, covering the attitudes of the general population as well as the legal elites. The most liberal group of intellectuals in the 1996 Academy of Social Sciences survey, the legal elite, and the common people can be compared in much detail through these surveys. A 2005 survey found that as many as 88.4 per cent of the legal elites supported the death penalty.<sup>75</sup> Only 57.8 per cent in the public survey, however, supported the death penalty. While 7.5 per cent of the legal elites wanted to abolish the death penalty immediately, 14 per cent of the general survey respondents held this opinion. Furthermore, 28 per cent of the general population were unsure what position to take compared with 21 per cent of the legal elites.<sup>76</sup>

The conclusion we can draw from this table comparing the general population and most liberal of the elites, the legal elite, is that the alleged “backward” group of common people is actually more liberal on the death penalty question than any of the elite groups. The argument here is not that of “deeply rooted revenge psychology” of the masses or a general “penal populism” in China. We rather see clear survey evidence of a “*penal elitism*”. The death penalty is a political instrument held aloft not by a 5000 year-old “culture”, but by the State and its elites. This is a political, not a cultural issue, and involves a conservative, too slow moving state and Party bureaucracy. In terms of the secrecy of the numbers executed in China, the general public is also more advanced than the Party and State elite. Asked whether the Chinese government should publish the annual number of executions, 64% answered yes, and less than 16% were against publishing the execution figures.<sup>77</sup>

In conclusion, we can say that public opinion in China is moving faster than the system itself. The only thing that seems “deeply rooted” in the Chinese death penalty debate is the deeply rooted myth of a general retributive and revengeful opinion standing in the way of legal reducing or abolishing the death penalty. The penal norm, as we have seen, is far from the old mainstream assumption that “we learn to react punitively... just as we learn to speak a language”, a matter of hard-to-change core culture. On the contrary, the penal norm in China is not part of a never changing,

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<sup>75</sup> Kang Junxin, p. 143.

<sup>76</sup> Kang Junxin, pp. 28, 143, and Oberwittler and Qi, p. 10.

<sup>77</sup> Oberwittler, Dietrich, Shenghui Qi, “Public Opinion on the Death Penalty in China. p. 21

deeply rooted core-culture. It is changing rapidly and substantially. The new innocence frame is one of the driving forces in the change we have seen on a global scale for some years already. This frame is beginning to establish itself also in China. John Kingdon has quoted Victor Hugo in trying to understand the power of framing. Hugo once said: “Greater than the tread of mighty armies is an idea whose time has come”.<sup>78</sup> The innocence frame is clearly an idea whose time has come, and death penalty opinion in China is in the process of radical change.

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<sup>78</sup> John W. Kingdon, *Agendas, Alternatives, and Public Policies*, Boston, Little Brown & Co., 1984, p.1. The Hugo quote comes in different translations, and the closest original I can trace is: “*On résiste à l’invasion des armées; on ne résiste pas à l’invasion des idées.*” More directly but less elegantly translated the quote reads: “One withstands the invasion of armies; one does not withstand the invasion of ideas” in Victor Hugo, *Histoire d'un Crime* (The History of a Crime) (written 1852, published 1877), Conclusion, chapter X. Trans. T.H. Joyce and Arthur Locker.

