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# Lenient Death Sentencing and the “Cash for Clemency” Debate

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## ABSTRACT

This article examines how financial compensation has been drawn into death sentencing practice and debate in China. The Supreme People’s Court is nowadays encouraging judges to mediate between defendants and the families of homicide victims to secure a financial agreement between the two parties that will allow courts to sentence defendants to a two-year “suspended” death sentence which is commuted to a life sentence after the probation period. The SPC has promoted a series of “standard cases” that exemplify this practice. The controversial practice, dubbed “cash for clemency”, complicates the death penalty debate: critics say that it undermines the law and encourages “bargaining” for a life on the part of those who can afford to do so. Others, however, are sympathetic to any practice that can reduce execution rates. This controversy is part of a larger debate on state killing in the world’s largest killing state.

On the evening of 1 November 2005 in the city of Dongguan, Guangdong Province, three men robbed and killed a local factory worker, Mr Cai. During the pre-trial process, Cai’s family applied for civil compensation from the offenders, since the family depended solely on Cai’s income. The family of Wang, the main offender, expressed willingness to offer compensation of 50,000 yuan to the victim’s family, which Cai’s family accepted. Wang expressed sincere remorse and the Dongguan Intermediate Court sentenced him to a “suspended” death sentence (*sihuan* 死缓)—a two-year reprieve which is almost always commuted to a life sentence after the probation period. A public uproar ensued in the press; money had bought life for one violent offender convicted of robbery and murder in the Chinese criminal justice system, while other offenders had been sentenced to immediate execution for similar crimes.<sup>1</sup> This case is one of the first of many that have grabbed newspaper headlines since mid-2006 when the

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1. “Guangdong Dongguan changshi peiqian jianxing: qiangjiefan pei 5 wan huo qingpan sihuan” (Dongguan City, Guangdong, Tests the System of Using Compensation in Exchange for a Reduced Sentence: Robber Pays 50,000 Yuan and Gets a Light Suspended Death Sentence) (31 January 2007), [http://news.xinhuanet.com/legal/2007-01/31/content\\_5676183.htm](http://news.xinhuanet.com/legal/2007-01/31/content_5676183.htm), accessed 13 March 2013.

Supreme People’s Court (SPC) began encouraging leniency in death sentencing. Such controversial judgements have contributed to public outrage that convicted murderers could effectively choose to save their lives by offering compensation to the victim’s family in exchange for the family agreeing to a more lenient sentence, in this case a suspended death sentence. Financial compensation to the victim or the victim’s family through subsidiary civil action (*fudai minshi susong* 附带民事诉讼) is an established legal provision in the Criminal Procedure Law, although it was originally applied only to minor crime. In this process, which is handled concurrently with but as an adjunct to the criminal case and in the same court as the criminal trial, the victim can sue the defendant for material and psychological damage or loss resulting from the defendant’s actions.<sup>2</sup> This issue of compensation has become central to the death penalty debate in China since 2006.

In Western retentionist states such as the US, the core polemic in the death penalty debate relates directly to the question of abolition versus retention. In China, the issue of whether or not death is at all an appropriate punishment is not central to death penalty debates either among the general public or in legal circles.<sup>3</sup> The concepts that mark out the debate in China are not the bookends of “abolition” and “retention” but rather the question of how appropriate it is to “kill fewer”, together with the issue of which offenders deserve to die and which deserve to be spared through more lenient sentencing. Political understandings of whom to kill and whom to spare have driven the death penalty polemic in the PRC, beginning in the early 1950s with Mao’s oscillation between “killing many” and “killing fewer”.<sup>4</sup> This limitation of the debate has enabled the Party-state to foreordain its responsibility to kill “extremely serious criminals” in pursuit of national stability and the common good.

This article focuses on one strategy that has been employed to “kill fewer” since 2006. It examines financial compensation for leniency in death sentencing by exploring five facets of the debate and the practices that inform lenient death sentencing and the issue of paying compensation in exchange for leniency: attitudes towards leniency; the changing dominance of harsh punishment policy in China and ambiguity and judicial discretion in death sentencing; the road to leniency through the use of suspended death sentences; the 2009 SPC dissemination of “standard cases” (*dianxing anli* 典型案例) which exemplify best practice

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2. Subsidiary civil action is dealt with in the Criminal Procedure Law. For an outline of supplementary civil compensation, see Mike McConville, with Satnam Choongh, Pinky Choy Dick Wan, Eric Chui Wing Hong, Ian Dobinson and Carol Jones, *Criminal Justice in China: An Empirical Inquiry* (Cheltenham: Edward Elgar, 2011), pp. 198–200.

3. Most legal scholars in China hold what they would call a realistic view of the death penalty: that abolition is a desirable aspiration but that it is not practical to dismantle the death penalty regime at this point.

4. For a discussion on the “killing many” and “killing fewer” dialectic, see Susan Trevaskes, *The Death Penalty in Contemporary China* (New York: Palgrave Macmillan, 2012), pp. 15–48.

in lenient death sentencing; and the debates on cash for clemency that took place in 2009 and after in scholarly circles.

#### ATTITUDES TOWARDS DEATH PENALTY LENIENCY

Since 2006 the ongoing controversy over whom to kill has played out within the context of broader death penalty reforms that have led to a significant decline in annual death penalty rates. The numbers killed each year remain a state secret, but some experts now put the annual rate at around 2,400 to 3,000, which is a dramatic reduction of the rate since the early 1980s and 1990s. According to the *People's Daily*, in 1984, during the first eight months of China's first "strike hard" campaign, over 24,000 people were executed.<sup>5</sup> During the mid-1990s the annual figure had been estimated to be 15,000; estimates in the early-to-mid-2000s ranged from 8,000 to 10,000.<sup>6</sup>

The principal drivers of the change have been reformers, mainly within the SPC, rather than public demands for abolition. Two main reforms—one policy and one legislative—provided the legal and judicial impetus for this decline in the number of executions. In the mid-2000s, reformers within the SPC began to tout a new criminal justice policy called "balancing leniency and severity" (*kuan-yan xiangji* 宽严相济) which they intended to supersede a two-decade-long policy of "striking hard" (*yanda* 严打) at serious crime. This new policy discourages harsh punishment across the board for all categories of serious crime, a practice previously adopted in "strike hard" policy and referred to in judicial and scholarly circles as "heavy-penaltyism" (*zhongxing zhuyi* 重刑主义).<sup>7</sup> The new policy acknowledges a positive utilitarian value in relatively lenient sentencing for all but society's most heinous criminals; thus, it gives lower courts the freedom to consider a sentence of "suspended" rather than "immediate" death in many homicide cases, particularly those that are the result of a domestic or neighborhood dispute. The legislative reform occurred in October 2006 when the National People's Congress (NPC) Standing Committee reversed a legal provision which was first put in place in 1983 to support the "strike hard" policy and which aimed

5. "1984 10 yue 31 ri: yanda diyizhanyi chengguo xianzhu" (31 October 1984: The Fruits of *Yanda's* First Offensive Are Outstanding), *Renminwang ziliao* (People's Daily Resources On-Line), <http://www.people.com.cn/GB/historic/1031/3642.html>, accessed 10 March 2013.

6. These estimates for the early 2000s and the 1990s are from published Western sources, including David T. Johnson and Franklin Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (Oxford: Oxford University Press, 2009), pp. 231–42. Johnson and Zimring estimated the figure to be around 6,000 per annum in 2006 and 2007, and around 15,000 during the 1990s when anti-crime campaigns were prevalent.

7. Article 2 of a 2010 SPC Judicial Opinion, which defines the new policy and describes its scope, states that "courts should use this policy . . . to overcome the negative influence of 'heavy penaltyism'".

at “severe and swift punishment” for a wide range of serious offenses. The 1983 provision allowed the vast majority of death sentences to be reviewed and approved at the provincial rather than central level. Provincial higher courts thus became their own legal gatekeeper; they had the dual role of hearing appeals and reviewing their own appeal decisions. The October 2006 amendment to the Organic Law of the People’s Courts, which came into effect on 1 January 2007, returned to the SPC in Beijing the exclusive authority to review and approve all death sentences. According to the SPC, the number of death sentences in 2007 was reduced by a stunning 30 per cent, as a direct result of this reform. SPC Chief Justice Xiao Yang announced that, for the first time in PRC history, the number of suspended death sentences handed down had outnumbered the number of executions.<sup>8</sup> At the start of 2007, the SPC began to institutionalize moves to encourage the courts further to reduce the high rate of killing as punishment, through promoting more lenient sentencing for extremely serious crimes. Since then, the execution rate has declined dramatically. As Wang’s case exemplified, the highly controversial practice of “cash for clemency”<sup>9</sup> or “paying cash for one’s life” (*yiqian maiming* 以钱买命) has been one aspect of this decline in executions.

Senior SPC authorities have been encouraging financial compensation in death sentencing since the mid-2000s as part of the more general trend toward mediation in both civil and minor criminal cases. Judicial reformers see this innovation as a necessary step in changing the punitive mindset, not just of judges, but also of Party functionaries, victims’ families and across Chinese society—ingrained over roughly 25 years of the “strike hard” policy. Official validation to the public of introducing compensation into the death sentencing system claimed that compensation would help placate family members of victims, leading to the “social harmony” that President Hu Jintao first articulated in 2004.

Yet critics, including a number of media commentators in the liberal press (such as the *Southern Daily*), bloggers and legal scholars see cash for clemency as a morally questionable approach. The purchase of leniency clearly privileges wealth and punishes poverty; it draws the market into the sentencing process. It might also provide a precedent in the sentencing process for other money-driven operations, making sentencing into a tradable “commodity” and distorting fair judicial assessment of factors such as degree of blameworthiness and remorse. Judges in lower courts have long complained that they are under pressure from the families of homicide victims to execute immediately.<sup>10</sup> Nowadays, judges are

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8. “China Sees 30% Drop in Death Penalty”, Xinhua News Agency (10 May 2008), [http://www.chinadaily.com.cn/china/2008-05/10/content\\_6675006.htm](http://www.chinadaily.com.cn/china/2008-05/10/content_6675006.htm), accessed 13 March 2013.

9. David T. Johnson and Franklin Zimring, *The Next Frontier*, p. 277.

10. Hao Jianjian, “Sixing wenti diaocha baogao” (Investigative Report on Death Penalty Issues), in Gao Weijian (ed.), *Zhongguo sixing wenti de shehuixue yanjiu* (Social Science Research on Issues of the Death Penalty in China) (Beijing: Zhongguo Renmin Gongan Daxue Chubanshe, 2007), p. 219.

officially urged by the SPC to be also the mediator between a defendant and the victim's family, to try inside and outside the courtroom to secure the latter's acceptance of the former's financial compensation and expression of contrition so that the criminal becomes eligible for a suspended death sentence.

In China there has been no major grass-roots social movement urging abolition. However, over the last decade public opinion about the outcomes of individual death penalty cases, as exposed through the media, have nevertheless influenced the direction of death penalty reform in general, as well as the outcome of particular cases. Indeed, it was public outcry against a spate of wrongful convictions in the early-to-mid-2000s that became a catalyst for the 2007 reform of the death penalty. Infamous miscarriages of justice such as the She Xianglian and Nie Shubin cases exposed to the public for the first time the deeply arbitrary nature of capital case decision-making.<sup>11</sup> Since then, the public has also tended to react against death sentences when the defendant is perceived in a sympathetic light. The case of Yang Jia in 2008 and more recently that of Wu Ying in 2012 exemplify this tendency. In a revenge attack against police abuse, Yang Jia killed six policemen and was sentenced to death in 2008. Demonstrators sympathetic to the abuse that Yang had suffered protested outside the courthouse, which further attracted widespread public sympathy throughout the country.<sup>12</sup> Wu Ying was initially sentenced to death with immediate execution for fundraising fraud. This occurred at a time when public opinion was particularly sensitive to the social divide between élites and the masses in relation to criminal punishment. Her case attracted widespread sympathy from the public who were drawn to her rags-to-riches story. The SPC overturned her sentence of immediate execution in April 2012 and sent the case back to the original court to be resentenced to a suspended death penalty.<sup>13</sup>

Conversely, courts fearful of public unrest and social instability have also become increasingly responsive to public outcries against perceived leniency since the Party-state's "stability maintenance" agenda became heavily politicized after 2007. The cases of Yao Jiaxin and Li Changkui are illustrative of public outrage against defendants portrayed in the media in an unsympathetic light. In October 2010, Yao Jiaxin, a Xi'an Conservatory of Music student, accidentally hit a poor young mother with his car. As she looked obviously like a peasant, he reasoned

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11. Xingliang Chen, "Destiny of the Death Penalty in China in the Contemporary Era", *Frontiers of Law in China*, Vol. 1 (2006), pp. 61–62. Benjamin Liebman and Tim Wu also argue that these cases contributed to the SPC's death penalty reforms (Benjamin Liebman and Tim Wu, "China's Network Justice", *Chicago Journal of International Law*, Vol. 8, No. 1 [2007], pp. 276–77).

12. "Yang Jia and China's Unpopular Criminal Justice System", *China Rights Forum*, No. 1 (2009), pp. 59–66, <http://www.hrchina.org/crf/issue/2009.01>, accessed 21 July 2013.

13. For a summary of the Wu Ying case, see "Chinese Supreme Court Overturns Tycoon Wu Ying's Death Sentence", *The Guardian* (21 April 2012), <http://www.guardian.co.uk/world/2012/apr/20/chinese-supreme-court-wu-ying>, accessed 21 July 2013.

that she might try to take advantage of the situation and sue him, so he stabbed her to death. The case attracted unprecedented public attention, partly because the act was so cold-blooded and partly because of a false Internet rumor that Yao was a wealthy member of the social élite and had powerful family connections. In an online poll, Internet users on social media sites and blogs voted overwhelmingly in favor of a death sentence, and the music student was executed in June 2011.<sup>14</sup> The victim’s family was offered compensation in exchange for his life, but refused it, preferring to see Yao executed. The case of rural worker Li Changkui attracted similar public hostility in 2011, though he was not perceived as élite. Li murdered his former girlfriend and her younger brother in a spontaneous act of violence, in reaction to her rejection of his marriage proposal. He was sentenced to death with immediate execution. On appeal, the Yunnan Higher Court classified the crime as one that originated as a domestic/neighborhood dispute, warranting lenient treatment since the offender immediately gave himself up to police and offered the family financial compensation. The court downgraded the sentence to a suspended death sentence, and a media frenzy immediately ensued. The court was pressured into reversing the decision, acceding to public outrage. It is highly unusual for a higher court to use an obscure loophole in the law to withdraw its own commutation of sentence and have the case resentenced, but on 22 August 2011 the court did just that, announcing that Li would be resentenced to immediate execution.<sup>15</sup>

Regardless of these individual instances of public outrage either for or against execution, public surveys on attitudes toward the death penalty indicate that a moderate majority of people support the practice in general. For example, a 2007–08 survey of 4,500 people conducted in three provinces on behalf of the Max Planck Institute for Foreign and International Criminal Law found that 58 per cent of respondents were definitely in favor of the use of death penalty in general. However, this percentage increased to 78 per cent when they were asked about the specific crime of murder.<sup>16</sup>

Public support has often been used to legitimize death penalty practice in China. The notion that state killing merely reflects the will of the people and a public taste for retribution is a well-worn argument used by the Party-state.<sup>17</sup> A number of scholars reject this argument, including me. Cultural tradition is not the key driver of death penalty policy in China. The Party-state is not *compelled*

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14. “Murderous Driver Yao Jiaying Executed”, Xinhua News Agency (6 June 2011), [http://www.china.org.cn/china/2011-06/07/content\\_22728216.htm](http://www.china.org.cn/china/2011-06/07/content_22728216.htm), accessed 18 June 2013.

15. Susan Trevaskes, *The Death Penalty in Contemporary China*, pp. 217–18.

16. Dietrich Oberwittler and Shenghui Qi, “Public Opinion on the Death Penalty in China: Results from a General Population Survey Conducted in Three Provinces 2007/2008”, *Forschung Aktuell/Research in Brief*, No. 41 (Freiburg: Max Planck Institute for Foreign and International Criminal Law, 2009).

17. Børge Bakken, “China, a Punitive Society?”, *Asian Journal of Criminology*, Vol. 6, No. 1 (2011), p. 42.

to respond to retributive sentiments such as “paying for a life with a life”; it is a deliberate political policy to use executions as deterrence by actively constructing the public will.<sup>18</sup> As the key shaper of the country’s political culture, the Party-state, and not public opinion, is the main source of court approaches to criminal punishment.

### CHANGING CHINA’S PUNITIVE CULTURE

As with many other areas of policy in China, reform in death penalty policy and practice was made possible by careful and savvy moves by reformers who aligned their policy initiatives with the prevailing political narratives. The narrative of a “harmonious society” (*hexie shehui* 和谐社会) was in the ascendant at the very time that SPC reformers wanted to reform the death penalty. They argued that changes in criminal justice policy could contribute to the building of a harmonious society by readjusting execution practices to punish severely only an extremely small minority of society’s most truly heinous criminals. They suggested that harmony could be promoted by preventing the further escalation of violence by criminals or the families of offenders isolated from society through the stigma of harsh punishment.

The SPC recognized that judges in lower courts were vulnerable both to public waves of penal populism and to local Party pressure to mete out harsh justice for deterrence purposes. It began issuing “notices”, “opinions” and “judicial interpretations” in late 2006 and early 2007, strongly urging lower courts to choose “life” (suspended death) over death (immediate execution) for homicide offenders who had killed as a result of domestic or neighborhood disputes and who were willing to compensate their victims adequately. Courts were urged where possible not to hand down immediate executions, but to give a suspended sentence when the offender surrendered to police, was extremely remorseful, and provided immediate financial compensation to the victim’s family.<sup>19</sup> The expectation was that the lower courts could take advantage of China’s vague and amorphous death penalty legislation.<sup>20</sup>

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18. Michelle Miao, “Capital Punishment in China: A Populist Instrument of Social Governance”, *Theoretical Criminology*, Vol. 17, No. 2 (2013), p. 241; Susan Trevaskes, *The Death Penalty in Contemporary China*, p. 8; and David T. Johnson and Franklin Zimring, *The Next Frontier*, p. 269.

19. For a discussion of these SPC directives, see Susan Trevaskes, “China’s Death Penalty: The Supreme People’s Court, the Suspended Death Sentence and the Politics of Penal Reform”, *British Journal of Criminology*, Vol. 53, No. 3 (2013), pp. 490–91.

20. The death penalty’s central legislative pillar is Article 48 (1) of the Criminal Law (1997), which states simply: “The death penalty shall be applied only to criminals who have committed extremely serious crimes. If the immediate execution of a criminal punishable by death is not deemed necessary, a two-year suspension of execution may be pronounced simultaneously with the imposition of the death sentence.”

Changing the mindset of the judiciary, local Party and public has been one of the most difficult aspects of reforming China’s system of capital punishment. Yet, as reformers understood, SPC prodding was intrinsic to this reform, since the SPC was not in a position to amend the Criminal Law. Changing mindsets through sentencing guidelines was particularly important for enacting one of the most controversial parts of the reform strategy: victim compensation.

The Criminal Law names a number of general conditions under which an offender’s sentence can be considered for mitigated punishment. These circumstances relate mainly to the behavior of the offender after a criminal act (such as voluntary surrender and performing an act of meritorious service like offering important information to police). One discretionary circumstance that could justify a mitigated sentence would be the act of expressing remorse through the practical means of offering financial compensation to the victim’s family. Civil compensation only began to be promoted by the SPC as an important mitigating circumstance in capital case sentencing practice in the mid-2000s. It moved beyond the circumstances of the defendant to those of the victim or victim’s family, requiring that the latter accept the compensation offered and express willingness to forgive the offender as part of the process of criminal reconciliation. The post-2007 challenge for reformers was to justify and promote compensation as a legitimate discretionary circumstance under which mitigated punishment could be applied.

#### LENIENCY THROUGH FINANCIAL COMPENSATION

According to Article 48 of the Criminal Law, a suspended death sentence can be applied to criminals convicted of capital crimes who are deemed to deserve the death penalty but whose crimes may not warrant immediate execution. Until the mid-2000s, suspended death sentences were handed down relatively infrequently, in approximately 15–20 per cent of death sentences.<sup>21</sup> They were mainly used as a safe choice in capital cases where careful judges were reluctant to execute when the facts of a case were not clear, to “leave some leeway” (*liuyou yudi* 留有余地) for uncertainty. The leniency drive required lower-court judges to expand the use of suspended death sentences in homicide cases and cases of assault resulting in death, by encouraging them to recognize a wider array of mitigating circumstances. Officially, a key rationale for the scheme was that it would promote social harmony and stability through reconciliation in communities socially harmed by violent death. When they have been given a sentence of immediate execution, offenders in capital cases generally do not pay compensation to the victim’s family.

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21. Huang Weiming, *Sihuan zhidu de dangdai jiazhi* (The Contemporary Value of the Sihuan System) (Beijing: Kexue Chubanshe, 2007), p. 113; Hao Jianjian, “Sixing wenti diaocha baogao”, p. 218.

This leaves many of the families financially destitute. In short, the suggestion of offenders “paying compensation and receiving a reduced sentence” was promoted as a practical way of simultaneously addressing non-compliance in paying compensation and of building harmonious social relations.<sup>22</sup>

As a legally institutionalized practice, compensation has had a marked impact on death sentencing since 2007. According to legal practitioners in Chongqing in 2007 and 2008, 58 per cent of death sentences from first-instance cases handled by Chongqing Municipal People’s Procuratorate were suspended as a result of the victim’s family agreeing to accept the compensation offered by the accused. Of the appellate capital cases handled in Chongqing that year, 64 per cent of sentences were reduced to a suspended death sentence after the defendant compensated the victim’s family.<sup>23</sup> This high percentage of suspended capital sentencing reflects the situation nationwide, according to scholars Zhao Bingzhi and Peng Xinlin. They claim that further empirical research by a scholar who studied sentences in 83 intentional homicide cases at undisclosed jurisdictions supports these figures. That research revealed that defendants had an 87 per cent chance of receiving a suspended death sentence if both parties agreed to civil compensation, but only a 42 per cent chance if no compensation was involved. The data suggests that offenders have the greatest chance of receiving a suspended death sentence in cases where civil compensation is offered and accepted. They have greatly diminished chances of receiving a suspended sentence when they do not actively pursue payment of compensation.<sup>24</sup>

Some members of the judiciary of higher-level courts were initially resistant to the widespread use of suspended death sentences in homicide cases.<sup>25</sup> Heads of some provincial courts were reluctant to encourage civil compensation in death penalty cases for fear of a public backlash, while others were unclear about what specific kinds of crime circumstances the SPC would find acceptable or appropriate for applying this compensation practice. By 2009, it had become obvious that the unpopularity of lenient death sentencing in some provincial courts would require the SPC to address the issue directly by encouraging through example.

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22. “Panqian peichang jianxing yilei zhidu weihe luyin zhengyi” (Why Does the Act of Compensating the Victim Prior to a Court Judgement to Receive a Reduced Sentence Create Controversy Time and Again?) (27 September 2007), *Renminwang*, <http://npc.people.com.cn/GB/6331072.html>, accessed 15 March 2013.

23. Zhao Bingzhi and Peng Xinlin, “Lun minshi peichang yu sixing de xianzhi shiyong” (On Civil Compensation and Limiting the Application of the Death Penalty), *Zhongguo faxue* (Legal Science in China), No. 5 (2010), p. 55.

24. Zhao Bingzhi and Peng Xinlin, “Lun minshi peichang yu sixing”, p. 55.

25. “Henan gaoyuan cheng: busha bu zuyi pingmin fen, jianjue pan sixing” (Henan Higher Court States: Not Killing [Offenders] Will Fail to Satisfy the People’s Anger, We Must Therefore Resolutely Continue to Sentence Offenders to Death), *Caixinwang* (25 August 2011), <http://ucwap.caing.com/2011-08-25/100295058.html>, accessed 21 March 2013.

### EXEMPLIFYING LENIENCY THROUGH STANDARD CASES

The SPC’s guidance mechanisms include judicial interpretations, notices and other provisions, and the promotion of what are referred to as “standard cases” that exemplify best practice in sentencing. Standard cases are “typical” or “representative” cases put forward by the SPC as examples of best practice. The SPC has used them since the 1950s as a guidance mechanism to help courts with the interpretation of new rules, laws or judicial practices. They have been published regularly in the SPC gazette since 1985. The SPC clearly regards these cases as having the potential to mold judicial decision-making behaviors, but they are not legally binding. It publishes these cases in an attempt to shape or reshape judicial decision-making behaviors or to clarify the application of the law or policy.<sup>26</sup> In 2009 the SPC sought to clarify the application of law and policy in death penalty cases involving compensation to the victim’s family. In the cases discussed below, the SPC modeled the practice of judicial mediation between defendant and victim’s family to try to secure a compensation arrangement to qualify the defendant for a suspended death sentence.<sup>27</sup> The standard cases targeted judges in provincial higher courts, rather than judges in municipal courts of first instance, because from 2007 provincial courts were required to send their applications for executing a death sentence to the SPC for review and approval.

The 2007 changes to the processes of review and approval put a new procedure in place under which, if the SPC rejects an application for a sentence of immediate execution, the case is sent back to the original court via the provincial higher court for retrial, or is directly resentenced by the higher court to a suspended death sentence. Modeling mediation through standard cases was (implicitly) promoted as a way for provincial courts to avoid having their appeals rejected by the SPC and sent back to the provinces for retrial or resentencing. Therefore, of major significance to the sentencing process, the SPC was encouraging higher courts to move beyond passively reviewing homicide cases to secure the conditions for lenient death sentencing, when appropriate, by mediating between the two parties. In so doing, the SPC set a new imperative, not upon the offender or the victim, but upon the judge. It is the judge who is urged to create mitigating circumstances through personal effort.

In response to the concerns of provincial courts about how to implement these reforms and also, for some, about the wisdom of the “kill fewer” approach and

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26. Li Shichun, “Anli zhidao zhidu de ling yi tiao silu—sifa nengdong zhuyi zai Zhongguo de youxian shiyong” (An Alternative Path for the Case Guidance System—The Limited Applicability of Judicial Activism in China), *Faxue* (Legal Science), No. 6 (2009), pp. 59–64.

27. Jiang Anjie and Xu Wei, “Shenyong sixing yinling Zhongguo sifa geng lixing” (The Cautious Application of the Death Penalty is Leading the Way in Developing a More Rational Justice System in China), *Fazhi ribao* (Legal Daily, hereafter *FZRB*) (4 August 2009), [http://www.legaldaily.com.cn/bm/content/2009-08/05/content\\_1133596.htm](http://www.legaldaily.com.cn/bm/content/2009-08/05/content_1133596.htm), accessed 16 March 2013.

about the partiality that mediating compensation could impose upon the higher court judiciary, in 2009 the SPC promulgated a series of five standard cases.<sup>28</sup>

The five standard cases, each one highlighting the process of judicial activism in persuading the victim's family to accept civil compensation, were put forward by the SPC over a number of days in mid-2009, along with a newspaper report on public and scholarly reactions to these cases reported in August that year.<sup>29</sup> All were homicide cases that had escalated from a family, neighborhood or similar personal dispute. Five different provincial courts had sent these cases to the SPC to approve immediate execution as the sentence, but the SPC had rejected all five applications. These standard cases were promoted nationwide as the kind of cases where "it is not necessary to execute immediately" according to Article 48 of the Criminal Law.

The standard cases were published in the SPC's national newspaper, *Legal Daily*. Publishing them in a national newspaper—along with interviews with legal experts and comments from the public—was an attempt by the SPC not only to clarify to courts the appropriate use of the compensation system in death sentencing but also to validate it to the general public. Here the SPC was giving its full imprimatur to the new approach, issuing a clarion call for acceptance to local courts and by implication to the general public. The summaries below paraphrase two of the five standard cases.

### Standard Case 1: "Judge travels across three provinces to mediate case and bring Ma Tao back to life from the dead"

During the evening of 26 September 2006 at the Yongsheng Shoe Factory dormitories in Dongguan City, Mr Zheng accidentally splashed water on Ma Tao when he was bathing, and a verbal altercation transpired. Later in the evening, Zheng gathered a group of his workmates to confront Ma about the altercation. Ma felt aggrieved at the group ganging up to abuse him and, after they left, in the presence of his roommates, he grabbed a knife from his dormitory and ran into

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28. "Faguan kua sansheng tiaojie Ma Tao'an qisi huishen, yifa bu hezhun sixing dianxing anli: zhi yi" (Judge Travels Across Three Provinces to Mediate Case and to Bring Ma Tao Back to Life From the Dead: Standard Case of Non-Approval of the Death Sentence: Case 1), *FZRB* (2 November 2009), [http://www.legaldaily.com.cn/misc/2009-10/30/content\\_1174648.htm](http://www.legaldaily.com.cn/misc/2009-10/30/content_1174648.htm), accessed 20 February 2013; "Sixing fuhe ru nüren xiuhua banjingxi: yifa bu hezhun sixing dianxing anli: zhi er" (The Death Penalty Review and Approval Process Can Be Likened to Delicate Feminine Craftwork of Embroidery: Case 2), *FZRB* (30 August 2009), [http://www.legaldaily.com.cn/zbk/2009-08/30/content\\_1154119.htm](http://www.legaldaily.com.cn/zbk/2009-08/30/content_1154119.htm), accessed 20 February 2013.

29. Jiang Anjie and Xu Wei, "Shenyong sixing", and Jiang Anjie and Xu Wei, "Tegao: zhuming xingshi xuezhe cheng shenyong sixing yinling Zhongguo sifa geng lixing" (Special Report: Famous Legal Expert States that Cautious Application of the Death Penalty is Leading the Way in Developing a More Rational Justice System in China), *FZRB* (5 August 2009), [http://www.legaldaily.com.cn/0801/2009-08/05/content\\_1133954.htm](http://www.legaldaily.com.cn/0801/2009-08/05/content_1133954.htm), accessed 16 March 2013.

Zheng’s room, intending to stab him. A fight ensued, and he ended up stabbing a Mr Tong to death, as well as seriously injuring Zheng and another roommate.

Representing the SPC’s panel responsible for reviewing and approving Ma’s death sentence, Judge Ran visited Xinyi County in Henan Province with the defendant’s family to mediate compensation. The Ma family had offered the victim’s family 48,044.80 yuan in civil compensation. Ma’s parents indicated to Judge Ran that they were intending to sell their house to pay the compensation and would approach the victim’s family to ask for forgiveness and understanding. They also indicated that they did not have any further funds to pay for additional compensation. The judge explained to Ma’s family that usually, if the defendant’s family offers more compensation after the first-instance trial and asks the victim’s family for forgiveness themselves, the conditions can be satisfied for the court to re-sentence the offender to a death sentence with a two-year reprieve. Ma’s older sister then offered an extra 150,000 yuan in compensation to the victim’s family.

Before the “immediate execution” application was eventually rejected by the SPC, the SPC review panelists handling the case were divided in their opinion. Some believed that the facts of the case were clear and the evidence sufficient to convict, that Ma’s method of attack was vicious and the consequence of the crime very grave. They argued that financial compensation to the victim’s family could in no way make up for Ma’s crime. Others on the SPC panel pressed for mercy. They believed that the case should be classified as originating from a personal dispute, and that Ma was young, with no previous criminal record, and did not exhibit grave malicious intent. He was extremely remorseful, the family had immediately offered compensation, and the victim’s family had accepted their plea for forgiveness.

Judge Huang Erhai, head of the SPC’s Criminal Tribunal No. 1, had followed the case carefully, and instructed the panel head and other members to coordinate a response with the Guangdong Higher Court and the Dongguan Intermediate Court (where the first trial was held). He asked the panel to investigate two possibilities: first, whether the Guangdong provincial government could supplement the compensation; and second, whether the victim’s family would react negatively if the SPC resented the defendant to *sihuan*. The panel head, Judge Wang Wei, went to Dongguan to discuss the matter with the Dongguan judicial authorities, who also went with him to the shoe factory where Ma worked to see whether the owners would be willing to supplement some compensation—because the defendant’s family income was deemed to be over the income threshold, Ma was not eligible for the case to be considered for publicly funded compensation.<sup>30</sup> The

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30. The judge did not have authority to act as an official mediator and so visited Guangzhou on the pretext that he was interviewing the defendant, Ma Tao.

Guangdong Higher Court could not be certain that the victim's family would not be willing to accept Ma being given a suspended death sentence.

Judges Wang and Ran then traveled to Sichuan to visit the victim's family—to discuss the compensation offer, to inform them of the additional compensation that the defendant's family was willing to offer, and to recommend that they accept the new conditions. Tong's family agreed not to demand execution, if the defendant's family was willing to pay the additional compensation and to sign a statement to that effect. Before Judges Wang and Ran returned to Beijing, they went back to Henan Province to secure the 150,000 yuan payment from Ma's family. However, Ma's sister had a change of heart when she read the statement from the victim's family that they were willing to forgive the defendant and would not push for execution. She had been under the mistaken impression that the execution could be avoided since the judges had a signed statement from the family, and had assumed that her brother's life would be spared, even without the additional 150,000 yuan payment. The judges explained that the family's statement accepting the new conditions was conditional upon the extra payment. Judge Ran stayed in Henan Province until he was sure the money had been transferred into the Zheng family's bank account. Ma's sister transferred the money in June 2009, and in July the SPC ruled that the execution sentence would not be approved; the case would be sent back to the Guangdong Higher Court for resentencing to a suspended death sentence.<sup>31</sup>

### **Standard Case No. 2: “The death penalty review and approval process can be likened to the delicate feminine craftwork of embroidery”**

At 8 p.m. on 11 January 2008, Liu Bing went to a store owned by his landlord, Mr Ren, to ask for an extension of time to pay overdue rent. Ren refused, and an altercation broke out, the dispute then turning physical. Liu grabbed a small knife belonging to Ren and stabbed him twice in the neck, killing him. Liu then robbed him of 5,600 yuan and fled. On 18 August 2008, the Chongqing No. 1 Intermediate Court convicted Liu of homicide and theft, and sentenced him to death with immediate execution. His appeal to the Chongqing Higher Court was rejected on 8 December.

The review and approval process began in the SPC in Beijing on 11 February 2009 and involved Judge Li Xunyi and Assistant Judge Zeng Lin. Judges Li and Zeng both believed that the crime was a spontaneous act and that, while an intentional murder, it did not demonstrate a high degree of maliciousness. As the offender admitted guilt, the case could therefore be classified as “borderline”:

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31. “Faguan kua sansheng tiaojie Ma Tao'an qisi huishen”.

either immediate execution or suspended execution were sentencing possibilities. Judge Li noted the SPC’s policy on such cases, which urged courts to err on the side of caution when differentiating between, on the one hand, homicides and assaults resulting in death that originated from domestic or neighborhood disputes and, on the other, much more malicious violent crimes that had a far greater impact on social order. The SPC judges noted that Liu’s actions did not reflect grave malicious intent. He was a first-time offender, it was a spontaneous crime, and he could therefore be considered as a type of criminal whom it is “not necessary to execute immediately”.

In this context, Judge Li began proceedings to mediate between the victim’s family and the defendant’s family on the issue of financial compensation. He visited the victim’s family; they first expressed an attitude of “an eye for an eye, a tooth for a tooth” towards the defendant’s fate. After much persuading by Judge Li, the family’s stance softened, and they eventually stated that they would consider forgiving the offender if he or his family offered them adequate compensation. In the meantime, Judge Zeng had visited the defendant’s two siblings (Liu’s parents had died when he was young, and he had not been close to his siblings). His sister said that she did not have the money and refused to help him, especially considering that, on his release from prison in over 20 years’ time, it would be highly unlikely that he could find a job to repay her and she would have to look after him.

Zeng then went to prison to see defendant Liu, who assured the judge that he was remorseful and would mend his ways; he would reform himself in prison and, when eventually released, would work to repay the compensation to the victim’s family. The victim’s family were even less inclined to accept a mitigated sentence, having heard that the defendant’s family were unwilling to provide his compensation, but Judge Zeng pressed the point that the defendant had lost his parents early in life and that his older siblings had not looked after him. The judge also relied on the defendant’s willingness to spend the rest of his life after prison working to repay the compensation. The judge even used the old adage, “showing mercy to another reflects well on one’s own reputation”, to persuade the family. The family eventually agreed to forgive Liu and not to insist on his execution, even though he could not pay them compensation. On that basis, the SPC rejected the application for his execution and at the same time, approached government compensation funding bodies to help him to apply for publicly funded compensation.<sup>32</sup>

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32. “Sixing fuhe ru nüren xiuhua banjingxi”.

### THE CONTROVERSY

The standard cases published in 2009 created an instant uproar in the media, according to journalists with the newspaper *Legal Daily*. On 5 August, *Legal Daily* journalists Jiang Anjie and Xu Wei published an interview with one of China's foremost scholars on the death penalty, Professor Zhao Bingzhi, whose statement defended the SPC rulings:

The motive driving the SPC review and approval process is to ensure that the death sentence is applied extremely cautiously. The general trend of death penalty decision-making is moving in the direction of leniency, that is, "not to kill" [for the vast majority of capital cases]. When case circumstances might attract mitigated punishment and the victim's family can forgive the offender, judges should take a "not to kill" route. The final stronghold of death penalty practice in China today remains violent crimes that threaten or take the life of another person. In the gradual process of abolishing the death penalty in any country, violent crimes will be the last crime type on which it is abolished. Therefore, these five standard cases are particularly significant, as they not only exemplify how to limit the use of the death penalty for violent crimes, but also signal the future direction of the death penalty in general.<sup>33</sup>

*Legal Daily* received a large volume of complaints about the standard cases, according to their reporters. Even some journalists from the newspaper's own newsroom publicly opposed SPC decisions in the five cases. One sub-editor who worked on publishing the cases remarked on the one where, after a verbal altercation, a man went back to his room, returned with a knife, and murdered his victim in cold blood. This type of criminal deserves to be executed, the sub-editor opined, according to a *Legal Daily* report providing background to the publication of the cases. A retired former chief editor of *Legal Daily* phoned the newsroom to complain about the cases, arguing that it is wrong for an offender to be able to escape execution simply by paying financial compensation. He asked acerbically, "Does it all come down to a simple calculation of 'paying money in exchange for a life'? . . . Reducing a sentence to a suspended death sentence once a family 'forgives' and absolves the defendant amounts to handing over the

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33. Jiang Anjie and Xu Wei, "Tegao"; and "Zhao Bingzhi jiaoshou jiu zuigao fayuan gongbu 'yifa bu hezhun sixing dianxing anli': jieshou Fazhi Ribao jizhe caifang" (Professor Zhao Bingzhi Talks to *Legal Daily* about the SPC Publication of Standard Cases Exemplifying Non-Approval of Executions), <http://www.criminallawbnu.cn/criminal/Info/showpage.asp?showhead=&ProgramID=1520&pkID=23878>, accessed 13 March 2013.

decision-making process to the victim’s family, rather than leaving it in the hands of judges.”<sup>34</sup>

According to Article 61 of the Criminal Law, punishment that a judge hands down to an offender should be decided “on the basis of the facts, nature and circumstances of a crime, the degree of harm done to society, and the relevant provisions of the [Criminal] Law”. Critics have argued that, under this practice of the offender showing remorse by offering compensation, the law itself is not the main basis for judicial decision on lenient or harsh treatment in a capital case. SPC urgings for judges to give a more lenient sentence—to promote criminal reconciliation, social harmony or “restorative justice”—distort the outcome, rather than delivering “balanced” justice.<sup>35</sup>

The inequitable nature of the sentencing is a particular focus of public outrage. “Those who can’t afford it can’t pay for their life”, opponents claim. A spokesman for the Dongguan Court featured at the beginning of this article argued that it was not a simple transaction, exchanging money for one’s life. Rather, “it restores certain interests to the victim’s family and lightens their emotional load, thus lessening the probability that the victim or their family will take revenge on society. Furthermore, compensation will restore their financial standing in the community.”<sup>36</sup>

Some death penalty scholars have pointed out that the main source of controversy is that, for many cases from 2007 to 2009 where a reduced sentence was given, the crimes did not actually originate in domestic/neighborhood disputes but, rather, were highly malicious and premeditated. Other scholars and practitioners have argued that the compensation system can extend to cases outside the SPC perimeters. In 2009, the national journal *People’s Procuratorial Semimonthly*, published by China’s public prosecution agency, published a debate between legal experts. The views presented exemplify the range of expert opinions on the issue. Four experts—Professor Liang Genlin (Peking University Law School), Wang Jun (head of the No. 1 Criminal Tribunal in the SPC), Zhou Feng (head of the Appeals Tribunal in the Supreme People’s Procuratorate) and Lin Jianjiang, a provincial procurator—debated the application of suspended death sentences in four controversial capital cases outlined in the newspaper. The cases had no obvious statutory mitigating circumstances. Two are summarized below.

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34. Jiang Anjie and Xu Wei, “Tegao”; and “Zhao Bingzhi jiaoshou jiu zuigao fayuan gongbu ‘yifa bu hezhun sixing dianxing anli’”.

35. Liang Genlin, “Sixing anjian bei xingshi hejie de shida zhengwei” (The Ten Big Falsehoods about the Idea of Criminal Reconciliation in Death Penalty Cases), *Faxue*, No. 4 (2010), p. 7.

36. “Guangdong Dongguan fayuan chengqing: ‘peiqian huanxing’ shuofa shu wujie” (Dongguan Court in Guangdong Issues a Public Clarification: The Idea that a Defendant Paid Monetary Compensation in Order to Get His Sentence Reduced Is Incorrect), *Renmin ribao* (People’s Daily) (6 February 2007).

In case 1, Li was convicted of robbing, raping and murdering a 17-year-old female in her home. He broke into her house, threatened her with a fruit knife, taped up her hands, feet and mouth, stole 550 yuan and a mobile phone, and then raped her and stabbed her in the chest and neck, rupturing an artery. During the trial, the defendant's family came to an agreement about civil compensation and the family was paid 120,000 yuan by the defendant's family in exchange for a statement that the victim's family had forgiven the offender. The court gave him a suspended death sentence.<sup>37</sup>

The debate's four participants were divided on how this case should have been sentenced. One opinion was that, because Li's crimes were gruesome and the nature of the crime was particularly threatening to the community's sense of security, Li deserved to be punished on the basis of the Criminal Law, rather than on the basis of a compensation agreement between parties. The contending opinion was that a suspended death sentence could help to enforce a civil compensation agreement and that the money gave the victim's family both financial and psychological relief, allowing a suspended sentence to promote the spirit of building a harmonious society.<sup>38</sup>

In case 2, Chen and his girlfriend had been dating for three years when they broke up. Chen attempted to get back together with his former girlfriend on many occasions, but she refused. Chen found out that she had a new boyfriend, Zhang. Chen waited outside the gates of Zhang's work one lunchtime, and stabbed him over 20 times in the head, neck, chest and arms, causing his death. The contentious issue in this case was whether or not the circumstances constituted a homicide arising from a domestic or similar personal dispute that could be treated with relative leniency. One opinion from the four-person panel was that, broadly interpreted, the case could be considered as an instance of a domestic or personal dispute, and was therefore open to considerations of sentence mitigation. A contending opinion was that the victim was not in a relationship with the offender, and it was not a case of a dispute escalating into a homicide.<sup>39</sup>

Scholars such as Liang Genlin warn against using so-called criminal reconciliation indiscriminately in capital cases, because it plays up external factors, undervaluing the legitimacy of the law. He argues that, if the state is serious about "killing fewer", authorities should not rely on external policies but should, rather, amend the Criminal Law to reflect this ethos of leniency. Liang claims that capacity and will to compensate victim or kin should not be central in determining whether a defendant in a capital case is killed or allowed to live. Serious

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37. "Sixing liji zhixing yu huanqi zhixing de jiexian ruhe zhangwo" (Coming to Grips with the Dividing Line Between Immediate Execution and a Suspended Death Sentence), *Renmin jiancha* (People's Procuratorial Semimonthly), No. 4 (2009), p. 29.

38. "Sixing liji zhixing yu huanqi zhixing de jiexian ruhe zhangwo", pp. 29–30.

39. "Sixing liji zhixing yu huanqi zhixing de jiexian ruhe zhangwo", p. 30.

enforcement of Criminal Law Article 48 should mean that, if a trial finds a crime to be extremely serious with grave consequences, the court should not be urged, or even allowed, to reduce the severity of a sentence simply because of financial compensation paid by or for the defendant, without considering other mitigating or aggravating factors in the case.<sup>40</sup> Otherwise, the principal sentencing decision on life or death for the capital offender is reduced to a decision made by a party—the victim’s family—who are not of the judiciary, or even of the legal system. Sentencing extremely serious crime as the preserve of individual decision-makers outside the criminal justice system is counter to criminal punishment, as a system operated by the state on behalf of society as a whole. Basing a judgment in a capital case ultimately on the opinion of the victim’s party produces a sentence that only satisfies the victim’s party, rather than the pursuit of justice. Liang’s overall viewpoint is, not to argue for greater use of immediate execution, but rather to point out that, if the state’s intention is really to “kill fewer”, then wide-ranging amendments should be made to the Criminal Law. This would place the onus on legislators rather than the judiciary to guarantee consistency and commitment to lenient sentencing in all jurisdictions across the nation.<sup>41</sup>

The scholar Sun Wanhuai, like Liang Genlin, opposes considering criminal mediation in capital case sentencing on the grounds that mediation has its roots in the system of minor criminal case disposition and cannot be transferred upward indiscriminately to capital case sentencing.<sup>42</sup> In serious intentional homicide cases where compensation is on the table, one of the two parties is represented by family members of the victim, which is substantially different from the misdemeanor cases where mediation is between the accused and the victims themselves. The very purpose of criminal mediation is to console the victim and to improve the victim’s status in litigation, but in intentional homicide cases the victim is dead, and therefore the basic grounds for “reconciliation” do not exist.<sup>43</sup>

Sun and others argue that criminal mediation in capital case sentencing also undermines social relations in the community at large, and society’s sense of fairness.<sup>44</sup> Realizing justice through criminal punishment should take into consideration not only “individual” justice but also “communal” justice.<sup>45</sup> Sentencing someone to death is not done simply for revenge, but for the legitimate exercise of retributive justice through the law, so that the fiduciary nature of social values such as fairness can be maintained in society at large. Sun argues that, when

40. Liang Genlin, “Sixing anjian bei xingshi hejie de shida zhengwei”, p. 4.

41. Liang Genlin, “Sixing anjian bei xingshi hejie de shida zhengwei”, pp. 4–5.

42. Sun Wanhuai, “Sixing anjian keyi bing xuyao hejie ma?” (Can, and Indeed *Must*, Criminal Mediation be Applied in Death Penalty Cases?), *Zhongguo faxue*, No. 1 (2010), p. 184.

43. Sun Wanhuai, “Sixing anjian keyi bing xuyao hejie ma?”, p. 184.

44. Sun Wanhuai, “Sixing anjian keyi bing xuyao hejie ma?”, p. 184.

45. Sun Wanhuai, “Sixing anjian keyi bing xuyao hejie ma?”, p. 184.

judicial authorities encourage “bargaining” between the victim’s family and the accused, the interests of the victim only *appear* to be protected. The outcome is in fact achieved at the cost of sacrificing society’s belief in fairness and in the dignity and authority of law, a loss which works against the interests of the victim, the court system and society at large. Sun asserts that, under these circumstances, death penalty decision-making as epitomized in the SPC’s standard cases is based, not upon judicial assessment of objective harm caused by the crime and subjective risk of the offender to society, but upon the willingness of the victim’s family to forgive the defendant and accept compensation.<sup>46</sup>

Scholars have certainly been divided on the benefits of this practice. One of China’s leading scholars of criminal law, Zhao Bingzhi, remains sympathetic to any practice which can bring down execution rates by “moving the goalposts” in borderline cases that may attract a sentence of immediate execution. In response to criticisms that arose from the SPC promulgation of the five standard cases in 2009, Zhao Bingzhi noted: “in any borderline case where there is a choice between killing or not killing in which there exist mitigating circumstances, if the family has forgiven the offender, then it is right not to execute”. Zhao cited a case in 1984 that occurred in Beijing, partly in order to emphasize the benefits of the post-2007 reforms, and also (we can presume) to remind readers of the realities of China’s not so distant past when “overkill” was in force for decades:<sup>47</sup>

In 1984, a peasant hauled a cart full of watermelons into Beijing to sell. When he arrived at the marketplace, over a dozen people suddenly descended on him and stole his watermelons. These people were themselves fruit sellers. Since all of them participated in the act of stealing the watermelons, they were all charged with robbery. For their crime of stealing watermelons, many of them were executed, some were given suspended death sentences and some life imprisonment. The lightest punishment given was 15 years’ imprisonment, and that was only because the offender had stolen just one melon.<sup>48</sup>

Despite this overall support for the practice of using judicial guidance mechanisms such as standard cases to reform death penalty practice, Zhao has argued, like Liang Genlin, that it is now time for the NPC to amend the Criminal Law.<sup>49</sup>

46. Sun Wanhuai, “Sixing anjian keyi bing xuyao hejie ma?”, p. 184.

47. Jiang Anjie and Xu Wei, “Tegao”; and “Zhao Bingzhi jiaoshou jiu zuigao fayuan gongbu ‘yifa bu hezhun sixing dianxing anli’”.

48. Jiang Anjie and Xu Wei, “Tegao”; and “Zhao Bingzhi jiaoshou jiu zuigao fayuan gongbu ‘yifa bu hezhun sixing dianxing anli’”.

49. Zhao Bingzhi, “Guanyu Zhongguo xianjieduan shenyong sixing de sikao” (Reflections on the Prudent Application of the Death Penalty Currently in China), *Zhongguo faxue*, No. 6 (2011), pp. 5–22, and Zhao Bingzhi and Yin Jianfeng, “Guyi sharen zui sixing sifa kongzhi lungang” (Outline of Judicial Controls Relating to Intentional Homicide in Death Penalty Cases), in Zhao Bingzhi (ed.), *Sixing shiyong biao zhun yanjiu*

It is also time for the NPC to provide clear statutory guidelines for sentencing conditions.

Reform-minded judges and experts in China are continuing their efforts to install a mindset of “kill fewer, kill cautiously” in death sentencing. In the process of waiting for legislators to catch up to judicial reforms in the SPC, it is not surprising in this increasingly commodified economy that we will continue to see practices such as “paying money for one’s life” finding their way into the death penalty reform process, albeit under the auspices of building a harmonious society. However, one of the problems of relying on such political missions is that they are inherently unstable. “Harmonious society” rhetoric, for instance, was reconfigured after 2007 to incorporate a hardline approach to “stability maintenance” which enabled a number of members of the judicial élite to ride a wave of penal populism in arguing for the continued use of the death penalty. In response to the national debate surrounding the controversial Li Changkui case in Yunnan mentioned above, and in 2011 at the height of the obsession with maintaining stability, the Henan Higher Court President stated publicly:

. . . where nothing but the execution of the offender will assuage the masses’ anger, courts must hand down a sentence of immediate execution . . . When deciding death penalty cases, lower courts must take community attitudes and public opinion into full consideration.<sup>50</sup>

In this context, it is not surprising that death penalty scholars from both sides of the compensation debate agree that the demise of the death penalty in China must ultimately rely on amendments to the law, and not on the vicissitudes of political policy.

## CONCLUSION

The 2006 legal amendment to the Organic Law of the People’s Court which returned exclusive review and approval authority to the SPC changed the landscape of death penalty decision-making in China dramatically. It did more than any other reform to pave the way for a change in the ethos of judges, often described as a culture of “heavy-penaltyism”. Post-2007, however, the continuing decline in the number of executions was not primarily the result of further legislative change. It was strategically encouraged by the SPC through their judicial guidance mechanisms issued to courts. The SPC, now repositioned within the court

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(Research on Standards for Application of the Death Penalty) (Beijing: Zhongguo Fazhi Chubanshe, 2011), pp. 161–72.

50. “Henan gaoyuan cheng”.

system further to deepen death penalty reform, sought to influence the execution rates in lower courts by maneuvering through the minefield of politics and law. Changing China's death sentence decision-making culture since this time has entailed manipulation of policy, legal ambiguity and judicial discretion in death sentencing. The road to leniency through suspended death sentences was encouraged in the 2009 SPC dissemination of standard cases which exemplify best practice in lenient death sentencing, and the post-2007 debates on cash for clemency. The standard cases outlined in this article demonstrate the SPC's own educative role in guiding change in social attitudes towards punishment.

Yet, in relying on the discretionary space in decision-making, the SPC set the scene for an ethically and ideologically contentious sentencing process that fuses the Criminal Law's ambiguities with judicial politics and judicial activism to implement national political policy. Controversy over the practice of cash for clemency was amplified by the political requirement that judges play their part in building a harmonious society through their role as judicial activists.

The crux of the matter is revealed through the common label of "paying cash for one's life". As well as building a harmonious society, rewarding defendants found guilty of capital offenses because they compensate their victim's families financially can ignite social condemnation. Urging judges to be judicial activists who mediate personally between defendants and their victim's family to secure "killing fewer" undermines judicial authority. Critics have also railed against what they believe to result from this practice: the abandonment of fairness, judicial impartiality, criminal justice and, indeed, rule of law.

Debates within China on the practice of cash for clemency offer a platform from which we can see the use of the death penalty within the larger picture of justice reform in China, and appreciate the complex knot of issues and interests, politics and economics, ideology, morality and human emotion that legal reform entails. Reconciling "killing fewer" with a harmonious society and "stability maintenance" requires more attention to legal clarity, fairness of the judicial system, and integrity of the lawmakers. Increasingly, scholars are calling for this to be achieved through codifying the reforms into Criminal Law, rather than through influencing sentencing outcomes in such a contentious way, by the back-door method of judicial discretion and by relying on the fickle nature of political policy.