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# THE DEATH PENALTY IN CHINA TODAY

## *Kill Fewer, Kill Cautiously*

\_\_\_\_\_ Susan Trevaskes  
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### Abstract

This paper examines a recent debate at the highest level of China's politico-legal leadership on the application of the death penalty. The debate centers around the interpretation of a new criminal justice policy called "balancing leniency and severity" and around limiting the death penalty to all but the most egregious criminals.

Keywords: death penalty, China, punishment, serious crime, strike hard

The death penalty in China is a major issue in human rights, in Chinese law, and in Chinese legal discourse. This paper analyzes a recent debate on the death penalty in terms of the shifting power relationships in China today. This debate has real consequences in terms of changes to the law. Furthermore, for the first time in any discussion on the death penalty in China, the debate is being played out in the media. The Chinese approach, which I examine in this paper, is to conceive the appropriateness of applying the death penalty in terms of (relative) lenient or severe punishment. The newly revived revolutionary dictum *Shaoshu Shensha* (Kill Fewer, Kill Cautiously) occupies the leniency side of the debate, while the long-lived *Yanda* (Strike Hard) policy occupies the severe side. The Supreme People's Court's (SPC) interpretation of a newly touted policy, *Kuanyan Xiangji* (Balancing Leniency and Severity), is to err on the side of relative leniency when sentencing all but the most egregious crimes.

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On the one hand, at the height of the debate in late 2006 and early 2007, the SPC was pushing to strictly limit the death penalty to only the “most heinous” criminals. At the same time, Luo Gan, then secretary of the Communist Party of China (CPC) Central Political and Legal Affairs Committee, was, on the other hand, fighting to maintain the two-decade-old “strike hard” policy, which encourages severe punishment to be meted out to a wider range of serious criminals.

To even suggest leniency in terms of serious crime that attracts the death penalty is an important shift in Chinese law. This paper places the recent rhetoric on leniency within the long-term rhetoric of severity to demonstrate this shift. The argument is that this shift develops in four stages. The first section deals with the first stage, where the death penalty is placed within the long-standing discourse of the “strike hard” policy against serious criminal offenders. Second, the death penalty is placed within the recently espoused policy of “balancing leniency and severity” as part of the new “harmonious society” (*hexie shehui*) discourse. Third, it is situated within the internal criminal justice policy contestations about the relative efficacy of prioritizing “attacking crime” over “preventing crime.” Finally, the death penalty is placed within a contest about how to interpret what it is that constitutes “extremely serious crime” and how this interpretation informs the policy of “balancing leniency and severity” as it is applied to capital offenses.

## Background

The number of people executed in the People’s Republic of China (PRC) each year remains classified, but the figure is thought to be up to 10,000.<sup>1</sup> While the PRC death penalty debate has been an ongoing and highly contentious issue in the international human rights arena, death sentence policy and practice in China have remained relatively static since the early 1980s. A historic shift is now occurring. Events in late 2006 and early 2007 have altered the landscape of capital punishment in China. The authority to review and approve all death sentences was returned to the SPC on January 1, 2007, after more than two decades of residing in provincial courts. This means that the number of executions may decrease on a dramatic

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1. In 2004, a National People’s Congress (NPC) delegate let it slip that China executes nearly 10,000 people annually. When the report was later published in *Zhongguo Qingnianbao* (China Youth Daily), the delegate claimed that the figure was “not accurate” and his statement was later retracted. See Borge Bakken, “Moral Panics, Crime Rates, and Harsh Punishment in China,” *Australian and New Zealand Journal of Criminology* 37:4 (December 2004), p. 80. According to Bakken, a leaked CPC document reported that from 1997 to 2001, 60,000 people were executed, an average of 15,000 per year.

scale. Yet, this decision has not spelled the death knell for a leading cause of China's high death penalty rate: the "strike hard" policy. Article 48 of the Criminal Law (1997) states that the death penalty is to apply only to those found guilty of an "extremely serious crime." At issue in this debate is the concept of what constitutes extremely serious crime. The debate has been framed around interpretation of a new criminal justice policy called "balancing leniency and severity."

In late 2006, SPC Chief Justice Xiao Yang kicked off the campaign to weaken, or at least moderate, the use of Yanda, subtly employing as his Trojan horse a new policy of "balancing leniency and severity." Announcing a new role for the concept of "balance" as a way of deterring overzealous use of the death penalty, Xiao Yang instructed judges to avoid handing down death sentences with immediate execution, for all but the most heinous criminals. In the months before and after the reversion of authority to the SPC in January 2007, the debate about the future of Yanda and the application of the death penalty was played out as a political chess game, to borrow a metaphor from Chinese commentators. Its multiple players included Xiao Yang, Luo Gan (the Politburo's chief law-and-order policy maker), and to a lesser extent, senior bureaucrats from the Ministry of Public Security (MPS). A central issue for all players was how criminal justice authorities interpret the application of the policy of "balancing leniency and severity" in order to develop a harmonious society. The stage has been set for a continuing battle about the best way to promote a more harmonious society in China, the majority of whose citizens are reportedly reluctant, so far, to give up the "eye for an eye" death penalty logic.

There is a history to this debate on the death penalty. The October 31, 2006, NPC amendment of Article 13 of the Organic Law of the People's Court reversed an NPC decision of September 2, 1983. That decision had delegated the power to review and approve death sentence decisions to provincial courts, for cases of homicide, rape, robbery, bombing, and other crimes that seriously endanger public security and damage social order.<sup>2</sup> The 1983 decision was originally taken in order to accommodate the policy of "severe and swift punishment" against serious criminal offenders who were targeted during China's first Yanda campaign.

In the intervening years, the main issue regarding application of the death penalty was the law's uncertainty. Uncertainty took two forms: first, inconsistency in imposition during anti-crime campaign and non-campaign periods, and second, geographical differences across jurisdictions. This inconsistency, together with the increasing number of miscarriages of justice exposed in the media, triggered escalating calls in the 1990s to rein in the

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2. The provincial courts were temporarily delegated this power in 1980 and again in 1981.

authority of provincial courts as the final decision makers in death penalty cases. In 2002, the level of authority to approve death penalties was formally raised as an issue at the 16th National Congress of the CPC; by October 2005, the SPC had explicitly signaled, in the Second Five-Year Program for the Reform of the People's Court, that it was taking over this power. As the Xinhua News Agency enthusiastically wrote, "[T]hat news sufficed to inspire all those who were interested in this reform. From 'talking the talk' to 'walking the walk,' the relevant departments embarked on intense and orderly work regarding the reversion of the death sentence approval power to the SPC."<sup>3</sup>

Up until that time, provincial judges had exercised overlapping decision making on two levels, both reviewing appeals cases on condemned criminals as well as ratifying their own appeals decisions. By amending the law to return authority to ratify death sentences to the SPC as of January 1, 2007, the October 2006 NPC amendment opened a judicial Pandora's box. The SPC intends that this reversion of authority will have a domino effect on further judicial reforms in China. The return is expected to act as a catalyst in the transformation of criminal justice in China, in the view of some observers, "in the same way as 'one correct move on the chessboard saves the whole game'."<sup>4</sup> Chen Weidong, a legal academic, refers to this change as a "clever move on the chessboard": it will "trigger a string of changes to the criminal procedures of first instance [i.e., intermediate courts] and second instance [provincial appellate courts] and even the procedure of investigation. The procedure of criminal justice in China as a whole will also change accordingly."<sup>5</sup>

One aspect of this domino effect is the intention of the SPC to force intermediate and provincial courts to improve the quality of their decision making. As part of the preparation for the SPC takeover of approvals, the SPC ordered that from July 2006, all appellate cases involving the death penalty would have a full hearing in provincial courts, not simply a review of case file paperwork, the usual practice up until that time.

### Yanda Policy and Death Penalty Practice

The return of the authority to the SPC has coincided with increasingly vocal dissent within the upper ranks of the police and judiciary about the use of Yanda policy against specified categories of serious crime. As noted above, in 1983, at the start of the nation's first and bloodiest Yanda campaign

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3. Tian Yu, Zou Shengwen, and Zhang Zongtang, "Focusing on Change to the Power to Approve Death Sentences," Xinhua Domestic Service, February 15, 2007.

4. Ibid.

5. Ibid.

against serious criminal offenders, provincial courts were delegated the responsibility for reviewing and approving death sentences handed down by inferior courts. This decision, coupled with the overzealous use of the policy of “strike hard” is a leading reason for the continually high number of executions in China.

*Yan* in Yanda means “harsh or severe” and *da* is “to strike”—in this context, through the law. “Yanda” is shorthand for *yanli daji yanzhong xingshi fanzui* (strike hard at serious crime). It refers first to a type of anti-crime campaign and second to an ongoing criminal justice policy that is used both within, and independent of, large-scale Yanda campaigns. Yanda, as an ongoing policy, is a mechanism for dealing with targeted serious criminals “severely and swiftly.” Yanda, as an anti-crime campaign, comes in two forms. The first is the large-scale Yanda campaign, which runs for up to three years at a time, focusing on a variety of crime targets. The second is the *zhuanxiang douzheng* (specialized struggle), which is a smaller scale campaign that targets only one category of crime. Thousands of criminals continue to be executed as part of the application of Yanda policy during these drives, especially “specialized drives.”

Anti-crime drives have emerged as a dominant response to serious crime in China since the start of the reform era. Every year since 1980, there has occurred at least one national anti-crime drive in one form or another, employing the Yanda approach. This roller coaster ride of campaign after relentless campaign has produced a culture of campaign-style justice in China. But this serial approach itself has helped bring about a dramatic upsurge in violent crime. The brutalization of crime is reflected in the dramatic rise in the number of serious crimes in China. According to one Party politico-legal insider, in 1982 there were 64,000 recorded cases of serious crime including homicide, robbery, bombing, arson, rape, kidnapping, major theft, and serious assault. By 1999, the figure had climbed to over one million.<sup>6</sup> Brutalization is also reflected in the fact that criminals committing property offenses during campaigns are much more likely to use violence and, in many cases, to murder their victims to avoid the anticipated “severe and swift punishment” that they would receive, were they to leave witnesses.<sup>7</sup> This brutalization is met with a brutal response from the state; executions increase exponentially not just during large-scale Yanda

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6. Lin Zhongliang, *Geji Danwei Zhengfa Wei de Zhineng ji Hongguan Zhengfa Gongzuo* [The functions and macroscopic tasks of the politico-legal affairs work of politico-legal affairs committees at all levels of government] (Beijing: Changan chubanshe, 2004), p. 337.

7. Scholars such as Borge Bakken have long argued that this culture of campaign-style justice has produced a brutalizing effect on society. See Borge Bakken, *The Exemplary Society: Human Improvement, Social Control, and the Dangers of Modernity in China* (New York: Oxford University Press, 2000), p. 394.

campaigns but also during specialized drives and small-scale Yanda-like “attacks” on specified targets.

There are 68 offenses for which the death penalty can be applied. The majority of criminals who are executed have committed crimes such as murder, manslaughter, robbery, rape, drug trafficking, or serious assault. Chen Guangzhong, a professor at the University of Politics and Law, argues that it is not simply the large number of offenses in the PRC Criminal Law that has made the death sentence so widespread in China over the past 25 years but rather the prolific use of “severe and swift punishment,” the leitmotif of Yanda.<sup>8</sup> Criticism about Yanda from internal judicial and police circles is located within the broader death penalty debate and concerns that criminals require “swift and severe punishment.” In the context of the current death penalty debate, Yanda essentially refers to the ongoing policy of selecting targets and applying “severe and swift punishment” to them, which can occur both within and outside nationwide campaigns. That is to say, Yanda policy has become a workaday part of the fight against serious crime, and it is this ongoing and consistent application of the harshest punishment against targeted categories of crime that is the main cause for concern.

Since late 2006, this contestation about the future of Yanda and the application of the death penalty has dovetailed into a debate about what kind of serious offenses deserve Yanda treatment. In other words, it has become a matter of defining what constitutes “extremely serious” crime. The debate is in essence a question of *who* to “Yanda,” that is, whether or not to strictly limit “severe and swift punishment” to all but the most heinous criminals.

### Balancing Leniency and Severity

The recent death penalty debate is manifest in a series of conflicting policy statements issued by Xiao Yang, Luo Gan, and, to a lesser degree, bureaucrats from the MPS, each presenting different ideas about how to interpret the CPC’s new national policy direction of “building a socialist harmonious society” in relation to the key task of fighting crime and punishing criminals. Contestation about “leniency” and “severity” surfaced almost immediately after the 16th Party Congress’s *Resolution* in October 2006 to promote Shehui Zhuyi Hexie Shehui (Socialist Harmonious Society) as a top priority for China.<sup>9</sup> “Harmonious society” is in essence a blanket catchphrase

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8. Zhao Lei, “Zhongguo Sifa Kaiqi Shaosha Shidai: Congzhong Congkuai Chengwei Lishi Henji” [Chinese justice enters a new era of fewer executions: Severe and swift punishment becomes a vestige of history], in *Nanfang Ribao* (Southern China Daily), January 4, 2007.

9. The *Resolution of the CPC Central Committee on Major Issues Concerning the Building of a Socialist Harmonious Society* was adopted at the Sixth Plenum of the 16th Party Congress, October 11, 2006. See Xinhua News Agency, October 25, 2006, OSC Translated Text, Doc. No. 200610251477.1\_bef29e81da82353c, accessed March 28, 2007.

that purports to deal with the rapid and dramatic rise in “social contradictions” in China triggered by unprecedented economic growth and social transformation over the past decade, especially the past five years.

Social harmony can be achieved, the *Resolution* says, through strengthening social management strategies and institutions, by solving problems such as mass riots and demonstrations before they escalate to crisis stage, by improving means of narrowing the gap between rich and poor, and by developing a system of social security and medical benefits. Buried at the end of the *Resolution* in an inconspicuous corner of the document was a phrase “balancing leniency and severity,” which referred in passing only to the handling of juvenile crimes. It is doubtful that the writers of the Party document ever intended the policy of “balancing leniency and severity” to become a major national criminal justice policy aimed at limiting the death penalty. This goes part way to understanding why it was that this phrase set sparks flying in the debate on the death penalty and the continuation of Yanda policy. In short, the SPC argued that harmonious society can be achieved by using severe punishment only against a small minority of society’s most heinous criminals and not against all serious criminals. However, Luo Gan, the party’s chief law and order politician, refused to accept this viewpoint. He believed that only severely punishing serious criminals—not limiting “serious” only to the most heinous criminals—could bring about social stability, and only social stability can bring about a harmonious society.

“Balancing leniency and severity” is a recent derivative of a long-standing criminal justice policy called Chengban Yu Kuanda Xiangjiehe (Combining Punishment with Leniency). As Du and Zhang explain, “[C]ombining punishment with leniency,” enshrined in Article 1 of the 1979 Criminal Law, is a policy of trying to “win over and reform the great majority of criminals while isolating and punishing the minority” through a variety of means. These include punishing principal offenders severely and accessories lightly, punishing recidivists harshly and first time offenders lightly, and imposing harsh punishment on those who fail to confess to their crimes, while treating leniently those who surrender themselves to police or perform meritorious service.<sup>10</sup>

On the minor-crime end of the leniency and severity spectrum, the policy of “balancing leniency and severity” advocates the further decriminalization of minor offenses and infringements, and encourages non-custodial sentences for minor crimes. The policy can be implemented in practice by encouraging recognition of an offense as a misdemeanor, not a crime (where

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10. Du Xichuan and Zhang Lingyuan, *Chinese Legal System: A General Survey* (Beijing: New World Press, 1990), p. 104.

appropriate), by promoting the use of non-custodial sentencing, and by handing down light sentences. In the past, heavier sentences would have been encouraged, especially for crimes targeted during Yanda drives, regardless of the severity of the crime. As Huang Jingping explains: “In the past, courts would more than likely encourage the prosecution of a minor offense but nowadays they encourage its disposition through the system of administrative punishment.”<sup>11</sup>

As for the serious crime end of the spectrum, “leniency and severity” go hand in glove with the recently revived revolutionary dictum “kill fewer, kill cautiously.” Liu Ri, vice president at Hebei Administration College and former execution-scene supervisor in Hebei Province, argues that the dictum’s most important aspect is that it can be the catalyst for turning around the criminal justice system’s reliance on harsh punishment. The actual number of executions, Liu believes, can be severely restricted. In 2004, he reports, 3,400 executions were recorded in various Chinese newspapers; there were 3,797 executions in the entire world that year. That is to say, nine out of 10 executions in the world occurred in China. Crucially, Liu adds, “[W]e all know that this recorded number is much lower than the real figure. From the statistics I have compiled, I estimate that there are close to 10,000 executions [in China] per year.”<sup>12</sup>

### Negotiating the “Attack” and “Prevent” Balance of Crime Control

Just as there has been a shift from *yan* (severe) to a balancing of leniency and severity in the SPC rhetoric, there has also been a shift from “attacking crime” to “preventing crime” in MPS pronouncements. SPC Chief Justice Xiao Yang commandeered “balancing leniency and severity” in the battle to reduce death sentences as early as mid-October 2006, immediately after promulgation of *The Resolution of the CPC Central Committee on Major Issues Concerning the Building of a Socialist Harmonious Society* and the NPC’s official amendment of the Organic Law of the People’s Courts. Discussions about harmonious society and severe punishment, however, did not gain momentum until November when Deputy Minister of Public

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11. Huang Jingping, “Kuanyan Xiangji Xingshi Zhengce de Shidaihanyi ji Shixian Fangshi” [The significance of the policy of balancing leniency and severity to our times and the method of its implementation], *Zhongguo Faluwang* (China Law Net), at <<http://www.criminallaw.com.cn/article4.default.asp?id=289>>, accessed February 3, 2007.

12. Liu Ri, “Yi Shaosha Shensha Wei Tupu Kou, Jiejue Sixing Hezhunquan Huishou-zhong De Wenti” [Using the policy of kill fewer, kill cautiously as the breakthrough point to solving issues related to the return of the authority of the review of death penalty decisions to the SPC], in *Tansuo yu Zhengming* (Explorations and Contentions) 7 (2006), p. 34.

Security Liu Jingguo came out with a series of statements subtly undermining the Politburo's stance on Yanda policy.

Since the turn of the new century, Yanda policy has become an increasingly contentious issue within criminal justice circles, in particular, in the MPS and the public security bureaus under it at provincial, city, and county levels. From the start of China's reform period in the early 1980s, public security work has employed a two-pronged approach to crime control, one focusing on prevention through the policy of *shehui zhi'an zonghe zhili* (comprehensive management of public order) and the other on "severely punishing serious crime," otherwise known as the Yanda approach. What has emerged over the past seven years or more is an increasing tension between the Party's call to "Yanda" serious crime and the police's Yanda alternative to control crime through grassroots prevention strategies. While campaigns are popular among a minority of senior public security officials, the majority argue that basic preventative policing is the only really effective way to control serious crime.

At the 2006 Second National Conference on Comprehensive Management of Public Order in Beijing on November 6, Deputy Public Security Minister Liu announced that the public order situation across the country had "stabilized" in 2006, adding that this was now becoming a clear "trend" in China.<sup>13</sup> While the deputy minister pointed out that there had been a national specialized drive against Mafia-style organized crime that year, he credited this stability not to Yanda policy but to crime prevention tactics. The police, he said, had strengthened their force of attack using specialized crime prevention operations to maintain control over the possession and sale of illegal explosives, firearms, and knives. As a result, bombings and crimes involving firearms had dropped. These positive results, Liu asserted, were a direct outcome of the implementation and promotion of comprehensive management of public order, that is, crime prevention strategies.<sup>14</sup>

On the same day, Luo Gan, the Party's chief Yanda architect, gave a speech at the Fifth National Conference on Trial Work, asserting that "we must maintain Yanda policy and we must resolutely 'strike hard' at criminals." He called for a policy of containment to keep a lid on what he considered to be a "high rate" of violent crime, arguing that this was a significant trend in China. Although he did mention the policy of comprehensive

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13. "Wo Guo Shehui Zhi'an Chixu Wending, Fanzui Anjian You Xiajiang Qushi" [The public order situation in China continues to stabilize, reflected in the trend of a continued decline in the number of criminal cases], Xinhua News Release, November 6, 2006, <[http://news.xinhuanet.com/legal/2006-11/06/content\\_5297553.htm](http://news.xinhuanet.com/legal/2006-11/06/content_5297553.htm)>, accessed November 16, 2006.

14. Ibid.

management of public order, crime prevention clearly took second place to Yanda's "attack" mode of crime control. It was not enough that Luo Gan stressed the continued necessity for Yanda policy. He added a further political message that in conducting criminal trials, judges should continue to be loyal to the Communist Party, the motherland, the people, and (lastly) the law.<sup>15</sup>

The essence of Luo Gan's speech was first, that social stability was a precondition to a harmonious society, and second, that the current trend in China was toward "a high incidence of crime," not a stabilized crime rate, as the MPS had suggested. Third, Luo said the new policy of "balancing leniency and severity" was an expression of the *basic* principle of combining punishment with leniency, thus relegating the new policy to a relatively lower level of importance. Fourth, the key to the new policy was in its "correct implementation."<sup>16</sup>

The following day, SPC Chief Justice Xiao Yang gave a speech at the trial work conference, using the occasion to make an important rhetorical break from past pronouncements about the courts' role in anti-crime activities. For decades, the SPC, along with the MPS and the Supreme People's Procuratorate, had referred to their task as "striking hard at serious crime according to the law" (*yifa yanli daji yanzhong xingshi fazui*). Xiao Yang subtly replaced the term "striking hard" with *punishing* "serious crime according to the law" (*yifa yancheng yanzhong xingshi fazui*). He was making a distinction here between the political task bestowed upon courts to "strike hard" and the legal requirement of courts, not to "strike" at crime but rather to "punish" it. In doing so, he was not openly contesting the continuation of Yanda in general but rather, tacitly downplaying the court's role in striking hard at crime.

Xiao Yang's next statement openly challenged Luo Gan's interpretation of the policy of "balancing leniency and severity" and Yanda, given the day before. Xiao Yang asserted that what needed "correct implementation" was the policy of Yanda, not the policy of balancing leniency and severity, as Luo Gan had suggested. As Xiao Yang explained, "Only when we correctly understand and correctly implement Yanda policy and correctly understand the relationship between attacking crime and preventing crime, can we hope to effectively keep the lid on increases in crime." Again, in

15. "Luo Gan Zai Quanguo Dewuci Xingshi Shenpan Gongzuo Huiyishang Qianghua" [Luo Gan's speech at the fifth national conference on trial work], *ibid.*, November 7, 2006, <[http://www.xinhuanet.com/politics/bd\\_szpd.htm](http://www.xinhuanet.com/politics/bd_szpd.htm)>, accessed November 10, 2006.

16. "Xiao Yang: Changqi Jianchi Yanda, Zhengque Guanche Kuanyan Xiangji Xingshi Zhengce" [Xiao Yang says to continue to maintain Yanda policy, correctly implement the criminal justice policy of balancing leniency and severity], November 8, 2006, <[http://news.xinhuanet.com/legal/2006-11/08/content\\_5306478.htm](http://news.xinhuanet.com/legal/2006-11/08/content_5306478.htm)>, accessed November 10, 2006.

open challenge to Luo Gan's insistence on maintaining Yanda policy, Xiao Yang stated, "I will remind all courts that they must continue to adhere to the policy of 'both attacking and preventing crime, with crime prevention as the main focus.' 'Attacking and preventing crime' are the main links in the comprehensive management of the public order chain. However, 'attack' is not the basic policy of the comprehensive management of public order."<sup>17</sup>

Clearly, Luo Gan needed to act fast to put forward his interpretation of "harmonious society" in general and in particular to appropriate "balancing leniency and severity," which, by that stage, was beginning to appear in more and more media statements and news reports. An explanation of the application of "balancing leniency and severity" was given at a national conference on politico-legal work held on November 27 and 28, organized under the auspices of Luo Gan's national Political and Legal Affairs Committee (Zhengfa Weiyuanhui). A statement announced that "severity" referred to a method "whereby criminal justice organs combine forces to strike hard at crime." For four main categories—crimes endangering national security, mafia-style syndicate crime, serious violent crime, and frequently occurring crimes that impact on the public's sense of security—authorities were urged to "strike hard and not be irresolute when firmness is needed."<sup>18</sup>

### Battling for the Ownership of "Severity and Leniency"

Chief Justice Xiao Yang's motive in putting all his weight behind the policy of "balancing leniency and severity" was aimed first of all at reducing the overall number of death sentences handed down by courts in the provinces. Second, his goal was to convince a skeptical public of the benefits of reducing death sentences while introducing the idea of longer custodial sentences as an alternative. Third, as mentioned above, Xiao Yang was attempting to reduce the criminal justice system's reliance on Yanda policy as the key crime control strategy in dealing with serious crime. Finally, the chief justice aimed to diminish the scope of Yanda's influence over the harsh punishment of non-violent crimes such as theft. His tactic, as we

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17. Ibid.

18. "Zhengfa Gongzuo Huiyi: Kuanyan Xiangji Xingshi Zhengce Goujie Hexie" (Conference on politico-legal work: Balancing leniency and severity policy is compatible with developing harmony), <[http://news.xinhuanet.com/legal/2006-11/28/content\\_5403391.htm](http://news.xinhuanet.com/legal/2006-11/28/content_5403391.htm)>, accessed December 1, 2006. To moderate the balance, it was announced that all those crimes that fit into the category appropriate for "lenient treatment" in which the crime is minor or where there are extenuating circumstances involved, clemency should be invoked, and the offender must be treated leniently through punishment choices ranging from lenient treatment (*congqing*) to reduced punishment (*jianxing*) or exemption from punishment (*mianyu*).

find below, was not to deal with Yanda head on but to subtly maneuver the debate to focus on the issue of “balance.” To do this, he needed a Trojan horse of a policy.

Although Xiao Yang initiated meetings with law academics to discuss the “severity and leniency” balance as early as mid-2006<sup>19</sup> and issued a number of media statements in November, his big move came on December 28 with two major media statements on the eve of the SPC takeover of the approval system for death sentences. In the first statement, “balancing leniency and severity” was wheeled out as the SPC’s Trojan horse in the death penalty debate, being announced as a new key foundational criminal justice policy in China. The Criminal Law (1997) allowed for a wide range of discretionary sentences that can be reduced for a number of mitigating circumstances. In this context, Xiao Yang announced that criminals in capital cases who surrendered to authorities, as well as criminals who provided important evidence in a criminal case, along with non-principal offenders, would escape immediate execution. For these convicted criminals, a two-year suspended death sentence should be handed down as an alternative punishment, one that would automatically revert to a life sentence after that time. For homicides that escalated from domestic or civil disputes, or in cases in which the perpetrator immediately confessed and was financially able to offer compensation to the victim’s family, the lower courts were told not to consider the death sentence with immediate execution as the first and only alternative.

Despite acknowledging the pervasive culture of harsh punishment, Xiao Yang insisted that the SPC would allow for the application of the death penalty only within the strict boundaries of existing laws. This SPC tactic was aimed at reducing Yanda’s influence over non-violent crimes. Although Xiao Yang was adamant that the policy of “swiftness and severity” would be maintained, he crucially added that it would be reserved only for the *most* heinous criminals. Stating that the SPC would continue to apply the death penalty to the small minority of criminals who require the most severe punishment, he said that “in cases where the evidence is clear and where the death penalty is applicable, we will continue to apply the death penalty and we will not be ‘limp wristed’ about it.”<sup>20</sup>

Xiao Yang’s Trojan horse approach did not end there. A second speech delivered on the same day clarified just how limited lower courts would be,

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19. See Zhao Lei, “Zhongguo Sifa Kaiqi Shaosha Shidai.”

20. “Zhongguo Jiangzai Xiaoyou Falu Kuangjianei Yanghe Kongzhi Sixing” [China is putting in place strict legal controls on the application of the death penalty], Xinhua News Release, December 28, 2006, <[http://news.xinhuanet.com.legal/2006-12/28/content\\_5542754.htm](http://news.xinhuanet.com.legal/2006-12/28/content_5542754.htm)>, accessed December 29, 2006.

after January 1, 2007, in their use of the death sentence. The chief justice announced that in the near future, the SPC would draw up unified national standards for evidence applied to capital cases. These standards would stipulate that to apply the death sentence to a case, “all the facts must be clear [*shishi qingchu*] and the evidence abundant [*zhengju chongfen*].”<sup>21</sup> In applying these two principles, Xiao Yang said courts would be returning to the “original” intent and stipulations in the Criminal Procedure Law. In fact, he was nullifying the use of a Yanda policy called the “two basics” (*liang ge jiben*) in capital cases. The two basics are part of the repertoire of Yanda’s “severity and swiftness” practice. The policy asserts that during crackdowns on targeted crimes, judges need only be satisfied that the basic (not all) facts are clear and that only basic or “essential” evidence needs to be conclusive.

In reviewing death penalty cases, the SPC would, where possible, hear each defendant’s defense in person. Alternatively, in some cases, the defendant would be permitted to write a response to the panel of three SPC judges reviewing the case. Further expanding on post-January 2007 SPC death penalty approval policy, Xiao Yang explained that henceforth, if the three-person panel agreed that the facts were unclear, the evidence was inconclusive, the sentence too harsh, or that there were procedural irregularities, the panel would use its authority to reject the provincial application for sentence approval. However, if there was dissent within the panel, the case would go to a specially arranged SPC judicial committee (*shenpan weiyuanhui*). In the event that the judicial committee convened to discuss a disputed case, the head of the Supreme People’s Procuratorate, or his/her deputy, would be required to attend the meeting to listen to the cases but would not be permitted to participate in discussions. This required attendance is in no small way a disincentive mechanism for prosecutors at lower levels to insist on the death penalty at intermediate-level trials for anything but the most heinous crimes, and an encouragement to lower courts to hand down custodial or suspended death sentences.<sup>22</sup>

Three weeks after Xiao Yang’s major policy speeches in late December 2006, the SPC issued an authoritative *Opinion* (Yijian) document to lower courts on January 15, 2007, further expanding on the importance of applying the policy of “balancing leniency and severity” to individual cases. The document reiterated that courts must continue to “strike hard” at serious crime; protect national security and social stability; and severely punish

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21. “Quebao Meiyiqi Sixing Anjian, Jingdeqi Lishi Jianyan” [Ensure that each and every death penalty decision can stand the test of time], *ibid.*, <[http://news.xinhuanet.com/legal/2006-12/28/content\\_5542621.htm](http://news.xinhuanet.com/legal/2006-12/28/content_5542621.htm)>, accessed December 29, 2006.

22. *Ibid.*

crimes that endanger national security, terrorist crimes, and mafia-style syndicate crimes. Courts were nevertheless urged to temper this with lenient treatment for other offenses. Courts were urged not to hand down the death sentence with immediate execution but to give a suspended sentence in capital cases that had escalated from civil and domestic disputes, cases where provocation was involved, or cases where the defendant was extremely remorseful and also provided immediate compensation to the victim's family.<sup>23</sup>

One day after the SPC *Opinion*, Politburo official Luo Gan waded back into the debate to respond to Xiao Yang's crucial December 2006 death penalty policy announcement. In essence, Luo Gan's message was that China must not give up the Yanda approach and must continue to punish serious crime severely and swiftly. Speaking at the first National Comprehensive Management of Public Order Conference for 2007, Luo Gan urged criminal justice organs to "strike hard" at three main categories of crime in 2007: Mafia-style syndicate crime, violent crime, and frequently occurring serious crime. In addition, agencies across China would continue with the "People's War on Drugs," a national specialized drive that began in mid-2005. Luo Gan concluded his speech by saying that with the Spring Festival on the horizon, Party committees and government offices around the nation would need to pay close attention to public order problems in their areas, and must strike hard at crime.<sup>24</sup>

### Shrinking the Parameters of "Most-Serious Crime"

The SPC's efforts to limit the use of the death penalty necessarily involved diminishing the potency of Yanda. Diminishing this potency required a subtle but concerted attempt to redefine the meaning of Yanda for three aspects: targets, serious crime, and local court discretion, which leads to inconsistency. This involved clarifying the legal definition of serious crime that attracts the death penalty. The issue of who to Yanda, in other words, what categories of crime continue to deserve "swift and severe punishment," boils down to a more specific but fundamental question of what constitutes "serious crime." To be more precise, it relates to the question

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23. "Zuigao Renmin Fayuan Guanyu Goujian Shehuizhuyi Hexie Shehui Tigong Sifa Baozheng de Ruogan Yijian" [SPC opinions concerning the provision of legal guarantees for the building of socialism and a harmonious society], January 15, 2007, Document No. 2, 2007. See the SPC's official website at <<http://chinacourt.org>>, accessed January 30, 2007.

24. "Luo Gan Zai Zhongyang Zongzhiwei huishang Qiangdiao Zhashi Tuijin Pingan Jianshe" [Luo Gan stresses the importance of solidly carrying forward peaceful construction], Xinhua News Release, January 16, 2007, <[http://news.xinhuanet.com/politics/2007-01/16/content\\_5613427.htm](http://news.xinhuanet.com/politics/2007-01/16/content_5613427.htm)>, accessed January 17, 2007.

of what constitutes the *most* serious crime. The Criminal Law (Article 48) states that the death penalty applies only to those criminals who commit crimes in which the circumstances are exceptionally serious, but it does not spell out exactly what circumstances can be classified as either serious or exceptionally serious. Unclear legal definitions are often addressed via the practice of issuing SPC judicial interpretations. Defining specifically what is meant by “extremely serious crime” is not a one-step process. Rather, it requires refining the practice of trying capital cases through a series of judicial interpretations and authoritative opinions. In short, it is a matter of refining judicial discretion.

A much anticipated SPC judicial decision passed by the Court’s judicial committee on January 22, 2007, and promulgated on February 27 set out 13 articles on the specific kinds of death penalty applications that would or would not be accepted for approval by the SPC. Cases in which the facts were not clear and the evidence was not abundant would not be accepted and would be returned to the lower courts for retrial or resentencing. Cases with clear facts and sufficient evidence, but where the defendant had been sentenced too harshly, would also be rejected and sent back. Cases that were rejected because of unclear facts or insufficient evidence would need to be retried at the Intermediate Court. The decision explained that if the SPC review panel determines that the case must be sent back to the court of first instance (the Intermediate Court) for retrial, the case would have to be tried at a new court session. A new trial with a new panel of judges would need to be formed for death penalty applications rejected by the SPC for capital cases that fit one of the following categories: (1) cases in which the facts were deemed unclear, or (2) cases in which judicial procedure was incorrect, or (3) cases in which illegal procedure was discovered, or (4) cases in which the evidence was insufficient. Again, this is a substantial incentive for provincial courts to try to avoid having cases sent to the SPC in the first place. The SPC interpretation also noted that a report of each application, whether ratified or rejected, would be sent to the provincial court with justification of the decision and explanation of the relevant laws applied.<sup>25</sup>

Next in the process of refining the definition of “serious crime” and tightening the noose around Yanda policy was a joint SPC, Supreme People’s Procuratorate (SPP), MPS, and Ministry of Justice *Opinion* promulgated

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25. “Zuigao Renmin Fayuan Guanyu Fuhe Sixing Anjian Ruogan Wenti de Guiding” [Decision of the SPC on issues relating to approval of death sentences], Document 2007-4, <[http://www.chinacourt.org/flwk/show.php?file\\_id=116488](http://www.chinacourt.org/flwk/show.php?file_id=116488)>, accessed February 28, 2007. Note that although it was first promulgated as a “decision” (*juding*), it was confirmed later as a judicial interpretation (*sifa jieshi*), which is more authoritative than a decision.

on March 9. Containing 52 articles, the document outlines the specific procedures for each of the four institutions in the SPC death sentence approval process. One of the most clever and interesting aspects of the document was the lip service paid to Yanda, which was quickly followed by a string of measures to thwart many of the traditional Yanda strategies. Although Article 3 announced that the four organs would need to “continue to maintain Yanda policy as a method of punishment” and would continue to “struggle against” (*douzheng*) serious criminal offenders, the rhetoric carried much less teeth than previous Yanda exhortations.<sup>26</sup> Judicial organs were urged to implement Yanda policy “correctly, fully and precisely” but crucially, only toward an *extremely* small minority (*ji shao*) of offenders whose crimes were extremely serious (*ji yanzhong*). They were to sentence these criminals to death in accordance with the policies of harmonious society and “killing fewer, killing cautiously.” Many of the strict procedural regulations outlined in the *Opinion* either neutralized or frustrated the use of traditional Yanda tactics such as “severe and swift justice” and the “two basics.” Judicial organs were told not to overlook procedural justice in favor of substantive justice; they were not to rely on “attacking crime” at the expense of guaranteeing a defendant’s rights. Article 7 further undermined Yanda tactics, declaring that the policy of balancing severity and leniency would need to be applied to all cases in which there were mitigating circumstances such as a defendant’s confession.

A number of points toward the end of the document were aimed, at least in part, at limiting speedy executions. Article 45 introduced, for the first time in the PRC, the requirement for courts to contact and to arrange visitation by relatives of a soon-to-be-executed criminal. Article 46 stipulated that the Procuratorate would need to be notified of an execution at least three days before the set date. Executions would need to be publicly announced. The practice of exhibiting criminals (*shizhong*) or parading them publicly atop trucks (*youjie*), which interfered with human dignity, would be strictly forbidden. The document also ordered authorities to ensure that members of the public who visited the execution site out of morbid curiosity would be forbidden from the practice of stoning or throwing objects at the bodies of executed criminals awaiting transportation to the crematorium.<sup>27</sup>

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26. “Zuigao Renmin Fayuan Zuigao Renmin Jianchayuan Gonganbu Sifabu Guanyu Jinyibu Yanghe Yifa Ban’an, Quebao Sixing Anjian Zhiliang de Yijian” [Joint opinion from the Supreme People’s Court, the Supreme People’s Procuratorate, the Ministry of Public Security, and the Ministry of Justice on further measures to strictly apply the law in case work and to ensure the quality of decision making in capital cases] (hereafter referred to as the “Joint Opinion”), March 9, 2007, <[http://www.chinacourt.org/flwk/show1.php?file\\_id=116768](http://www.chinacourt.org/flwk/show1.php?file_id=116768)>, accessed March 14, 2007.

27. *Ibid.*, n.p.

It was now time for Xiao Yang's lieutenants to appear. Liu Jiachen, SPC deputy president, accepted an interview with Xinhua News on March 9. Liu is currently in charge of criminal tribunal affairs in the SPC and is therefore responsible for overseeing the entire death penalty review process. Liu spoke candidly on a number of issues. He shed more light on the imminent standardization of rules for which the death penalty could be applied. The standards for deciding on death penalty cases had now been written up, he explained, but were not yet published. These standards, written in consultation with a variety of judicial authorities and other experts, would provide uniform measures for judging capital cases. The standards applied particularly to the four most prominent types of capital cases: murder, armed robbery, drug trafficking, and assault resulting in death. The decision, Liu explained, would standardize interpretation of specifically which criminal circumstances warranted the application of the death penalty.<sup>28</sup> He then gave some indication as to the overall effect of the changes on the criminal justice system in general:

I believe that the return of authority is a tremendous symbol. It is not just about improving the quality of judicial decision-making. It is a landmark in the judicial history of our country. . . . The SPC has grabbed the social institution of punishment by the hairs of its head so the rest of the body of punishment has no alternative but to be dragged along."<sup>29</sup>

Liu talked about the abolition debate, following this with a brief comment on the idea of increasing the number of years of imprisonment for life sentences. In judicial circles, he explained, there was basic agreement that the time to abolish the death penalty is not now. The SPC, he stressed, did not carry out this recent development as a way of abolishing the death penalty. However, the return of the death sentence ratification process to the SPC would automatically bring about a situation whereby courts are "killing fewer, killing cautiously," and Liu believed this trend would continue. As for the idea of reducing the number of capital offenses in the 1997 Criminal Law, he had this to say:

There are those who say that only a few [offenses] should remain and the rest should be abolished. I do not agree. That is not our intention in the SPC at present. . . . If we were to reduce capital offenses to a few, people might then be tempted to commit crimes if the death penalty was taken off the table. . . . This

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28. "Sixing Hezhun Bukaiting, Shi Chu You Yin" [Ratification procedures of death sentences are not heard in open court for good reason], Xinhua News Release, March 10, 2007, <[http://news.xinhuanet.com/legal/2007-03/10/content\\_5825329.htm](http://news.xinhuanet.com/legal/2007-03/10/content_5825329.htm)>, accessed March 10, 2007.

29. *Ibid.*

could result in a huge tidal wave of crime, which would bring to an end any further judicial developments.<sup>30</sup>

Following Liu's press conference, another SPC judge, Fu Xiangjun, posted a paper on the SPC's official website interpreting in unambiguous language the implication of the joint circular issued on March 9. Section 48 of the Circular outlines the prohibition of any criminal justice activities that involve parading criminals. This is an example of the modernization of human rights, Fu explained. "Public arrest rallies," "public parading of criminals," and other so-called law enforcement activities had been popular in past decades despite the fact that authorities organizing these events were frequently castigated for doing so. In 1988, the SPC, SPP, and MPS issued a joint notice forbidding public parading and humiliation of criminals and suspects. Despite this, a minority of individuals and criminal justice organs remained enthusiastic about using these methods to create a "shock and awe" deterrence effect. This recent circular, Fu stressed, clearly stipulates that these activities are prohibited. "The circular expresses the importance of protecting human rights and the application of humanitarianism. The new page we have turned has significance for the development of the legal system as a whole."<sup>31</sup>

As for the new provision that criminals may see their family before execution, Fu also declared this new stipulation an expression of humanitarianism. "This gives the criminal[s] the right to say farewell to their family and to satisfy the most basic needs of the human condition. . . . The death sentence is an activity that is carried out in the interests of society. Attending to this basic individual interest [*liyi*] of the condemned criminal does not neglect or negate the wider interests of society." He noted also that before the new decision, courts acted as they wished in this regard. "In some places, the execution took place immediately after the judgment was signed and sealed and the family was only notified after the execution took place." This new decision, Fu declared, is a "tremendous advance."<sup>32</sup>

The tremendous advance was further cemented in Article 46 of the March decision, which states that the Procuratorate must be notified three days before the execution, thus guaranteeing that the execution will not take place immediately after the judgment notice is signed. At the very least, there will now be a short gap between the ratification time and the

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30. Ibid.

31. "Sixing Zhixing Xin Guiding, Jiekai Renxinghua Zhifa Xin Pianzhang" [The new decision outlining enforcement of death sentence opens up a new page in the application of humanitarianism], *Renmin Faluwang* (People's Law Online), <<http://www.chinacourt.org/public/detail.php?id=238318>>, accessed March 16, 2007.

32. Ibid.

execution. Before the authority to ratify death sentences was returned to the SPC on January 1, 2007, the three procedures—judgment, ratification, and execution—all occurred in quick succession. Fu explained:

Now that the SPC's authority has been returned, ratification and execution cannot occur on the same day. . . . A number of important consequences flow from this change. The procuratorate is better able to exercise their supervisory powers over the court that is executing the criminal and the criminal is then given breathing space to provide the authorities with any significant information that might be considered meritorious service, thus allowing the condemned criminal a stay of execution.<sup>33</sup>

These new stipulations are an expression of the policy of “balancing severity and leniency” and “killing fewer, killing cautiously,” the judge declared. But more importantly, he argued, they guarantee the rights of the condemned criminal as set out in China's Constitution: “Because these rights are protected, the condemned criminal not only receives the right to bid farewell to their family, but also the right to psychologically prepare for death. This includes preparations to pass on material possessions to loved ones, the opportunity to reflect on their life, and time to reflect on their soul.”<sup>34</sup> When an SPC judge talks about *linghun* (soul) within the setting of a court system operating out of a communist political structure, one can gain a sense of the magnitude of the SPC's newfound confidence.

In mid-March, Xiao Yang accepted interviews from selected journalists to elaborate on the SPC's plans to lessen the overzealous use of the death penalty. In response to a reporter's question about the homogenizing of judicial standards for applying the death sentence, Xiao Yang stated that one of the main reasons for returning review authority to the SPC was to standardize the application of death sentences. The SPC, he noted, had recently invited the heads of all intermediate and higher courts to Beijing to participate in training sessions to unify thinking (*tongyi sixiang*) on the application of capital cases and to lay the organizational foundations for standardizing judicial practice in applying death sentences.<sup>35</sup> In a crucial move, Xiao Yang announced that the SPC had completed a draft “guidance” (*zhidao*) document on applying the death sentence to cases of homicide, robbery, drug trafficking, and assault causing death; the draft was awaiting comment from key experts and practitioners. This, he said, would further standardize judicial practice. Again, he urged courts to hand down

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33. Ibid.

34. Ibid.

35. “Xiao Yang Jiu Sixing Ershen Kaiting Deng Wenti Jieshou Jizhe Caifang” [Xiao Yang interviewed on the move to full court sessions for appellate capital cases], *Renmin Fayuanbao* (People's Court News), March 15, 2007, p. 1.

long custodial sentences instead of death sentences, using the loophole of giving “death sentences with a two-year reprieve” that is invariably downgraded after two years to life imprisonment.<sup>36</sup>

### Conclusion

The policy of “balancing severity and leniency,” coupled with the recent return of the old revolutionary dictum “kill fewer, kill cautiously,” is an important advance in the criminal justice system in China. Yanda policy has been a mainstay of criminal justice operations since the early 1980s and, as I have argued, is a leading cause of the high state-sanctioned death toll. If estimations of annual executions of 10,000 are correct, then around 250,000 criminals have been executed in China over the past 25 years.

As this article has shown, on the surface the death penalty debate has not been about whether or not to Yanda, but rather, who to Yanda and how to Yanda. The issue has come down to what constitutes “the most serious crime.” China is, of course, not the only death penalty country to play around with the wording of “most serious crime.” China signed the International Covenant on Civil and Political Rights (ICCPR) in 1998,<sup>37</sup> but the NPC has yet to ratify it. Article 6 (2) of the Covenant makes reference to restriction of the death penalty to “be imposed only for the most serious crimes.” The enigmatic definition of most-serious crimes is often brought up by countries unwilling to accept the spirit of this portion of the Covenant. In 1984, the Economic and Social Council of the U.N. promulgated “Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty.” As Roger Hood points out, Safeguard 1 specifies that the scope of the most-serious crimes “should not go beyond intentional crimes with lethal or other extremely grave consequences.” Hood recommends that Safeguard 1 be amended to include the “most-serious offenses of culpable homicide,” without death being mandatory for such crimes.<sup>38</sup>

The significance of Yanda policy in the death penalty debate needs also to be considered in relation to the ever-strengthening institutional power of the police and court systems in China. This article has demonstrated that there is indeed Party politics at work in the war against serious crime, but there is also “politicking” going on within criminal justice institutions

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36. Ibid.

37. For a detailed examination of China and the ICCPR, see Katie Lee, “China and the International Covenant on Civil and Political Rights: Prospects and Challenges,” *Chinese Journal of International Law* 6:2 (2007), pp. 445–74.

38. Roger Hood, “The Enigma of the ‘Most Serious’ Offenses,” Center for Human Rights and Global Justice, New York University School of Law, Extrajudicial Execution Series, Working Paper, no. 9 (2006), p. 4.

that manifests in the increasingly heated debate about the efficacy of using Yanda as the state's primary tool against serious crime. The political role of protecting the development and maintenance of the state is writ large in Yanda. Despite this characteristic, there is an emerging trend toward a discursive and institutional alternative to Yanda in which Chinese criminal justice agencies seek to strengthen their own institutional authority.

The developments described in this article may not see a complete end to the Yanda practice of "severe and swift punishment." After all, it is not the courts that own Yanda, but the Party. The Communist Party still leads police and courts in policy matters relating to crime control. Yanda policy, campaigns, and smaller specialized drives are initiated from the CPC's Political and Legal Affairs Committee in Beijing and run under the leadership of the Party at national, provincial, municipal, and county levels. This includes party organizations run within each and every court from basic level courts up to the SPC. The SPC cannot refuse outright to participate in Yanda drives. Moreover, this debate is not a clear-cut "two-line struggle" between criminal justice agencies and the Party. To be sure, Yanda policy remains popular in a number of high-crime provinces such as Yunnan (China's drug capital) and Guangdong (China's itinerant worker capital). Despite this, one of the most positive developments in the recent debate is the freedom that has been given to the SPC and MPS to voice (careful) dissent on Yanda policy. Yanda is being challenged, but it is too early to say the extent to which this debate will undermine Yanda operations. Much will depend on Luo Gan's successor, Zhou Yongkang, who was appointed to the Politburo at the 17th Party Congress in October 2007. Zhou is the former minister of Public Security and, unlike his predecessor, not an overly enthusiastic advocate of Yanda. In any case, any undermining of Yanda operations will not necessarily undermine the role of the CPC in formulating criminal justice policy, nor will it see an end to the use of the death penalty.

In December 2007, Xiao Yang announced to the Xinhua News Agency that for the first time in the history of the PRC, the annual number of suspended death sentences (which revert to life sentences after two years) handed down exceeded the number of death sentences with immediate execution. In the same month, an SPC deputy president announced that the number of executions in China in 2007 had decreased by a massive 33%. On March 10, 2008, Xiao Yang retired as chief justice. The same day, it was announced at the annual NPC that Xiao Yang's replacement in the SPC would be one of Luo Gan's former colleagues in the Political and Legal Affairs Committee, Wang Shengjun, who has no legal training whatsoever. These changes indicate that, at the very least, criminal law in China remains intrinsically political business.