

CHAPTER FOUR

RESTORATIVE JUSTICE OR MCJUSTICE WITH CHINESE CHARACTERISTICS?

SUSAN TREVASKES

China's latest version of socialist transformation rhetoric, "harmonious society", is an easy target for western critics, cynics and old-guard socialists alike. Harmonious society (*hexie shehui*) can in part be seen as the Hu–Wen leadership's attempt to jump on the bandwagon of neo-Confucianism that has become part of a prevailing political ideology in many societies in the East Asian region. But more specific to the political context of China, *hexie shehui* has risen to rhetorical prominence as a blanket catchphrase that purports to deal head-on with the rapid and dramatic rise in "social contradictions" (*shehui maodun*) triggered by unprecedented economic growth and social transformation over the last decade or more.

The "Resolution of the CCP Central Committee on Major Issues Concerning the Building of a Socialist Harmonious Society", adopted at the Sixth Plenum of the Sixteenth Party Congress on 11 October 2006, sets out nine goals to reach a harmonious society. These range from addressing "development gaps between urban and rural areas and between various regions" to developing a social security system; improving public services, social order, ideological and moral standards, scientific and cultural quality, and health quality; and enhancing good social ethics and harmonious human relations. The October 2006 Resolution set in motion an outpouring of catchphrases, the like of which has not been seen for a decade or more in China. In 2007, no policy announcement given any public airing was now safe from the ubiquitous adjectival modifier "harmonious": "harmonious education", "harmonious culture" and "harmonious international relations" to name a few. No sector of society, it seemed, was free from the national obligation to build harmony. Firefighters, for instance, were put on alert to promote harmonious society by improving their skills in putting out fires and gamblers were urged to

do their bit for a harmonious society by curbing their impulses.¹ Not even the CCTV's annual Chinese New Year Gala Spectacular in February 2008 was spared, as performance after performance spun more harmonious rhetoric than could be healthy for any television audience member.

But how benign, really, is the concept of harmonious society? Is it simply a lazy way of confronting, or at least acknowledging, the enormity of social discord and dislocation we find roiling in China today? Is it merely an attempt to encourage rhetoric to labour in the place of action. Or can real change evolve from a piece of propaganda even when the original intent was never that social transformation might actually occur? This essay examines how the seemingly vacuous concept of harmonious society can be turned, domino effect-like, into a catalyst for real change in social policy. I explore a move within criminal justice circles to transform the prevailing culture of "heavy-penaltyism" (*zhongxing zhuyi*) in China by using the Trojan horse of "harmonious society" and its judicial progeny, the newly espoused concept of "balancing leniency and severity" (*kuanyan xiangji*).

The focus here is on the recent decision to promote a balance between leniency and severity in prosecutorial decision-making that softens state responses to minor indictable offences. This prosecutorial effort to "balance leniency and severity" beginning mid-2007 translates first into a policy of excluding from criminal indictment a number of minor criminal offences that were once subject to prosecution in China. Second it translates into the practice of offering a perpetrator the opportunity to make amends for his or her crime by paying financial compensation to the victim in exchange for a reduced sentence (*peiyang jianxing*). One case in particular—a bicycle rider who accidentally knocked a pedestrian on the street, an incident which ended up in a minor scuffle—set media sparks flying in September 2007. This type of incident, which occurs many thousands of times a day in China, became a *cause célèbre* for legal commentators and internet bloggers alike. Some were outraged that the bicycle rider was able to buy his way out of punishment by offering the victim cash for a reduced sentence and others were outraged that he should ever have been the subject of prosecution in first place. Still others were

¹ Burke Hansen, "China to Purify Cyber Gamblers, Building Harmonious Society," http://www.theregister.co.uk/2007/02/28/onlin_gambling_china/print/html (accessed 14 March 2007).

pleased, heralding the new system of paying compensation and receiving a reduced sentence as “restorative justice” (*huifuxing sifa*).²

The concept of “restorative justice” is now at work in many criminal justice systems across the world. Despite being recognized as an effective alternative to custodial punishment, there is no universally accepted concept of what it entails precisely and often it ends up meaning “all things to all people”.³ Nevertheless, restorative justice is acknowledged broadly as an alternative to custodial punishment, aiming to make offenders aware of, and accountable for, the damage their criminal behaviour has caused, and encouraging them to take responsibility for their crimes as a way of healing not only victims but also offenders and their communities. It is thus not simply a matter of financially compensating victims, which the Chinese context outlined below suggests.

Alternatively, it could be argued that these developments in China reflect a “McDonaldization” of criminal justice as Robert Bohm explains of criminal justice in the United States. He has labelled as “McJustice” a tendency for the characteristics of assembly-line production—efficiency, calculability, predictability and control—to dominate the organizational culture of the criminal justice organs.⁴ For example, the new standards of indictment and the policy of paying compensation and receiving a reduced sentence in China encourage both uniformity and streamlining of case disposition. However, the kind of rationality we find in the McDonald’s assembly-line type production inherently nurses an irrational side or what George Ritzer calls the “irrationality of rationality”.⁵ That is to say, McDonaldized institutions produce irrationalities that ultimately undermine rationality. The final section of this essay explores both the rationality and irrationality of criminal justice efforts to reform the system of case disposition for minor crime in China.

Rational or not, judicial authorities branded the treatment given to cyclist Yang—the option to pay compensation to receive a reduced sentence—as an exemplar of the new policy of “balancing leniency and severity” in action. But in the eyes of a large section of the interested

² Wang Lin, “Kuanyan de biao zhun, ruhe zhangwo?” (How do we come to grips with the standards for leniency and severity?), *Nanfang dushibao* (*Southern Metropolitan Daily*), 16 August 2007.

³ Declan Roche, “The Evolving Definition of Restorative Justice,” *Contemporary Justice Review* 4 (2008): 344.

⁴ Robert M. Bohm, “‘Mc Justice’: On the McDonaldization of Criminal Justice,” *Justice Quarterly* 23, no. 1 (March 2006): 127.

⁵ George Ritzer, *The McDonaldization of Society* (Thousand Oaks, London, New Delhi: Pine Forge Press, 2004), 135.

public at least, the idea of a harmonious new world order sits rather uncomfortably with this move to soften state responses and simultaneously commodify criminal justice in the name of harmony. Despite public uncertainty and disagreement, the debate itself is an interesting exemplar that reflects an increasing propensity for media and internet players to participate in, if not shape, national debate around key issues to do with law and justice in China today. To this end, this essay describes and analyzes how the discourse of harmonious society plays out in one institution, the social institution of punishment, transforming politics into policy in a way that was not necessarily intended by the authors of social harmony doctrine. In so doing, this study exemplifies how the media, legal experts and the public alike can now engage in shaking, if not moving, contemporary policy making.

Harmonious Society and Balancing Leniency and Severity

While this essay concerns the realm of minor crime and lenient punishment, the story begins with serious crime and severe punishment. Until recently, China's key criminal justice policymakers, members of the Party Central Committee's Politico-legal Committee (*zhengfa weiyuanhui*), have controlled the fate of broad legal reform in both severe and minor punishment. While the Committee recently supported some reform to the death penalty, it has been apparent that over the last two decades the Communist Party had no intention of dramatically moving the regime away from one dominated by "heavy penaltyism" to one characterized by a more lenient approach. Yet in late 2006 and 2007, the stars aligned to create a narrow avenue for liberal-leaning legal reformers in the Supreme People's Court (SPC) and later the Supreme People's Procuratorate (SPP) to capitalize on the opportunity to use the optimistic jargon of "social harmony" to begin to manipulate the culture of punishment away from "heavy penaltyism" and toward a more nuanced approach.

Soon after the Harmonious Society Resolution in October 2006, the then Chief Justice of the Supreme People's Court, Xiao Yang, initiated a subtle but concerted campaign to soften China's prevailing criminal justice culture of heavy-penaltyism, in particular, in relation to the overzealous use of the death penalty. This campaign was less a direct consequence of Hu Jintao's official call to harmonize and more the seizure of an opportune moment to enhance the SPC's longstanding plan to limit the use of the death penalty. It was made possible with the return of the authority for final review and approval of all executions in China to the SPC in Beijing on 1 January 2007. At the start of China's first "Strike Hard" (*Yanda*) anti-

crime campaign in 1983, this authority had been transferred from the SPC to the provincial higher courts. Their enthusiastic approval of death sentences handed down by municipal courts, especially during subsequent Yanda drives, is widely regarded as the number one reason for the overzealous use of the death penalty over the past quarter century.⁶

The plan to return this authority to the SPC on 1 January 2007 had been in the pipeline for years. The SPC over time had increased its calls to lower courts to “kill fewer, kill cautiously” (*shaosha shensha*). However, the catalyst giving real teeth to these calls was a new policy that espoused “balancing leniency and severity”, which until then had been referred to only in passing in a handful of SPC statements. However, buried at the end of Hu Jintao’s Harmonious Society Resolution, in an inconspicuous corner of the document “balancing leniency with severity” had resurfaced, although only in passing reference to the handling of juvenile crimes. Nevertheless, it was sufficient evidence for Xiao Yang to make a direct connection between “harmonious society” and reforms the SPC was seeking to the culture of heavy-penaltyism. In a masterstroke of politicking, Xiao Yang took hold of the obscure phrase “balancing leniency and severity” and made it the leitmotif of “harmonious criminal justice”. As part of the implementation strategy of “balancing leniency and severity”, the SPC signalled on 28 December 2006, and decreed on 15 January 2007, that a wide range of capital crimes would no longer attract an immediate death sentence but a death sentence with a two-year reprieve (*sihuan*) that would inevitably be downgraded to a life sentence of 20 years.

In mid-2007, promoting the policy of balancing leniency and severity in the field of minor crime was begun by criminal justice authorities intent on correcting the severity/leniency imbalance at the other end of the continuum: minor crime. The “balance” was promoted through decriminalizing some minor offences and some other offence types, by giving non-custodial sentences in certain designated cases. This move is significant. It can potentially affect thousands of individuals in China each year who will now escape the long arm of the Criminal Law through changes in the definition of what constitutes an indictable offence. The following describes events surrounding two major moves to balance leniency and severity at the minor crime end of the spectrum, one involving the procuratorate’s move to lower the standards for indictment

⁶ For a discussion of recent changes to death penalty policy, see Susan Trevaskes, “The Death Penalty in China Today: Kill Fewer, Kill Cautiously,” *Asian Survey* 48, no. 3 (2008): 393-413. For a broader discussion of harsh punishment and Strike Hard policy, see Susan Trevaskes, *Courts and Criminal Justice in Contemporary China* (Lanham MD: Lexington Press, 2007).

and the other promoting a system of offenders paying financial compensation in exchange for a reduced sentence.

The Rocky Road to De-penalization

Traditionally Chinese socialist legal ideology has prescribed that changes in the concrete circumstances of social development be reflected in Party norms. Changes were made to law and judicial practice in response to changes in Party norms, which in turn were said to be based on the continually shifting conditions of socialist transformation. And because law was to serve the interests of socialist construction, it needed to be flexible. The legal distinction between a crime (that is, a prosecutable act) and an unlawful act (which is dealt with through a separate system of administrative punishment) has, since the early days of the PRC, been conceived in relation to the degree of social harm caused by that act.⁷

Despite the introduction in 1979 of the PRC's first Criminal Law, which aimed to provide stability and predictability in application of the law, the ethos of "flexibility" continued to guide criminal justice agencies in their investigation, prosecution and punishment of crime. Until recently, this flexibility had been employed to drive forward China's regime of "heavy-penaltyism", allowing for changes in the Criminal Law and in criminal justice policy to increase the severity of punishment given to a variety of crimes targeted during anti-crime campaigns. In 2007, however, signs of a reversal of the trend in relation to minor crime began to emerge. The story began in Zhengzhou city in July 2007. As predicted?, a flurry of media outlets decried that any softening of the punishment regime by state authorities would only encourage more criminal activity.

It is not uncommon in China to find new criminal justice policy that is formulated at the national level first trialled at the provincial or local level to "test the waters" of public opinion and take the heat off the central authorities before national policy is announced. In early July 2007, the municipal People's Procuratorate in Zhengzhou city, Henan province, issued a document outlining the trialling of new standards for criminal indictment, which in essence lowers the standards by which certain offences are now officially deemed prosecutable.

Zhengzhou's chief prosecutor, Wang Qing, rationalized the changes by noting the absence of procedures to operationalize "balancing leniency and

⁷ A detailed examination of administrative punishment regime is given in Sarah Biddulph, *Legal Reform and Administrative Detention Powers in China* (Cambridge and New York: Cambridge University Press, 2007).

severity” at the local level. The Zhengzhou Trial Procedures outlined 19 offences for which lighter punishment could now be applied, nine no longer requiring arrest and detention of suspects, and 10 that were no longer indictable offences. A month after the Standards were promulgated, Zhengzhou Head Procurator Li Zemin issued a media statement saying that the decision would not affect the city’s high standards of law enforcement. “It is a change in the principle of law enforcement, not in the standards by which prosecutors engage in their work”, he asserted. Over the past 20 years or more, the Yanda approach had been favoured to deal with public order offences and serious crimes. While this was necessary and correct in relation to serious crime at the time, authorities became over-reliant on Yanda policy, the judge opined, making it the standard for all responses to public order crime.

In failing to clearly differentiate between who to Yanda and who not to Yanda, all types of crime were given the Yanda treatment. This was the reason for our reconsideration.⁸

Closely following Zhengzhou’s “testing of the waters”, the SPP issued new national standards on 13 August 2007. The new criteria were based on a revision of two previous regulations, the “Standards for Indictment” and “Standards for Non-Indictment” both originally issued in 2001. Revision of these standards, the SPP announced, was to aid the smooth implementation of the policy of “balancing leniency and severity”. The new standards clearly stipulate that “any indictment decisions that do not fit within the perimeters of the policy of ‘balancing leniency and severity’ are to be regarded as substandard”.⁹ Five types of minor criminal behaviour no longer attract an indictment for criminal prosecution in China:

1. offences committed by juveniles or senior citizens aged over 60 years whose offence has not seriously disrupted public order or whose actions were not carried out with malicious intent;

⁸ Du Taixin and Yan Bo, “Xingshi sifa kuanyan xiangji de Zhengzhou yangban” (The Zhengzhou Trialling of “Balancing Leniency and Severity” Policy), *Minzu yu fazhi shibao* (Democracy and Law Times), 13 August 2007.

⁹ “Gaojianyuan: xiafu qisu he buqisu anjian zhiliang xinbiaozhun” (The Supreme People’s Procuratorate Issues New Standards on the Indictable and Non-Indictable Cases), 14 August 2007, <http://www.spp.gov.cn/site/2006/2007-08-14/0002114812.html> (accessed 18 October 2007).

2. minor offences that result from a dispute within a family, or between friends or neighbours, school mates or colleagues in which the suspect admits the offence, apologizes to the victim or compensates the victim (or signs an agreement binding him/her to pay compensation in the future), or formally apologizes and the victim accepts the apology;
3. first offenders whose offences do not reflect malicious intent;
4. those who have committed more than one minor theft (or similar crime) but whose poor material circumstances drove them to commit the offence and whose actions did not cause harm to the victim (habitual theft was not included in this category); and
5. minor crimes conducted in the midst of a mass demonstration.¹⁰

The Standards were billed by an SPP spokesperson as a major change of criminal justice policy in China, a movement away from the Yanda inclination to punish “severely and swiftly” (*congzhong congkuai*) toward the softer *kuanyan xiangji* (balancing severity and leniency). Under Yanda policy, procurators adopted the prevailing principle that when there is a borderline case and there is a choice on whether to arrest an individual, always choose the arrest option and if there is a choice on whether to prosecute a case, always choose to prosecute (*kepu kebupu pu, kesu kebusu, su*). In his “Introductory Analysis of the Policy of Balancing Leniency and Severity” on the Lawtime website, Feng County Procurator Han Shanqing in Shaanxi province admonished the practice as “an effort to avoid the burden of being seen to be too soft on crime”.¹¹

A second major push to lever the scales of justice toward a more lenient regime came within weeks after the introduction of the new national standards. The story below on the “cash for reduced punishment” scandal again brought Zhengzhou city unwittingly into the limelight.

Paying Compensation to Receive a Reduced Sentence

The Criminal Procedural Law (1997) provides for a subsidiary civil action (*fudai minshi susong*) to be heard concurrent to the criminal trial, a process by which the victim or the victim’s family can sue the defendant for

¹⁰ Ibid.

¹¹ “Qianxi ‘kuanyan xiangji xingshi zhengce’” (An Introductory Analysis of the Policy of Balancing Leniency and Severity), Shaanxi Feng County Procuratorate Procurator Han Shanqing, 14 September 2007, <http://lunwen.lawtime.cn/xingfaxflw/2007021261376.html> (accessed 16 September 2007).

damages.¹² The new Zhengzhou indictment standards issued in July carried a provision that the procuratorate could recommend a reduced sentence for those who are willing and able to compensate the victim through the system of subsidiary civil action. On 24 September 2007, the Erqi Basic Court in Zhengzhou city tried and convicted Yang Weilin in an intentional assault case. The case unfolded in the following way.

As Yang Weilin was riding his bicycle on 26 April 2007, he accidentally struck a male pedestrian named Ma. The incident escalated into a physical fight and Yang ended up striking Ma in the face. The forensic examiner determined that the injuries were minor, not serious, in nature. The procuratorate nevertheless indicted Yang on charges of intentional assault. Ma applied to sue the defendant for 20,000 yuan through subsidiary civil action. Yang's family agreed to pay the amount up front and in full. Ma asked the court to give Yang a reduced sentence or exemption from punishment. The court determined that Yang, a first-time offender, had shown remorse for his actions and had immediately agreed to compensate the victim, who had expressed forgiveness. The court determined that the defendant was not a threat to the community and sentenced him to a one-year suspended prison sentence.¹³

The case, though a very minor offence, fuelled a second national debate in the media that year concerning China's procuratorial system. Those most critical of the decision argued that the policy of offering compensation for a reduced sentence is outside the perimeters of the law and that it would hand judges an even greater scope for judicial discretion. Others maintained that it is prejudicial and socially inequitable as those with little financial standing are not in a position to pay compensation and that, moreover, it leaves space open for judicial corruption.¹⁴ The irony, as some pointed out, was that had the incident occurred after the new Zhengzhou indictment standards were announced, then Yang would not even have been indicted. He was indicted before July 2007, and by the time his case came up for trial in September, it was the last remaining

¹² Subsidiary civil action is dealt with in Chapter 6 of the Criminal Procedure Law (1997).

¹³ Sun Qinghui, "Nanzi xingxiong dashang ren peiqian mian zuolao" (Man Guilty of Assault Compensates Victim to Evade Prison), *Zhengzhou wanbao* (*Zhengzhou Evening News*), 25 September 2007.

¹⁴ "'Panqian peichang jianxing' yilei zhidu weihe luyin zhengyi" (Why Does "The System of Compensating the Victim Prior to a Court Judgment to Receive a Reduced Sentence" Create Controversy Time and Again?), *Renmin Ribao* (*The People's Daily*), 27 September 2007, <http://npc.people.com.cn/GB/6331072.html> (accessed 30 September 2007).

minor case of its kind to end up in criminal prosecution. Hence it was the last opportunity for interested parties, including the media and legal commentators, to express their opinions on compensating for a reducing sentence.

One Zhengzhou lawyer who opposed the Erqi Court decision, for example, argued in a media report that it does a disservice to social justice. He asks, and answers:

Is it the case that only those who can afford to can buy their way out of a prison sentence, and moreover, that individual parties can bargain down their price? ... Subsidiary civil compensation is a burden that a defendant should be expected to carry as a matter of course. It should not become an excuse for reduced punishment.¹⁵

In a similar vein, an academic from the Henan Police Academy noted his concern about the court decision. “Defendants paying compensation and receiving a reduced sentence will have the effect of increasing the incidence of crime.”¹⁶ Next in the line-up of concerned and critical commentators came a league of legal forum bloggers including the contributor to the popular legal fraternity website “Sunflower Law Forum” who expressed this opinion:

The criminal justice policy of balancing leniency and severity sets a very dangerous precedent. Using the fig leaf of “harmonious society”, it allows imposition of criminal justice policies that damage the sanctity of the law and the legal system, making society increasingly dangerous and damaging its moral foundations.¹⁷

Another blogger claimed the law’s deterrence effect is not only to severely punish but also to demonstrate that “if you commit a crime then punishment is an inevitable consequence of your action”. Softening the standards and announcing it for the whole world to hear “is tantamount to handing criminals on a platter a ‘handbook’ describing in detail how to avoid punishment”.¹⁸ Another argued that the “balancing leniency and severity” policy contravenes the basic spirit of the law. For this blogger, the law should already be balanced and stable so why does it need to move

¹⁵ Sun, “Nanzi xingxiong dashang ren peiqian mian zuolao”.

¹⁶ Ibid.

¹⁷ “Kuihua falu luntan” (Sunflower Law Forum), blog site, <http://www.mykh.net/bbs>.

¹⁸ “Kuihua falu luntan”.

from “leniency” to “severity” and back again? An even more cynical blogger decried:

From the experience of the last few months, I can see the real significance of “balancing leniency and severity” policy. “Leniency” is for those with money or power. “Severity” is for those who resist and for the poor. Most of those who have been put into prison through this policy are the poor and disempowered.¹⁹

Yet those in favour of the new policy have argued that “Defendants paying compensation and receiving a reduced sentence actually helps to alleviate social conflicts”.²⁰ Typical of this position is lawyer Gan Zeyuan who sees the act of compensation as an expression of contrition from the perpetrator to the victim.²¹

Zhang Xiangqing, head of the Criminal Division of the Erqi Basic Court that tried the bicycle rider Yang, chimed into the media debate in September 2007 with the counter claim that paying compensation and receiving a reduced sentence is definitely “not a way to pay one’s way out of prison time” (*bushi huaqian maixing*). Rather, he says:

[I]t is to allow for the criminal perpetrator to redeem him/herself at the same time as being punished for his/her actions. It is also a practical way of helping the victim’s family. Both the act of a defendant paying compensation and the act of the defendant receiving forgiveness from the victim or the victim’s family are considered mitigating circumstances when deciding on a defendant’s sentence. It allows for the case to conclude in a “harmonious tone” and it gives expression to the policy of balancing leniency and severity as well as producing positive social and legal outcomes.²²

The national *People’s Daily* picked up on the intense media interest, interviewing Erqi Court President and other criminal justice authorities in Zhengzhou in late September. Presiding Judge Peng Bo, dumbfounded at the level of discord over the bicycle case, declared,

[W]e could not have imagined that the system we applied to deal with the case would attract such widespread criticism. This negative reaction took

¹⁹ Ibid.

²⁰ Sun, “Nanzi xingxiong dashang ren peiqian mian zuolao”.

²¹ Ibid.

²² Ibid.

us by complete surprise. “Defendants paying compensation and receiving a reduced sentence” is not our invention.

As he explained, it was the SPC, the highest echelon of judicial authority in China, which issued a decree in 2000 allowing for courts to take into account the willingness of the perpetrator to pay financial compensation to the victim as part of judges’ sentencing rationale.²³

One key rationale for the “pay the victim for a reduced sentence” policy was that it might help to curb a common practice in criminal trials involving subsidiary civil action, namely, the failure by the majority of offenders to follow up on judgment execution orders to pay compensation after they had been successfully prosecuted and given a custodial sentence. A court official in Erqi Basic Court pointed out that the vast majority of judgments that fail to be executed and are classified as “unfinished cases” are criminal cases involving civil compensation claims where the offender has continually refused to pay compensation to the victim. The main reason for this refusal, the Erqi judge explained, is that the defendant feels that he or she has already “paid” for the crime by receiving a prison sentence and is therefore unwilling to fulfil their legal obligations in compensating the victim. As such, the judge argued, “paying compensation and receiving a reduced sentence” is a practical way of resolving the issue of non-compliance in paying compensation. He gave the following example:

We had a subsidiary civil compensation case where the victim was already willing to mediate for civil compensation and where the defendant was willing to do a compensation deal and so made a request to the Court that his willingness to financially compensate the victim be taken into consideration at sentencing. The Court did not accept the request and handed down a one-year prison sentence. The judgment and sentence were both consistent with the law but the supplementary civil compensation claim has yet to be settled. After the defendant was released from prison, court bailiffs visited his last known address but found that he had moved residence. The case is therefore uncompleted.²⁴

²³ Article 4 of the Supreme People’s Court “Regulations Pertaining to the Issue of Adjudicating Cases Involving Supplementary Civil Compensation Proceedings” issued on 19 December 2000, states: “If a defendant has already financially compensated the victim, a court may consider this act when making a decision on the criminal sentence”.

²⁴ ““Panqian peichang jianxing’ yilei zhidu weihe luyin zhengyi”.

The Erqi judge asserts that in China, the “leniency” side of the “balancing leniency and severity” equation is gaining significance in line with the growing importance of the policy of balancing leniency and severity, harmonious criminal justice [*hexie sifa*], and the call to “kill fewer, kill cautiously” [*shaosha shensha*].²⁵

The McDonaldization of Criminal Justice?

George Ritzer’s observations in *The McDonaldization of Society* concern how the principles of fast-food production and consumption dominant in McDonalds, the world’s largest chain of fast-food restaurants find their way into the dominant rationality of organizations. His observations are in some respects useful to explain the goings-on discussed above in Chinese criminal justice in 2007. Based on Weber’s theory of bureaucratic rationality, McDonaldization describes the propensity for four key characteristics of this rationality—efficiency, calculability, predictability and control—to dominate organizational culture.

According to Ritzer, when what Weber identifies as formal rationality is applied to organizations, “the search by people for the optimum means to a given end is shaped by rules, regulations, and larger social structures”.²⁶ Rules and regulations improve efficiency and allow for streamlining of products.²⁷ This logic can be applied to the criminal justice system. For example, in the United States, 95 per cent of criminal cases are handled through plea bargaining, a highly streamlined process of case disposition. According to Robert Bohm, plea bargaining favours uniformity of process and discourages adversarial conflict.²⁸

In China, both the new standards of indictment and the policy for minor crimes, such that persons found guilty receive a reduced sentence through financial compensation to the victim, encourage uniformity and streamlining of case disposition. The introduction of new procedures for indictment does not in itself indicate a “McDonaldization of criminal justice”. After all, there has been a continuous rollout of new regulations and procedures for the past three decades in China. The difference this time is the nature of the new procedures and what they produce. They “decontextualize” individual circumstances of offences and cultivate a streamlined “one size fits all” approach to handling minor offences.

²⁵ Ibid.

²⁶ Ritzer, *The McDonaldization of Society*, 36.

²⁷ Ibid., 44.

²⁸ Bohm, “McJustice,” 130.

Ritzer's "calculability" refers to the quantitative aspects of McDonaldisation including emphasis on numerical standards producing the greatest output within a given time.²⁹ Quantification allows for predictability and calculability of results. Predictability emphasizes "discipline, order, systematization, formalization, routine, consistency, and methodical operation".³⁰ In the United States criminal justice system, determinate sentencing has developed over the last few decades as a policy that limits judicial discretion and encourages calculability and predictability.³¹ In China, efforts by legal reformers in the SPC and SPP to move away from "flexibility" and the Yanda approach encourage calculability and predictability.

Ritzer's "control" refers to the institutional encouragement given to those who participate in the system to follow the rules that govern the process.³² In the case of "defendants paying compensation and receiving a reduced sentence" in China, those offenders who are now encouraged to willingly pay compensation to their victims demonstrate the system's ability to effectively control the actions of offenders. China's *Southern Metropolitan Daily* columnist Wang Lin argues that the real motive behind "paying compensation and receiving a reduced sentence" has nothing to do with a more merciful approach to criminal justice by "balancing leniency and severity". The big push by judicial officials towards "paying compensation and receiving a reduced sentence" is really to facilitate their greater control over the civil compensation system. Wang observes, "It must be appreciated that if the court does not give the defendant a 'carrot', he or she is unlikely to compensate the victim".³³

The point here is that if a defendant is likely to receive a custodial sentence, more often than not, he or she will not be willing to pay financial compensation to the victim unless a substantial reduction in the sentence is forthcoming. As noted in the discussion above, in the past, the majority of criminals refused to pay the court-ordered compensation once they were sentenced to prison. "Defendants paying compensation and receiving a reduced sentence" therefore creates a way to halt the increasing flow of

²⁹ Uwe E. Kemmesies, "What Do Hamburgers and Drug Care Have in Common?: Some Unorthodox Remarks on the McDonaldisation and Rationality of Drug Care," *Journal of Drug Issues* 32, 2 (2002): 692.

³⁰ Ritzer, *The McDonaldisation of Society*, 86.

³¹ Bohm, "Mc Justice," 131-32.

³² *Ibid.*, 132.

³³ Wang Lin, "Kuanyan de biao zhun, ruhe zhangwo?" (How Do We Come to Grips With the Standards for Leniency and Severity?), *Nanfang dushibao* (*Southern Capital News*), 16 August 2007.

citizens—those who are disgruntled with local courts’ inability to execute civil judgments—from petitioning (*shangfang*) regional and national government authorities to act on their behalf.³⁴ These days, Wang argues, people are more likely to believe in the power of travelling to Beijing to petition government officials in the capital for justice than they are to believe in the efficacy of local legal officialdom. Around 70 per cent of petitions to government officials are complaints about the judicial handling of cases, Wang notes. This discomfoting situation has prompted courts to take urgent action to enable cases to be finalized in a timely manner to reduce the percentage of cases where citizens ultimately petition the government (and not the courts) for justice.³⁵

Perhaps the most useful aspect of Ritzer’s theory of McDonaldization of society for understanding criminal justice in China is his argument that the kind of rationality we find in the McDonald’s assembly-line type production inherently harbours an irrational side, or what he calls the “irrationality of rationality”. McDonaldized institutions produce irrationalities that ultimately undermine rationality.³⁶ Contrary to their original purpose, Ritzer says, “rational systems... often end up being quite inefficient... long lines of people often form at the counters, or parades of cars idle in the drive-through lanes. What is purported to be an efficient way to obtain a meal often turns out to be quite inefficient”.³⁷ This is because instrumental reason is “rational only as a business strategy... that has as its ultimate goal profit maximization”.³⁸

In the case of China, the focus on quantification, routine and speed at one level of the criminal justice system often serves to undermine efficiency, calculability, predictably and control at another level. For instance, the new standards for indictment mean that case dispositions for a large number of offenders will now be transferred out of the criminal justice system to the system of administrative punishment. Downgrading certain crimes to “illegal acts” does not necessarily mean that offenders will escape punishment. It means only that some offenders are now diverted to the public security bureau system of administrative punishment, where they will be fined, detained, or will serve sentences of “re-education through labour”. Whereas in the past judicial discretion would allow for many minor crimes to be disposed through courts and be given “exemption from punishment” (*mianyu chuxing*), these types of

³⁴ Wang, “Kuanyan de biao zhun, ruhe zhangwo?”.

³⁵ Ibid.

³⁶ Bohm, “Mc Justice,” 134.

³⁷ Ritzer, *The McDonaldization of Society*, 135.

³⁸ Bohm, “Mc Justice,” 134.

cases will now be sent to the administrative punishment regime, which dispenses a wide range of punishment including custodial sentences of up to three years.

It could be argued, on the other hand, that it was “the irrationality of rationality” in the first place that encouraged changes to the national standards of indictment in China. What seems a rational “assembly-line” operation of justice beginning with arrest and ending with incarceration produces irrationalities in a system that is chronically under resourced. Li Jingui, a procurator working in the Judicial Supervision Section of the Shenyang Procuratorate whose task is to supervise prison operations, illustrates this point with a number of startling figures that bring sobriety to the “balancing leniency and severity” debate. Li argues that the changes to indictment standards are less about a new culture of mercy and leniency and more about a critical lack of prison space in China.

In the 22 years from the start of the first Strike Hard campaign in 1983 to the end of 2005, over 120 million people were formally arrested, detained and charged with a criminal offence in China (almost one tenth of the nation’s current population).³⁹ In 2005 alone, 860,372 people in China were formally charged with a criminal offence. This was an increase of 6.1 per cent on the previous year even though in 2005 there was no Strike Hard campaign, through which arrests and prosecutions increase dramatically. In 2005, over 1.4 million people were serving prison sentences in China. For 36 per cent of prison inmates (530,000 individuals), prison authorities offered no programme of labour reform or any daily activity. These inmates were permitted to sleep and eat; no funds were available for prison labour programmes.⁴⁰

Li builds his case with more statistics on the length of offenders’ prison terms. In 1998, 42.7 per cent of the prison population were serving sentences of three years or less and in 1999 the figure was 45.1 per cent. In 2000, it was 43.3 per cent and in 2001 it was 45.8 per cent.⁴¹ These data indicate that the percentage of prisoners serving short-term sentences has been fairly stable over a number of years.

³⁹ This figure excludes the millions who were charged with committing an unlawful act and dealt with under the system of administrative punishment. Many of these people served or are still serving up to three years in “reform through education” facilities.

⁴⁰ Li Jingui, “Kuanyan xiangji shi woguo jiben xingshi zhengce” (Balancing Leniency and Severity is a Fundamental Criminal Justice Policy in China), *Zhengyiwang* (Justice on-line), <http://www.jcrb.com/zyw/n124/ca514495.htm>, 12 June 2007 (accessed 18 October 2007).

⁴¹ *Ibid.*

The point Li makes with these data is that the only way to decrease the prison population would be to move minor offenders—those serving sentences of three years and under for non-violent crimes—out of the prison system. Prisons, he says “have long been in a situation where ‘the amount of noodles one puts in the pot is determined by the amount of the water available to fill that pot’”.⁴² The number of prison beds available is the water in the pot. If there are not enough beds then the procuratorate will not even try to “add noodles to the pot” by prosecuting a minor crime in court, as it is aware (from its liaisons with prosecutorial officers placed in prisons in supervisory roles) when there is no room in a prison for more prisoners? inmates?.⁴³ Li claimed that the incarceration rate for minor offences is now less than half the number of those indicted for trial for minor crimes because judges, cognizant of the serious lack of prison resources, have the discretion in a large percentage of minor offences to hand down a sentence of “exemption from punishment”.

The lack of prison space begs urgent action, Li argues. He believes that the procuratorate should further manipulate the minimum standards for an indictable offence so that the bare minimum indictable offence attracts a prison sentence of no less than three years, and the offence must be a serious threat to society before the procuratorate considers indictment for trial. This outcome is unlikely to be achieved even amid “harmonious society” fever. Nevertheless Li’s point is clear; rational attempts to maintain social order by incarcerating offenders produces irrationalities in a system that is chronically under-funded.

By March 2008, it was becoming apparent that even more radical reforms were being considered to further correct the long-standing severity/leniency imbalance. Chief Procurator of Jilin province and National People’s Congress (NPC) delegate, Zhang Jinsuo, introduced to the sitting NPC in March 2008 a radical new proposal that he declared would change the course of law enforcement in China if passed by the NPC. He put forward a member’s bill recommending the establishment of a new system called “Temporary Suspension of Criminal Indictment” (*zhanhuan qisu*) to bring into full play the policy of balancing leniency and severity and more importantly to deal with chronic funding inadequacies. Zhang stated that the new initiative in the pre-trial process would entail suspending from prosecution a large number of cases that would otherwise clog up court time.

⁴² Ibid.

⁴³ Note that the procuratorate in China has a supervisory function over both prisons and courts. Li Jingui is a supervisory official for the procuratorate in the prison system.

Since over 60 per cent of China's per annum one million-plus cases indicted for criminal prosecution are minor crimes that could be dealt with through alternative avenues, the new system would give procurators the power to temporarily suspend the prosecution of minor offences pending the suspect's compliance with certain obligations such as paying civil compensation to victims. The indictment of suspects who are compliant would then be dropped and the case closed. Zhang said that this system would be a way of introducing the concept of "restorative justice" to China by way of reform through education and persuasion (*ganhua*). Moreover, it would be a beneficial way of making a clearer distinction between simple criminal cases and serious crimes. It would save prosecution and court time and would allow more resources to be channelled into the prosecution of serious cases.⁴⁴ Importantly, and in a classic attempt to pass the buck down the system, he recommended that the Ministry of Public Security establish a new system of parole and supervision as an alternative to incarceration to deal with these offenders in the community. This, of course, would be funded by the Ministry of Public Security, not the Procuratorate.

Perhaps not coincidentally, a statement by Deputy Chief Procurator of the Supreme People's Procuratorate Qiu Xueqiang was reported in the same issue of *Procuratorate Daily* that reported Zhang's NPC proposal. It announced the trialling of a number of initiatives that would provide alternative pathways for the disposition of minor cases in China. Qiu declared the policy of balancing leniency and severity to be a new foundational criminal justice policy, a specific manifestation of "dialectical materialism" in the field of criminal justice, a paragon of the policy of "combining principle with flexibility" and a "compass" for the prosecutor in case disposition work.⁴⁵ As part of their contribution to the new era of "balance" and harmony, procuratorates around the country, he announced,

⁴⁴ "Zhang Jinsuo daibiao: 'zhanhuan qisu zhidu you liyu shehui hexie'" (NPC Delegate Zhang Jinsuo Announces: The System of Temporary Suspension of Criminal Indictment is Beneficial to Social Harmony), *Jiancha ribao* (Procuratorial Daily), 7 March 2008: 1, <http://www.jcrb.com/200803/ca68344.htm> (accessed 7 March 2008).

⁴⁵ "'Guanche kuanyan xiangji xingshi zhengce, quanli weihe zhongyao zhanlue jiyuqi de shehui hexie wending': benbao jizhe zhuanfang zuigao renmin jianchayuan fujianchaguan Qiu Xueqiang" (Implement the Policy of Balancing Leniency and Severity. Spare No Effort to Safeguard the Important Strategy of Social Harmony and Stability in This Opportune Time: Our Journalist's Exclusive Interview with Qiu Xueqiang, Deputy Chief Procurator of the Supreme People's Procuratorate), *Jiancha ribao* (Procuratorial Daily), 7 March 2008, <http://www.jcrb.com/200803/ca68513.htm> (accessed 7 March 2008).

were in the process of standardizing new stipulations and creating alternative programmes and policies that would deal with minor crimes.

The procuratorate would adopt a new principle in borderline cases for suspects involved in particular types of crime—aborted minor crimes, minor crimes involving provocation, juvenile offences or crimes committed by senior citizens—and for those who surrender to police, perform meritorious acts or have other mitigating circumstances: “If there is a choice to prosecute or not prosecute the case, always choose to not prosecute” (*kesu kebusude, busu*).⁴⁶ Qiu’s willingness to put forward these views in a national newspaper while the NPC was sitting in March 2008 indicates the hold of “balancing leniency and severity” at least in the rhetoric, if not necessarily in practice, for quite some time to come.

Conclusion

Ritzer’s McDonaldization thesis has been criticized by some as a simplistic, “old wine in new skins” attempt to describe what Weber decades earlier articulated with greater nuance and eloquence.⁴⁷ Nevertheless, this metaphor does provide us with an opportunity to “snapshot” a particular instance of legal reform in China, along with some of the irrationalities and conflicts of interest that its implementation entails. In the past, some western scholars have held an essentialist view of the Chinese criminal justice system which presumes that by dint of its authoritarian nature, the system is tightly controlled and singular, with its various agencies sharing complementary interests. If anything, the “McDonaldization of criminal justice” highlights the limits of describing the criminal justice system in China as a holistic entity run entirely under the ethos of bureaucratic rationality. The discussion in this essay on recent changes reveals that criminal justice work in China is fashioned as much by routine considerations such as resources and organizational ties with other governmental organs as it is by ideology. Police, prosecutors and court workers are equally as vulnerable to economic constraints as they are to social, political and historical events.

It is therefore perhaps inevitable or at least not surprising that the SPC and SPP’s genuine attempt at social policy reform described above is tainted with a pragmatism alert to the woeful paucity of judicial resources—including prison bed space—available to local criminal justice

⁴⁶ Ibid.

⁴⁷ See, for example, Mark Alfino, John S. Caputo and Robin Wynyard eds, *McDonaldization Revisited: Critical Essays on Consumer Culture* (Westport, Connecticut and London: Praeger, 1998).

authorities. Because so, the policy where those found guilty pay compensation to their victim and receive a reduced sentence for it may indeed spell a new era of the “McDonaldization of criminal justice”. But this should not detract entirely from the genuine and momentous push to establish a new ethos of punishment that moves China away from a culture of heavy-penaltyism. As one SPC judge described, the death penalty reforms from Beijing have been a way of “grabbing 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”.⁴⁸ In this sense the recent moves may be seen as McJustice with Chinese characteristics more than as a step towards achieving restorative justice in the Chinese criminal law system. Meantime, however, like the concept of “balancing leniency and severity”, “restorative justice” as rhetoric helps to unhinge the girding of criminal justice from the heavy penaltyism ethos that distanced “justice” from the conduct of criminal law through a quarter century of reform.

⁴⁸ “Sixing hezhun Bukaiting, shi chu youyin” (Ratification Procedures of Death Sentences Are Not Heard in Open Court for Good Reason), Xinhua News Release, 10 March 2007, http://news.xinhuanet.com/legal/2007-03/10/content_5825329.htm (accessed 10 March 2007).