CHAPTER 4

CHOOSING LIFE OVER DEATH

Introduction

Our discussion about the central place of policy in the life of the death penalty in contemporary China makes it clear that choosing life over death in capital cases is a political and a legal decision. In this chapter, we focus on the legal dimensions, in particular, the legal considerations that inform the interpretive space of sentencing deliberations in capital cases. In the mid-2000s, sihuan, the two-year reprieve from execution, became the crucial dynamic in the narrative and practice of controlling death penalty in China. It offered reformers the best opportunity yet to institutionalize the principle of “kill fewer, kill cautiously.” It provided judges an ideal alternative to setting immediate execution as the automatic “default” choice in capital case sentencing, especially for violent crimes that began as domestic or neighborhood disputes.

But law and politics dance an intimate lockstep in this story. Before the political decision could be taken to forge ahead with death penalty reforms, sihuan needed further legal development, especially legitimation, as a principal legal mechanism for killing fewer. After all, sihuan has been part of the sentencing options since the first Criminal Law of 1979, produced in the political climate at the outset of China’s economic reform period. Yet, the overwhelming influence of “strike hard” policy on judicial decision making ensured that it was underutilized until the mid-2000s.

Death penalty reformers have encouraged a more extensive use of sihuan from the mid-2000s to pave the way for the development of a more stable, consistent, cautious, and less severe, system of death penalty sentencing in the post-2007 period that will be discussed in the following chapters. Today, in many provinces, higher courts have clarified their use of sihuan through death penalty sentencing guidelines that they have devised to help prevent inconsistent decision making. These guidelines encourage sihuan
and discourage immediate execution for the majority of extremely serious offenses.

Sihuan has been made an increasingly important sentencing option from around the mid-2000s. It has been deployed as the linchpin in the national agenda for death penalty reform—as a lifeboat rather than a short “reprieve.” Since this time, death penalty reformers have strategically mobilized the party resolution in 2006 to Build a Harmonious Society as the necessary rhetorical lever to open up a new, politically motivated rhetorical and legal space, where a new punishment rationale of “balancing leniency with severity,” could be developed in tandem with this agenda. Sihuan has been made the practical manifestation of this new policy stance on death sentencing. High-level encouragement from the SPC that judiciaries use sihuan to express the relative leniency favored in the new political climate, enabled courts to articulate its benefits and employ it more frequently. Since 2007, it has gradually gained the backing and imprimatur of the highest echelons of political power.

This more temperate policy of “balancing leniency and severity” began to overtake Yanda as the leading criminal justice policy response to serious crime around the mid-2000s. The SPC had already begun to issue a series of opinions and other announcements that centered on the importance of using immediate execution only as a “last resort,” and using sihuan in place of immediate execution for the vast majority of capital cases. However, the SPC did not release national standards outlining the appropriate legal application of sihuan and neither did the national legislature, the National People’s Congress (NPC), signal its intention to amend the Criminal Law in line with this new policy direction. The perceived need to clarify sihuan’s use in judicial practice has, in fact, long been a focus of scholarly and judicial debate. Moreover, with momentum from the SPC’s initiatives, since 2006, provincial courts have moved to clarify legal application of sihuan in practice, drawing from and against the backdrop of the large body of scholarly debate on the function and application of sihuan developed from the early 2000s.

This chapter tells the story of sihuan’s development as the mechanism for “killing fewer” as the punishment for extremely serious crime. It explores the muddied waters of the sihuan system and the legal debates about interpreting its application. How this system was, and continues to be, harnessed in efforts to normalize sentencing standards and to restrict the use of immediate execution, in fact, tells us an important part of the death penalty story. It is