Criminal Defense in Chinese Courtrooms: An Empirical Inquiry

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Introduction

Studies on the Chinese legal system have grown tremendously in the last two decades. Along with the sweeping social and economic changes in China, scholars have become increasingly interested in the progress concerning China's Criminal Law and Criminal Procedure Law reforms (e.g., Clarke, 2008; Epstein, 1991; Liang, 2008; Lo, 1995; Lubman, 1999; Potter, 1999; Zhu, 1989). The slow pace in the actual implementation of substantive legal reforms remains a major concern. Many examples of blatant abuse of government power, intimidation and trumped-up criminal charges against adversarial criminal defense lawyers are widely publicized (e.g., Big-Stick 306, 2011; Clarke & Feinerman, 1995; Dicker, 1993).

In comparing China's criminal justice system with that of Western industrialized nations, it is helpful to keep in mind China's historical context and the dramatic changes China has gone through in the last three decades. On one hand, the Chinese criminal trial procedure has been heavily influenced by China's indigenous legal tradition and the Soviet style continental legal system. As a result, the inquisitorial model has dominated China's trial procedure. For instance, the adjudicators (i.e., judges) play multiple roles actively in different phases such as investigation, prosecution, and adjudication (e.g., R. Chen, 1997). On the other hand, great strides have been made to reform China's criminal law and trial procedures, exemplified by the 1996 *Criminal Procedure Law* (96CPL), the 1997 *Criminal Law* (97CL), both of which aim to provide more legal protections and rights to criminal defendants and defense lawyers.

In such a unique historical, social and legal context, examination of China's criminal procedure and Chinese criminal defense lawyers' work shall pay attention to what could/should be done legally (or theoretically) according to the book/law and what have been and are being done in reality and practice. Such a comparison would allow us to see potential disjunctions between the two, and to better understand how defense lawyers carry out daily practices in China's current legal system.

One significant obstacle to research in this field has been lack of access to collect meaningful data. Although trials are now open to the public (with a few exceptions), any large-scale court observation turns out to be out of question given facility limitation and administrative restrictions (Liang, 2008). Majority of the existing empirical studies therefore have turned to other means such as interview of lawyers (e.g., S. Liu & Halliday, 2011), study of lawyers' online discussions (e.g., Halliday & Liu, 2007), study of court documents (e.g., Lu & Miethe, 2002), and study of online televised trials (Zhong, Hu, & Liang, 2011). All of these studies shed critical lights on our understanding of the limited roles played by Chinese defense lawyers in the current system

and the problems faced by them in making progress. Nevertheless, important information about defense lawyers' work such as their preparation and presentation in courtroom and their interaction with the prosecution and the judges is largely missing. The current study benefits from invaluable access to field observation of 325 trials in J province in China. It aims to fill a void to explore criminal defense lawyers' actual work in the courtroom.

Previous Research on Chinese Criminal Procedure and Defense

There is little doubt that in the post-Mao reform era China has witnessed sea changes in almost all dimensions, including its criminal justice system. Early studies by scholars such as Cohen (1968, 1970), V. Li (1978), and Leng (1985) disclosed the functioning of China's criminal justice system in the prereform era, in which very little rights were given to criminal defendants. Defense lawyers worked as state employees to help the court find the truth and reach a verdict instead of fighting for defendants' rights and freedom. Consistent with the nature of the socialist state and the inquisitorial system, one's individual rights (i.e., defendants' rights) were trumped by the collective rights (i.e., the rights of the people), and prosecution, police, and defense were all supposed to work with the court to punish the criminal and safeguard the interests of the people.

The adoption of the 96CPL and the 97CL (and subsequent revisions of them and other laws such as the *Lawyers' Law*) eventually signaled dramatic transitions in China's criminal law and procedure. Under the new laws, changes were made to better protect the rights of defendants in the criminal process (such as the right to request bail and the assistance of legal counsel), to shift the power from the police and the procurator (i.e., prosecutor) to the court and to set up a more neutral role for judges (e.g., via limiting judges' active roles in investigation and prosecution), and to expand the roles of defense lawyers (such as granting a broader scope of compulsory legal assistance, an earlier intervention in case investigation, an easier access to case files, and the right to call and cross-examine witnesses in trials). Although the new laws were by no means perfect and their practices were often far from what they promised (see discussion below), there is little doubt that they epitomized significant changes in China's criminal law and criminal procedure reforms (Fu, 1998; P. Liu & Situ, 2001).

When new grounds were breaking, Chinese lawyers and their lawyering responded gradually and steadily (though not without struggle). In 1979, the whole nation had just about 2,200 lawyers. After the reform was kicked off, the total number of lawyers began to rise: The number broke the 10,000 marker in 1982, increased more than tenfold to 100,198 by 1996, and peaked at 173,327 in 2009 (data from Chinese Statistical Yearbooks over time). Criminal defense, unquestionably the most controversial and risky among all legal practices in China, also stepped up. In 1981, Chinese lawyers

were involved in a total of 65,179 criminal cases; the number quickly jumped to 232,206 in 1989, and broke the 300,000 marker in 1999. The number hovered around 300,000s in the early years of the 21st century but rose to 495,824 in 2007; 511,971 in 2008; and went on to an all-time high of 564,204 in 2009 (data from Chinese Statistical Yearbooks).

Despite the changes in the written laws and the expansion of defense practice, whether and to what extent these changes have achieved meaningful results in actual legal practice remain unanswered, as lawyers and practitioners continued to run into insurmountable obstacles in their criminal defense work. Among all such obstacles, the most notorious are the so-called "Three Difficulties" (in Chinese, *sannan*), referring to the difficulties in meeting with the detained clients without police supervision, obtaining a copy of the prosecutor's case files, and gathering evidence and cross-examining witnesses at trial. These difficulties consistently raised deep concerns for defense work (Halliday & Liu, 2007; S. Liu & Halliday, 2009; Lynch, 2011). During politically sensitive periods such as anticrime campaigns, defendants' and defense lawyers' rights are often further buried and discarded in the name of serving the greater interests and goods of the society (Liang, 2005; Trevaskes, 2002, 2003, 2007). Even Chinese domestic scholars openly criticized the inadequacy and ineffectiveness of the new measures of the 96CPL and the 97CL, pointing out long-existing problems such as the lack of legal protection of the defendant's right to remain silent; few witness testimonies at trials; heavy reliance on written documents before, during, and after trials; and serious gaps in evidence law (e.g., lack of regulations on hearsay evidence and exclusionary rules[1]; e.g., R. Chen, 1996, 2000; W. Chen, 2001; W. Chen & Liu, 2008; Long, 2008; Xiao, 2008; Zuo, 2009).

In addition, the prosecution and the police seemingly have another formidable weapon against criminal defense lawyers in China, the so-called "Big-Stick 306," which refers to Article 306 of the 97CL. Along with Article 38 of the 96CPL, Article 306 makes it a criminal offense for a defense lawyer to

> help the suspect of a crime or defendant to conceal, destroy, or fabricate evidence, collude with each other, threaten or induce witnesses to alter their testimony, provide false evidence, or engage in other activities to interfere with the litigation procedure of the judicial organs.

Although perfectly legitimate in rhetoric, the Big-Stick 306 was often wielded by the authority against defense lawyers who defended serious criminals "inappropriately" (e.g., Fu, 1998; Halliday & Liu, 2007; Hou & Keith, 2011; S. Liu & Halliday, 2009; Lynch, 2011). During the first five years after the 96CPL became effective (1997-2001), 142 criminal defense lawyers were arrested by the police and procuracy, among which 77 lawyers were illegally detained or even beaten, and 27 cases were directly concerned with perjury (S. Liu & Halliday, 2009, p. 932). Although the overwhelming majority of cases charged under Article 306 had resulted in acquittal in court (Hou & Keith, 2011, p. 393; Young, 2005), occasional notorious cases (e.g., Li Zhuang's case) have raised the fear level to its extreme against potential defense

lawyers in China, and at the same time such abuse of power has aroused great indignation among scholars and practitioners (e.g., E. Li, 2010).

As S. Liu and Halliday (2009) argued, Chinese lawyers' difficulties in criminal defense have deep roots in the recursive nature of the criminal procedure reform. Those difficulties were produced in particular by interactions of recursive factors such as the indeterminacy of law, inherent contradictions, diagnostic struggles, and actor mismatch in lawmaking and implementation. For instance, in 2007 the amended *Lawyers' Law* tried to address some of these aforementioned concerns and placed more robust emphasis on the lawyers' professional defense of defendants' rights. Nevertheless, many provisions of the new law conflicted with the old ones such as the 96CPL. Although the official reply from the Legislative Affairs Commission of the National People's Congress Standing Committee in 2008 assigned precedence to the new *Lawyers' Law* in cases of conflict, such contradictions indeed make the implementation of the new law extremely difficult in reality due to bureaucratic resistance (Hou & Keith, 2011).

Given the extreme difficulty in collecting data and conducting research in this field, studies on how Chinese defense lawyers actually carry out their daily work and how effective is their defense work are quite limited. A few successful studies have relied on nonrandomly selected court documents to empirically examine the effectiveness of legal representation in various criminal cases. For example, statistical analyses from a series of such studies have shown that legal representation has no impact on the final sentences received by the defendants (Lu & Drass, 2002; Lu & Gunnison, 2003; Lu & Miethe, 2002). Nevertheless, as Lu and Miethe (2002, 2003) argued, different *defense strategy* might actually make a difference in persuading the court. For instance, strategies such as confession and asking for leniency (an attitude of cooperation rather than confrontation) are more likely to succeed in reducing sentences than challenging the facts of the case.

In addition, the *type* of defense lawyers might well make a difference in the courtroom. For instance, Liebman's (1999) study carefully traced the development of the legal aid system in China and showed how legal aid lawyers may have functioned differently in comparison with private lawyers in criminal cases. Often relying upon their expertise and relationship with the courts and the prosecution, local legal aid lawyers learned how to utilize their "cooperation" with the system to gain better access to case files and offer arguments on their clients' behalf. It is common for them to convince their clients to admit guilt to persuade the prosecutor to recommend lenient punishment (Liebman, 1999, p. 259). Consistent with the nature of China's inquisitorial system, it is still largely true that defendants who dare to challenge the system would not only have their claims rejected by the judges but also receive harsher punishment, whereas defendants who display a "cooperative" attitude (e.g., confession) often receive more favorable outcomes.

In short, compared with the prereform era, significant changes have occurred to China's criminal procedure and criminal defense in the new, reform era. At the same time, there are serious questions about how and to what extent these changes in the book are translated into actual practice. The majority of the studies in this field

indeed questioned and criticized the inadequate protection afforded by the current system to criminal defendants and pointed out the hapless situation faced by criminal defense lawyers. Nevertheless, very little has been done empirically to study Chinese criminal defense lawyers' actual work in courtrooms. Our explorative study is aimed to fill such a void. Specifically, using court observation data of 325 trials in J province in China, this study aims to empirically examine Chinese criminal defense lawyers' performance in three key dimensions: their trial preparation and presentation, the effectiveness of their defense work in courtroom, and potential variations of their work across different types of lawyers.

Discussion and Conclusion

In this study, we gained invaluable information based on court observations of the actual work of Chinese criminal defense lawyers. We paid particular attention to understand defense lawyers' preparation and presentation in the courtroom and to compare their work with that of the prosecution to gauge the effectiveness of their work. In addition, we further examined potential differences in their works by different types, numbers and gender composition of defense lawyers. Although still primitive and explorative in nature, our study presents a number of interesting findings.

First of all, though all odds are against them, our data show that Chinese criminal defense lawyers have no problem taking up challenges in the courtroom. From assuming legal representation, to trial preparation and all aspects of courtroom presentation (e.g., examination of defendants and witnesses, evidence production, and challenging prosecution), Chinese defense lawyers are fully engaged in the legal battle. It is difficult to evaluate their performance though, because of the lack of universal yardsticks. On one hand, when comparing their performance in criminal trials with that of their counterparts in Western nations, Chinese criminal defense lawyers' work would seem subpar; on the other hand, their performance was rather impressive and remarkable, given China's historical, social and legal contexts (especially the rapid changes occurred in the last two to three decades). In addition, there are signs of continued interest and effort in moving toward a more adversarial system from the government (e.g., the 12CPL) and the grassroots (e.g., lawyers taking up more and more criminal defense work and adjusting their defense strategies).

Second, in the current Chinese legal system, the effectiveness of defense lawyers' works seems to have fallen short despite their efforts. Our data show that the prosecution still dominates the trial process (in presentation time and interruptions), and defense lawyers' counterarguments do not fare well in the courtroom. The unsatisfactory reality epitomized in Chinese criminal trials is likely to continue for quite some time given the obstacles that Chinese defense lawyers have to face in their daily practice. Evidence from our research reconfirms the disjunction between what the new laws have promised in the book and what can be achieved in actual operation. It is not easy to go through the transition from the well-entrenched old system to the current semiadversarial system, and it presents a challenge not only to the defense lawyers but also to other players in the courtroom including judges and prosecutors (e.g., R. Chen, 2000; S. Liu, 2006; S. Liu & Halliday, 2009). While the reactionary forces (such as

bureaucratic resistance, inherent contradictions in laws) may hold up the pace of progress, it is unlikely that Chinese legal reforms would go backward. To move forward, the biggest obstacle seems to be coming from further structural reforms (e.g., more, if not complete judicial independence). Our data show that once the green lights are given, the Chinese lawyers will no longer be afraid of using the new laws in their practices.

At the same time, a defense strategy still matters under the current system and this is confirmed in our data. Consistent with past studies, when the defense "works with" the prosecution and the court (e.g., through defendant's confession in exchange for leniency), the pleas made by the defense are more likely to be accepted. On the contrary, when the defense plays the hard ball (e.g., challenge the criminal charge by claiming innocence), their strategies would largely fail. Nevertheless, it is interesting to see that Chinese defense lawyers are taking up a variety of defense strategies today and seemingly becoming more contentious and adversarial. When Lu and Miethe (2002) studied Chinese criminal legal representation base on 237 cases in 1999, *no* defense lawyers claimed innocence on behalf of their clients. Their empirical examination of confessions (2003) in criminal cases between 1986 and 2001 further noticed that the proportion of Chinese defendants who refuse to admit their guilt *increased significantly* over time (when contrasting pre- and postreform eras) and the legal representation *decreases* the odds of confession (though it also decreased the odds of acquittal). It is very telling that lawyers in our data set claimed innocence of their clients and challenged official charges against their clients in a significant portion of cases. Granted, lawyers in our sample are well learned and knew that strategies matter in the Chinese context, but their defense choices revealed their aggressive practice. It is reasonable to expect such a trend to continue in the future.

Third, our data also explored how different types of attorneys may matter. As instinctive as it is, this issue was rarely studied with very few exceptions (e.g., S. Liu & Halliday, 2011 for an analysis of how attorney's political view and embeddedness may impact their criminal defense work). Our data first contrasted the work of legal aid lawyers with that of the privately retained lawyers and showed that the latter largely outperformed the former and represented their clients more zealously and aggressively. The legal aid lawyers apparently relied more on written defense than their colleagues, but fell short on other measurements. It is not clear whether this is a strategic decision or due to the nature of their work (e.g., training, being overloaded, or being more cooperative with the government). Although the legal aid attorneys could be helpful and even effective in some cases (e.g., Liebman, 1999), our comparison here raised some questions with regard to their willingness to provide zealous legal representation (if that is the ultimate desired goal).

In terms of the number of defense lawyers, our analysis shows that utilization of defense lawyers in trial would strengthen the zealousness of the defense, especially when multiple defense attorneys work together as a team.[14] Note that our data do not measure the final outcome of the trial (e.g., conviction or sentencing), as previous studies casted doubt on the effect of having legal representation in reducing official punishment (Lu & Drass, 2002; Lu & Gunnison, 2003; Lu & Miethe, 2002). It may be likely nevertheless, that defense representation would carry more and more weight as China moves toward a more adversarial system and as defense lawyers assume more and more meaningful roles therein. However, given the general lack of effectiveness of lawyers' presentation in the current Chinese legal system, our data show that utilizing defense teamwork seems to be the most effective means to achieve better representation, though such a luxury would be certainly out of reach for majority of Chinese criminal defendants.

Our examination of female attorneys' involvement in criminal trials in comparison with their male counterparts showed that female attorneys provide equally effective legal representation. In some cases, female attorneys are more helpful and effective. This is consistent with S. Liu and Halliday's (2011) finding that female lawyers are significantly *less* likely to report the difficulty in meeting suspects than are their male counterparts (S. Liu & Halliday, 2011). How the traditional gender roles would play out in this complex context and how Chinese female defense lawyers battle in the semiadversarial system clearly warrant further study in the future.

To summarize, we would like to acknowledge a few limitations of this study. First of all, though our sampling covers extensively the District People's Courts in J province, it is by no means a representative sample of the whole nation. Our study is explorative and tentative. J province's experience could be more representative to provinces with similar level of economic development. In addition, the positive development observed in our study of J province criminal courts may serve as a model for the less-advanced cities and places in the future. Second, due to the design of the study (i.e., field observation) and difficulties in implementation and data triangulation, measurements utilized are imperfect and some key control variables (e.g., crime type, offense severity) and outcome variables (e.g., final sentences) are missing. Future studies could definitely benefit from evaluating defense lawyers' work from multiple angles and based on multiple sources.

Third, this study suffers from lack of a viable theoretical framework. Unfortunately, given the paucity of studies and lack of empirical data, there is no ready theory to be applied and tested in this very subject to our best knowledge. A few studies such as S. Liu and Halliday (2009, 2011) provided some initial theoretical frameworks to the study of Chinese defense lawyers from different perspectives (e.g., overall difficulty in reform, the impact of political embeddedness on practice), but none can be readily applied to the *actual courtroom practice* by Chinese criminal lawyers. Our empirical study provided a rare look at how defense lawyers actually perform inside the courtroom, and findings of this study hopefully can contribute to further theoretical discussion and theory building in the future.

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