



Criminal defense and judicial sentencing in China's death penalty cases

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Introduction

To date, systematic data on China's death sentences remain a state secret and are not made available publicly (Liang & Lu, 2016; Lu & Kelly, 2008; Lu & Zhang, 2005). The inaccessibility of death penalty data makes it very difficult for scholars and researchers to empirically examine China's death penalty practice, in particular judicial death sentencing. Despite the decreased use of the death penalty in recent years given the new policy of 'kill fewer, kill cautiously' (Hood, 2009; Lu & Zhang, 2005; Trevaskes, 2008; Xiong, 2016), it is still not known how Chinese judges make decisions in capital cases, especially with regard to the choice between the death penalty with immediate execution (hereinafter immediate DP) and the death penalty with a two-year suspension (suspended DP). For the former, once the SPC approves the death sentence, the execution will be carried out within a week; for the latter, one's death sentence is automatically commuted to life imprisonment after a two-year suspension unless new crimes are committed during this period (Liu, 2013; Trevaskes, 2013).

China's Criminal Procedure Law (hereinafter CPL, Article 34) mandated legal representation for defendants facing a death sentence as early as 1997. Nevertheless, there have been serious concerns about the actual function and effectiveness of criminal defense in capital cases (Lu & Miethe, 2007; Lu & Zhang, 2005; Miao, 2013; Yang, 2014). As Lu and Miethe (2002) showed, for instance, legal representation had little impact on judicial sentencing outcomes, as judges rarely accepted defense arguments. In some notorious cases (such as the Li Zhuang case), defense lawyers might even face grave risk of being arrested and charged for falsification of evidence (Li, 2010). Moreover, despite efforts to 'kill fewer' by trial court judges and the centralized and tightened final review by the SPC since 2007, empirical evidence suggested a very low reversal rate in the review of death penalty cases. For instance, Su and Ren (2014) indicated that out of a total of 152 death penalty final review and approval judgments issued by the SPC from 2 July 2013 to 30 September 2014, the reversal rate was merely 3.3%. This again casts doubt on how effective criminal defense is in death penalty cases.

In this study, we examine criminal defense and judicial sentencing in China's death penalty cases based on a *convenient* sample of 503 violent crime and drug cases. We caution the readers that this study is only exploratory, due to the non-representative nature of our sample. Specifically, we address two research questions: (1) what defense arguments are raised by the defense and how likely they are to be accepted by the court; (2) what factors influence judicial death sentencing, in particular the choice between immediate DP and suspended DP? We first review changes of China's death penalty policies overtime, the current status of criminal defense and judicial sentencing. Second, we review past empirical studies regarding China's death sentencing in practice. Then, we turn to our current study, discuss data collected, and present analyses based on our research questions. Lastly, we discuss policy implications and limitations of this study.

Death sentence in contemporary China

China's death penalty policy changes

Laws with regard to the death penalty changed markedly in China in recent decades, especially after the restoration of the final review by the SPC in 2007 (Liang & Lu, 2016; Lu & Zhang, 2005; Martinez, Vertino, & Lu, 2014; Miao, 2013). The most recent Ninth Amendment of the Criminal Law (hereinafter CL) in 2015 further abolished the application of the death penalty in nine offenses, therefore reducing the total number of death-eligible offenses to 46.

Besides changes to the CL, key players of the criminal justice system have published a number of rules and regulations to facilitate the 'kill fewer' national policy. For instance, in 1999, concerned about the increasing proportion of rural villagers among all death-sentenced offenders, the SPC issued a sentencing guidance titled the 'Minutes of the Criminal Trial Work Symposium on Maintaining Stability in Rural Areas,' which outlined SPC's intentions to encourage the use of suspended DP in cases of domestic or neighborhood disputes where the victim was in some obvious ways at fault or was directly responsible for the conflict that led to the fatal attack, or where statutory mitigating circumstances were present (SPC, 1999).

In 2007, joined by the Supreme People's Procuratorate (SPP), the Ministry of Public Security (MPS), and the Ministry of Justice (MJ), the SPC issued another document, the

'Opinion on Strictly and Lawfully Handling Death Penalty Cases to Ensure Quality.' In this Opinion, the SPC emphasized that the death penalty be only applied to criminals who have committed extremely serious crimes; it is not the time for an outright abolition, but steps should be taken to gradually limit and reduce its use (SPC et al., 2007).

In 2010, the SPC issued another opinion, the 'Opinion on Certain Issues Concerning Implementing the Criminal Justice Policy of Balancing Leniency and Severity'. This document provided legal bases for judges to consider a number of factors in meting out sentences such as societal harmfulness, one's malicious intent, self-surrender (*zishou*), and remorse (SPC, 2010). In the same year, five Ministries (SPC, SPP, MPS, MJ, and the Ministry of National Security) jointly issued the 'Rules on Certain Issues Concerning Examination and Judgment of Evidence in Death Penalty Cases' and the 'Rules on Certain Issues Concerning the Exclusion of Illegal Evidence in Criminal Cases' (SPC et al., 2010a, 2010b). Both rules deal with evidential issues in death penalty cases and target illegal evidence extracted from torture, and both are later integrated into the revised 2012 CPL.

Criminal defense in death penalty cases

The current 2012 CPL specifically mandates legal representation for defendants facing a potential death sentence or life imprisonment (Article 34), either through self-retained or government-appointed attorneys. Nevertheless, criminal defense, being the riskiest legal practice in China, is often merely symbolic and carries a very low 'success' rate (Li, 2010; Lu & Kelly, 2008). Private attorneys are often reluctant to represent defendants in death penalty cases, and government-appointed attorneys struggle with the meager financial compensation they receive (Du, 2009; Han & Liu, 2011). In addition, due to lawyers' marginalized status and the dominance of the '*gong-jian-fa*' (the police-procuratorate-court nexus) in China's criminal justice system, criminal defense is often viewed useless and therefore ignored by Chinese judges (Johnson & Zimring, 2009; Lu & Miethe, 2002; Lu & Zhang, 2005; Yang, 2014).

It should be noted that the 2012 CPL indeed added new measures to strengthen defense rights, including but not limited to, meeting with one's attorney within 48-hours (Article 37), the abolition of surveillance of these meetings (Article 46), and defense's right to appeal should their duties be hindered (Article 47). As mentioned above, the 2012 CPL integrated also two new evidence rules from 2010 to target illegal evidence extracted from torture (Articles 50, 53, 54). To improve the quality of criminal defense in death penalty cases, the MJ and the SPC have issued a number of official opinions in recent years to ensure the defendant's rights in death penalty cases (SPC, 2015a; SPC et al., 2007; SPC et al., 2010a, 2010b; SPC & MJ, 2008).

Judicial death sentencing

Death sentences are arguably the most difficult and sensitive decisions that judges have to make. Judges often turn to policies and other official documents such as sentencing guidelines for guidance. As violent and drug crimes make up the largest shares of capital sentences in China (Su & Ren, 2014; Xiong, 2016), we discuss capital sentencing on both offenses. Given the retributive and punitive culture in China, violent crimes causing death constitute the bulk of cases receiving death sentences. In contrast, the

death penalty is rarely utilized in robbery or other violent crimes that do not involve the death of the victims. In recent years, the SPC has issued, either alone or jointly with other agencies, many documents to standardize judicial sentencing and set limits. Most of these documents directly applied to violent capital cases (SPC, 1999; SPC, 2010; SPC et al., 2007).

Regarding drug crimes, the death penalty is restrictively applicable to drug smuggling, selling, transporting, and manufacturing. Further, Article 347 of the CL lays out a number of criteria in rendering harsh sentences (including the death sentence), such as the amount of drugs (1000 or more grams of opium, or 50 or more grams of heroin or methamphetamine), being a ringleader of gangs, carrying out armed and violent drug crimes, and being involved in international drug trafficking. To limit the use of the death penalty in drug cases, the SPC issued several documents to guide local courts for death sentences, in particular on the threshold amount of drugs and mitigating circumstances such as one's confession, accessory role, evidence problems, and low drug purity (SPC, 1987, 2000a, 2015b). Among all, the drug amount is still the most important, though not the absolute criterion for judges to consider in drug crimes. Moreover, it should be noted that every province in China has its own applicable criteria for drug capital sentencing, but such information is inaccessible to the public in most provinces. For instance, in 1987, the SPC issued a reply to the Yunnan Higher Court and recommended that criminals manufacturing, selling, or transporting drugs more than 500 grams of heroin or morphine in Yunnan Province should be sentenced to immediate execution (SPC, 1987). Available information from Shanghai and Guangdong (two cities covered in our study) in the 2000s, however, showed that both jurisdictions adopted criteria lower than the recommended 500 grams from the SPC in 1987 (Guangdong Higher Court, 2003; Shanghai Higher Court, 2005).

Past empirical studies

Few issues are as vital and noteworthy as criminal defense for death sentencing in court trials. Despite a rich body of literature in Western nations, this topic has rarely been explored in non-Western retentionist countries, and there is a general lack of rigorous empirical research. Given our research interest in this study, we focus on criminal defense and death sentencing in China, and our extensive research produced only a handful of such studies in China.

Despite efforts to strengthen the rights of criminal defense as discussed above, existing evidence shows that criminal defense in death penalty cases played very little role in practicality (Li, Longmire, & Lu, 2016; Lu & Kelly, 2008; Lu & Miethe, 2007; Lu & Zhang, 2005), and many scholars argued that such a reality would not help China further reduce and restrict the use of the death penalty, and nor curb wrongful convictions (Du, 2009; Jiang, 2013). In death penalty cases, very few defense attorneys pled 'not-guilty' on behalf of their clients; rather, most limited their defense to pleas of mitigating circumstances such as defendants' meritorious services (*ligong biaoxian*), self-surrender, good attitude, and accomplice roles, and issues of legal procedure (e.g. Lu & Miethe, 2007; Lu & Zhang, 2005; Luo & Tang, 2014).

Studies on judicial death sentences in China are very crude. A number of the studies presented primarily descriptive analyses regarding the nature of the offenses, offender and victim information, and sentencing information. They pointed out that Chinese

judges were more likely to mete out suspended DP or more lenient punishment in cases involving mitigating circumstance such as neighborhood and/or family disputes, defendant's self-surrender, confession, and active compensation; aggravating circumstances such as lethal violence, and malicious intent were the main considerations for allocating immediate DP (Gao & Zha, 2006; Ouyang, 2007; Wang & Zhang, 2008).

A few studies discussed defense arguments, but criminal defense was merely symbolic in these studies. For instance, Qi (2007) surveyed 43 death penalty cases adjudicated by an intermediate people's court in Hebei province, in which 98% of defense attorneys did not produce any evidence in favor of the defendants and consequently 81% of defendants were sentenced to immediate DP. Alternatively, Qi's data showed that defendants raised a number of legal defenses, such as claiming victim's fault (27% of all defendants so argued), defendant's good attitude (28%), lesser subjective culpability (7%), self-surrender (13%), being an accomplice (7%), and being not guilty of the charged offenses (7%). In another study, Du (2009) collected 129 death penalty cases around 2001 in Nantong, Jiangsu Province, and indicated that court-appointed attorneys represented one-third of all defendants, particularly in homicide and robbery cases. In contrast, private attorneys dominated in embezzlement and bribe-taking cases.

Most recently, Li et al. (2016) explored important correlates in China's capital sentencing in murder, intentional assault and robbery cases. Their findings showed that both mitigating and aggravating legal factors exert significant influence on the outcome of a case. The presence of a defense attorney is counterproductive: an offender with a defense attorney was more likely to receive a capital punishment than an offender without an attorney. However, this study failed to take into consideration specific defense arguments and whether the court rejected or accepted such arguments.

In sum, past empirical studies on China's judicial death sentencing are limited in various aspects. Most noticeably, little has been examined on how Chinese judges respond to various defense arguments, and how judges' acceptance/rejection of defense arguments may have affected the final death sentences.

Explaining criminal defense

Our data showed that criminal defense in China tried to put up a variety of potential defense arguments, ranging from challenges to prosecutorial evidence, to mitigating factors of crimes, to defendants' post-crime good behaviors. Given the past studies and China's prosecution-dominated system, it is not surprising to see that most defendants plead for leniency based on one's post-crime good behavior such as confession and self-surrender (Lu & Zhang, 2005; Luo & Tang, 2014; Qi, 2007). The fact that criminal defense presented other defenses might indicate a gradual shift towards a more adversarial system in which defense attorneys tried to exert more important roles (Liang & He, 2014). The acceptance rates of defense arguments, however, suggested that efforts by defense to counter prosecutorial evidence and establish mitigating factors generated a much lower success rate, compared to one's post-crime good behavior. One's confession and self-surrender still constituted the best chances of criminal defense. Though

confession and self-surrender indicate one's cooperative attitude and to some extent remorse, both defense strategies are largely factually determined. As both behaviors occur before legal representation becomes materialized, this casts doubt on the usefulness and effectiveness of one's legal representation (Lu & Miethe, 2002).

When broken down by crime and attorney types, the results showed that criminal defense strategies were largely determined by the nature of one's capital crime rather than one's attorney type. For instance, criminal defenses were more likely to counter prosecutorial evidence and argue for one's secondary or coerced role in drug cases, primarily because multiple defendants were likely to be involved in major drug cases, which allowed room for the defense to argue for evidentiary errors and one's minor roles. In contrast, victim provocation and defendants' lack of malicious intention played much more significant roles in violent crimes, thus more likely to be utilized by the defense. Moreover, our data showed that defense was more likely to use the self-surrender argument in violent crimes than in drug cases, again due to the nature of the crimes. Such rational choices of defense strategies were also reflected in the acceptance rates as shown in the data.

In comparison, the type of defense attorneys seemingly had a much weaker effect on the choice and effectiveness of defense strategies as many similarities were observed between two lawyer types. On the acceptance rate, in particular, no significant differences were found across attorney types. When we further contrasted criminal defenses by death sentence outcomes, our data indicated similar patterns of criminal defenses being presented no matter what was the final death sentence, with one exception on one's post-crime meritorious services. Surprisingly, a significantly higher percentage of defendants who received immediate DP raised such an argument than defendants who received suspended DP. One possible explanation is that in cases with co-offenders, some principal offenders with more information and knowledge about the crime(s) would desperately try to provide leads to the police, potentially earning meritorious services. Nevertheless, the meritorious-service argument is difficult to be accepted, as only four cases (among 29 cases) were successful in our data. As expected, cases that eventually received suspended DP were characterized by significantly higher acceptance rates of defense arguments regarding good post-crime behavior (confession, self-surrender, and meritorious services). This clearly indicates the crucial role that one's post-crime behavior played in capital sentencing in China.

Understanding judicial sentencing

Our regression analyses showed that criminal defense played a significant independent role in judicial death sentences after controlling other factors: the more defense arguments being accepted, the more likely the defendant to receive suspended DP. This suggests that Chinese capital offenders and their attorneys need to be strategic in their defense in order to be effective. Please note that we did not test each of the major defense arguments shown in Tables 3–6 in our regression models, primarily for two reasons. First, some of the defense strategies are highly correlated and might cause potential problems (e.g. multicollinearity). Second, the numbers of successfully accepted cases for many of the defense strategies were too few to run regressions. In our diagnosis (results available upon request), we tested the effect of confession and self-surrender

separately: confession contributed significantly to the outcome of suspended DP ($p < .05$), but self-surrender failed the significance test at the .05 level ($p = .06$), likely due to the small number of valid cases.

Results of control variables in regressions revealed three other important lessons for understanding China's judicial death sentencing. The first lesson is that, as revealed in the literature, Chinese judges rely on different sentencing criteria in different capital crimes. For violent crimes, our data showed that immediate DP was more likely to be imposed upon a defendant who faced multiple offenses, a strong indicator of the severity of one's crime(s). In contrast, a defendant who had co-defendant(s) was more likely to receive suspended DP, a likely result of one's attenuated criminal responsibilities (e.g. being a secondary instead of a principal offender). For drug cases, the only seemingly relevant factor is the drug amount, not drug types. This is consistent with the Chinese law and the literature: once the drug amount reached the official threshold for capital punishment, the specific drug type does not matter anymore. Rather, the more drugs one carries (an indication of the crime severity), the more likely one is to face immediate DP.

The second lesson is that Chinese judges tried to follow the laws strictly based on the facts of the case in judicial death sentences. On the one hand, Chinese judges tried to reserve immediate DP to the most severe crimes. The severity of one's crime(s) was largely determined by relevant facts such as committing multiple violent crimes and carrying significant amounts of illegal drugs. On the other hand, as discussed above, the success of one's criminal defense was largely factually determined by one's post-crime good behavior (confession and self-surrender). These fact-based criteria seemingly attested to the 'objectivity' of China's judicial death sentencing, a goal that the Chinese death penalty system has been trying to achieve in recent years (Liang & Lu, 2016). In addition, our results indicate that geographic/jurisdictional difference between GZ Court and SH Courts did not have a significant impact upon the acceptance rate of criminal defenses and the final sentences, a potential signal of desired jurisdictional uniformity in China.

Nevertheless, the third lesson revealed by our data is the 'submissiveness' of the Chinese judiciary to centralized directives, that is, the judiciary practice is still subject to policy changes and interventions by the central government. This is typified by the significance of the year variable in our analyses: the 2010 'Balancing Leniency and Severity' policy was adopted to lower the execution rate, and our data showed a clear effect of the policy, as suspended DP was more likely to be imposed in violent capital crimes in the post 2010 years (see Table 7). The effect of the policy, however, is not shown in drug cases, presumably due to the more 'objective' and overwhelming impact of the drug amount.

China's practice in comparison

Our findings above displayed both commonalities and uniqueness of China's practice compared to other retentionist nations such as the United States. For commonalities, our major finding that it is the acceptance by the court rather than the presentation of criminal defense arguments that impacted immediate death sentences in China is consistent with findings in the United States (Bjerregaard, Smith, Fogel, & Palacios, 2010; Gillespie, Smith, Bjerregaard, & Fogel, 2014). In addition, our findings that certain mitigations such as confession and having co-offenders significantly decreased the probability of immediate DP are consistent with previous studies (Baldus, Woodworth, Grosso, & Christ, 2002;

Bjerregaard et al., 2010; Gillespie et al., 2014). These consistent findings to some extent reflect efforts by retentionist nations in pursuing more 'objective' outcomes in death sentences. Interestingly, our finding that the decreased use of immediate DP after 2010 in China due to national policy changes is not unparalleled (e.g. the United States, see Johnson, Blume, Eisenberg, Hans, & Wells, 2012). This attests that criminal policy changes (e.g. abolition as an extreme case) in a nation could have had a great influence over judicial death sentences.

For uniqueness of China's practice, a few major differences were found in our study, compared to the past literature from other nations. First, in contrast to the positive effect of self-retained lawyers in reducing death sentences (Beck & Shumsky, 1997; Bjerregaard et al., 2010; Gillespie et al., 2014), our finding corroborated insignificant differences between private and appointed lawyers in their capital criminal defense in China (Anderson & Heaton, 2012; Gitelman, 1971). The dominance of the '*gong-jian-fa*' inquisitorial system and the laws (stipulating mitigation and aggravation based on facts) eventually leave little room for creative lawyering in China. Second, two post-crime defendant's behaviors, self-surrender and meritorious services, turned out to be key defense arguments in the Chinese setting. Neither was identified in the past studies. Both factors are stipulated statutorily and emphasize on defendant's effort to 'cooperate with' the authority (Lu & Miethe, 2002). Overall, China's unique legal practices are rooted in China's existing system, laws, and dominating criminal policies and culture (Lu & Miethe, 2007; Lu & Zhang, 2005).

Limitations

Due to governmental control over documents considered state secret, death penalty decisions in China are rarely made available. Scholars have been making tremendous efforts in deciphering death sentences via published news reports, SPC bulletins, law yearbooks, edited casebooks, and online databases (Du, 2009; Gao & Zha, 2006; Li et al., 2016; Liu, 2013; Lu & Miethe, 2007; Qi, 2007; Su & Ren, 2014; Wang & Zhang, 2008). Despite significant caveats such as selection bias, findings of such studies helped piece together the puzzles of death penalty practices in China in a modest but meaningful manner (Hood, 2009; Johnson & Zimring, 2009; Lu & Kelly, 2008; Lu & Zhang, 2005; Trevaskes, 2013). Following this tradition, we made effort to collect official judgments involving death sentences directly from the official websites of intermediate courts. Nevertheless, only data from three intermediate courts are large enough for meaningful analyses. As a result, three major limitations in this study should be acknowledged.

First, cases in our database are not randomly selected. They are not representative of the nation, and may not accurately represent capital cases in these three courts since it is impossible to extrapolate how many capital cases were actually decided each year in both Guangzhou and Shanghai. The fact that no meaningful jurisdictional differences were found between GZ Court and SH Courts on the acceptance rate of criminal defense and on the final sentences in our results, nevertheless, lends us more confidence in our discussion.

Second, data utilized in this study are limited to information contained in the judicial documents. Due to privacy protection, some demographic information and/or details of the offences were blackened or deleted before the judicial judgments were uploaded.

As a result, missing data on some useful variables such as gender, ethnicity, migrant status, and victim-offender relationship, prevented more in-depth examination.

Third, our study is limited to quantitative analyses of judicial judgments. Other dynamic aspects of criminal defense (e.g. potential oral debate in courtroom) and judicial sentencing actions (e.g. judicial deliberation) were left out. It is well known that judicial actions behind closed doors could matter substantively in China's death penalty system (Liang & Lu, 2016). Access to other data sources (e.g. courtroom observation) would be very helpful for future studies.

Despite these limitations, our findings echoed the results from previous studies on China's death sentencing. For example, the little/no effect of defendants' legal representation in securing better outcomes and the role of confession or self-surrender in securing more lenient punishment are both confirmed (Li et al., 2016; Lu & Kelly, 2008; Lu & Miethe, 2007; Lu & Zhang, 2005). Further, this study fills an important void regarding empirical understanding of criminal defense and judicial death sentencing in China, and sheds light on important interactions between criminal defense, the sentencing court, and the use of national sentencing criteria, guidelines and policies. As our data show, successful criminal defense could significantly increase the odds of saving one's life, but it appears to be a narrow path in China, relying upon one's post-crime good behaviors such as confession and self-surrender. Such good behaviors often occur before legal representation becomes materialized, thus casting doubt on the effectiveness of legal representation in these cases. The limited power of Chinese defense attorneys leaves little room for any creative contribution to reduce offenders' sentencing severity.

Notes

1. A breakdown of violent crime cases showed that 200 were homicide cases, 54 were robbery cases, 47 were assault cases, 17 were kidnapping cases, and one was a rape case.
2. Causing serious (but non-fatal) injuries to victims via heinous crime means could potentially subject offenders to capital punishment based on the Chinese Criminal Law (e.g., Articles 234, 236, and 263).

Disclosure statement

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