

# **On the Fairness and Communications in the Trial of Criminal Cases in China - An Empirical Analysis from the Perspective of Criminal Defence**

**Abstract:** It is generally accepted that the rights of suspects and defendants shall be properly protected in a criminal trial. The principle of “equality of arms” demands the accused to get access to legal counsel in a timely and adequate manner irrespective of their economic status. In China, the 1996 and 2012 versions of *Criminal Procedure Law* made some reforms from the perspective of human rights protection. People may wonder, how do the lawyers communicate and cooperate with their clients and witnesses and collect evidence? In this paper, the author will discuss these issues based on his legal-sociological observations in the courtrooms, interview with lawyers, judges and prosecutors, and analysis of dead case files kept in the justice institutions in three locations, apart from the most update literatures. According to his findings, lawyers play a relative passive role in the criminal defence. They have routine but few communications with their clients and witnesses, and what they can argue in the debate is mostly routine strategies for leniency argument. At the end of the paper, the author will also discuss the possibility of improving the effectiveness of criminal defence in China, especially the communications.

**Keywords:** right to the fair trial, communications, courtroom, criminal defence, empirical study, China

---

\*Corresponding author: Xin Fu, Northwest University of Political Science and Law, China, Email: [foxinadr@163.com](mailto:foxinadr@163.com)

---

## **1 Introduction**

It is generally accepted that the right to counsel must be provided in order to place more emphasis on personal freedom and human rights of the accused persons. Among the other things in the various standards of domestic and international documents, the principle of “equality of arms” demands the accused to get access to legal counsel in a timely and adequate manner irrespective of their economic status. For example, *International Covenant on Civil and Political Rights* states that, in the determination of any criminal charge against the accused, everyone shall be entitled to some minimum guarantees, such as to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed of this right if he does not have legal assistance; and to have free legal

assistance.<sup>13</sup> Similarly, apart from the provision that all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings, *Basic Principles on the Role of Lawyers* stipulates special safeguards for the accused in criminal matters in order to ensure that legal assistance of lawyers can be obtained timely by the accused.<sup>14</sup> The assignment of legal counsel to all criminal defendants is supposed to ensure the protection of individual rights and adequate scrutiny of police evidence against a criminal defendant (McConville & Baldwin 1981:597). In the process of arrest and charge (and trial), the power of the government is so strong and the defendant is in such a weak position that some protective measures are required to protect the accused from mistakes and from wrongdoing. The defence lawyers thus become involved in the criminal case from the beginning—to provide legal advice for the suspect and inform him of the possible legal consequences of answering the police questions, to help release the suspect's psychological pressures in such a confined and isolated world, to prevent the police from intrusive powers during the investigation, and to try to make sure that the police interrogation is conducted by respecting lawful rights of the suspect (McConville & Baldwin 1981).

In China, the 1996 and 2012 versions of the Criminal Procedure Law made some reforms from the perspective of human rights protection, for example, lawyers can meet their clients, access to the case files and conduct evidence collection at an earlier stage of the proceedings and make sufficient preparation before trial. Since the judge's active role is substantively reduced and the defence can be more convincing than before, indicating some elements of departing from the inquisitorial mode to the adversarial mode in the trial, what is the real situation in the practice? People may wonder, how do the lawyers communicate with their clients? How do they interact with the witnesses and collect evidence? How do they plan their defence strategies before trial? What kind of cooperation do they have with their clients, how do they present their evidence and challenge the prosecution evidence? How do they organize their words at the court debate stage? What kind of role they can generally play in the courtroom? In this paper, the author will discuss these issues based on his legal-sociological observations in the courtrooms, supplemented with the data from the interview with lawyers, judges and prosecutors, and analysis of dead case files kept in the justice institutions in three locations in mainland China, apart from the most update literatures.<sup>15</sup>

## 2 Overview of the legal provisions on criminal defence

---

<sup>13</sup> Article 14 of the *International Covenant on Civil and Political Rights*.

<sup>14</sup> Articles 5, 6, 7 and 8 of the *Basic Principles on the Role of Lawyers*.

<sup>15</sup> The criminal procedure that the author relied on for his data collection was the 1996 Criminal Procedure Law. Despite of the possible challenges by readers regarding the effectiveness of the old data, the author has reason to argue that such practice is still working given that there are no substantive changes in the court trials in the 2012 reform. Moreover, the author's research findings are also confirmed by the limited research data available by other researchers on the similar topic after 2013 when the 2012 CPL was formally implemented. In his research, there were 56 sample cases observed in the three sites, a vast majority of defendants were male, and involved with one charge. In Sites A and C, most cases were related to violent crimes such as the offence of intentional homicide or injury in Site A (65%) and in Site C (89%). By contrast, in Site B, the offence on the violation of property (66%), such as the theft, was the most common type of crime. Furthermore, although the defendants' educational level was different in the three sites, they generally lacked adequate education. As far as the defendants' age is concerned, given that the cases involving 16-18 year-old defendants were closed trials, the age group may not be so representative in each site, but generally speaking, the 18-25 years old group occupied a large portion, which varied between 34% and 44% in the three sites.

In China, it is not an exclusive right of lawyers to make criminal defence. Persons recommended by a public organization or the unit to which the criminal suspect or the defendant belongs; and guardians or relatives and friends of the suspect or the defendant are also eligible to be defenders.<sup>16</sup> In the light of the 1979 Criminal Procedure Law, the defenders could get involved in the criminal case only at the trial stage, 7 days prior to the trial proceedings, which was not sufficient to prepare for the defence. In some cases, it was said that 30% of cases were already at trial when the lawyers received the notice for the defence (Fu 1997). As there was no compulsory requirement for the cross-examination and witness court appearance as it is the judges' discretionary power, the defenders' role in the trial was quite limited.

After the reform in 1996, access to defense counsel is directly and closely tied to the movement away from an inquisitorial system, the establishment of the judge as an adjudicative figure and increases in the defendants' rights to cross-examine witnesses. Now, the defence lawyers' rights have been expanded. They can get involved at the early stage of criminal procedure, namely, after the first interrogation or suspect has been subjected to compulsory measures at the investigation stage; they can provide legal advice, help the suspect to file petitions and complaints and apply for bail pending trial.<sup>17</sup> Moreover, from the date on which the procuratorate begins to examine the case for prosecution, defence lawyers may consult, extract and duplicate the judicial documents pertaining to current case and technical materials on appraisal, conduct investigation and collect evidence, and meet and correspond with the defendant in custody.<sup>18</sup> At the trial stage, the defence lawyers can consult, extract and duplicate the material of the facts of the crime accused in the case, which refers to the Bill of Prosecution and attached list of evidence and witnesses and copies of major evidence transferred by the procuratorate, and may meet and correspond with the defendant in custody.<sup>19</sup> During the trial, since "cross-examination in court is allowed, the prosecution-dominated trial is replaced by a more balanced representation of both parties" (Fu 1997:82), and thus defence lawyers are expected to be more active. They can put questions to the defendant, cross-examine the prosecution evidence and witnesses, produce their evidence and witnesses, and make argument with the prosecution in court.

The 2012 CPL reform further expanded lawyers' right to defence in criminal cases. They can not only get involved at the investigation, review and prosecution stage, but also express their view orally or in writing on the cases to the investigators and prosecutors. Moreover, defence lawyers are entitled to attend the pre-trial conferences organized by the court and to express their views on the request of withdrawal of the interested persons from the panel or prosecution side, witness appearance in court and exclusion of illegally obtained evidence, and to persuade judge to make a decision favoring for his client (the defendant). Furthermore, the defence lawyers can meet their client without prior approval with the exception of some special cases. At the prosecution and review stage, they read, duplicate and digest all the case files. More importantly, the reform of the review procedure of death penalty also provided a good chance for lawyers to perform their defence functions.<sup>20</sup>

---

<sup>16</sup> Article 32 of the Criminal Procedure Law of the People's Republic of China (2012).

<sup>17</sup> Article 36, Criminal Procedure Law of the People's Republic of China.

<sup>18</sup> Article 38 of the Criminal Procedure Law of the People's Republic of China.

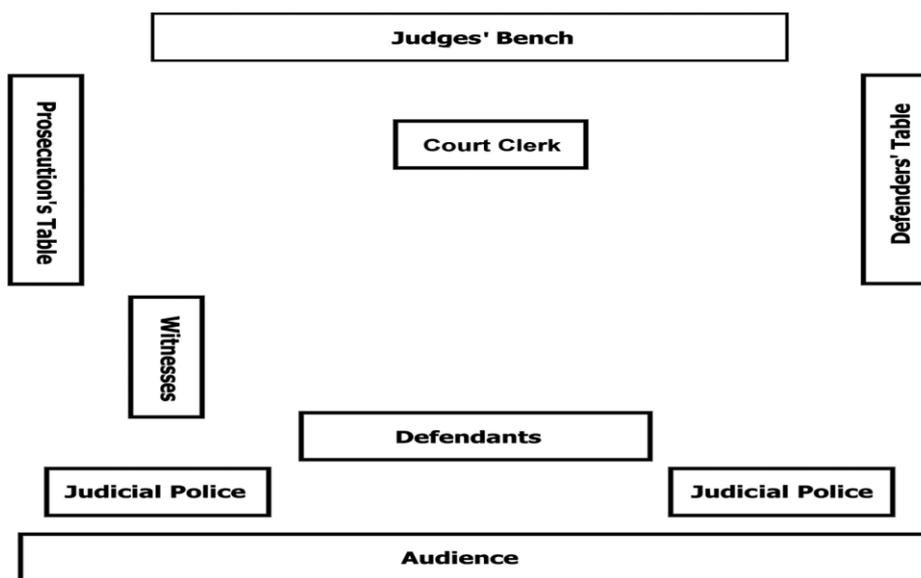
<sup>19</sup> Ibid.

<sup>20</sup> For detailed discussion of the reform in this regard, see Chen, *et al* (2012) and McConville and Fu (2014).

### 3 Criminal defence in action

This part is mainly based on the author's courtroom observation of 56 criminal cases in the three sites in mid and west China;<sup>21</sup> however, the rate of legal representation is now much higher, and even higher than the findings of the case file analysis in my research. Defenders appeared in more than three quarters of cases observed on average, most being privately retained lawyers. Generally speaking, the rate of legal representation is closely connected with the seriousness of crime and economic development of the areas. For instance, the rate of legal representation in Sites A and C (intermediate court) is 80% and 100% respectively, while only half of the defendants in Site B (district court) had a defender. Most of the defenders were privately retained, although there were some pro bono lawyers. Sometimes, the arrangement of pro bono lawyers served for special purpose.<sup>22</sup>

The picture below, the courtroom layout,<sup>23</sup> despite of some pilot reforms on defendant's seating, showed that defence lawyers are away from the defendant's seat, they had no chance for communication, especially temporary exchange, in the courtroom. Such a physical arrangement of the defendant under surveillance of the judicial police in the courtroom makes it unable for him/her to communicate and discuss the case with his/her lawyer during the trial, which contrasted the sitting arrangement of parties in the civil actions in China.



<sup>21</sup> The first site the author chose was a capital city in the northwest of China, which is an important military and economic centre in China. The population in the city was around 6-7 million, where people are very kind, frank, warm-hearted and honest, and cherish more personal relationships. The second site for the author's fieldwork (Site B) was a capital city in the southwest area of China, where there was a total population of 3-4 million and the weather in that place is very pleasant during the whole year. However, the security of social order was not very good in some districts. His fieldwork in Site C is an intermediate city in central China, with a population of around 1.5-2 million, which is located in a neighbouring province of Site A. These three sites represented judicial justice in different areas of western and central area of China.

<sup>22</sup> For example, a pro bono lawyer appeared in the trial of CTO B-7 (offence of theft), which was conducted in a police college as an exemplary court. Later, the author was told that the defender was the friend of one court clerk. Similarly, when Professor Mike McConville attended a court hearing in a district court during his visit in Site A in 2003, there was a pro bono lawyer for the defendant. The leader of the court explained the purpose of appointing a lawyer in the trial was to show the guests a typical setting of criminal trial after the reform of Criminal Procedure Law in 1996.

<sup>23</sup> Cited from Mike McConville *et al*, *Criminal Justice in China: An Empirical Inquiry*, (2011) Cheltenham, UK: Edward Elgar, p. 191.

Given that the defence lawyers have few opportunities to obtain witnesses' cooperation and collect other evidence and conduct only 1-2 pre-trial meetings with their clients, most of them are not sufficiently prepared for the defence (McConville *et al.* 2011).<sup>24</sup> The defence functions of the lawyers cannot be adequately performed without sufficient communications between them and clients before the trial. Where there is any conflicting opinion between the defence lawyer and the defendant during the trial, the collegial panel will generally provide a special opportunity for them to coordinate the viewpoints privately through a short court adjournment. Such conflicting opinions will not affect the judge in a persuasive manner (Chen 2014a:101).

In the following part, the author will discuss the performance of defence lawyers in the courtroom based on the data extracted through his personal observation.

### **3.1 Defenders at the court investigation stage**

Despite the importance and the assumption of lawyers being professionals in the best interests of their clients, many studies in the west show that the benefit to the defendant from a defender is less than expected. For example, the finding of some British scholars argued that there was “a perceived decline in the quality and standards of criminal defence work under the pressure of rising case numbers and falling rates of legal aid payment” (McConville *et al.* 1994:46). In fact, they found that only a small amount of suspects can be provided with legal advice during interrogation and most suspects do not benefit from legal advice during their custody; and “the interests (of the clients) are usually best served by routine processing through guilty pleas since for the most part, have no legal or factual arguments to set against an overwhelming body of prosecution evidence” (McConville *et al.* 1994:74-129).

These findings are replicated in China. Given the structure of the criminal process in China, the trial in essence is a process to confirm the prosecution case; the defence lawyers did not examine and cross-examine the evidence but rather affirmed it in court. Since the defendant in most cases had already confessed his crime, the defence has no legal or factual arguments to set against an overwhelming body of the prosecution evidence in most cases. In the absence of challenging the evidence, the defender could do nothing but focus on the suggestion of lenient punishment, which can benefit the defendant in essence, because the court has such discretionary power by law. Therefore, the defender was limited to asking questions on the details which were advantageous to his client.<sup>25</sup> According to my observation, most defenders in the three sites (86%, 63% and 94%) asked the defendant questions related to the details of the defendant's guilt and the circumstances which might attract lenient punishment. Take CTO B-1 (offence of intentional injury) for example. Here is the dialogue between the defender and the defendant:

Defender: How's your relationship with the victim?

Defendant: We are friends.

---

<sup>24</sup> Despite of the improvement in the 2012 CPL reform, Chinese scholars are still very concerned with the lawyers' meeting with clients in a sufficient and timely manner. See for example, Han (2014).

<sup>25</sup> Some did not even ask the defendant any questions at all, because they thought this was of no value or that it risked antagonizing the judge.

Defender: How did the knife appear with which you stabbed the victim in the crime scene?

Defendant: On that night, my friends called me to go out and I gave the knife to the victim. Later, the victim brought it back to me.

Defender: What did you see after you returned to your room?

Defendant: I saw that he (the victim) was mad from being drunk and was ready to attack others.

Defender: Did you quarrel and clash with him?

Defendant: Yes. He attacked me with a chair.

From the above dialogue, one can see the purpose of the defence lawyer's questions. First, the defendant thought his relationship with the victim was good, so there was no question of this being a revenge attack. Second, the victim was angry from drink. Third, the defendant tried to stop the victim acting violently. Fourth, the knife belonged to the defendant but the victim borrowed it and later returned it to the defendant, which proved that the defendant had no intention to use a knife to hurt the victim. Fifth, it was the victim who attacked the defendant with a chair first. As a result, the victim bore primary responsibility for the occurrence of the incident leading to the defendant's prosecution.

Later, when the presiding judge asked the defender if he had evidence to present, the defender said "no" but requested to be allowed to ask the defendant questions again.

Defender: What did the victim intend to do when he borrowed your knife?

Defendant: He planned to use it when he fought with country fellows on that day.

Defender: Then, who sent the victim to the hospital?

Defendant: It's me and other two people. I signed my name on the operation notice. I also looked for the victim's parents and teachers with a view to solving the problem.

Defender: Did your parents negotiate with the victim's parents on civil compensation?

Defendant: Yes.

Presiding judge: Defender, your question has nothing to do with the case.

Defender: All right.

In the second dialogue, the defender tried to show the victim's intention in borrowing the defendant's knife. Then, he tried to prove that the defendant showed a positive attitude to the crime by sending the victim to the hospital and looking for the victim's parents to discuss compensation. By asking the defendant questions twice, the defender had already expressed his opinions on the case indirectly. When it came to the debate stage, the defender would repeat his opinions in order to impress the judges and suggest lenient punishment. These questions were not pro-forma but intended to be of assistance to the particular defendant. However, the role of the lawyers in practice was still quite limited and they had to be careful not to offend the prosecutors and the judges in court.

At this stage, after questioning the defendant, the defence will have a chance to cross-examine the prosecution evidence and present their evidence. As to the prosecution's evidence, few defenders challenged it, except to contest or put into question to the testimony of some witnesses. For example, defenders in 30% of cases challenged the testimony of selected witnesses. However, the result of the challenge was often unsuccessful, since they had no evidence to contradict the prosecution's evidence. In CTO A-21 (offence of intentional injury), the defender of the second defendant challenged one copy of testimony provided by the witness DQX after the prosecutor presented copies of the testimony of nine witnesses. The prosecutor responded that he had nothing more to say and if the defender thought that testimony was not true. In the prosecutor's view, it was the defender's burden to present evidence to contradict the challenged testimony. However, because there were no witnesses appearing in court, the challenge was doomed to failure. After the 2012 reform, the CPL still requires the consent of the witnesses and victim or his or her relatives if the defence lawyer wants to collect evidence from them. At the same time, evidence collection at the lawyer's initiative before the trial may also bring the risk of being charged with perjury or falsifying the evidence if the defence version is different from the prosecution one collected from the same witness.<sup>26</sup>

Unlike the practice in western countries where the prosecution and the defence had equal chance to collect their own evidence, the police (and the prosecutors) in China monopolize the collection and production of evidence in criminal cases. After the report of the crime, the police were seen to be responsible for collecting the evidence. Thus the production of evidence is in the hands of the police/prosecution. If the defence lawyers want to collect evidence and conduct investigation, there would be obstacles for them. For example, according to the law, defence lawyers may collect information pertaining to the current cases with the prior consent of the witnesses or other units and individuals concerned.<sup>27</sup> However, on most occasions, few witnesses were willing to cooperate with the defence lawyers, because they thought that the police, the prosecutors or the judges should be exclusively responsible for collecting the evidence. The defender had to spend lots of time in explaining the law and persuading a witness to give evidence. Furthermore, the defence collection of evidence from the victim, victim's near relatives or witnesses provided by the victim is subject to the consent of not only the parties concerned but also of the procuratorate or the court,<sup>28</sup> which makes the defence investigation and evidence collection more difficult. Moreover, there was a risk for the defender in collecting the evidence. If the content of the testimony given by a witness to the defence lawyer was present in court, but was contradictory to that collected by the prosecution, then the defender would have more trouble awaiting him, for instance, the possibility of being investigated for perjury (Zhang 2014). Therefore, most defenders were unwilling to conduct investigation and collect evidence. Given the limited time to prepare for the criminal defence and the difficulties and the potential risks, few defenders are able to collect evidence. As a result, they relied heavily on the prosecution evidence. During the court investigation, very few witnesses will present in court to testify and thus give the defence opportunities for cross-examination, even in some socially important cases (West China Daily 2009; Chen 2014b).<sup>29</sup>

---

<sup>26</sup> Some Chinese scholars suggested a third evidence collection model: Writ of evidence collection issued the court in jurisdiction. But the effect of such practice needs further observation in China in the criminal trial. See Chen 2014b.

<sup>27</sup> Article 37, *Criminal Procedure Law of the People's Republic of China*.

<sup>28</sup> *Ibid.*

<sup>29</sup> The CPL 2012 provided situations of compulsory measures for bringing witnesses, mostly key witnesses, to court; however,

On rare occasions, defenders produced some evidence concerning the defendant's involvement in crime which might be relevant to mitigation of punishment (rather than to guilt or innocence). In the three sites, defenders in less than 30% of cases on average presented the so-called evidence or material in court, such as the defendant's case history issued by a hospital, the material to prove the defendant having no criminal record or the circumstances of voluntary surrender, evidence to prove that the defendant's family having returned part of the illicit money or the agreement of compensation between the defendant and the victim's family and testimonials proving the defendant's good daily performance and meritorious performance. For example, the defender in CTO C-3 (offence of intentional injury) presented the receipt of compensation and the testimonial provided by the detention house on the defendant's act of disclosing other criminals' undiscovered fact of crime.

### **3.2 Defender at the court debate stage**

Comparatively speaking, the defender was very active and energetic at the courtroom debate stage. They could express their opinion on the case and, in some cases, argue with the prosecutor for further discussion. For example, 40% of defenders in Sites A and B and 19% in Site C had further debate with the prosecutors, since they had disagreement on the argument such as if the defendant had the intention of fraud, if the defendant was guilty, if the evidence was sufficient and the charge was correct, if there was a voluntary surrender, if the victim has fault, if the defendant had a legitimate defence, if the defendant had a good attitude toward his crime and if the suspended penalty was applicable.

But, given the defendant's confession before the trial, few defenders can argue for the innocence of the defendant. In the 56 cases observed, defenders in only two cases (3.58%) argued for the defendant's innocence because of illegal evidence or insufficient evidence in Site A. For instance, in case CTO A-8 (Offences of robbery and theft), the defender of the first defendant makes a speech to argue for the innocence given that the prosecution lost the original copy of key evidences:

Dear Presiding judge, our opinion has essential differences from the prosecutor's. First, this case gives us a good lesson. I supplement the article of the criminal procedure law—"The oral confession alone, without other evidence, cannot establish the defendant's guilt."

Second, the charge of theft against the first defendant is not tenable. The 1979 criminal law should be applicable since the case happened before the enforcement of 1997 criminal law. What's more, the evaluation of the stolen tricycle will affect the nature of charge in that theft case, since there is something wrong with the invoice of purchasing the vehicle, the charge is not tenable.

Third, I cannot understand the following three problems—the offence of robbery in its subjective should have the intention to illegally possess others' property, which is a prerequisite. But in this case, the defendant denied this intention not only in his eight

---

such decision power is at the hand of the judges. Against the background of emphasizing the efficiency and heavy workload of judges, very few judges like to have witnesses testifying in court, as this would delay the whole trial process.

confessions but also in today's court hearing. How can we make a judgment? The criminal procedure law says that only after the court hearing can we make clear the issue.

Another problem is the collection of evidence breaks the basic rules of criminal procedure law. For the important and grave case, if the defendant was detained beyond the prescribed time limit, there should be a report on prolonged detention. The defendant in this case was detained for more than 8 years, but there was no such report. The criminal procedure law states that illegal evidence is not admissible. In my opinion, I think the police engaged in some illegal acts to collect evidence. The police missed the testimonies, photos on the site and post mortem, woolen coat and the knife (lethal weapons). The blood left in the site and lethal weapons are very important. The police can explain that this a mistake in their work, but from the legal perspective, these evidence don't exist any longer. The police made a lot of forged document, for example, they changed the material of reporting the case and asked someone else to sign the name on behalf of the witness. How can we adopt those evidences? I suggest the court to make an innocent verdict because the fact of crime is not clear and the evidences insufficient.

This daring defence opinion led to another round of debate between him and the prosecutor, when the presiding judge asked the prosecutor if he wanted to respond to the defenders:

Yes, Presiding Judge. We think the fact is clear and the evidence is sufficient in principle. The first defendant made a confession in the Public Bureau of XX District, Beijing. According to the invoice, the tricycle was bought on February 16 and lost on February 20, which has the value of 4000 Yuan. The present price should be price of actual value. Second, the defender challenges the evidence because of the signature. This is the defender's personal deduction. The key point is the fact of homicide. The plaintiff witnessed the defendants' whole process of murder. The material of reporting the case proves the existence of the robbery and murder. It is natural that the police' different questioning style causing slight differences. Third, the knife, not one but two knives, mentioned by the defendants did exist in fact. Fourth, who killed the victim is not the focus of this case, because we charge two defendants with the offence of robbery but not homicide. The two defendants try to avoid the responsibility in the court hearing, but one thing is clear—when one defendant committed a crime, another one gave his helping hand, so they should bear joint responsibility for the victim's death. Fifth, the police losing evidence wouldn't mean the non-existence of these items of evidence, because the two defendants had confessions to give us detailed description on the whole process of the case. Sixth, the defendant s' statement on torture is not correct. He confessed his act of theft in Beijing first and then his crime of murder in this city. The police in Beijing contacted us to confirm the fact of crime here. The defendant's transfer went through three police organs, he made a guilty statement. When the police here asked the first defendant key questions, he didn't answer them but lowered his head. If the police made use of torture, he could not keep silent. Although we cannot clarify who stabbed the victim, the fact does exist.

The defender definitely disagreed with the prosecutor:

The problem is that it is not reasonable to use Mr. A's invoice but not the owner Mr. B's. You said that it was reasonable that different police interrogated the same defendant may cause slight difference in signature, but if the same police interrogated the same defendant, how can you explain it? We suggest the panel to make a new expertise on the signature. If there is any trace of man-made change in the document, there is no need to open court hearing today. In addition, there is a lack of witness testimony. There's a contradiction in the only one testimony. We should treat the case with our utmost care since it involves human lives. We should be responsible for both the defendant and the law. Third, according to the international convention that China joined in, no one is compelled to self-crimination. Therefore, the people's procuratorate should bear the responsibility to make clear fact and the evidence should be sufficient, instead of basically being sufficient. Otherwise, it would trample on the law. The case involved illegal evidence will make a laughingstock of itself before experts.

The Presiding Judge did not say anything on the brilliant debates and the defence opinions but just go ahead with the proceedings. However, according to the judgement, the outcome of the case seemed to be certain when the case is prosecuted. The court finally held that:

The charge of robbery is established, but the offence of theft, the second charge against the first defendant is not tenable. After the panel's investigation, the opinions of the first defender are partly acceptable. The makeup of material of reporting the case cannot be used as the evidence in this case, but other documents such as written record of site reconnaissance, since they are originated from the copy of authentic one in the past, and the content is true, so these evidences are acceptable. The defender's opinion on the first defendant's innocence is not admissible. The main facts and evidence can prove the defendants' crime, so the court supports the procuratorate's charge. The two defendants' circumstances of crime is grave, they should be punished severely.

On the contrary, most defenders often argued for leniency because the victim had fault, the defendant played a minor role in the crime, or the defendant had a good attitude towards his crime. For example, here's the defender's opinion in CTO A-25 (offence of intentional injury) in summary:

First, on behalf of the defendant, I apologize to the victim's family. Second, I agree with the nature of charge, the fact and the evidence. Third, the victim had certain fault. Fourth, the defendant has the circumstance of voluntary surrender. Fifth, the defendant has a good attitude towards his crime and the performance of contrition. Sixth, the defendant's family actively compensated the victim's family for the damage of near 60 thousand Yuan. So we suggest the panel reduce the defendant's punishment or impose him a lenient punishment.

### **3.3 Defender's professional quality**

The effectiveness of criminal defence will affect the final outcome of a criminal case to a certain degree. Researches in the UK demonstrated that the quality of defence lawyers and other paralegals varies considerably. For instance, McConville et al (1994) found that in the criminal defence with notable exceptions, the paralegals, clerks and personal assistants employed are unqualified and unskilled persons with limited amount of experience. Therefore, in the absence of professional training and quality, defence lawyers would be concerned with “legal guilt and influenced by more popular conceptions of factual guilt and criminal responsibility” (McConville *et al.* 1994:12). Moreover, many defendants complained that defence counsel spent insufficient time with them prior to the court hearing, was ill-prepared to put in an adequate plea in mitigation (Baldwin & McConville 1977:92). Furthermore, there is a system of effective defence in the criminal cases developed through case law in such countries as the USA in order to fully protect the rights of the accused (Peng 2015).<sup>30</sup>

In the author’s research, defenders’ professional ability was different in the three sites. Some were high, while some performed poorly in the trial. Some of the defence lawyers were not competent in criminal defence at all, because they did not have detailed knowledge of the case, or lacked sufficient preparation or were inadequately trained.<sup>31</sup> For example, the defender in CTO C-10 (offence of intentional injury) did nothing in the investigation stage but simply asked the defendant one question on how the defendant was caught and got the answer that the defendant was caught by the police when he was irrigating the field. Then, at the debate stage, he stated that he had no disagreement with the charge, but there was a special reason for the occurrence of the case since the victim had obvious fault; although the defendant did not tell the court clearly, he had the circumstance of voluntary surrender; moreover, the defendant had no criminal record and had a good attitude toward his crime; as a result, the defender suggested the judges impose the defendant a lenient punishment. The prosecutor replied that there was no evidence to prove that the defendant had the circumstance of voluntary surrender, since he had been caught by the police. In this case, it was obvious that the defender did not understand the case information in detail and mistook voluntary surrender of the defendant’s brother as the defendant’s act, although the defendant’s answer at the investigation stage indicated his arrest by the police.

In addition, the privately retained lawyers and the court appointed lawyers had a different attitude. They might hold different opinions, even based on the same facts and charge. Take CTO A-8 for example. The defender of the first defendant, who was employed by the defendant’s family, asked the first defendant a total of 19 questions before the presiding judge stopped him. Then he asked the second defendant four questions to inquire when the second defendant knew the victim was dead, who actively invited the other defendant to the victim’s home and if they had discussed the plan beforehand and the reason why the second defendant fled. When the judge in charge of the case asked the defender of the first defendant if he had any challenge, the defender raised four doubts on the evidence:

First, the material on reporting the crime has been made up a long time after the case;  
second, the written record on the site reconnaissance could not prove anything, apart

---

<sup>30</sup> See e.g. also *Powell v. Alabama*, 287 U.S. 45 (1932); *Brooks v. Tennessee*, 406 U.S. 605; *Geders v. United States*, 425 U.S. 80 (1976) and *Wiggins v. Smith*, 539 U.S. 510 (2003), regarding the effectiveness of the criminal defence in the USA.

<sup>31</sup> This was also provided another similar grand research project in China. See McConville *et al.* (2011):293-314.

from having manmade changes inside; third, the document on the post mortem has also been changed by the police; and fourth, there was no test of blood type of the victim. During the oral debate, the defender of the first defendant argued that the charge of the offence of theft was not admissible. Then, he pointed out that the charge of robbery was not reasonable since the two defendants stole nothing and refused to admit the crime. Furthermore, the defender attacked the police's illegal possession of evidence and extended detention of eight years. Finally, he argued that the first defendant was innocent because of unclear facts and insufficient evidence. In his view, the police losing the evidence in case meant that there was no evidence from the perspective of law. These led to further debate between the defender of the first defendant and the prosecutor.

By contrast, the defender of the second defendant, who was appointed by the court via the local legal aid centre, asked the first defendant five questions and the second defendant three questions respectively on the detailed facts of crime. Then, she stated that she held similar opinions as the defender of the first defendant when cross-examining the prosecution evidence. At the debate stage, the defender of the second defendant agreed with the prosecutor's charge in principle, but asked for a lenient punishment by insisting that the second defendant had a good attitude towards his crime and was willing to undertake civil liability although his ideology of law was poor. It was obvious that the second defendant and his defender shared quite different opinions.

The defender's opinion was not really held, as she just fulfilled her routine duty to be the defender in order to satisfy the legal requirement in this case. She did not provide any substantive help to the defendant, because she spent less time and was insufficiently prepared for the defence. Her attitude was not positive and her behaviour in court was poor. Since the defendant refused to admit his crime, how could she insistently state that the second defendant had a good attitude toward his crime? Indeed, the defender of the second defendant at the debate stage tried to impress upon the panel that the second defendant admitted the crime and accepted the punishment of law, because this was quite likely to be adopted by the judge and finally may bring factual virtues for the second defendant—the possibility of lenient sentencing. These lawyers, professional experts in criminal defence, knew that in most judges' mind, the defendant's attitude towards the crime—the confession of the crime or resistance to admit his crime, to a certain extent, can reflect his subjective evilness, personal danger and difficulties or ease in ideological reform capacity to endanger the society in future (Fan 2003). As a result, it was not surprising to see two lawyers have different opinions in one case. In other words, from this case, people can understand that the legal aid lawyers were not very responsible for the defence. This proved that the appearance of legal aid lawyers in criminal cases was on a routine basis, and the issue of money was also one of the major concerns of the legal profession. In fact, according a Chinese scholar's view, most lawyers are not so willing to engage in legal aid services in criminal cases, because the remuneration arising from such representation is very few (Lin & Liu 2014:72; Chen 2014a:103) and factually most lawyers engaged in the pro bono defence are lack of practicing skills or experiences (Chen 2014a:103). Likewise, some researches in the UK found similar problems in legal defence (McConville *et al.* 1994:46). Moreover, some Chinese researchers still criticized lawyers' professional ethics and

responsibility in the criminal defence even after the CPL reform (Gao 2012:56).<sup>32</sup>

#### 4 Conclusion

As discussed above, although the rights of defenders, especially the defence lawyers, have been improved in the criminal defence in China, there is no balanced contest in the trial. The defender's role is still very limited and passive due to structural disadvantages, the difficulties in meeting the suspect, reading case files, conducting investigation and collecting evidence at the pretrial stage and the potential risks in dealing with criminal cases,<sup>33</sup> which hindered the criminal defence in China. Therefore, "the notion of emphasis on striking against the crime and substantive law and insufficient attention to the protection of human rights and procedural requirement and too many restrictions against lawyers practice in judicial interpretation, especially those discriminatory clauses, have seriously encumbered the enforcement of criminal defence" (Fan 2001). After the 2012 CPL reform, the pretrial evidence discovery initiated by the court or procuratorate in some places aimed to improve the trial efficiency; however, there is a risk of going through the formalities: No substantive exchange of the views on the evidence discovered at the pretrial stage or in the courtroom (Liang 2015). This may weaken the role of criminal defence in the trial.

When the defence lawyers present in the courtroom, they are seated away with the defendant, so there are no or at least very few effective, communications between the lawyers and the defendant in the court. They have routine but few communications with their clients, what they can communicate with is the incomplete case files provided by the prosecution. And what they can argue in the debate is the routine strategies for leniency argument. This kind of defence and communication before, during and after the trial cannot safeguard effective exercise of defence for the accused.

In order to improve the effectiveness of criminal defence in China, especially the communications, it is necessary for China to conduct further reforms. For instance, it should delete Articles 306 and 307 of the Criminal Law in order to remove potential professional risks for defence lawyers, increase of pretrial evidence discovery to facilitate the defence side to sufficiently obtain the case information and defence preparation. Moreover, it is important to secure effective communication between the defence lawyers and the clients before the trial. And if possible, the communication between them in the court trial should also be safeguarded, such as the sitting arrangement. In this way, the author thinks China can better protect rights of the accused in the long run.

#### References

Baldwin, J., & M. McConville. 1977. *Negotiated justice: Pressures to plead guilty*. London:

---

<sup>32</sup> There are various reasons for this situation in China. Apart from lack of the immunity from professional risk, low allowance for legal aid lawyers which cannot cover their real costs and insufficient staff are another two important aspects causing such a routine but ineffective practice in China. See detailed discussions in Zheng (2015).

<sup>33</sup> Some lawyers might be sued because of the falsification of evidence (Congressional-Executive Commission on China 2003). For detailed discussions on this, See Pils (2013:411-438); and Lan (2013:304-322). See also Guo (2013:411-448) and Li (2010).

- Martin Roberson.
- Chen, R. 2014a. On the issues involving effective defence in the criminal proceedings. *Journal of Soochow University (Philosophy & Social Science Edition)* 5. 94-105.
- Chen, R. 2014b. Three models of evidence collection for defence lawyers. *Studies in Law and Business* 1. 73-84.
- Chen, R., et al. 2012. *Break-through and limits of the reform of legal procedure*. Beijing: China Legal Publishing House.
- Congressional-Executive Commission on China. 2003. Defense lawyers turned defendants: Zhang Jianzhong and the criminal prosecution of defense lawyers in China. [Http://www.usc.cuhk.edu.hk/PaperCollection/Details.aspx?id=2269](http://www.usc.cuhk.edu.hk/PaperCollection/Details.aspx?id=2269) (Last visit: 10 October 2015).
- Fan, C. 2001. A practical analysis of enforcing criminal defence system. *Legal Daily*. 8 April.
- Fan, F. 2003. On the significance of simplified ordinary procedure in advancing the judicial reform. *Legal Daily*. 15 May.
- Fu, H. 1997. The right to a fair trial in China: The new criminal procedure law. In Andrew Byrnes (ed.), *The right to fair trial in international and comparative perspective*, Hong Kong: Centre for Comparative and Public Law, the University of Hong Kong.
- Gao, W. 2012. A study of problems on defence lawyers in China's criminal procedure. *Justice of China* 6. 52-58.
- Guo, M. 2013. Empirical study of defence lawyers' right to collect evidence and conduct investigation. In Sun C. (ed.), *Criminal Justice Review* 1(1). 411-448. Beijing: China Procuratorial Press.
- Han, F. 2014. Current situation of the criminal defence system in China and its improvement. *Law and Society* 11. 38-42.
- Lan, R. 2013. Killing the lawyer as the last resort: The Li Zhuang case and its effects on criminal defence in China. In M. McConville and E. Pils (eds.), *Comparative perspectives on criminal justice in China*. Cheltenham, UK: Edward Elgar.
- Li, Q. 2010. Li Zhuang case and criminal defence—Examining the relationship between criminal defender and the accused in Germany. *Journal of Political Science and Law* (27)6. 71-76.
- Liang, Y. 2015. Observation and reflections on the evidence discovery in China—Based on the pilot activities in some local courts and procuratorates. Paper of the Fifth International Conference on Law, Language and Discourse, Örebro University of Sweden.
- Lin, T. & W Liu. 2014. Effective defence of the Lawyers at the Pre-trial Stage. *Chinese Lawyer* 9. 72-73.
- McConville, M., et al. 2011. *Criminal justice in China: An empirical inquiry*. Cheltenham, UK: Edward Elgar.
- McConville, M. et al. 1994. *Standing accused: The organization and practices of criminal defence lawyers in Britain*, Oxford: Clarendon Press.
- McConville, M. & J. Baldwin. 1981. *Court, prosecution, and conviction*. Oxford: Clarendon Press.
- McConville, M. & X. Fu. 2014. China's criminal justice system. In L. Cao, I. Y. Sun and B. Heberton (eds.), *The Routledge handbook of Chinese criminology*. New York: Routledge. 89-102.
- Peng, J. 2015. Effective defense and defense quality—Analysis on the effective defense system of the United States. *Journal of Xiangtan University (Philosophy and Social*

- Sciences Edition*) (39)4. 45-49.
- Pils, E. 2013. Disappearing' China's human rights lawyers. In M. McConville and E. Pils (eds.), *Comparative perspectives on criminal justice in China*. Cheltenham, UK: Edward Elgar.
- West China Daily. 2009. Li Zhuang case open session tomorrow and none of the 8 key witnesses will appear in court. *West China Daily*. 29 December.
- Zhang, J. 2014. Research on the practice predicament and legal rights of criminal defence attorneys. *Journal of Shaoguan University (social science edition)* (35)3. 119-123.
- Zheng, L. 2015. A study of relevant issues relating to criminal legal aid (in China). *Justice of China* 10. 78-80.