

CRIMINAL DEFENSE AND LEGAL AID IN CHINA

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The Chinese legal aid system in criminal procedure provides defense or other help by the State to a suspect or a criminal accused who cannot afford to provide his own defense, so as to maintain their lawful rights and interests. Criminal procedure is a judicial process in which the state determines whether a suspect has committed a crime and makes decisions on the criminal's right of freedom, right of life or right to certain properties. Therefore the State pays great attention to the right to defense of a suspect or an accused.

The right of a criminal suspect or accused to a defense and requirements for guaranteeing the exercise of the right are all stipulated in relevant laws.

I. Legal Regulations of Criminal Defense in China

A. Relevant Rules in the Criminal Procedure Law Promulgated in 1979

The Chinese criminal defense system is an important and indispensable part of the Chinese Criminal justice system. As the first criminal procedure law in China, the 1979 law provided a criminal defense system. The basic contents are as follows.

1) The right to defence of the accused and the right to authorize a defender are declared. According to Article 26 of the 1979 Criminal Procedure Law, defendants may themselves exercise the right to defense. They may also authorize the following people to defend them:

- a. Lawyers;
- b. Citizens who are recommended by a people's organization or by the defendant's unit or who are allowed by the people's court; and
- c. Close relatives or guardians of the defendant.

2) A court may designate a defender in two types of cases:

a. In cases in which a public prosecutor appears in court to bring a public prosecution, and the defendant has not authorized anyone to be his defender, the peoples's court may designate a defender for the defendant.

b. In cases in which the defendant is deaf, mute or a minor and has not authorized anyone to be his defender, the people's court shall designate a defender for him.

3) The responsibility of a defender is, on the basis of the facts and the law, to present materials and opinions proving that the defendant is innocent, that his crime is minor, or that he should receive a mitigated punishment or be exempted from criminal liability. The defender should safeguard the lawful rights and interests of the defendant.

4) In conducting the defense, a lawyer may consult the material of the case, acquaint himself with the circumstances of the case, and may interview and correspond with a

defendant held in custody. Defenders who are not lawyers may, with permission of the people's court, also acquaint themselves with the circumstances of the case and interview and correspond with a defendant held in custody.

5) No later than seven days before the first court session, a copy of the indictment shall be delivered to the defendant and he shall be informed that he may appoint a defender, or if necessary, that the court will designate a defender for the defendant.

6) A defender has the right to put questions to the defendant, the right to apply for a summons of a witness, for obtaining new material evidence and for new evaluation or inspection. He also has the right to argue for the defendant during the court room hearing.

7) A defendant may dismiss his defender and may also authorize another defender.

These provisions of the 1979 Criminal Procedure Law on criminal defense laid a foundation for the Chinese criminal defense system and played a role in maintaining justice and safeguarding the right to defense of the accused. With the deepening of the reform and opening to the outside world, amendment of the 1979 Criminal Procedure Law was put on agenda.

B. Relevant Regulations in the New Criminal Procedure Law 1997

In March 1996 the National People's Congress adopted a New Criminal Procedure Law, which came into effect on January 1, 1997. The new law contains many important amendments which were planned on the basis of experiences of implementing 1979 law. While effective and reasonable provisions of the old law were maintained, a major reform was adopted in order to improve justice, safeguard human rights in judicial process and to fight against crimes. The main amendments concerning the criminal defense are as follows:

1) Delivery of indictment and notice of the right to appoint a defender to the defendant now should be no later than ten days before opening the court session¹. In the old law the minimum interval was seven days.

2) Under the new law a suspect may authorize a lawyer to act as his attorney after the first interrogation or after his freedom is restricted with a coercive measure. An attorney can provide legal advices and can file a petition or a complaint of illegal act of investigators. The authorized lawyer has right to ask the investigators about the charge against his client. The attorney can also interview the suspect held in custody to get information about the case².

3) The concept of "legal aid" is definitely put forward and the basic frame and principles of criminal legal aid system are defined in this new law. A defender designated by the court now must be a lawyer and criminal legal aid became a lawful duty of a lawyer³. These are important developments in the reform of criminal justice and the safeguarding of the human rights of the accused in the judicial process.

II. Legal Aid for Criminal Defense

In accordance with provisions of the new Criminal Procedure Law and newly prom-

¹ Criminal Procedure Law [C.P.L.] art.151(1).

² C.P.L.art.96.

³ C.P.L.art.34 and Attorneys Law of People's Republic of China art.42.

ulgated Lawyer's Law, the Chinese Ministry of Justice and the Supreme People's Court have issued a Joint Circular in which the procedure for providing legal aid is defined in detail. The main contents are as follows:

1) A criminal legal aid case in which a people's court appoints a defender shall be accepted and implemented by a legal aid agency that is acting where people's court is located. In those areas where a legal aid agency is not yet set up, the case shall be accepted and implemented by a judicial administration organ located in the same area and at the same level as the court.

2) In cases in which the accused is blind, deaf, mute, or minor, and may be sentenced to death but has not authorized a defender, the legal aid agency or the judicial administration organ shall, within three days after the notice of indictment and the appointment, designate a lawyer who has the responsibility of providing legal aid to defend the defendant.

3) For cases in which a accused meets the standard of indigence stipulated by the local government and the court considers a defense lawyer is necessary, the legal aid agency shall designate a lawyer, within three days after receiving the notice of the appointment a defender.

4) In case a court considers a defense lawyer is necessary for the circumstances of the case, and the accused meets with one of the following conditions, a legal aid agency or a judicial administration organ shall, within three days after receiving the notice of appointment, designate a lawyer who has the responsibility to provide legal aid of defense:

a. The accused himself does not have economic resources and the economic situation of his family cannot be verified;

b. The accused himself does not have economic resources, and his family, after repeated persuasion, does not wish to pay the defense expenses;

c. In cases of complicity, other accused have authorized defenders, but the accused has not yet authorized a defender;

d. A foreign accused has not authorized a defender;

e. The case has major social impact;

f. The people's court considers that there ia a problem with the indictment or with prosecution evidence, that might prevent the court from fairly determining crime and sentence.

5) For the case which a people's court considers needs a defender, the notice of assignment and a copy of the indictment shall be delivered to the local legal aid agency or the judicial administration organ at the same level as the court. The delivery shall be ten days before the opening of a court session. An explanation of the accused's situation eligible for legal aid, or a certificate specifying his economic difficulties shall be attached to the notice.

6) A defense lawyer who accepts a legal aid case may carry out his defense duty after getting approval of the accused.

7) A people's court shall actively support legal aid lawyers in conducting their functions. It shall provide the lawyers with facilities to consult the materials of the case, to make extracts of or copy the records of the case, and to interview and correspond with the defendant held in custody, etc.

In addition to providing of criminal defense when assigned by the court, Chinese legal aid agency also accepts requests for legal aid from suspects who have already been interrogated, or put under coercive measures by the investigation organ. Assigned lawyers provide legal advice, file petitions or complaints against illegal investigative measures acting as the

defendant's attorney. The legal aid agency also accepts requests for legal aid from an accused without assignment by the court and provides defense for him. Of course, the legal aid agencies need to review the financial situation of the applicant. Legal aid shall only be granted to those applicants who meet standards of economic difficulties regulated by a local government.

III. Future Plan

Criminal legal aid is an important part of the legal aid system. It is also an important reflection of protection of human rights in criminal justice system.

The Chinese legal aid system is just at the first step. Even though the frame and principles of criminal legal aid system are provided in the Criminal Procedure Law, to establish an integrated system, we need to learn systems from other countries and at the same time need to take into account of Chinese situation so as to further develop and improve our system.

A. Short Term Objectives

Since China is a developing country, the fund for legal aid depends on donations from the society in addition to a certain amount of allocation from the government. It needs lawyers, notaries and other legal workers who work at grass-root levels to provide voluntary services. At the beginning of implementing the legal aid system, stress shall be put on providing legal aid for criminal cases defined in the Criminal Procedure Law and the Joint Circular issued by the Ministry of Justice and the Supreme People's Court. Accuseds and suspects whom the court failed to assign to a legal aid agency in spite of their economic difficulties should also have priority. For a developing country with 1.2 billion population out of which 70 million are impoverished, to achieve this objective will be a great progress.

B. Long Term Objective

With the development of the Reform-and-Open policy and strengthening of the legal system in the environment of a market economy, and with increased resources for legal aid provided from the growing social prosperity, the Chinese legal aid system will achieve a greater development in future.

The system will probably develop as follows:

1) Lawyers who provide criminal legal aid will be more professionalized. With the development of the legal aid system, many lawyers who participate in legal aid work will be specialized at criminal defense. A highly professionalized group of criminal defense lawyers will be formed out of this group.

2) The fund for legal aid in criminal case will be guaranteed with priority. Criminal defense relates to the protection of procedural human rights and the justice. The government's function and responsibility in protecting human rights in the judicial process will be stressed day by day, making references to the good experiences of other countries. The legal aid funds provided by the government will give priority to suspects and the accused in criminal cases rather than those who are involved in civil disputes.

3) Criminal legal aid will play a more important role in promoting justice. With the development and improvement of Chinese legal system, lawyers who take part in providing criminal legal aid will carry out their defense function more fairly and objectively. They will

be more coordinated with courts, prosecutors and investigation agencies and can make greater use of the facilities of these agencies. Their opinion on the defendant's liability and sentencing will be more respected by the courts and prosecutors. Obviously, this is just the result of reforming criminal justice system which our reform seeks for.

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