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Ш. Ванг

ПРЕПЯТСТВИЯ В ПРИМЕНЕНИИ УГОЛОВНО-ПРАВОВОЙ ПОМОЩИ И ИХ УСТРАНЕНИЕ В КИТАЕ

Аннотация: статья посвящена проблеме применения правовой помощи в Китае, которая достаточно редко осуществляется. Предлагаются пути решения данной проблемы. Автор считает, что необходимо улучшить знания работников правоохранительных органов, изменить способы приема адвокатов на правовую помощь, уточнить права на помощь и обязанность уведомления. Эти действия помогут существенно исправить ситуацию.

Ключевые слова: правовая помощь, обязанность уведомления, реформа, адвокат.

Sh. Wang

ON THE OBSTACLES AND SOLUTIONS IN THE APPLICATION OF CHINESE CRIMINAL LEGAL AID SYSTEM

Abstract: the article discovers the problem of application of Chinese legal aid system, which is very low. The problem should be solved as below. The author suggests strengthening the education to investigators, changing the way of employing legal aid lawyers and clarify the content of the right informing and applying for legal aid system. These actions application might well improve the situation.

Keywords: legal aid system, obligation to notify, reform, legal aid lawyers.

The new «Chinese Criminal Procedure Law» has been implemented for three years, many factors that may affect the application of legal aid system at the time of legislation were unexpected. Between the «quality» and «quantity» of the application of the legal aid system, the question of «quantity» is more urgent and prominent, because the improvement of the «quality» must be based on certain «quantity» of application. There are about three elements that affect the application of the legal aid system – subject, system, consciousness, and each element has a «fatal» defect.

«Subject» element in the legal aid system mainly refers to the legal aid lawyers, the main problems of the legal aid lawyers at present is that «they have a small number and less experience.” According to statistics, at present, the average number in the county legal aid agencies in China is only 3.98, some principal of the administration authority of justice also serves as the principal of the county legal aid agency, and the average number of the people who actually engaged in the daily work of legal aid is only 2.98 [1]. However, this is only the surface of the problem, the substance the problem is treatment. «System» element is that during the application process of the legal aid system, the content of operations of the procedure at each stage and penalties for violations of procedures should be clearly defined. There are no targeted provisions about the variety of key details in the legal aid system’s practice in current laws and judicial interpretations, however, it is these overlooked details that are most likely to be amplified in practice, and become the biggest obstacle in the application of the legal aid system. «Consciousness» element refers to the consciousness of investigators that they should be familiar with the contents of the legal aid system, and should apply the system initiatively when the

situation is suitable. In current judicial practice, the lack of consciousness presents an extremely serious situation.

1. Obstacles in the application of Chinese Criminal Legal Aid System

1.1. Subsidies to Legal Aid Cases Restrict the Team Building of Legal Aid Lawyers

Currently, legal aid lawyers' treatment includes wages and subsidies, and the subsidies has always been criticized. In judicial practice, problems of the subsidies in legal aid system focused on two points: «a small amount» and «unbalanced». Furthermore, «unbalanced» includes not only the unbalance between different regions, but also the unbalance during different stages of the proceedings. In particular, below.

Firstly, regional divergence is too large and is not match with the region economic development. For example, Wuyishan City, Fujian Province, an eastern province whose economic is more developed comparatively, its legal aid subsidies for the stages of investigation, prosecution and trial are 100 yuan, 100 yuan and 400 yuan, and in the Legal Aid Centre of Lanzhou City, Gansu Province, subsidies for three stages all are 1,200 yuan, a difference of as much as ten times [2]. The amount of subsidies in other regions are also disproportionate to the trend level of economic development of the region.

Secondly, the amount of subsidies is too immobilized. A common practice in legal aid cases is to be given fixed and few subsidies for legal aid in the three stages mentioned above, but such practice must not suit for the variety situations in different cases. Meanwhile, because of the amount of subsidies is so small, the problem of «lawyers handle with cases with their own money» becomes more serious.

Thirdly, the divergence of subsidies between stages of investigation, prosecution, and trial is too large. In the session report of «Implementation Summary Seminar of Chinese Criminal Legal Aid System in 2014», hosted by Professor Gu Yongzhong in China University of Political Science and Law, there are data of 18 regions or units, and 10 of them give different amounts of subsidies to legal aid in stages of the investigation, prosecution and trial. The amount of subsidies in the investigation stage is less than or flat with the stage of prosecution, but the amounts of both of them are less than the trial stage.

During the investigation stage, the defense counsel can do these matters for the suspect: to meet the suspect, to provide legal assistance; proposing petitions and complaints; applying for change of coercive measures; learning from the investigation authority about charges of the suspects and details related to the case, and giving some advice; communicating with the suspect; collecting material related to the case; applying for the transfer of evidence material which can prove the suspect's innocence or can lead to a lighter punishment. In the prosecution stage, besides what matters the defense counsel can do for the suspect in the investigation, the defense counsel also have rights below: verifying the relevant evidence with suspect or defendant; consult, extract and copy the files of the case. In the trial stage, defense counsels still have these rights, but in general, most of their work are completed in the investigation and the prosecution stages, and most of time and transportation costs are produced in these two stages. Therefore, the system design of giving immobilized subsidies to investigation, prosecution and trial stages, and even obviously benefit to the trial stage is unscientific.

The reason why the treatment is «subject» element's «fatal defect» is that treatment is the origin of these problems below.

1.1.1. Team building of legal aid lawyers is hysteresis

Normally, the implementation of the new «Criminal Procedure Law» would bring a sharply rose of the demand for legal aid, and legal aid agencies should increase the number of the staff, and as a result, the proportion of legal aid lawyers handling the case should also rose sharply. In practice, however, the proportion of social lawyers handling the case was significantly higher than the proportion of legal aid lawyers handling the case, and it still appears to an increasing trend [2], the underlying causes of this strange phenomenon is still the treatment.

Treatments of the legal aid lawyers in legal aid center refer to civil servants, which are low and immobilized, while subsidies for legal aid cases are significantly lower, and the amounts in some places only are one or two hundred yuan, often leading legal aid lawyers to make ends meet when dealing with the cases. Therefore, lawyers in legal aid centers not only face the problem of «small number», but also face the problem of «low quality». This can explain the reason why the proportion of social lawyer to handle legal aid cases is still higher than the proportion of legal aid lawyers after the implementation of the new «Criminal Procedure Law».

1.1.2. Legal aid lawyers are negative in dealing with legal aid cases

One of the reasons why legal aid lawyers are negative in dealing with legal aid cases may due to their own inertia, but to a greater extent this is because of the pressure of reality. It is undoubtedly a luxury that depending on legal aid lawyers to deal with cases with low and immobilized incomes. Problems that may arise under

the existing provisions would be that the requirement of two times meetings with the suspect is compressed to once, and a legal aid lawyer still do not know basic information of the suspect in court debate. It is more likely that we have made a mistake to attributable the reasons to legal aid lawyers' inertia. Many scholars have been discussing how to evaluate the quality of legal aid cases, hoping to use this to restrain legal aid lawyers, and to ensure the quality of the cases, I think they take the branch for the root. There is no doubt that the current salaries and subsidies will affect the quality of the case, and this is the reason why so many suspects prefer to hire a defense counsel instead of a free legal aid lawyer.

1.2. The fulfillment of rights informing and notification obligations are not perfect

Problems of «System» element is mainly focused on that «the fulfillment of rights informing and notification obligations are not perfect». Legal aid system can be started in two ways: one is application of applicants, and the other is the decision of court. But the informing of rights is always not so exhaustive that if only to inform the right name to the suspect without explaining its content, the suspect or the defendant or the people who have the right to apply for legal aid may still be confused after being informed of their rights, or do not know how to apply the system, or do not have basic trust to the system, or even finally waived the right of legal aid. Meanwhile, in the legal situation of applying legal aid, there is also a problem that the notification of legal aid lawyers is not perfect, such as: the notification subject is unknown, the notification procedure is not specifically and so on, which greatly affected the rate of the application of the legal aid system.

*1.3. The consciousness of the investigators to apply the legal aid system initia-
tively is poor*

The new Criminal Procedure Law has not only extended the legal aid system to the stages of the investigation and prosecution, but also expanded the scope to five kinds of people. If investigators are not familiar with the provision, it will lead to a result directly that cases which are suitable to applying for legal aid cannot start this system, or do not notify the legal aid agencies in cases which they should do. It is more likely because that there is no system design of corresponding penalty for this situation, but we cannot deny the importance of promotion to the implement of the new law. A more direct reason is that the training and education of authorities of investigation, prosecution and trial to their staff about the new Criminal Procedure Law is not enough. Therefore, it is very necessary for the authorities to enhance the learning and training of investigators.

As mentioned above, «legal consciousness» includes not only «knowing about the law» but also «the consciousness of using the law», therefore, the education and training to investigators can not only be limited to expand their knowledge, but also pay attention to the consciousness training of investigators to apply the legal aid system initiaively. Nowadays, a variety of learning methods make it easy to learn about the provisions, and the problem of lacking of consciousness of protecting the human rights is becoming more seriously.

2. Analysis and solutions to the key procedural issues

2.1. Two paths for the personnel security of legal aid lawyers

The question of personnel security of legal aid lawyers is in an awkward position in the whole system of legal aid, because there is a contradiction between the expectations of the designer to legal aid lawyers and the specific system. On the one hand, system designers want to establish a specialized team to deal with legal aid cases, and want to use the limit of «cannot accept non-legal aid cases» to restrict the legal aid lawyers, and encourage them to put all their energy into the legal aid cases, in order to ensure the quality of legal aid cases; on the other hand, they give low and immobilized wages and subsidies to legal aid lawyers, but also hope to absorb some experienced lawyers to engaged into the legal aid system. In my opinion, there are two programs can be chosen to solve the problem of legal aid lawyers.

Firstly, in the legal aid cases, we can make the legal aid agencies on behalf of the government to commission legal aid lawyers and pay legal fees similar to how much in the commissioned defense cases should pay, to provide legal assistance to eligible suspect or defendant.

The biggest difference between legal aid cases and commissioned defense cases lies in the different ways a lawyer involved into the case, one is assigned by the legal aid agencies, the other is commissioned by a party. But the difference ways are not the inevitable reason that lead to the differences between the quality of cases handled by legal aid lawyers and social lawyers, the treatment is the key factor. Therefore, giving the same treatment to the social lawyers in legal aid cases and in other cases can solve the problem. To establish a special team of legal aid lawyers

and limit them to handle with legal aid cases, is not necessary for the legal aid system, and its purpose is to make it easier in arranging a lawyer for legal aid cases when having a relatively fixed selection range, and this can also save costs and improve efficiency.

Meanwhile, the advantage of this program is bigger than that in the program which giving high subsidies to legal aid lawyers, for it does not kink on the question that the actual expenditure is more or less compared with the fixed subsidies, and is more flexible, and the most concerned question in legal aid system about lawyers' «mental subsidies» has also been solved.

Secondly, establish a public lawyer system, and legal aid will be included within the purview of public lawyers. CPC-eighth the Fourth Plenary Session mentioned the suggestion to establish a public lawyer system, but there are not yet specific policies and rules. Generally, the responsibilities of the public lawyers include providing legal advice and consulting services for government departments and their decision-making, undertaking the cases of administrative reconsideration and administrative litigation.

We can consider to include the legal aid within the purview of public lawyers, and a public lawyer can deal with legal aid cases only if they have pass the assessment and excerpts. The advantage of this system is that it can maintain a relatively stable and high quality team of lawyers, and the lawyers play a role as the national staff and have the equal status with the public prosecutor, which is benefit for the lawyers to exercise the right to defense. The disadvantage is that the interconnectiv-

ity between the national staff, just like the delicate relationship between the prosecution and the court, the cooperation is much more than restriction, which is a hidden threat that we can foresee.

For the two programs, I prefer to the first one, because it catches the key points that affect the lawyers' enthusiasm in handling the case more directly, and it is more favorable for the main objective of legal aid cases – to ensure the quality of handling.

2.2. Clarify the right informing and the notification obligations

The right informing should not be confined to inform the name of a right, and the specific content of the right should be explained further. The procedure of right informing can imitate the procedure of «Miranda Warning», when the investigators told suspects or defendants that they have «the right to appoint a defender», they should make a brief explanation of the basic responsibilities of the defender at the same time, and tell them «if they have difficulties in financial, they can apply to the legal aid agencies for legal aid». They should also tell them that the legal aid is free, and they can even tell them that the profession level of the legal aid lawyers is flat with or even slightly higher than the general level of lawyers, in order to build the applicant's confidence to the legal aid system.

The obligation of notification to the legal aid lawyers should include content of «notified by who», «How to notify» and «Notify whom» at least. In judicial practice, subjects of «notified by who» maybe include specific investigators and outreach staff, and if there are no specific regulations, they may shirk their responsibilities. Therefore, in order to clarify their responsibilities and with considering the

practical operability and convenience, we suggest that binding the notification obligation to the case, and make the specific investigators to fulfill the notification obligation on behalf of the authorities.

The question of «How to notify» is more complex, which involves time limits, ways of notification, feedback and other issues. Legal Aid relates to the protection of the rights of suspects, and is especially more prominent in the investigation stage at which rights guarantying is vulnerable. Therefore, in the process of handling cases, the investigators should first confirm whether the cases match the conditions of legal aid or not. The time of notification should not be limited to be too specific considering the differences between cases, otherwise it is not easy to fulfill. Meanwhile, in order to avoid the delay caused by the submitting of instrument, it is recommended to notify by phone call firstly, and then send out the notification instruments, and the legal aid agencies should give a receipt of legal aid work arrangement after having received the notification instrument.

The question of «Notify whom» is more simple relatively, in the situation of the legal aid decided by the court, legal aid agencies should be notified, and defendant counsel should be assigned by them.

2.3. Procedural safeguards for the situation of «should notify but not»

There are no punitive measures for the situation when the authority of prosecution found that the investigation authority shall notify the legal aid agencies to provide legal assistance but not, which also contributed to the problem that investigating authorities don't notify the legal aid agencies or delay to notify them, in order to facilitate their investigation by delaying the time of legal aid lawyers involving

into the cases. For this situation, some scholars believe that the outcome of the investigation can't be negated totally, the prosecution authority return the case to investigation authority to re-investigation is a waste of judicial resources. Some scholars think that we should distinguish the verbal evidence and the physical evidence, in the situation of «should notify but not», the oral evidence should be excluded according to the illegal evidence exclusion rules, but the physical evidence can be used.

The author suggests that this problem can be solved as below.

Firstly, after the investigation authority transferring the case to the prosecution authority, the prosecution authority should censor the fulfillment of notification obligation in legal aid cases. When they found the situation of «should notify but not», they should return the cases to investigation authority for re-investigation, and exclude all the evidence achieved. Relatives of suspects may also appeal to the prosecution authority for the behavior of delaying to notify of the investigating authority, and the prosecution authority can return the cases to investigation authority for re-investigation after examination and verification.

Secondly, for the cases investigated by prosecution authority, after they being prosecuted, the court should censor whether there are situations of «should notify but not», and for the cases which violate of legal procedures, the courts have the power to return them for re-investigation and deny the evidence effectiveness achieved.

Thirdly, for the cases that the investigation authority does not violate of the notification obligation, but the prosecution authority violates of the notification obligation and interrogate the suspects and obtain new evidences, if the court found

after inspection, it can deny the evidence effectiveness achieved at the prosecution stage and return the cases back to the prosecution authority for re-prosecution. Similarly, relatives of the suspects can also appeal to the court for the behavior of delaying to notify of the prosecution authority, and the court can deal with the appeal according to the procedure mentioned above after examination and verification.

Fourthly, for the situation of «should notify but not» occurred at the trial stage, on the one hand, the prosecution authority can institute prosecution recommendations as the legal supervisory authority; on the other hand, the procedural errors can be the reason for the higher courts to return the cases for re-trial.

3. Conclusion

The quality of legal aid cases is the core and vitality of the legal aid system, «quality» of the defense is important, but we should ensure the «quantity» of the applications of the legal aid system firstly, so that the suspects and defendants can get legal assistance. This is an important step on the forward road of the legal aid system, and I hope the suggestion mentioned above can be verified in practice, and make some contribution to improvement of Chinese legal aid system.

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Ванг Шаоиа – аспирант, кандидат на присуждение степени доктора философии Колледжа уголовного права Китайского политико-юридического университета, Китайская Народная Республика, Пекин.

Wang Shaojia – postgraduate, PhD candidate of Criminal Justice College of China University of Political Science and Law, People's Republic of China, Beijing.
