

Research on the Protection of Rights for Defense Attorneys

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Abstract: In criminal proceedings, defense lawyers, as participants, play a crucial role in safeguarding the legal rights of criminal suspects. They not only serve as advocates for the rights of the accused but also influence the attainment of justice and the development of international legal standards. In the construction of a rule of law society, the value demonstrated by defense lawyers in criminal cases is becoming increasingly significant. This article, starting from the current state of the exercise of defense lawyers' professional rights, provides an in-depth analysis of the existing issues in the exercise of these rights. It further outlines the direction for optimizing the system, considering principles such as the balance between prosecution and defense and the protection of human rights.

Keywords: Defense Lawyer; Rights Protection; Prosecution-Defense Balance.

1. Introduction

In criminal defense, attorneys appointed either by the defendant or by the court to provide legal representation are referred to as defense lawyers. Defense lawyers serve as guardians of human rights and defenders of constitutional and legal protections. Within the realm of legal proceedings, it is crucial to enable defense lawyers to fulfill their roles in the defense process. This necessitates the extension of certain rights, especially in the context of the defendant's right to counsel, to ensure the effective exercise of these rights. This is, in fact, the primary purpose of the legal framework that grants defense lawyers various rights in litigation --to safeguard the defendant's rights throughout the legal process by harnessing the full potential of defense lawyers.

2. The Necessity of Safeguarding the Rights of Defense Lawyers

In criminal proceedings, the role of defense lawyers is of paramount importance in fully safeguarding the legal rights of criminal suspects or defendants, achieving procedural justice, and maintaining a balance between prosecution and defense. To some extent, whether defense lawyers can exercise their rights to the fullest extent also impacts the overall fairness of the entire criminal litigation process and the construction of a rule of law society.

2.1. A Fundamental Need for Building a Rule of Law Democratic Society

The protection of defense lawyers' rights is an inevitable requirement for constructing a modern rule of law and democratic society. If a country's legal system does not provide for the protection of defense lawyers' rights, it implies an authoritarian legal framework. The emergence and development of the legal profession itself signify the progress of democracy; it is a product of democratic systems. In the course of litigation, lawyers uphold the rights of their clients and engage in struggles and resistance against state authority. This, in itself, is a reflection of democracy. The extent to which state authorities safeguard the rights of criminal suspects or defendants and whether the legitimate rights of

their defense lawyers are effectively protected directly reflect the level of human rights protection. As one of the two fundamental functions of criminal proceedings, safeguarding human rights has proven in practical terms that when individuals lack legal knowledge and face objective constraints, such as the restriction of personal freedom, the involvement of defense counsel is necessary to ensure the protection of their human rights. Therefore, the significance of defense lawyers in the realization of human rights cannot be overstated. In other words, the degree to which the rights of defense lawyers are protected also serves as a crucial indicator of a country's progress toward the rule of law and is indispensable in this regard.

2.2. Facilitating the Implementation of the Balance between Prosecution and Defense

In contemporary rule of law countries, during the legislative process, there is a strong emphasis on and adherence to the principles of procedural justice. In litigation, both the prosecution and defense are provided equal opportunities for participation, and the judiciary accords equal consideration to the viewpoints of both sides. However, this often remains a formality. The public prosecution system in modern criminal proceedings has matured significantly, evolving from investigative evidence collection to reviewing prosecutions and providing courtroom support. The collaboration between law enforcement agencies and prosecuting authorities forms a powerful prosecutorial combination. In other words, the prosecuting authority representing the state in criminal proceedings has grown stronger and plays a proactive role in exercising state punitive power. As one party in litigation, it now possesses advantages that the accused cannot easily match.

Therefore, the more powerful party in litigation should bear certain special obligations, while the party with comparatively weaker procedural participation capabilities should have necessary litigation privileges. The establishment of principles such as the presumption of innocence, the prohibition of self-incrimination, and the exclusion of illegally obtained evidence serves as a robust defense against the violation of the legal rights of criminal defendants. However, seeking the assistance of legal professionals and

using rights to counterbalance power is also a crucial element. Thus, by expanding the various rights of defense lawyers and establishing a scientific and reasonable framework of rights and institutional systems, not only do defense lawyers gain more accessible channels for exercising their right to defense, effectively filling in gaps in the defense system and further enriching the role of defense, but it also strengthens the position of the defense, which is often at a disadvantage in the litigation structure. This, in turn, ensures a substantive and effective confrontation between the prosecution and defense.

3. Analysis of the Current Situation and Reasons for Protecting the Rights of Defense Lawyers

3.1. The Current Situation of Safeguarding the Rights of Defense Lawyers

3.1.1. Impediments to Meeting Clients

The right to meet with clients is essential for lawyers to understand the details of a case and facilitate communication with the accused, allowing them to gather more information to help safeguard the client's rights. Article 39 of the Criminal Procedure Law of China stipulates that, except for specific types of crimes, lawyers holding a law firm certificate, a lawyer's practice certificate, and a power of attorney or a legal aid letter can meet with the accused. While the law clearly outlines and affirms the right of defense lawyers to meet with their clients, there are numerous challenges in its practical implementation.

Firstly, in judicial practice, some authorities impose unreasonable restrictions that hinder or delay defense lawyers' access to their clients and their participation in criminal proceedings. This is often done to expedite the legal process and move the case to the next stage as quickly as possible. For example, although the law only specifies that defense lawyers should be allowed to meet with detained criminal suspects during the investigation period in cases involving crimes endangering national security and terrorist activities, some authorities interpret this more broadly to encompass cases that do not require approval, effectively limiting the right of lawyers to meet with their clients.

Secondly, the law explicitly states that if a defense lawyer requests a meeting, the detention center should arrange it promptly, with the meeting not to be delayed beyond 48 hours. While this provision may seem to strengthen the enforcement of defense lawyers' meeting rights, it is open to interpretation. In practice, detention centers often make arrangements within the 48-hour period but still unilaterally determine the specific meeting time, leading to constant delays that effectively restrict the lawyers' right to meet their clients. Furthermore, while there are specific provisions regarding meeting rights, there are no concrete legal provisions for their implementation and protection, leaving a lack of adequate remedies.

3.1.2. Challenges in Evidence Collection

Regarding the right to investigate and collect evidence, both the Criminal Procedure Law and the Lawyers Law in China have clear provisions. These include the right to apply for evidence collection to the court and the procuratorate, as well as the right for lawyers to conduct their own investigations. These provisions are meant to extend and protect lawyers' rights, aiming to improve their disadvantaged position. However, when it comes to practical implementation,

there are still numerous issues concerning the realization and protection of these rights.

Firstly, the right to apply for evidence collection from judicial authorities is an essential means for lawyers to obtain evidence. It's widely known that the investigative power in criminal cases is held by public authorities, usually initiated by law enforcement agencies. Lawyers, as individuals, cannot compete with law enforcement agencies in terms of investigative techniques or timing. Furthermore, lawyers and law enforcement agencies have different roles, positions, and even opposing interests. These factors make it difficult for lawyers to exercise their right to apply for evidence collection effectively.

Secondly, the right to conduct independent investigations by lawyers requires approval from the procuratorate or the court and the consent of witnesses. In practice, lawyers often encounter difficulties in obtaining approval and cooperation. Some witnesses or organizations may not take these requests seriously and may prioritize their own interests, leading to a failure to collect evidence. Moreover, when lawyers do manage to persuade witnesses to provide testimony, it may still carry risks. Since this is considered self-collected evidence, lawyers might face potential charges related to false testimony or obstructing witness testimony, as they tread a fine line in their investigative efforts. The root of these challenges lies in the fact that the law grants lawyers the right to investigate and collect evidence but does not establish corresponding obligations for the subjects of investigation. This results in a lack of legal constraints on those who are the targets of the investigation.

3.1.3. Inadequate Remedies for the Protection of Lawyers' Rights

The concept of remedies goes hand in hand with rights; if a right cannot be effectively remedied, it becomes virtually meaningless. In the case of lawyers, there are inadequacies in the remedies available to protect their professional rights. Several factors contribute to this situation. Firstly, there are issues with the timeliness and comprehensiveness of the remedies provided by lawyers' associations. Lawyers' associations may not always handle requests for rights protection from defense lawyers promptly and comprehensively. This can result in delays in safeguarding the professional rights of defense lawyers and may even exacerbate infringements. These problems might be constrained by the status and organizational structure of lawyers' associations. As autonomous organizations, they may lack robust equipment and procedures, often finding themselves in a passive position.

Secondly, the avenues for self-remedies available to defense lawyers may be limited, lacking necessary support measures. For example, in certain situations, defense lawyers might not have sufficient opportunities for hearings and expressing their opinions, making it challenging for them to effectively defend their rights when infringed upon. Furthermore, defense lawyers may lack channels for appeals and complaints, which can hinder their ability to seek assistance when their rights are violated. The principle "no remedy, no right" applies here and can disrupt the legal proceedings of defense lawyers.

3.2. Root Causes Analysis

3.2.1. Influence of Traditional Legal Concepts

Throughout China's long history, traditional Confucian ideals of a harmonious society with minimal disputes

prevailed, emphasizing social order and discouraging conflicts. This, combined with a deeply rooted hierarchical society where the government held significant power over the people, led to a weak awareness of individual rights and a lack of a culture of human rights protection.

The legal profession was introduced in China during the late Qing Dynasty, but due to centuries of instability, the legal system struggled to take root. It was only after the era of reform and opening up that people's minds began to open up, and awareness of individual rights slowly awakened. However, the clash between new and old ideas continues to affect the legal system's development in China. In the eyes of many, defense lawyers are often seen as individuals trying to help criminals evade punishment, leading to a lack of public understanding and even hostility towards this profession. This stereotype can also persist among judicial personnel. As a result, defense lawyers often face limitations on their rights, such as the right to meet with clients or review case files before trial. During the trial process, their arguments may not be taken seriously, and their role may not be fully recognized. In summary, the historical influence of traditional legal concepts and the public's perception of defense lawyers as "criminal defenders" contribute to the limitations on defense lawyers' rights in China's legal system.

3.2.2. Insufficiencies in Legal Regulations

While China's legal system has been continuously improved, the protection of lawyers' rights in the Criminal Procedure Law and Lawyers Law is still relatively broad and lacks specificity compared to other countries with case law systems. This high level of generality leaves significant discretion to judicial authorities and personnel in practice. For instance, the regulations on lawyers' investigative rights stipulate that lawyers require permission from the People's Procuratorate or People's Court, as well as the consent of witnesses or relevant individuals and entities, to collect evidence. This process presents practical challenges for defense lawyers, and the lack of specific operational guidelines can significantly diminish the effectiveness of these rights. Similarly, the provisions regarding the right to meet with clients are quite general, lacking specific details on meeting frequency, procedures, and remedies for violations. The vagueness of these regulations can lead to practical difficulties in safeguarding these rights during judicial proceedings. Additionally, there may be conflicts between the regulations in the Criminal Procedure Law and Lawyers Law, making it challenging to apply them accurately in practice. This inconsistency can result in a lack of emphasis on protecting lawyers' rights by relevant personnel. In summary, the insufficiencies in the specificity of legal regulations in China's legal framework, coupled with potential conflicts between different laws, contribute to challenges in effectively protecting the rights of defense lawyers in practice.

4. Improvement of the Protection of the Rights of Defense Lawyers

4.1. Improvement of Rights Setting

4.1.1. Improvement of Investigation and Evidence Collection Rights

Internationally, the right of lawyers to investigate and collect evidence is highly regarded as a critical component of legal systems. It is recognized that crucial evidence often determines whether a criminal suspect or defendant is guilty, making the right to investigate and collect evidence a vital

aspect of legal systems. It serves as a crucial indicator of the completeness of legal systems and a significant criterion for assessing judicial democracy.

In practice, situations may arise where investigative authorities restrict defense lawyers from meeting with detained witnesses or suspects, fearing collusion or false testimonies. However, there are usually no legal provisions explicitly prohibiting defense lawyers from meeting with detained individuals. In such cases, legal interpretations should not be stretched beyond the boundaries set by the law. Instead, it is essential to allow defense lawyers to meet with detained witnesses, as there is no legal basis for restricting such meetings. To prevent potential misconduct by lawyers, it can be mandated that a third party is present to supervise when defense lawyers collect evidence from detained individuals. This measure can ensure the legality of the process while preventing any potential abuse. Furthermore, the requirement for dual approval from witnesses and the prosecution or the court when defense lawyers exercise their right to investigate and collect evidence should be reconsidered. Witnesses and victims may have inherent biases or be in positions contrary to those of the accused, making it challenging for defense lawyers to collect evidence. The dual approval requirement adds unnecessary complexity to the process and should be reconsidered. The legal system should provide procedural safeguards to facilitate defense lawyers' exercise of their investigative rights.

On the other hand, the law should clearly define the consequences when the prosecution or the court fails to cooperate with investigative evidence collection. In judicial practice, it is common for the prosecution or the court to refuse cooperation with defense lawyers in collecting evidence, citing reasons such as the evidence being unrelated to the case or the difficulty of determining its relevance. However, the new Criminal Procedure Law only stipulates that when defense lawyers apply to the people's court to collect evidence, the court will do so if it deems it "necessary." This gives the court significant discretionary power to determine whether it is necessary, which may not be scientific and does not favor the protection of the defense's interests. It could be improved by allowing defense lawyers to collect evidence as long as it does not involve national interests or violate the legitimate rights and interests of others. The right to investigate and collect evidence is crucial for both the prosecution and the defense. Given that public authorities already have an advantage, it is in line with the principle of balancing the prosecution and the defense to fully protect the investigative evidence collection rights of lawyers.

4.1.2. Improving the Right to Visit

The right to visit can be improved in several ways. First, the vague provision in Article 39 of the Criminal Procedure Law, which states that the visit shall not exceed 48 hours, needs to be clarified through legislation. It should be explicitly defined that the 48-hour countdown starts from the moment when the defense lawyer with the three required documents requests a visit to the suspect, and the visit must be arranged within this time frame. Additionally, unlawful hindrance and restrictions on visits by relevant authorities in practical situations should be penalized through legislation. The law should specify the responsibilities and consequences for investigative agencies that illegally obstruct visits. Furthermore, special attention should be given to the two specific categories of cases where visit permits are required. These cases are more prone to lawyer perjury and obstruction

of investigation, and the law should provide detailed regulations and improvements for these two categories. While limitations are imposed on these cases, they are often excessively expanded by detention centers. To address these issues, defense lawyers can request written explanations from public authorities that deny visits, and if they believe there has been a violation of relevant laws and regulations, they can apply to the supervisory commission for an investigation into the dereliction of duty by relevant public officials.

In judicial practice, one major reason why the right to visit of defense lawyers is repeatedly violated is the lack of effective channels for safeguarding these rights, which fails to place adequate constraints on detention centers and handling agencies. Therefore, for serious violations of the right to visit defense lawyers, judicial administrative agencies and bar associations should swiftly initiate the grievance procedures and protect these rights in accordance with the law. As a legal oversight agency in China, the prosecutor's office should also play its rightful role in safeguarding and remedying the rights of defense lawyers. It should clearly include the protection of the right of lawyers to visit as part of the supervisory matters of the prosecutor's office stationed in detention centers. During the trial process, if evidence obtained during a restricted lawyer visit cannot be reasonably explained by relevant authorities, the court may exclude such illegally obtained evidence.

4.2. The Self-improvement of the Lawyer Industry

4.2.1. Improve the Lawyer Practice Insurance System

The legal profession, like all professions, comes with certain risks. For defense lawyers, due to the unique nature of the cases they handle and the more prominent risks, one of the best ways to avoid risks is to purchase appropriate insurance. In the legal field, there is a special type of insurance called "lawyer's professional liability insurance", which can help defense lawyers reduce losses caused by professional risks, minimize damage, and protect their rights.

In the United States, lawyer's liability insurance is a specialized type of insurance, and the American Bar Association requires lawyers to participate in this insurance, otherwise they need to provide sufficient personal asset proof to prove that they can bear the practice risk. Given that Chinese defense lawyers face a series of risks in their practice, it is possible to consider borrowing from the practices of the United States and implementing a defense lawyer liability insurance system that is suitable for China's national conditions. The insured party can be carried out by various levels of lawyer associations, which can ensure the feasibility of practicing liability insurance and reduce the situation of defense lawyers not taking out insurance or missing insurance due to economic reasons or lack of awareness.

In terms of reviewing insurance accidents, the majority of illegal and irregular behaviors of defense lawyers in practice can be regarded as insurance accidents, and the scope of identifying insurance accidents can be appropriately expanded. As for the determination of the insurance amount, multiple factors such as the length of practice of the defense lawyer, the size of the law firm, and the scope of practice can be considered to determine the size of the insurance amount. A sound lawyer's liability insurance system can exchange lower premiums for higher compensation, reduce the economic burden on defense lawyers, alleviate the anxiety of clients who entrust them, and also help manage the bar

association, achieving a win-win situation for all parties.

4.2.2. Establishing a Lawyers' Mutual Assistance Relief System

The legal profession, as a unique field of work, operates with distinct mechanisms that are often challenging for outsiders to comprehend. Understanding the work environment, scope of responsibilities, and work methods of lawyers can be particularly elusive for those outside the field. It is within the legal community itself that mutual understanding can be established, where lawyers can comprehend the professional obligations, regulations, and unwavering ethical standards that must be upheld. These constitute the internal code of conduct within the legal sphere. This understanding is especially prominent among defense lawyers, who frequently engage in exchanges and learning with their peers. Many defense lawyers' case strategies are honed through communication and knowledge sharing with fellow practitioners. When the professional rights of defense lawyers are encroached upon, it is fellow lawyers who can best relate to and empathize with the situation. They not only provide legal representation in cases where their peers' rights are infringed upon but also offer emotional support, drawing from a shared understanding of the challenges faced.

From the perspective of interest and advocacy, fellow lawyers are better positioned to champion the professional rights of defense lawyers and represent the collective voice of the legal profession. This collective action can lead to advancements in the legal field and a reduction in instances of infringements within the industry. In addition to relying on bar associations, fellow lawyers employ various avenues to safeguard the professional rights of defense lawyers. They leverage their status as legal professionals to seek recourse through national governmental institutions, thereby maximizing efforts to protect these rights.

Lastly, the legal community establishes a mutual assistance relief system among lawyers, strengthening cohesion and trust among peers. This enables lawyers to stand united on shared principles, share practical experience in practice, and collectively navigate professional challenges. Such an atmosphere of mutual aid ensures that when a defense lawyer's professional rights are violated, other lawyers promptly offer assistance and support, collectively defending the rights of the legal profession. Establishing a lawyers' mutual assistance relief system gradually, with the support platforms provided by law firms and bar associations, holds the promise of more effectively safeguarding the professional rights of defense lawyers.

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