

Examination of Foreign Legal Aid Systems and Their Operating Mechanisms

Ning Yang

Party School of Ningxia Committee of C.P.C (Ningxia Academy of Governance), Yinchuan, Ningxia, 750021, China

Abstract: The extraterritorial experience of legal aid mechanisms should also be examined in a dynamic and practical manner. It is impossible to understand the actual system of a country on the basis of its legislative texts or the jurisprudence of its courts. As Ehrman, a famous comparative law researcher, emphasized, “When comparing, it is possible to know what must be functionally compared rather than just words. No matter how serious it is, it cannot be based only on legal provisions. No matter how clear and explicit it is, we must observe its actual effects.” Therefore, it is necessary to use the “five pairs of relationships” that support China's legal aid operation mechanism as the basic analytical framework to examine the basic experience of representative extraterritorial countries' legal aid operation mechanisms, and present their normative structure and practice. In order to objectively analyze the advantages and ingrained habits of the extraterritorial legal aid system, and reconsider the interrelationships between the five entities of the government, legal aid agencies, aid lawyers, aid recipients, and case handling agencies.

Keywords: Legal Aid; National Responsibility; National Finance.

1. Introduction

It is common for countries with mature legal aid systems to establish legal aid as a State responsibility, with the State playing an irreplaceable role in setting up legal aid institutions, coordinating the participation of social organizations and social forces in legal aid, and financing legal aid through multiple channels[1].

2. The Role of the Government and the Primary Responsibilities of the Country

The government plays a critical role in the legal aid system and its operational mechanisms. First, most countries have fixed legal aid agencies or legal aid committees. These agencies and committees are generally directly set up by the government and managed by a functional department of a certain government, which shows that the government and legal aid agencies generally have administrative relationships. Second, national laws generally stipulate that the government (country) bears responsibility for legal aid. When an aid recipient applies for legal aid services from the Legal Aid Agency, the Legal Aid Agency is authorized by the Government to assign lawyers, and the Government is liable when the applicant suffers damages as a result. Moreover, the most important responsibility of the Government is to support legal aid organizations through the budget to carry out legal aid services, to provide supporting funds at the central and local levels to ensure the normal operation of legal aid organizations, and to ensure that the services of aid lawyers are remunerated, and so on. Finally, most governments provide comprehensive support for legal aid in terms of people, finances, and materials, etc., and manage and guide legal aid agencies, and aid lawyers, etc. in terms of funds, quality of case handling, and level of service through a certain supervision system.

But government responsibility is not synonymous with national responsibility.

The reasons why extraterritorial countries establish legal aid as the main responsibility of the state can be summarized in two points. First, the legal aid system itself is of great significance. As a basic requirement for a fair, humane and efficient criminal justice system, legal aid is closely linked to maintaining justice and safeguarding the rule of law. It is an inseparable part of a country's rule of law system. Although the government, as representative of the administrative branch in the national system, bears important responsibilities in implementing the rule of law in the country, it cannot replace the entire country in carrying out its responsibilities. Second, only the state can coordinate legal aid forces, including the government, judicial organs, social organizations, and market mechanisms. Since the rise of a new public governance model in the middle of the 20th century, the pure government management model is no longer sufficient to meet social needs, and the pure market competition model cannot generate sufficient supply of legal aid resources[2]. Therefore, the state must coordinate the relationship between different legal aid subjects, such as the government, the market, and social forces, to give full play to their respective roles and energy.

Through an examination of the operating experience of extraterritorial legal aid mechanisms, it can be found that establishing legal aid as a national responsibility can better play the role of social organizations and social forces in an integrated manner, and can ensure that the state can provide strong financial support for legal aid. In Japan, for example, it was not until 2004, when the *Japanese Comprehensive Legal Aid Law* was officially implemented, that legal aid was fully funded by the Government. Before that, the Japan Federation of Lawyers remained one of the important sources of funding for legal aid associations. Meanwhile, the introduction of the *Japan Comprehensive Legal Aid Law* in 2004 also marked the formal establishment of a national responsibility system for legal aid in Japan. Section 17 of the law clearly stipulates that the judicial support center shall be fully funded by the government. This has directly led to the positive effects of a rapid increase in funding for legal aid in

Japan and a marked increase in the participation of various social organizations. The American Bar Association amended the *Standard Rules of Professional Ethics* in 1993 to require each lawyer to perform at least 50 hours of legal public service activities per year. Although the rule does not impose mandatory restrictions, it has a guiding effect on lawyers' conduct due to the unique status of the American Bar Association. Large law firms have taken the lead in action in the field of public benefit legal services and have publicized information on the public benefit legal services they have implemented to introduce the contribution of the firms to public benefit legal services, which in turn has contributed to the firms' commercial business[3].

3. National Finance as the Main Source of Funding for Legal Aid

The healthy operation and development of the legal aid system is inseparable from strong national financial support. Countries such as Italy and Spain have not established a special financial system for the provision of legal aid funds. Lawyers are still required to provide free legal aid services through mandatory assignments by the Bar Association. This has led to a low level of development of legal aid in these countries, with major problems in terms of development policies, quantity and quality of aid, which directly constrains the level of human rights protection in the crime justice system.

The state bears the main responsibility for legal aid, requires the state to use a tax-supported budget as the main source of legal aid funding, and establishes a special and sustainable financial guarantee mechanism for the legal aid system. However, an examination of fiscal expenditure practices in different countries shows that there are great differences between countries in terms of total expenditure on legal aid programs and the proportion of central and local government expenditure. However, what can be observed and is worth learning from this experience is that the direct allocation of special funds from the central financial administration to guarantee all expenditures for criminal legal aid work is an important guarantee for the effective operation of the criminal legal aid mechanism[4].

3.1. Ratio of Total Legal Aid Funding to Criminal Legal Aid Funding

The first feature of the structure of legal aid funding in countries with more mature extraterritorial legal aid systems and their operational mechanisms is the high level of total legal aid funding and the relatively high share of criminal legal aid funding in total legal aid funding.

The ratio of legal aid funding to national financial expenditure between 0.1% and 1% is an important sign that the state's financial support for the legal aid system is strong. The UK's total legal aid funding in 2014 was £1,995 million, accounting for 1% of its central government expenditure, while criminal legal aid funding was £916 million, accounting for 45.91% of total legal aid funding. Therefore, some scholars once pointed out that the United Kingdom has established the world's most complete legal aid system for defendants by relying on financial contributions. Moreover, in countries with more developed legal aid systems, such as the Netherlands, Denmark and Japan, the proportion of legal aid funding to the national financial expenditure has reached 1%, 0.5% and 0.11% respectively.

In addition, because the size of the population and the cost of cases vary from country to country, the total amount of funding for legal aid cannot be measured solely on the basis of the total amount of funding, but rather on the basis of per capita funding for legal aid and the proportion of legal aid funding in the justice system, which is a relatively reasonable and scientific approach.

In 2018, the European Commission on Judicial Effectiveness published a research report on *The European Judicial System - Judicial Effectiveness and Quality* (as shown in Table 3-1) based on the legal aid situation in Europe in 2016 (as shown in Table 3-1). Although there is a large gap between the total expenditure of legal aid funds and the proportion of legal aid funds in the judicial system between different European countries, the amount of legal aid per capita in European countries and regions is 6.5 euros/person, and using statistical methods, it was found that the average amount of legal aid per capita in most European countries also reached 2.1 euros/person. However, in terms of the share of legal aid funds in judicial expenses, there are also large differences between countries. However, in a number of countries (regions), such as England, Wales and Scotland, Norway and Ireland, legal aid accounts for more than one-third of the funding of the justice system. At the same time, there is a positive correlation between this difference in total legal aid expenditure and the proportion of legal aid funding in the judicial system. In comparison with Sweden and Ireland, for example, Switzerland's per capita legal aid budget is as high as 36.21 euros, and legal aid funding accounts for 28% of the judicial system; Ireland's legal aid expenditure accounts for 35.1% of the judicial system's expenses, and the per capita legal aid budget is 19.61 euros. The implication of this is that the security of legal aid funding can only be increased if both the legal aid budget per capita and the proportion of legal aid funding in the justice system are increased[5].

However, due to its special nature, criminal legal aid should generally be given priority protection in terms of funding. For example, in the past, Canada already used 50% of its legal aid funding for criminal legal aid. Practice in recent years has also revealed that such a proportion of funding allocation is prone to widening the gap between the supply of and demand for criminal legal aid, and therefore two-thirds of the total funding for legal aid is generally allocated to criminal legal aid, with a focus on guaranteeing the healthy operation of the criminal legal aid mechanism. Due to the growing trend of population and criminal cases around the world, many countries are under great pressure to secure funding for criminal legal aid. In order to save and control expenses so that limited funds can play the greatest role, government departments in many countries have begun to carry out corresponding reform measures, such as implementing a "capping system" for legal aid funds and discontinuing the "open budget system" for legal aid funds. In this context, legal aid management agencies are required to comprehensively arrange legal aid requirements according to the importance and volume of legal aid needs. Compared with the financial requirements for civil cases, administrative lawsuits, and family cases, criminal legal aid usually takes priority over financial security.

3.2. Central and Local Fiscal Expenditure Structures

After examining the financial guarantee mechanism of the legal aid system in extraterritorial countries, it was discovered

that most countries have their own “local problems” with regard to funding, and the financial expenditure structure of the central government and local authorities in the field of criminal legal aid is one of them. There are differences between countries in how the central government and local authorities bear the proportion of legal aid funds. A few countries adopt a model where the central government fully funds, such as the United Kingdom, while most countries adopt a model where central and regional governments share responsibility, such as the United States, France, Australia, Japan, and Canada, etc. Two of the noteworthy lessons learned are that funding for legal aid should be guaranteed by leveraging both central and local financial incentives and that funding for criminal legal aid should be borne primarily by the central Government.

Almost all funding for legal aid in the UK comes from the central treasury. There is a dedicated department and staff in the UK Treasury to work with the Lord Chancellor's Office on the legal aid budget proposal, and this negotiation takes place every three years. The Ministry of Finance puts forward two basic requirements to the Chief Justice's Office before every negotiation. The first is to determine the number of persons in need of legal aid and their proportion in the next budget cycle; and the second is to ensure that the need for legal aid for all citizens in the next budget cycle is included in the work plan of the Legal Aid Commission, and that the need for criminal legal aid should be met as far as possible. However, during the long-term development process, the central government of the United Kingdom has also been overwhelmed, requiring local governments and social donations to play a greater role in securing legal aid funding.

The United States has adopted the practice of focusing on state and county fiscal expenditure and supplementing the federal government's fiscal expenditure with financial expenditure on criminal legal aid. Since criminal legal aid in the US is mainly implemented through the public defender system, according to the 2007 US criminal legal aid funding data, out of 50 US states and one administrative district of Columbia, 22 have set up public defender offices at the state level, and 27 are set up at the county level. The corresponding state and county level governments bear the expenses for public defender's legal aid expenses. Although most of the funding for the Bar Association comes from the national budget, and some also comes from social donations. However, the US federal financial payments are less intense, and it mostly relies on state and county level finance to guarantee legal aid funding. As a result, the level of legal aid services varies greatly from state to state in the United States, especially in states and counties that are relatively backward in terms of development, and the government's financial support for criminal legal aid funding is scanty, which has a direct impact on the safeguarding of the defendant's right to a defense[6].

The Canadian federal government has also experienced constant adjustments and changes in the proportion of legal aid funds allocated. Between 1972 and 1990, the federal government and provinces actually covered 50% of legal aid funding, while the federal government, in turn, is responsible for a percentage of the provinces' legal aid funding usually ranging from 30% to 80%. In the face of growing demand for legal aid, the Canadian federal government's support for legal aid funding reached 85% between 1985 and 1990, leading to an overload of central finance. Therefore, the Federal Government introduced a reform, requiring that the

proportion of the Federal Government's financial support for legal aid be reduced to the level of the pre-1990 period, and that the Federal Government allocate 20% of its funds for legal aid for the year 2005 to 2006.

Therefore, when it comes to the issue of financial security for legal aid, the lack of financial support, or only governmental financial support, or only centralized financial support, or only local financial support, will affect the sustainability of the financial security mechanism, and thus the good functioning of the entire legal aid mechanism. Therefore, in terms of legal aid funds, it is a more mature experience to give full play to both central and local initiatives and to have centralized funding for criminal legal aid.

3.3. Taking Social Donations

Financial support for criminal legal aid is guaranteed by the State, which does not exclude and encourages governmental administrators and implementers to actively engage in soliciting donations for social legal aid.

In Japan, the finance of the duty lawyer system, the criminal suspect assistance system, and the juvenile protection case assistance system is jointly borne by the Japan Federation of Defense Lawyers, the Bar Association, and lawyers. The source of funding for the duty lawyer system, before May 2009, was covered by special membership fees paid by lawyers to the Japan Federation of Defense Lawyers (“special membership fees for emergency financial funds such as duty lawyers”), but since June 2009, it has been changed to “special membership fees for juvenile and criminal finance funds” and membership fees of various bar associations, which also include part of the utilization of fees paid by appointed privately elected defense lawyers. The above financial relief recipients include suspects who are unable to pay for lawyers' meetings or attorney fees, and juveniles brought before the Family Court[7].

However, the diversification of sources of funding for legal aid in the US and the strength of social donations are also impressive. It is well known that the “government” of the United States does not represent the “country”. Under the promotion of national responsibility, lawyers, law firms, and bar associations will donate a considerable amount of money to legal aid funds. Whereas interest on lawyers' trust funds, large corporations, foundations, businesses, charities and private donations are very well channeled, and a substantial portion of confiscated money from the courts and the Government is used to secure funding for legal aid. In addition to setting up public defender offices to implement specific legal aid services, the councils of legal aid agencies in each state also hire special personnel to raise funds for legal aid[8].

Therefore, when resolving issues relating to “money” in the legal aid system, the state finance should play the main role, but at the same time, it should also play the functions of macro-management, organization, and advocacy, actively mobilize the enthusiasm of social organizations and social forces, absorb social donations widely, ensure sufficient sources and channels for legal aid funding, and ultimately guarantee the sustainable growth of legal aid funding.

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References

- [1] [US] H.W. Ellman: Comparative Legal Culture, translated by He Weifang and Gao Hongjun, Life, Reading, and New Knowledge, 1990 edition, p. 27.
- [2] UNODC, Global Study on Legal Aid (Country Profiles), United Nations Press, 2016, p.505.
- [3] Wu Hongyao, Guo Yong: Thoughts on Improving China's Criminal Legal Aid System, Administration of Justice in China, No. 2, 2016, p. 50.
- [4] Jia Wuguang, Editor-in-Chief, A New Edition on Foreign Legal Aid Systems, China Fangzheng Press, 2008 edition, p. 352.
- [5] Dong Jin and Song Siyu: Contradictions between Lawyers' Professions and Public Legal Aid Practice: Inspired by the Professional Development of American Lawyers, Academic Forum, No. 4, 2012, p. 146.
- [6] Rebeca Sandefur, Lawyer's Pro Bono Service and Market-Reliant Legal Aid, Private Lawyer sand the Public Interest: The Evolving Role of Pro Bono in the American Legal Profession, Oxford University Press (R.and L.Mather ed.,2009).
- [7] Gong Xiaobing, Editor-in-Chief, Introduction to the Foreign Legal Aid System, China Procuratorate Press, 2003 edition, p. 274.
- [8] Norman Lefstein, In Search of Gedion's Promise: Missions From England and the Need for Federal Help, 55 Hastings L.J. (2004), P.835.