

Research on the Duty Lawyer's Function of Effective Advocacy in Misdemeanor Cases of Guilty Plea

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Abstract

In the era of misdemeanour, the contradiction between the increasing number of misdemeanour cases and the limited judicial resources is prominent. In order to realize the goal of diverging complex and simple cases and reducing the burden of prosecution, the role of guilty plea system in the management of misdemeanour should be fully brought into play. There are many problems in effective defense of on-duty lawyers in guilty plea cases in China. The position of on-duty lawyers is "a witness", the performance guarantee of on-duty lawyers is insufficient, and the supervision mechanism of on-duty lawyers is missing. In the future, China needs to clarify the functional positioning of duty lawyers, adjusts the provisions on duty lawyers' involvement time, litigation rights and defense duties, and improve the supervision mechanism of duty lawyers' performance.

Keywords

Misdemeanor Governance; Guilty Plea; Duty Lawyer; Effective Defense; Right Protection.

1. Presentation of Problem

According to the particularity of guilty plea cases and the current situation of criminal defense in China, perfecting the duty lawyer system is an important part of effective defense in guilty plea cases. In the misdemeanor cases of guilty plea, the key is to ensure the criminal suspect to get effective defense, especially whether they can obtain effective legal help from lawyers, that is, effective defense[11]. The idea stems from the U.S. federal court ruling that the defendant has a "constitutional right to an effective defense." [1] Britain is the first country to develop the duty lawyer system, specifically divided into police station duty lawyers and court duty lawyers, aiming to ensure that detainees can get help quickly. [2] The duty lawyer system in Japan is that lawyers take turns on duty to provide counsel to criminal suspects and waive the first lawyer fee. [3] In the system design, China currently mainly protect the guilty suspects to enjoy the right to lawyer help through the duty lawyer system. The Pilot Measures for the Confession System points out that on-duty lawyers should provide "effective legal help" to criminal suspects and defendants, including "providing legal advice, procedure selection, and applying for changes in compulsory measures". In the misdemeanor cases of guilty plea, whether the function orientation of the duty lawyer is a defender, a prospective defender or a legal helper and a witness, the academic circle has aroused fierce debate. Due to the unclear function positioning of duty lawyers, judicial personnel lack of understanding of the importance of duty lawyers' participation in the guilty plea in practice. The role of duty lawyers is vague and their rights are limited, so that there is a certain gap with the realization of effective defense, and the function of duty lawyers to promote the realization of effective defense is not given due play.

This paper holds that we should start from the needs of the protection of the right to defense in the case of guilty plea, analyze the function orientation of the duty lawyer in the confession system, and demonstrate that the duty lawyer should perform the duty of effective defense.

2. Problems of Effective Defense by Duty Lawyers in Misdemeanor Cases of Guilty Plea

The duty lawyer system of guilty plea cases in our country is different from the function of the duty lawyer system in foreign countries. The extra-territorial duty lawyer system aims at providing urgent legal services to the accused,[4] and pursues all-round protection of the defense right of the accused in criminal proceedings. The duty lawyer system in misdemeanor cases of guilty plea in China is a guarantee system of alternative defense right in the absence of entrusted lawyer and legal aid defense, of which main purpose is to realize effective defense. Although the duty lawyer provides legal help in misdemeanor cases of guilty plea, it cannot be effective and there are many problems at present.

2.1. The Positioning of the Duty Lawyer is "a witness"

Compared with entrusted defense and legal aid defense, the duty lawyer system can play an effective defense function while retaining the general functional advantages of the duty lawyer system. Therefore, there are many controversies about the function and role of the duty lawyer system, for example, the duty lawyer's function turns to the witness's and quasi-defender's.

At present, one of the most representative views about the position of duty lawyer in misdemeanor cases of guilty plea is "the duty lawyer's function turns to the witness's ". The emergence of this point of view is because the Measures for the Pilot System of Confession and Punishment does not clearly specify the identity of the duty lawyer, but deliberately distinguish the duty lawyer and the defender. The argument supported by some scholars in the theoretical circle is that the source of the rights of duty lawyers, that is, the identity of defense lawyers is obtained on the premise of the consent or confirmation of the parties, and the involvement of duty lawyers in plea cases stems from the arrangement of legal aid agencies, thus denying the identity of defenders who can exercise the right of defense of duty lawyers. In practice, the judicial authorities mostly regard duty lawyers as witnesses and supervisors of plea cases, rather than as defenders.

The trend of duty lawyer's function turning to the witness's in misdemeanor cases of guilty plea is the manifestation of function alienation, which will have many adverse consequences on China's judicial practice: First, the rights of duty lawyers are greatly compressed, and effective defense is difficult to realize. Secondly, some duty lawyers even cooperate with the public power, destroying the trust of the accused in the duty lawyer. Similar situations also exist in countries outside the region. For example, defense lawyers are more willing to try their best to persuade defendants to plead guilty in plea bargaining cases in the United States.[5]

2.2. The Performance Guarantee of the Duty Lawyers Is Insufficient

First, duty lawyers do not enjoy the right to review papers and the right to be present throughout the prosecution stage, which will affect the duty lawyers to provide effective legal help for criminal suspects. Although the plea leniency system is based on the cooperation between the prosecution and the defense, only by understanding the case can the duty lawyer verify the evidence with the accused, help them fully understand the case and possible legal consequences, and ensure the voluntary and authenticity of the plea and freely make procedural choices.

Second, the bridging mechanism of duty lawyers at different litigation stages is lacking. In the case of limited number of duty lawyers, the same accused person may get help from different duty lawyers in the review and prosecution stage and the trial stage, but there is no corresponding linkage mechanism. This will lead to problems at least two aspects: First, because they do not participate in the review of the prosecution stage, the legal help of the duty

lawyer at the trial stage is not targeted. Second, a lot of repetitive work in a sense reduces the work efficiency of duty lawyers and wastes judicial resources.

2.3. The Supervision Mechanism for the Performance of Duty Lawyers Is Missing

In view of the behavior of the first-instance court violating legal procedures and affecting the fair trial, the Criminal Procedure Law of China establishes the procedural consequences of revoking the original judgment and exerting the retrial, but it does not include the behavior of lawyers who do not perform their due diligence in defense activities or have major defense defects. In contrast, the United States has established the double standard of invalid defense, which will lead to the consequences of procedural sanctions, that is, the court declares some litigation actions invalid and restores the proceedings to the litigation state before the occurrence of invalid defense.[6] This demarcates the behavior boundary for lawyers' defense, clarifies the legal bottom line that lawyers' defense cannot cross, and promotes lawyers actively realize effective defense. The Criminal Procedure Law of China does not establish the principle of effective defense, nor does not regard the defendant's obtaining effective defense as a constitutional right. Under the influence of the concept of "emphasizing entity and underestimating procedure" in China, the supervision mechanism of duty lawyer performing his duties has been ignored, and the related rights relief mechanism of the accused has also been ignored. In cases where lawyers do not perform their duties and even do not put forward any valuable defense opinions, they are usually classified as lawyers in breach of contract or violation of professional ethics, while the court is often more concerned about whether the facts are unclear or the evidences are insufficient.

To sum up, in the case of existing problems about the functional orientation of duty lawyers, the voluntary, wisdom and authenticity of the choice that the accused make about guilty plea and procedure are difficult to be guaranteed. How to protect the right of effective defense of the accused in the case of guilty plea is worth discussing.

3. The Improving Way of Effective Defense of Duty Lawyer in Misdemeanor Cases of Guilty Plea

3.1. Clarify the Functional Positioning of the Duty Lawyer

The function orientation of duty lawyer in plea case should be determined by the function of duty lawyer, rather than limited to the usual understanding of duty lawyer. Different from ordinary cases or non-guilty cases, the key to the role of duty lawyers in plea cases is the pre-trial stage, in which both the prosecution and the defense should reach an agreement on the facts of the crime, sentencing recommendations and the application of procedures, so it is particularly important to ensure that the accused can obtain effective defense by duty lawyers. From the functional point of view, in order to ensure the authenticity, voluntary and wisdom of the defendant's guilty plea, the duty lawyer should be endowed with the functional positioning of "quasi-defense lawyer" to ensure the full play of its effective defense function and better protect the legitimate rights and interests of the defendant.

3.2. Strengthen the Guarantee of Effective Defence by Duty Lawyers

First, the condition of duty lawyer's intervention should be changed from the accused "plead guilty" to only "admit their guilt". In essence, guilty plea is already a result state. If the accused person only intervenes in the case after the guilty plea, the space and time that the duty lawyer can play a role are greatly compressed, and it is difficult to implement effective defense.

Second, in order to enable duty lawyers to provide effective defence, they should be given the necessary defence rights. For example, giving the duty lawyers the right to review papers and

the right to be present throughout the sentencing consultation. In addition, it is also of great significance to give duty lawyers the appropriate right to make procedural suggestions. In Taiwan province, the person prosecuted or his agent or defender may make a request for the application of the "consultation procedure" to the prosecutor on his own initiative.[7] In France, the client or his lawyer also has the right to request the prosecutor to apply the "pre-trial plea procedure".[8] An attorney's right of procedural advice is regarded as an extension of the right of the defendant's procedural choice. It is also necessary to refer to the provisions of the American Bar Association on the duties of lawyers in the guilty plea and plea bargaining procedures, clarify the defense duties of duty lawyers, and refine the specific content of legal help of duty lawyers, such as fully fulfilling the obligation to inform, actively applying for changes in compulsory measures, mastering the facts of the case and relevant evidence, and actively negotiating with the procuratorial organ on sentencing issues, in order to seek maximum sentencing concessions for the accused.

In addition, the working connection mechanism of duty lawyers at different litigation stages should be improved, and the same duty lawyer should be responsible for the legal help of the same accused person throughout the litigation process as far as possible. At the same time, in order to promote the realization of effective defense of duty lawyers, it is necessary to strengthen their performance guarantee by raising the level of funds and optimizing the conditions of relevant facilities.

3.3. Strengthen the Supervision of Duty Lawyers to Perform Their Duties

Examining the relevant systems of countries with extraterritorial rule of law, China should appropriately learn from the standard of effective defense in plea bargaining of the United States[9], strengthen the performance supervision of duty lawyers, strengthen the management of legal aid work and the reward and punishment system of duty lawyers. Since the invalid defense in the United States depends on the court's emphasis on the role of lawyers in defense and the deep understanding of the principle of fair trial. At the moment, China puts substantive justice above procedural justice, so that it is difficult for China to directly introduce invalid defense system based on procedural centralism. In addition, strengthening the training and assessment of duty lawyers will also help duty lawyers play the substantive role of effective defense.

4. Summary

At present, it has been basically realized that the accused have the help of duty lawyer in the misdemeanor cases of guilty plea in our country, but there is still a long way to realize effective defense. We urgently need to realize the importance of effective defense in guilty plea cases. Perfecting the duty lawyer system is the focus of effective defense in guilty plea cases in China. In this process, first of all, it is clear that the function positioning of the duty lawyer should be "quasi-defense lawyer" rather than witness, which is the premise to ensure that it can provide effective defense. On this basis, the necessary defense duties of duty lawyers are clarified and detailed, and the substantive rights of relevant legal help are given to them, such as the right to review papers and the right to be present. Finally, in order to ensure the effectiveness of the duty lawyers, a supporting guarantee mechanism should be established. To safeguard the rights of the accused, an assessment and relief mechanism should be set up for the legal help provided by duty lawyers. The connotation and extension of effective defense theory has been developing, for example, the field of effective defense in the United States has developed from the jury trial of prosecution and defense to the plea bargain of prosecution and defense cooperation, and from the trial stage to the pre-trial stage. The duty lawyer system of criminal proceedings in China was initially established for guilty plea cases. The Duty Lawyers' Opinion and Measures on Carrying out the Pilot Work of Full Coverage of Lawyers' Defense in Criminal Cases issued

in recent years show that China is trying to fully cover the duty lawyer system in all criminal cases, and it is necessary to clarify the function and positioning of duty lawyers in various cases. Ensuring the duty lawyers' function of effective defense is generally conducive to the equal protection of the defendant's right to counsel assistance, and also helps to realize the diversion of complicated and simple cases, ease the trial burden of criminal proceedings, and promote the perfection of the misdemeanor litigation system with Chinese characteristics.

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- [11] This paper adopts the concept of "effective defense" in a broad sense, that is, it mainly refers to the equal, timely and effective protection of the lawyer's right to help the accused, which is different from the narrow understanding only for the lawyer's own defense behavior and defense quality.