

THE CRIMINAL LEGAL AID IN CHINA**Long Changhai¹, V.V. Sonin²**¹*Inner Mongolia University, Hohhot, China*²*Far Eastern Federal University, Vladivostok, Russia*

The subject of the article is the criminal legal aid in China.

The main goal of this work is to introduce the current state of legal aid in criminal cases in China to Russian scholars and legal professionals.

Results. Criminal Legal Aid in China appeared relatively recently, and in the last years of its operation was marked by a number of achievements and some problems. Legal assistance in criminal cases is an integral part of the institute of Legal Aid in China and plays an invaluable role in ensuring due process, maintaining the balance between prosecution and defense, as well as in guaranteeing human rights. This study contains a general description of the current state of criminal legal aid in China, highlights inherent problems of this institution and describes prospects of its development. This work is based on the Criminal Procedure Code of the PRC in version of 2013 year, and provides analysis of the Russian and Chinese special literature, Chinese law and practice, as well as the official Chinese statistics. The scope of legal assistance in criminal cases is extremely narrow, the funding is not enough, and the quality leaves much to be desired. These and other shortcomings already have become obstacles to the development of the Chinese criminal procedure law. Despite of a number of changes to the legal regulation of the institute in the 2013 edition of the PRC Criminal Procedure Code, a number of issues remained unresolved.

Conclusions. The existing difficulties can be overcome by expanding the scope of legal aid, increase in funding and introduction of public defenders. To increase funding in the budgets proposed to establish minimum public funding of legal aid, to attract non-governmental and international funding, to strengthen control and to ensure openness and transparency of spending. To improve the quality of legal aid PRC government should rise up compensations for lawyers, introduce the institution of public defender and create a mechanism for evaluating the quality of legal assistance.

Key words: China, PRC, criminal procedure, legal aid, legal assistance, lawyer, defender, public defender, suspect, defendant.

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1. Overview of the institute of legal aid in criminal cases in China

Despite the fact that the Chinese Criminal Procedure Code adopted in 1979 mentioned legal aid in criminal cases, the institution of legal assistance in criminal cases received full legal support only in the Criminal Procedure Code of 1996. Since then the process of improving legal aid in criminal cases has started, up to the adoption of the "Provision on Legal Aid" in 2003. This

"Regulation" carries out general systemic regulation of the institution of legal assistance and many of its norms directly affect the issues of legal assistance in criminal matters [2, p. 43].

Revision of the CPC of China in 2012 and corresponding "Clarification of the China People Court on the application of the Criminal Procedure Code of the PRC" (hereinafter - "Clarification of the CPC of China") improved the legal regulation, including the scope and the forms of legal assistance in criminal matters [3, p. 107]. The novels of the last edition of the CPC of China, which came into force in 2013, basically result to the following:

Firstly, the start of legal assistance in criminal proceedings is shifted "to the left", to the preliminary investigation stage that poses the will of providing legal assistance at all stages of the criminal procedure: the preliminary investigation, consideration of the prosecution case for arraignment, the case in court.

Secondly, the entity empowered to apply for legal aid is not only the court (as before), but the prosecutor's office, the suspect, the accused and his close relatives. The position of the "appointment of a lawyer by the court" has been changed and set out on as follows: "Authority of public security, the prosecution, the court asks for the legal aid body to send a lawyer". This increases the importance of the procedural authority of legal aid in the process of functioning of the system legal assistance in criminal cases.

Thirdly, legal assistance in criminal cases is legally divided into mandatory and non-mandatory. Obligatory legal assistance covers the cases of appointment by a court, public prosecutor's office or public security body of a defender to a suspect or accused on a mandatory basis. In view of expansion of the procedural time limits of provision of legal aid (to the stage of preliminary investigation), suspect is now the subject of the right to legal aid too. In accordance with Article 286 of the CCP and Clarifications, which is mandatory legal assistance in criminal cases is provided in the following cases:

1. The suspect, the accused is blind, deaf, or dumb.
2. The suspect, the accused suffers from a mental disease, but not completely lost the ability to realize the significance of his action or control it.
3. The suspect, the accused may be sentenced to life imprisonment.
4. The suspect, the accused, can be sentenced to death.
5. The defendant at the stage of conviction approval to the appointment of the death penalty by the Supreme People's Court of China.
6. The accused in a case on the application of compulsory medical measures not without his procedural representative.

. In accordance with para. 43 Clarifications to CPC PRC optional legal assistance can be provided on the basis if the following:

1. In cases of crimes committed in complicity if part of the accused subjects invited defenders.
2. On matters of great social importance.
3. The review of cases where sentences have been appealed by prosecutors.
4. In cases in which the act of the accused may not contain the corpus delicti.
5. In other cases when a lawyer is needed.

2. Problems of Legal Aid Institute for Criminal Cases in China

Despite the relatively late appearance of the institute of legal aid in criminal cases, as well as the presence of positive tendencies of its development, the Institute continues to demonstrate a number of problems:

1) Extremely narrow sphere of providing legal assistance.

In comparison with the minimum standard established by the International Covenant on Civil and Political Rights, the Chinese rules on subjects eligible for legal assistance in criminal matters still show a certain lag. At the same time, the sphere of rendering legal assistance established in China in comparison with the norms of other states also appears to be narrow. Thus, legal assistance in criminal matters in the United States is provided for all categories of cases, from crimes of small gravity to those that are punishable by death: "Whether the defendant confessed to committing a crime or not, whether the case is being tried in a federal court or in the state court, unless the subject (the suspect) is in a difficult financial situation, or invited the defense counsel, regardless of the stage of the process, the state gives him free protection" [4, p. 252]. This example confirms the persistence of significant differences in the scope of legal aid in criminal cases provided in the PRC and other states. This also demonstrates the vector of the necessary improvement in the institution of legal assistance in criminal matters in the PRC in the future.

2) Insufficient funding of legal assistance in criminal matters.

Adequate funding is the material basis of the normal functioning of the institution of legal assistance in criminal matters. "Regulations on legal assistance" provide in Art. 3: "Legal assistance refers to the management of government bodies, the people's governments of the county level and above are obliged to conduct active work on the organization of legal aid, to finance legal aid ..." This norm is formulated too abstractly and vaguely, it does not establish criteria and amounts of funding and legal consequences of inaction of the relevant bodies. Legal aid in the PRC is currently funded by local budgets. From 2011 to 2015 the total funding of legal aid in the PRC increased in 15.2%.

It is easy to see that as the Chinese economy grew, the government significantly increased the funding of legal aid. However, despite this, a comparison of the cost of providing legal aid to China and the developed countries of the West shows a significant lag in China, both in absolute and in per capita terms. This does not allow to resolve the contradiction between "demand" and "supply" in the field of legal assistance in the PRC effectively.

"Regulations on Legal Aid" assign legal aid to the conduct of **the administration**, at the same time pointing out that the provision of legal aid is the responsibility of lawyers. The specificity of the lawyer's profession is that his income depends on the number of cases and on the amount of the fee for each case. The number of cases that a lawyer can guide in determining in the first time, but the limitations that puts his income is directly dependent on the size of the fee for each case. However, the imperative duty of the lawyer to provide legal assistance in conjunction with a limited amount of compensation for each case by way of legal aid leads to the fact that the income of lawyers providing legal assistance is low. In this regard, this obligation does not promote enthusiasm of lawyers. Laying on the duties of lawyers to provide legal assistance without full financial support is unfair. In order to avoid expenses or to minimize them, lawyers do their work in bad faith, they relate to their duties formally, which, in turn, has the most negative impact on the quality of legal aid, ultimately negatively affecting the interests of the suspect or the accused.

Besides, the level of economic development of various regions of PRC is different: how Typically, the economy of western districts falls behind Eastern regions which also leads to emergence of a serious territorial imbalance at the sphere of provision of legal help. For example, the western province of Shaanxi in 2015 spent of 33.2849 million yuan on the provision of legal aid, including general expenses totaled 4.686 million yuan (6.8% of total expenditures), payment for services expenses amounted to 28, 59 million yuan. In the structure of the cost of services, targeted transfers from the central government to support the provision of legal aid in the field

amounted to 11.4 million yuan, the central fund of charitable lotteries - 2.96 million yuan, from provincial, urban and county budgets - 14.23 million yuan. Thus, the share of own funds of local budgets was 43%, which is slightly lower than the average Chinese indicator of 66.8%. The per capita expenditure of local provincial budgets on legal aid is only 0.38 yuan, well below the national average of 1.21 yuan.

3) Low quality of legal assistance in criminal cases.

As a rule, in cases requiring legal aid and financed from the state budget, the payment of lawyers involved in providing legal assistance is disproportionate to their work, the rights of lawyers are not properly provided. This ultimately leads to reluctance of many lawyers engaged in the provision of legal assistance, especially in criminal cases. In 2011, the number of cases of legal assistance in China reached 844 624, of which only 113 717 were criminal cases (13.46%). In 2012, legal aid was provided in 1 020 000 cases, 130 000 of which were criminal cases (13%). In 2013, it was reported 1 158 875 cases of legal assistance, of which criminal cases amounted to 222 200 (19%). In 2014 legal assistance was rendered to 1 243 075 cases, 240 480 of which were criminal cases (19.3%). In the context of increasing the number of cases, the provision of legal assistance in criminal matters should pay attention to the number of employees. In 2011 it was 14 150 people, in 2012 - slightly more than 14 thousand, in 2013 - 14 548 people, in 2014 - 14 533 people. Table 1 shows the total number of cases, legal aid separately specified number of criminal cases, as well as the number of employees of legal aid:

Table 1. The main characteristics of legal assistance in criminal matters in China by year

A type	Year	2011	2012	2013	2014
Total number of legal aid cases		8446 24	10,200,000	1158875	1243075
Cases of legal assistance in criminal matters		113717	130000	222200	240480
The number of employees		14150	14,000	14548	14533

3. Trends of the development of the Institute of Legal Assistance in Criminal Cases in China

Adopted in October 2014 Decision of the Plenum of PRC Central Committee "On certain fundamental issues comprehensively advancing the state management on the basis of the law" contains two specific requirements for the content of legal aid institute reforms. Firstly, the scope of legal aid is proposed to include "all persons appealing the verdict or decision of the court who does not have the means to hire a lawyer". Secondly, it is planned "to improve the institute of legal aid, to expand the scope of its application, create a system of legal aid to guarantee the right of the masses to obtain timely and efficient legal assistance in case of legal problems or violation of rights." In 2015, the Office of the CPC Central Committee and State Council adopted "Guidelines on improving the legal aid institution" that gave rise to wide-ranging discussion among Chinese legal scholars. There are following trends of development of the institution.

1. Further expansion of the scope of the provision of legal assistance in criminal matters.

Legal assistance in criminal cases is the core of the entire institution of legal aid. Legal assistance in criminal matters helps to ensure the rights of the suspect, the accused, to strengthen the wish to set up the beginning of the procedural justice, reduces the number of miscarriages of justice. The amended Criminal Procedure Code of the PRC in 2013 expanded the range of subjects eligible for legal aid, but it still seems insufficient. Chinese Professor Chen Guanchzhun believes that after the introduction of the amended Code of Criminal Procedure of China in 2013, " the

proportion of criminal cases involving the defender is still small, it is well below the legal community expectations, and in my experience is less than a third of the total number of criminal cases" [5]. The defendant in a criminal case in the absence of assistance of counsel resides in the power of the prosecution and is hardly able to protect his own rights and interests.

Of course, the expansion of the circle of recipients of legal aid would increase the financial burden on the state budget. However, an adequate expansion of the circle of recipients of legal aid seems to be able. Some scholars suggest the provision of legal aid in cases which could be sentenced to more than 10 years' imprisonment and in cases of appeal against the prosecution of sentences". [6] The authors believe that this recommendation is quite reasonable.

In cases of appealing by the prosecutor's office there are differences in qualification or significant differences in the definition of the size of the punishment. The emergence of such disagreements can negatively affect the position of the accused on appeal, so the cases of the prosecution appeal the sentence should also be included within the scope of the mandatory provision of legal aid in order to ensure the balance of the prosecution and defense, safeguard the rights of the accused, the implementation of substantive and procedural fairness.

2. Further increase in the provision for legal aid

Against the backdrop of increasing the total number of cases related to the provision of legal aid it is necessary to increase funding for this sector. Chinese scientists have calculated that the "government spending for legal aid constitute a very small part of the financial income of the state" [8]. In the context of the further growth of state budget revenues targeted transfers from the central budget for the provision of legal assistance should be increased.

Firstly, the minimum amount of funding should be legitimized.

Secondly, it is necessary to establish special funds for the accumulation of public funds for the provision of legal aid. The establishment of such specialized funds will attract public resources and thereby reduce the burden of funding legal aid.

Thirdly, it is necessary to attract international funding. These funds have safe budgets and provide financial support for entities engaged in the corresponding area. Legal aid serves to protect the rights and the interests of vulnerable social groups and this can help to bring funding from specialized international funds.

Fourth, the government should strengthen supervision and ensure openness and transparency of the spending of funds, to eliminate improper use of funds.

Measures of improvement of the quality of legal assistance in criminal casers

Improving the quality of legal assistance in criminal cases is an actual problem. This problem can be solved in the following three areas.

Firstly, one should increase the fees of lawyers in criminal cases in the framework of the provision of legal aid. The amount of fees is underrated For example, in one of the criminal case in one province of Shandong cities lawyers working on legal aid, get only 500-800 yuan, which is definitely not enough to recover all costs of conducting business, including transportation, travel, correspondence, etc. Many lawyers have to pay more out of pocket, and this cannot affect the enthusiasm of a lawyer on the conduct of the case [10]. Since legal aid in criminal cases raise important questions for the citizens' life, personal freedoms etc., the amount of compensation for lawyers in criminal cases should be at least appropriately increased in order to stimulate their activity and improve the quality of case management.

Secondly, one of the major problems hindering the improvement of the quality of legal assistance in criminal matters is a shortage of lawyers. In some remote areas of China, the number of persons eligible to participate in criminal proceedings, is relatively small. In these

circumstances, some Chinese scholars have proposed to consider the possibility of introducing the institution of "public defender" [11]. Highly qualified professionals could be provided with the status of civil servants in positions of "public defenders" specifically for the provision of legal assistance in criminal cases. An appropriate mechanism of selection of public defenders as well as their control and certification should be created. This measure will be of great importance for improving the quality of legal assistance in criminal matters.

Thirdly, it is necessary to create a mechanism of assessment of the quality of legal assistance in criminal matters. Insufficient financing of this sector has led to the fact that many lawyers who provide legal assistance in criminal matters, cannot perform their duties with full dedication. Part of the lawyers are not familiar with the evidence, they do not carry out other necessary preparations for the defense, and so on [12]. Therefore, China should introduce a mechanism of assessment of the quality of legal assistance in criminal matters.

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