

Criminal Legal Aid: Problematics on Legal Professionalism

Delu Xiong*

School of Law of Sichuan University

School of Law of Sichuan University of Science & Engineering

Keywords: Legal Professionalism; Institutional Demand and Supply; Artificial Intelligence (AI); Criminal Legal Aid

Abstract: The problem of criminal legal aid is actually a problem of legal professionalism. What the accused need is universal, timely and effective criminal legal aid. The system of criminal legal aid that can't relieve the litigation interests of the accused is the paper imagination of traditional legal professionalism. The reserve of legal intellectual resources is scarce, the state financial allocation is insufficient, and the social identity of the judicial function of criminal legal aid is not high. These are the basic difficulties in the construction of criminal legal aid. The future-oriented legal professionalism that focuses on facts and consequences should be the basic approach to construct the criminal legal aid.

Criminal legal aid is the initial form of legal aid, which is in the most basic position in the modern legal aid[1]. From the perspective of legal economics, criminal parties should choose legal aid, especially free legal aid, so as to get more litigation benefits. In other words, under the background of the current construction of the legal state, the demand for legal aid in litigation practice should be universal and increasing[2]. However, the conclusion of empirical study shows that the demand for criminal legal aid in western central cities is not high[3].

1. Problem: Demand and Supply of Criminal Legal Aid

As a criminal compulsory measure, the purpose of custody is to ensure the smooth progress of criminal proceedings, which is closely related to the results of criminal proceedings. If the criminal parties are taken custody measure, the probability of adverse criminal proceedings is high, such as the high possibility of being sentenced to fixed-term imprisonment; If the custody measure is not taken, the result of criminal proceedings is not likely to be very bad, but may tend to be favorable such as the high probability of probation, or even acquittal. This is a judgment that depends on the professional knowledge and experience of criminal proceedings. The rational accused should make decisions with the help of lawyers' professional judgment as much as possible. Especially at zero cost, there is no reason to refuse legal aid.

The demand for criminal legal aid in western central cities revealed by the empirical study is not high, and the problems involved may not be the problems of demand but supply. Thus, as a kind of institutional product, the criminal legal aid needs to consider the practical demand of criminal justice, and cannot indulge in the imagination of academic legal professionalism.

2. The Demand for Criminal Legal Aid of the Accused

From the perspective of the litigation interests of the accused, criminal legal aid should have the following basic functions. The first is the legal aid that can realize the procedural rights of the accused; The second is the legal aid that can realize the entity rights of the accused; The third is legal aid involving lawyers; The fourth is the legal aid that ensures the effective participation of lawyers. However, the empirical analysis of criminal justice practice shows that there are almost no

*Xiong Delu. Ph.D. student of School of Law of Sichuan University, lecturer of School of Law of Sichuan University of Science & Engineering.

corresponding institutional conditions to ensure the universality, timeliness and effectiveness of criminal legal aid mechanism, which cannot meet the litigation interests of suspects and defendants[4]. Criminal legal aid can not relieve the procedural rights and substantive rights of the accused. This kind of system can only be the imagination of legal professionalism that stays on paper.

(1) Universal criminal legal aid

According to Provisions on Legal Aid in Criminal Proceedings in 2013, the condition for criminal suspects and defendants to obtain criminal legal aid is "there is no entrusted defenders for economic difficulties". However, the attorney fees of criminal cases and the minimum living expenses of urban and rural residents are two different standards. Taking the standard of minimum living guarantee as the condition of applying for criminal legal aid, most of suspects and defendants who do not have the financial ability to hire lawyers are actually excluded.

Measures for the Pilot Work on the Full Coverage of Lawyers in Criminal Cases in 2017 expands the scope of criminal legal defense aid and requires lawyers to participate fully in criminal proceedings in the form of defense or legal aid[5]. At present, the national defense rate of criminal cases is still less than 30%,[6] of which legal aid for criminal defense accounts for about 20%. According to the full coverage of criminal lawyers' defense, the proportion of legal defense aid almost needs to be doubled. If there is no institutional guarantee, the full coverage of the criminal lawyer's defense can only be the design that stays on paper.

(2) Timely criminal legal aid

In the investigation procedure, the stage from the suspect to the procuratorial organ before arrest is the key to his fate. When interrogated for the first time or taken compulsory measures, the criminal suspect should be informed that he has the right to apply for legal aid from legal aid institutions according to provisions. However, most of the suspects actually receive legal aid after they have been approved for arrest[7]. At this time, the evidence collected by criminal investigation has basically reached the standard of transfer for examination and prosecution. For the criminal suspect, an important moment has been missed to achieve litigation rights through criminal legal aid.

(3) Effective criminal legal aid

If there is no universal criminal legal aid, defense lawyers cannot timely participate in this aid. The lack of protection and incentives for defense lawyers to participate in criminal legal aid will seriously weaken its effectiveness. Public welfare criminal legal aid is a free legal service and there is no market incentive. The average subsidy for criminal legal aid cases granted by the state through financial allocation is about 1,000 yuan[8]. Such economic subsidy cannot guarantee quality criminal legal aid, and in particular, cannot guarantee the legal aid that the accused expect. In fact, the low quality of criminal legal aid cases is directly related to the low case subsidies[9]. Many lawyers, particularly experienced and competent ones, are unwilling to engage in criminal legal aid; Even if they can't refuse, they are unlikely to go all out and are more likely to go through the motions. This highlights the profound contradiction between the profit seeking of the legal service market and the public welfare of legal aid.

3. The Legal Professionalism Imagination of Criminal Legal Aid

At present, China is still facing the dilemma of low rates of both criminal defense and legal aid[10]. If the contextual basis of this dilemma has not changed fundamentally, then the rates of the two will not change substantially. Thus, the fact that suspects and defendants "enjoy free social welfare of legal aid" can only be a kind of academic imagination lacking practical foundation[11].

(1) The problem of legal professionalism

At present, the theory and practice of criminal legal aid have a strong color of legal professionalism. The empirical analysis shows that the demand for criminal legal aid is not high. This is more likely because this service is not the service expected by the accused, but the legal professional community divorced from the actual legal formalism imagination.

The practice of legal profession in China is still a traditional legal professionalism which focuses on the concept of authority, words and formal logic. This kind of legal formalism practice, which is addicted to words but ignores real life, infatuated with logical deduction but ignores legal consequences, has encountered crisis in western legal countries and sought new liberation in the twilight[12]. Compared with the traditional legal professionalism, Posner advocates the legal professionalism which is based on the wisdom of social science, faces the real social life and pays attention to the practical consequences[13]. However, China's legal professional community has not learned from the western experience and lessons, lacking a deep reflection on legal formalism. It cannot face China's real legal practice and seeks to solve all conflicts in social transformation through formalism law once and for all[14].

(2) Imaginary criminal legal aid

Based on the demand for litigation rights of the accused, it can be found that the theory and practice of criminal legal aid are separated from the criminal justice reality. If this aid deviates from the needs of the accused, it can only become a system that stays on paper.

First, the coordination of legal intellectual resources

The concept of criminal legal aid, including criminal defense and legal aid, involves the reserve, distribution and coordination of legal intellectual resources such as lawyers and legal workers. At present, lawyer resources are still a scarce resource, and the distribution is not balanced, in fact, it cannot be balanced. Under such a situation of legal intellectual resource reserves, it is unrealistic to give high expectations to criminal legal aid. In particular, it seems even more impossible to require lawyers to participate in the trial of all criminal cases in the form of criminal defense and legal assistance to achieve the "full coverage of criminal lawyers' defense".

The economic logic of competitive distribution of resources determines that scarce resources must flow to the fields with higher benefits. Therefore, legal intellectual resources are more likely to focus on paid services with higher returns rather than public welfare legal aid. After all, lawyers are urban animals chasing high incomes[15]. The development of criminal legal aid is bound to face the limitation of legal intellectual resources.

Second, designated defense and legal aid

According to the requirement of "full coverage of criminal defense", 70% of cases newly covered by "criminal defense" also need criminal legal aid, including lawyer defense and legal aid. This is because it is impossible to force the accused to entrust a defender to conduct the "full coverage of criminal defense". To a large extent, it needs to provide free legal aid for criminal defense to the accused in a systematic way. However, even free criminal legal aid is not so popular. The root cause is that the criminal legal aid is not the institutional product that the accused need. To win the trust of the system requires practical and consequential thinking, which cannot only consider problems from the supply side, ignore the demand side or even overlook it. The fact that the accused does not agree with criminal legal aid shows that "legal person's thinking" is divorced from criminal judicial practice[16].

Third, imagination of extraterritorial experience in criminal legal aid

It is the basic approach of legal formalism to conceive China's legal practice by taking the experience of extraterritorial legal civilization as the reference. In terms of criminal legal aid, Britain, the United States and Germany all have a long history of institutional practice and established a wide range of multi-level forms of national responsibility of criminal legal aid. Thus, some scholars have taken this as a reference and proposed a "full coverage" Chinese criminal legal aid from three dimensions: hierarchical structure, supply-side reform and diversified model construction of the criminal legal aid[17].

However, if we face up to China's criminal judicial practice, we can clearly see the difficulties of "full coverage of lawyers' defense in criminal cases". These difficulties include the scarce reserve of legal intellectual resources, the insufficient financial allocation of the state and the low social recognition of the judicial function of criminal legal aid. If these basic conditions remain unchanged, the conception of criminal legal aid based on the extraterritorial advanced legal experience can only be a beautiful imagination. This includes the functional division and connection of duty lawyers and

defense lawyers, and the coordination of legal aid mechanisms of socialization, marketization and nationalization.

4. Criminal Legal Aid as a Problem of Legal Professionalism

This paper points out the problem of legal formalism in criminal legal aid, which is not intended to deny its institutional value. Instead, it aims to reveal the defects of thinking, intelligence and discourse in its institutional construction, and then advocates a functional approach that focuses on the consequences of institutional practice. It considers the criminal legal aid as a part of China's criminal judicial reform, and values the actual effect and institutional growth in stages rather than the institutional construction that can be finished overnight.

The acceptance of criminal legal aid directly involves the real litigation interests. Thus, the suspects and defendants must balance their interests, which is a consequential balance based on cost-benefit analysis. If we do not respect the demand of the accused in criminal judicial practice, only design legal products based on the abstract belief of legal formalism, and arbitrarily believe that the public will happily accept it, this will lead to the fatal conceit of formal logic of conceptual law[18].

The practice of social life is often not the prospect of logical reasoning. In particular, it will not follow the doctrines of legal formalism, and it is a kind of illogical historical existence empirically. The wisdom of the judicial innovation caused by the artificial intelligence AI (AI) reflects this illogicality. As a legal technology based on big data, AI will have a subversive impact on the traditional legal career prospect, which may cause the structural collapse of the legal service market[19].

It can be said that AI has eroded the territory of traditional legal professions and has reduced the space for criminal legal aid. This perspective just reveals that there are fundamental conceptual problems in the development of criminal legal aid, namely, the concept of traditional legal professionalism. If the narrow vision of traditional legal professionalism is put aside, AI, as a developing legal technology, is bound to promote the transformation of criminal legal aid.

From the perspective of legal realism facing real social life, AI may bring a new era to the development of criminal legal aid. Intelligent justice requires the construction of new legal knowledge with the thinking of "overcoming law" (Posner) and the practice of criminal legal aid. Its institutional implication is legal realism based on facts and consequences, as well as a kind of real legal professionalism facing the future[20].

References

-
- [1] Hu Ming, Wang Tingting. A Chinese Model of Legal Aid and Its Reform[J]. Journal of Zhejiang University (Humanities and Social Science), 2017,(2).
 - [2] "Compared with the increasing demand for legal aid from the people, especially the people in need, there are still some problems in the work of legal aid, such as the imperfect system, the imperfect guarantee mechanism and the urgent need to expand the scope of legal aid." Seen the Opinions on Improving the Legal Aid of the General Office of the CPC Central Committee and the General Office of the State Council.
 - [3] Zuo Weimin. Urban Criminal Legal Aid: Empirical Research and Reform Suggestions on Pilot Projects[J]. Legal review, 2014,(6).
 - [4] Liu Fangquan. What kind of criminal legal aid does China need?[J]. Journal of Fujian Normal University (Philosophy and Social Sciences),2014,(1).
 - [5] Article 2 of the 2017 Measures for the Pilot Work on the Full Coverage of Lawyers in Criminal Cases.

-
- [6] Gu Yongzhong, Chen Xiao. Research Report on the Development of China's Criminal Legal Aid (1949-2011). Gu Yongzhong (editor). Chinese Practice and International Vision of Criminal Legal Aid[M]. Beijing: Peking University Press, 15-17.
- [7] Liu Fangquan. What kind of criminal legal aid does China need?[J]. Journal of Fujian Normal University (Philosophy and Social Sciences),2014,(1); Article 5 of the Provisions on Legal Aid in Criminal Proceedings, 2013.
- [8] Wang Yinglong. On the Chinese Model of Criminal Legal Aid——The Way to Realize the "Full Coverage" of Criminal Defense[J]. Criminal Science, 2018,(2).
- [9] Zuo Weimin. What kind of criminal legal aid should China build?[J]. China Legal Science, 2013,(1); Ma Jinghua. A Positive Study on the Value of the Assigned Counsel: By Reference to the Attained Attorney[J]. Modern Law Science, 2010(6).
- [10] Wang Yinglong. On the Chinese Model of Criminal Legal Aid——The Way to Realize the "Full Coverage" of Criminal Defense[J]. Criminal Science, 2018,(2).
- [11] Liu Fangquan. What kind of criminal legal aid does China need?[J]. Journal of Fujian Normal University (Philosophy and Social Sciences), 2014,(1).
- [12] [U.S.] Richard A. Posner. Overcoming Law[M]. Su Li(trans). Beijing: China University of Political Science and Law Press, 2001:81-93.
- [13] [U.S.] Richard A. Posner. The problematics of Moral and Legal Theory [M]. Su Li(trans). Beijing: China University of Political Science and Law Press, 2001:215,216,233.
- [14] Li Xueyao. Transformational Society and Moral Vacuum: Legal Career Blueprint in Judicial Reform[J]. China Legal Science, 201,(3).
- [15] Su Li. Sending Laws to the Countryside for Forty Years[J]. LIFE WEEK, 2018,(40).
- [16] Su Li. Thinking of Legal Person[J]. Peking University Law Review, vol.14,(2). Beijing: Peking University Press, 2013.
- [17] Wang Yinglong. On the Chinese Model of Criminal Legal Aid——The Way to Realize the "Full Coverage" of Criminal Defense[J]. Criminal Science, 2018,(2).; Chen Guangzhong, Zhang Yinan. Discussion on Promoting the Full Coverage of Criminal Defense Legal Aid[J]. Law Science Magazine, 2018,(3).
- [18] [U.K.] Hayek. F. A. The Fatal Conceit : The Errors of Socialism [M]. Feng Keli(trans). Beijing: China social sciences press, 2000:226.
- [19] Cao Jianfeng. Prospects and Challenges of AI Legal Services[N/OL]. Tencent Research Institute, 2017-03-20.<http://www.tisi.org/4855>.
- [20] [U.S.] Richard A. Posner. Reflection on Judging[M]. Su Li(trans). Beijing: Peking University Press, 2004; [U.S.] Richard A. Posner. The Problematics of Moral and Legal Theory[M]. Su Li(trans). Beijing: China University of Political Science and Law Press, 2001:7,8,263,264.