

Original Paper

Research on the System of Effective Criminal Defense

Chen Xinlong¹, Yijia Guo², Tongxu Ren² & Yangbo Jiang²

¹ Institute of Problem Solving, Dalian Ocean University, Heishijiao Street, Dalian, China

² School of Marine Law and Humanities, Dalian Ocean University, Liaoning, China

Received: November 29, 2024 Accepted: December 12, 2024 Online Published: December 14, 2024

doi:10.22158/elp.v7n3p148

URL: <http://dx.doi.org/10.22158/elp.v7n3p148>

Abstract

This article, based on the current state of China's criminal procedure system and with a focus on improving the quality of criminal defense, explores the construction of an effective defense system tailored to China's national context by incorporating international concepts of effective defense and practices of ineffective defense systems from other jurisdictions. By analyzing the concept of effective defense and its procedural and substantive values, the article identifies issues in China's existing criminal defense system, particularly regarding lawyers' visitation rights, access to case files, and the role of duty lawyers. The article argues that introducing the principle of effective defense and establishing an ineffective defense system with clear standards for lawyers' performance and remedial mechanisms are essential steps in improving China's criminal defense framework. Moreover, ensuring the protection of lawyers' rights is a crucial prerequisite for achieving effective defense. Through the institutionalization of the effective defense concept, the article aims to enhance the fairness and authority of China's criminal procedure system, thereby advancing the high-quality development of the rule of law.

Keywords

Criminal Defense System, Effective Defense, Ineffective Defense, Duty Lawyers, Extraterritorial Reference

1. Introduction

The criminal defense system plays a critical role in safeguarding the legitimate rights of defendants and reflects the level of human rights protection and the development of the rule of law in a country. In the evolution of China's criminal litigation system, the scope of lawyers' defense rights has gradually expanded, progressing from being limited to the trial stage to encompassing the review and prosecution stages. However, problems such as low criminal defense rates and inconsistent defense quality have persisted over time. To address these issues and enhance the efficiency and quality of criminal

litigation, the Supreme People's Court issued the Measures for the Pilot Program of Full Coverage of Lawyer Defense in Criminal Cases in 2017. This initiative significantly increased defense representation rates in pilot regions, achieving the initial goal of "ensuring representation".

Nevertheless, merely achieving "representation" is not sufficient to meet the demands of a modern rule-of-law system. Numerous challenges remain in criminal defense practice, including the inadequate protection of lawyers' rights to visitation and access to case files, as well as the unclear legal status of duty lawyers. These issues hinder the effective functioning of the defense system and make it difficult to achieve a transition from "representation" to "effective defense".

The concept of effective defense provides a theoretical foundation for addressing these challenges and offers guidance for further improving the criminal defense system. However, academic and practical research on effective defense in China remains limited, and there is no unified standard for evaluating its effectiveness. Therefore, it is imperative to explore the connotation, criteria, and implementation pathways of effective defense from both theoretical and practical perspectives to advance its integration into China's criminal litigation system.

2. The Basic Theory of Effective Defense and Ineffective Defense

2.1 The Concept of Effective Defense and Determination of Standards

The concept of "effective defense" can be directly interpreted from the meanings of "effective" and "defense" in Chinese. First, "effective" refers to "achieving the intended purpose", while "defense" means "providing arguments to protect oneself or a third party". Therefore, "effective defense" refers to a defense counsel's activities aimed at achieving the intended objectives on behalf of the defendant literally.

But there is no unified standard for what constitutes "effective defense" in either academic or judicial circles, as interpretations vary depending on individual perspectives. The way of people judging whether the defense behavior is effective varies. Some scholars evaluate the effectiveness of a defense based on the lawyer's behavior and the defense process, while others focus on the purpose and outcome of the defense. Still, some believe that effective defense is defined by the lawyer's due diligence.

For a better understanding of this concept, we need to know the core of this, and the core heart lies in whether the defense counsel's efforts ultimately achieved the expected results. To judge whether a defense is valid in criminal proceedings should be judged from two different angles. From the perspective of the defense counsel's actions (process-oriented): it involves evaluating the objective conduct of the lawyer, such as whether the lawyer fulfilled their professional duties and strived to secure reasonable interests for the defendant. From the defendant's perspective (outcome-oriented): this approach assesses the lawyer's defense based on the outcome of the trial, specifically whether the quality of the defense aligned with the defendant's expectations. These two perspectives provide different criteria for effective defense: one focuses on the diligence and responsibility of the defense counsel, while the other emphasizes the outcome of the defense in achieving the expected results.

However, there would be very serious problems if defense results alone were used as the criterion for defining an effective defense. For example, a defense attorney may fully fulfill their defense obligations, meticulously prepare for the case, skillfully apply appropriate defense techniques during the trial, and present a highly reasonable argument. However, the ultimate decision on the case outcome lies with the trial committee, which may not adopt the views of the defense attorney. It is clearly unfair to condemn or even punish a lawyer based solely on the defendant's perspective of negative defense outcomes, while defining "ineffective defense" without considering the lawyer's efforts and fulfillment of their obligations. Another example that aligns with common understanding is when a defense lawyer successfully persuades the judge to accept part of their arguments, resulting in a significantly reduced sentence for the defendant. In such a case, the defense would undoubtedly be considered successful. However, for a defendant striving for a complete acquittal, the lawyer's efforts might not meet their expectations. This highlights the inherent unreasonableness of solely emphasizing defense outcomes from the defendant's perspective.

Herefore, effective defense behavior standard, it should and is refers should refer to whether the lawyer, during the defense process, has actively fulfilled their corresponding obligations, performed their duties, and exercised due diligence. For example, in practice, this includes whether the lawyer has engaged in meaningful communication with the defendant, presented valuable arguments during the trial, and provided a substantive defense to challenge the prosecution's case. The effective defense of the lawyer should be judged by a relatively controllable and determinable standard of conduct rather than a standard of result, since the outcome of the case is affected by various factors and no one can guarantee the outcome of the trial.

The author believes that the effective defense is the defender in the defense process to actively perform the corresponding professional obligations, as far as possible to ensure that the legal rights and obligations of the accused, effective defense and the results of the defense does not have a direct relationship, which be supported by the research results of most scholars.

No defense party can guarantee that their arguments will be accepted by the court, and an unreasonable definition of effective defense could undermine the professional enthusiasm of defense lawyers. However, without clear constraints on effective defense, if a lawyer merely goes through the motions, the defendant's interests may not be adequately protected. Therefore, it is crucial to establish clear boundaries. The U.S. "ineffective assistance of counsel" doctrine offers valuable insights to ensure the implementation of the concept of effective defense in criminal proceedings. While the U.S. Supreme Court has not provided a specific definition of "effective defense", it has clarified what constitutes "ineffective defense" through reverse legislation, thereby safeguarding effective defense as a constitutional right.

2.2 *The Value of Effective Defense*

2.2.1 Value in Procedural Terms

From the perspective of protecting human rights and unholding the rule of laws, the defendant's lawful rights should be fully guaranteed in accordance with the law. Only under such a premise can the criminal justice system be convincing, its outcomes credible and trustworthy, and ultimately deemed effective. This is even more important for some financially disadvantaged defendants.

In criminal proceedings, whether it involves expedited procedures, simplified procedures, or standard procedures, if the accused can receive professional assistance, their comparatively weaker private rights, when juxtaposed with the vast state machinery, can be reasonably protected. This enables them to respond more effectively to unfair or unreasonable demands. The absence of such professional assistance would further imbalance the scales of justice. Without an effective defense system, the government may benefit from improper conduct, while the rights of the accused are undermined by such misconduct. This issue is even more critical for economically disadvantaged defendants who cannot afford legal representation.

The concept of effective defense requires judicial authorities to protect the accused's right to defense, ensuring that defense lawyers' rights to meet with clients, review case files, and cross-examine evidence are not subject to third-party interference. Introducing the concept of effective defense into the system would enhance the protection of lawyers' rights, set higher standards for defense conduct in litigation, and compel lawyers to improve their professional capabilities. This would establish a more equal confrontation between defense and prosecution, thereby better safeguarding the legal rights of the accused.

2.2.2 Value on the Entity

From a substantive perspective, the concept of effective defense reduces the likelihood of the accused facing unjust penalties. Unjust penalties can lead to wrongful convictions, resulting in violations of the accused's personal freedom or even their right to life. Although the responsibility for wrongful convictions may not entirely rest with judges, and judges may fulfill their corresponding ethical duties, judicial rulings may still deviate from the facts of the case due to various factors.

In practice, judges primarily understand cases through reading case files, questioning the accused, listening to the arguments of both the prosecution and the defense, and reviewing evidence and facts during trial cross-examinations. These approaches, however, are relatively limited, and relying solely on them to comprehend the case may still result in wrongful convictions. Although courts have the authority to investigate and collect evidence, for the sake of efficiency, this power is seldom exercised. This common practice creates an awkward situation in judicial proceedings: normal exercise of investigative powers may be perceived as proactive intervention in the case, which contradicts the principle of trial-centeredness and undermines the image of judicial impartiality and neutrality.

Therefore, the accused cannot rely on the judicial authorities to protect their interests but should instead place their trust in defense lawyers. The primary value of defense lawyers lies in safeguarding the rights of the accused. Through their professional expertise, defense lawyers enhance the defendant's ability to protect themselves against the immense power of the state.

2.3 The Concept and Recognition Standard of Invalid Defense

The relationship between effective defense and ineffective defense is not a binary, mutually exclusive one. Effective defense is an abstract legal concept aimed at safeguarding the legitimate rights of the accused. It primarily serves as a guiding principle for the conduct of defense lawyers. In contrast, ineffective defense is a legal doctrine that establishes specific criteria and punitive measures to regulate defense behavior and prevent harm to the rights of the accused caused by inadequate or improper defense. Together, they form a complementary system that ensures the protection of rights in criminal proceedings. While effective defense is a goal that cannot be directly quantified or implemented, ineffective defense provides a practical framework through institutionalized rules. For example, in the U.S. legal system, the consequences of ineffective defense can include the overturning of a prior judgment by a higher court and the remanding of the case for retrial or disciplinary action by a bar association against the defense lawyer. The determination of ineffective defense requires the simultaneous fulfillment of three elements: first, the lawyer fails to perform their duties with diligence and competence; second, the judicial authority renders an unfavorable decision against the accused; and third, there is a direct causal relationship between the lawyer's misconduct and the unfavorable decision.

For instance, if a defense lawyer fails to meet with the accused before trial or deliberately abstains from participating in court proceedings, such actions may violate the principles of effective defense but do not necessarily constitute ineffective defense. If the trial court, despite the lawyer's negligence, issues a favorable ruling for the accused, the lawyer's misconduct, though problematic, does not meet the criteria for ineffective defense. This demonstrates that ineffective defense requires not only misconduct on the part of the lawyer but also an adverse outcome for the accused as a key prerequisite.

In summary, the determination of ineffective defense requires the simultaneous fulfillment of all three elements, with the result-oriented criterion—an adverse outcome for the accused—being a critical prerequisite. If there are flaws in the defense process but no adverse consequences occur, it typically does not constitute ineffective defense. While effective defense as an abstract concept cannot be directly implemented, the institutionalization and enforcement of the ineffective defense doctrine not only regulate the conduct of defense lawyers but also enhance the overall protection of the rights of the accused. This ultimately serves to uphold fairness and legitimacy in criminal proceedings.

2.4 Consequences of Ineffective Defense

In the United States, where the concept of ineffective defense originated, the determination of ineffective defense requires a higher court to assess the conduct of the lawyer. If the lawyer's actions meet the standards defined under the ineffective defense doctrine, they are deemed to constitute

ineffective defense. The core objective of this doctrine is to ensure the practical implementation of the principle of effective defense, which is recognized as a constitutional right in the United States. To safeguard the rights of the accused, higher courts may rule that a lawyer's conduct violates the Constitution and order a retrial of the case.

2.5 The Current Situation in China and Suggestions

In contrast, China's Criminal Procedure Law has not yet established the principle of effective defense, nor has it enshrined effective defense as a constitutional right. Cases where lawyers fail to fulfill their obligations, neglect their duties, or commit significant misconduct are typically classified as breaches of contract or violations of the Lawyers Law or professional ethics. However, these standards lack clarity and are insufficient to comprehensively and effectively regulate the conduct of defense lawyers. The author suggests that integrating the principle of effective defense with the doctrine of ineffective defense to create a system tailored to China's national context would help address many of the current issues in criminal defense. And this article explores the integration of the principle of effective defense with the doctrine of ineffective defense to develop a system tailored to China's national context, aiming to address the current issues in criminal defense. Such a system would not only provide defense lawyers with clear behavioral guidelines but also safeguard the legitimate rights of the accused through institutional mechanisms, thereby enhancing the fairness and authority of criminal proceedings in China.

3. The Current State and Issues of Criminal Defense in China

The rate of criminal defense in China has remained relatively low for a long time. According to statistics from the Ministry of Justice, the defense rate by lawyers in criminal proceedings was less than 30% in 2017. This situation improved significantly after the 2018 amendment to the Criminal Procedure Law and the implementation of the Measures for the Pilot Program of Full Coverage of Lawyer Defense in Criminal Cases. The defense rate by lawyers during the trial phase of criminal cases has steadily increased nationwide, with some regions seeing rates exceed 80%.

3.1 Current Status of Legislation

According to Article 130 of the current Constitution of the People's Republic of China, "People's courts shall hear cases in public, except as otherwise provided by law. Defendants have the right to defense". This provision serves as a basis for defendants to exercise their right to defense. However, since this article is stipulated within the scope of the powers of the people's courts, some scholars argue that it is insufficient to establish the right to defense as a fundamental right of Chinese citizens.

With societal progress, it has become increasingly necessary to incorporate the right to defense into the basic human rights of citizens. Protecting citizens' right to defense is, to some extent, also a means of safeguarding the power of effective defense. If defendants, as citizens, do not enjoy basic rights, how can lawyers effectively defend them?

In addition, in recent years, China's Criminal Procedure Law has introduced provisions such as the leniency system for those who plead guilty and accept punishment, as well as the duty lawyer system. These measures further enhance the likelihood of defendants receiving relatively fair penalties and judicial assistance.

3.1.1 The Leniency System for Those Who Plead Guilty and Accept Punishment

In 2018, China's Criminal Procedure Law established the leniency system for those who plead guilty and accept punishment, reflecting the nation's approach of "leniency for confession". In practice, this system has provided protection for criminal suspects willing to plead guilty and accept punishment. However, it also raises concerns about potential violations of defendants' human rights, such as wrongful convictions resulting from false confessions. The risk of wrongful convictions due to false guilty pleas is difficult to eliminate and is influenced by factors such as the quality of evidence, the authenticity of confessions, and the professional competence of investigators. For individuals who falsely plead guilty and accept punishment, the "lenient treatment" reduces the cost of convicting a crime, which itself constitutes an unjust misrepresentation of the concept. A defendant's decision to plead guilty and accept punishment should stem from their own free will. If this disposition severely contradicts objective facts or the individual's true intent, it clearly deviates from the foundational principles of this system.

Ensuring the voluntariness of guilty pleas and acceptance of punishment is a crucial core of this system. If defendants are coerced into admitting guilt against their will, it constitutes forced self-incrimination, which should be excluded under the rules governing illegal evidence. Defendants must possess sufficient capacity to make rational judgments about whether to plead guilty and accept punishment. However, in reality, defendants often lack professional negotiation skills. Their decisions are frequently based on a rudimentary understanding of legal justice and emotional reasoning, which may be mixed with misconceptions about the law. Facing the highly specialized state judicial apparatus, they are often in a disadvantaged position.

Therefore, safeguarding the voluntariness of defendants requires the support of negotiation skills. In this process, the active performance of lawyers and duty lawyers is particularly critical. They should ensure that defendants clearly understand the legal consequences and make decisions regarding guilty pleas and acceptance of punishment based on this understanding, thereby securing fair sentencing. As one practical analysis points out, "those who are well-prepared and professionally supported achieve the best negotiation outcomes". In the current judicial context of advocating leniency for guilty pleas and acceptance of punishment, integrating the concept of effective defense is of great significance in protecting the voluntariness of defendants. If, in such cases, defense lawyers fail to fulfill their duties of negotiation with judicial authorities and the process becomes merely perfunctory, it diminishes the defendants' chances of receiving lighter sentences. This clearly undermines the original intent of the leniency system. The concept of effective defense can regulate the passive behavior of defense lawyers,

ensuring that guilty pleas and acceptance of punishment proceed on a voluntary basis. Therefore, embedding the concept of effective defense within the leniency system is essential.

3.1.2 Duty Lawyer System

In 2018, China's Criminal Procedure Law formally established the duty lawyer system, stipulating that duty lawyers provide legal assistance, such as consultation and procedural advice, to criminal suspects or defendants who have not formally appointed a defense lawyer and do not meet the criteria for legal aid. However, the legal status of duty lawyers has been a topic of debate in both judicial practice and theoretical discourse. The positioning of duty lawyers determines whether they can exercise some or even all the rights of defense lawyers, which would significantly enhance the protection of the accused's right to effective defense.

According to the language of the Criminal Procedure Law, it is clear that the rights of duty lawyers are distinct from those of defense lawyers. Article 36 specifies that duty lawyers can provide legal consultation, procedural advice, and assistance in applying for changes to coercive measures. Duty lawyers operate as "legal assistants", which differentiates them from "legal aid lawyers" and "defense lawyers". Their limited scope of rights allows them to provide only partial legal assistance, which is often insufficient to fully protect the accused.

There are two primary perspectives in academic discourse regarding the legal status and improvement of the duty lawyer system. The First Perspective: Duty lawyers are seen as legal assistants to ensure efficiency. Proponents of this view argue that defendants requiring full legal defense should independently seek a lawyer. The Second Perspective: Duty lawyers are viewed as potential defense lawyers. However, this perspective includes several distinct proposals: First, transform the current duty lawyer system into a true appointed defense system, ensuring every defendant has access to legal defense. This would allow duty lawyers to exercise rights such as meeting with defendants, reviewing case files, and conducting investigations, as well as negotiating equally with the prosecution. Second, reform the duty lawyer system by shifting from a "legal assistant" model to a "mandatory defense lawyer" model, granting lawyers the right to interrogate suspects during the investigation stage. Third, integrate the roles of duty lawyers, legal aid lawyers, and defense lawyers into a unified system. Under this model, duty lawyers would handle legal consultation during the investigation stage while fulfilling defense responsibilities during the prosecution review phase.

The author believes that although the Criminal Procedure Law distinguishes between duty lawyers, defense lawyers, and legal aid lawyers, it is feasible to expand the interpretation of duty lawyers to include their role as defenders. From the perspective of their functions, the duty lawyer system is designed to ensure that defendants receive legal consultation and guidance on procedural choices during the investigation stage, guaranteeing that they make procedural decisions voluntarily. At its core, the system fulfills a defense function based on safeguarding the rights of defendants. Since the right to defense is a fundamental litigation right that spans the entire criminal procedure, it naturally includes the investigation stage.

The defense activities of duty lawyers are aimed at preventing potential abuses of state power that could harm defendants. Therefore, duty lawyers must not only understand the basic facts and evidence of a case but also provide substantive defense, as procedural defense alone is far from sufficient. The primary focus of improving the duty lawyer system lies in establishing the legal status of duty lawyers as defenders, which is the cornerstone for ensuring that defendants can access effective defense.

3.2 Judicial Practice

3.2.1 Lawyers' Visitation Rights is limited

The right to visitation is a fundamental privilege of defense lawyers. Through visitation, lawyers can understand the situation of the accused, listen to their opinions and defenses regarding the accusations made by the prosecution, and establish effective communication with them. This step is often the first in carrying out defense work. Although the current Criminal Procedure Law grants lawyers the right to meet with clients, the issue of "difficulty in arranging visitation" remains particularly severe in judicial practice.

The primary obstacles to the exercise of visitation rights include the following: Firstly, insufficient judicial resource allocation. For instance, the shortage of meeting rooms in detention centers often requires lawyers to schedule appointments in advance and wait in line, significantly reducing litigation efficiency. Additionally, although the Criminal Procedure Law stipulates that lawyers need only provide an authorization letter, law firm certificate, and lawyer's license for visitation, in practice, additional documents such as identification cards are often required, further complicating the process. There are also several issues with the remedies available for violations of lawyers' visitation rights. First, the remedies are overly simplistic. The current measures are very limited; when lawyers encounter obstacles in exercising their visitation rights, they can only request the procuratorate to issue corrective opinions. In more severe cases, the procuratorate may issue a "Notice of Correction of Illegal Acts", but beyond these measures, there are few effective remedies available. Second, although regulations require detention centers to arrange lawyer visitation within 48 hours at the latest, there are no clear or mandatory punitive measures for failure to arrange timely visits. This highlights the lack of enforcement of the time limit. Third, the penalties for violations of lawyers' visitation rights are insufficiently stringent. Even in serious cases, the current approach is limited to issuing a "Notice of Correction of Illegal Acts", which lacks both enforceability and deterrence. These problems result in narrow remedies, weak penalties, and inadequate deterrence, making it difficult to effectively constrain or warn against actions that obstruct lawyers' visitation rights. In summary, the current remedial mechanisms for protecting lawyers' visitation rights lack diversity and enforceability, failing to provide sufficient deterrence against violations. This necessitates further improvement and reform.

3.2.2 The Investigation Stage Lawyer's Right to Read the File Is Restricted

The current Criminal Procedure Law grants lawyers the right to review case files during certain procedural stages of criminal litigation. However, defense lawyers are still restricted from exercising this right during the investigation phase, which creates obstacles to effective defense in the early stages

of a case. From the perspective of legislators, limiting defense lawyers' access to case files during the investigation phase is primarily aimed at avoiding interference with the investigative authorities' evidence collection process, preventing the disruption of investigations, and mitigating the risk of suspects evading legal accountability.

Nevertheless, from the standpoint of human rights protection, granting defense lawyers a certain degree of access to case files during the investigation phase is both feasible and necessary. This would not only strengthen the protection of the rights of defendants but also help establish a more balanced and fair adversarial mechanism early in the legal process.

4. Extraterritorial Reference and Inspiration for the Effective Defense

4.1 International References of Effective Defense

With the evolution of legal systems, the litigation models of civil law and common law jurisdictions have increasingly influenced and merged with each other. The concept of effective defense has transcended the boundaries of legal traditions and has been adopted in civil law countries.

In Germany, for instance, Article 338, Section 5 of the Code of Criminal Procedure identifies specific grounds for absolute legal appeals. It stipulates that holding court hearings in the absence of the prosecution or other legally required participants constitutes grounds for appeal. This provision also applies to cases where defense lawyers are absent from court proceedings. The legislation aims to safeguard the defendant's right to effective defense during criminal proceedings. If a trial is conducted and a verdict is rendered without the assistance of a defense lawyer, the higher court is authorized to annul the original judgment and order a retrial. Similarly, Japan has established provisions regarding ineffective defense, particularly concerning the misconduct of court-appointed defense attorneys. Article 38-3, Clause 4 of the Code of Criminal Procedure stipulates that defense lawyers who "clearly violate their duties" must cease to perform their roles. The term "clearly violate their duties" is generally limited to severe negligence or actions that entirely disregard the wishes of the suspect or defendant. This legislation explicitly recognizes that a defense lawyer's negligence, which infringes on the defendant's right to effective defense, constitutes a serious procedural violation. Its purpose is to ensure that the defendant's right to defense is not compromised by the misconduct of their lawyer.

A comparative analysis of the criminal procedure laws in Germany and Japan reveals that both countries use specific provisions to define serious passive behavior by lawyers as significant procedural errors to protect the defendant's right to effective defense. Although the concept of effective defense is not explicitly mentioned in their criminal procedure laws, the codified rules reflect substantive protection for effective defense, aligning with the characteristics of codified legal systems. As a principle, the concept of effective defense is present, to varying degrees, in criminal procedure laws across different jurisdictions. In China, for instance, Article 11 of the Criminal Procedure Law states: "The defendant has the right to defense, and the people's court has the obligation to ensure the

defendant's right to defense". This provision can be considered a partial embodiment of the principle of effective defense.

In contrast, ineffective defense is more specific and operates within a defined legal framework. Although the provisions for ineffective defense vary across jurisdictions, they generally encompass issues such as lawyers failing to fulfill their obligations, excessive interference by public authorities, and conflicts of interest among lawyers. For example, under China's Criminal Procedure Law, the Interpretation of the Supreme People's Court on the Application of the Criminal Procedure Law explicitly prohibits a defense lawyer from representing more than one co-defendant or any defendants in related but separately handled cases. However, situations where public authorities hinder the defendant from receiving defense assistance or where lawyers fail to perform their duties are not explicitly addressed in the Criminal Procedure Law. Given the implementation of a nationwide system of comprehensive lawyer representation in criminal cases, such issues are likely to become increasingly prominent in judicial practice.

4.2 The Implications of the Concept of Effective Defense in Criminal Proceedings

Although the concept of effective defense originates from the Sixth Amendment of the U.S. Constitution, its applicability has transcended legal traditions with the establishment of criteria for determining ineffective defense. As discussed earlier, both Germany and Japan have incorporated ineffective defense systems into their legal frameworks, providing valuable insights for the potential adoption of such systems in China.

In 2017, the Supreme People's Court and the Ministry of Justice jointly issued the Measures for the Pilot Program of Full Coverage of Lawyer Defense in Criminal Cases. This significant judicial reform effectively increased the defense rate in pilot regions and addressed the issue of low defense representation in criminal cases. This reform demonstrates that the issue of low defense rates can be resolved progressively. However, improving defense rates is only the first step. The next critical task is to enhance the quality of legal defense, which is essential for advancing the construction of the rule of law in China. The concept of effective defense provides a viable pathway to achieve this goal.

Under the broader framework of comprehensive lawyer representation in criminal cases, the concept of effective defense not only improves the defense system but also lays the foundation for enhancing defense quality. Furthermore, both common law and civil law jurisdictions have implemented effective defense principles in practice, demonstrating its broad applicability and practical significance. However, determining the extent to which the concept of effective defense should be emphasized in criminal proceedings remains a challenging issue.

Overemphasizing effective defense may hinder the efficiency of legal proceedings, potentially leading to procedural stagnation. Conversely, neglecting the concept of effective defense risks failing to safeguard the legal rights of defendants. While balancing these two extremes presents a significant challenge, the promotion of effective defense undoubtedly encourages professional growth and development among lawyers.

Theoretically, there are no barriers to introducing an effective defense system in China. Establishing the concept of effective defense would not only drive the reform and development of China's criminal defense system but also hold significant practical value.

5. The Pathway to Achieve an Effective Defense

5.1 Introducing the Principle of Effective Defense

While the concept of effective defense has not been explicitly incorporated as a fundamental principle in the criminal procedure laws of codified legal systems, its core ideas are reflected in specific institutional arrangements. With the development of the leniency system for guilty pleas and the duty lawyer system, it is necessary to establish the principle of effective defense within these frameworks to demonstrate the state's commitment to protecting human rights.

As an abstract principle, effective defense can be embedded in existing laws by amending the principles outlined in Articles 3 through 18 of the Criminal Procedure Law. For instance, Article 15 could be revised to state: "If criminal suspects or defendants voluntarily and truthfully confess their crimes, acknowledge the facts of the charges, and are willing to accept punishment, they may receive lenient treatment in accordance with the law and have the right to effective legal defense".

In the context of China's legal practice, effective defense should be interpreted more broadly. In the U.S., effective defense is generally understood as effective legal assistance, but the terms "defense" and "assistance" hold different connotations in China. For example, under current law, duty lawyers are considered legal assistants and cannot act as defenders. Their assistance is also not subject to ineffective defense regulations. Thus, effective defense should be expansively interpreted to encompass both "effective defense" and "effective assistance". Since both concepts aim to protect the legal rights of the accused, they align with the value of due process.

5.2 Establishing an Ineffective Defense System

Although the law protects the right of defendants to defense, there are no remedial measures in cases where lawyers fail to fulfill their duties, creating a legislative gap. Establishing a specific system for ineffective defense could address this gap. As discussed earlier, ineffective defense requires three elements: (1) the lawyer fails to fulfill their duty of diligence; (2) the judicial authority issues an unfavorable ruling against the accused; and (3) there is a direct causal relationship between the lawyer's misconduct and the unfavorable ruling.

When lawyers or duty lawyers fail to perform their duties, leading to unfavorable outcomes for defendants, the question arises: who bears the burden of proof, and who is accountable for the consequences? The author argues that the defendant should bear the initial burden of proof to demonstrate that the lawyer's misconduct rendered the defense ineffective, constituting a "behavioral flaw". Additionally, the defendant must show that the misconduct resulted in an unjust trial or unreliable judgment, meeting the "adverse outcome" criterion. However, as the U.S. has abandoned this stringent standard in cases like *Frye* and *Cooper*, the focus should instead be on proving and

identifying behavioral flaws. Courts can more easily verify defense lawyers' actions through materials such as defense arguments and written evidence, while defendants only need to provide preliminary evidence.

In leniency plea cases, the focus of defense and assistance shifts to the pretrial phase. If a duty lawyer misleads a defendant into pleading guilty without voluntary intent, this violates the principle of voluntariness. In such cases, procedural adjustments should be made based on the circumstances, transitioning from expedited procedures to simplified or standard procedures to ensure a fair trial. If such issues are identified during an appeal, they could fall under Article 238 of the Criminal Procedure Law, which stipulates that violations of legal procedural rights that may affect the fairness of the trial constitute grounds for annulment and retrial. Judges must thoroughly review the voluntariness of guilty pleas, the factual basis of the charges, and sentencing recommendations to ensure procedural justice.

5.3 Protecting Lawyers' Rights

5.3.1 Ensuring the Right to Visitation

Although the Criminal Procedure Law specifies the materials required for lawyer visitation, additional documentation is often requested in practice. Judicial authorities should enhance legal education for detention centers, clarifying that no additional materials beyond the legally mandated three documents may be required. Moreover, remedies for denied visitation should be diversified, extending beyond prosecutorial oversight, and penalties for such violations should be strengthened to enhance deterrence.

5.3.2 Ensuring Access to Case Files during Investigation

Access to case details during the investigation phase is crucial for effective defense. Without case materials from the investigative authorities, defense lawyers cannot provide timely and effective representation. Therefore, defense lawyers should be allowed to review case files within a defined scope, provided this does not hinder investigative efforts. The law should advance the timeline for granting access to case files to the investigation phase and specify penalties for obstructing investigations, ensuring a balance between lawyers' rights and investigative needs.

6. Conclusion

The concept of effective defense, though originating from common law systems, holds significant value for the reform of China's judicial system. While China has yet to explicitly define the principle of effective defense, its essence is already embedded in the nation's existing legislation. Against the backdrop of comprehensive coverage of criminal defense, the primary issue in China's criminal proceedings is expected to shift from "low defense rates" to the need for "high-quality defense". The principle of effective defense addresses the challenge of ensuring high-quality defense by regulating passive behavior among lawyers and safeguarding clients' legitimate rights through proactive legal representation.

Moreover, the principle of effective defense not only addresses potential future issues in criminal proceedings but also provides solutions to existing shortcomings in the plea leniency system and the

duty lawyer system. In plea leniency cases, effective defense plays a critical role in ensuring voluntariness and enhancing sentencing negotiations. It even rectifies certain “gray areas” within the plea leniency system and the broader defense framework, thereby advancing fairness and justice. By incorporating the principle of effective defense, the ambiguous positioning of duty lawyers can be alleviated, granting them expanded rights to ensure that defendants have access to advantageous procedural choices and enabling effective dialogue with prosecutors under conditions of equitable negotiation capability.

References

- Chen, R. H. (2017). Some controversial issues of plea bargaining leniency system. *China Jurisprudence*, 2017(01), 35-52.
- Han, X. (2016). Effective participation of defense lawyers in plea bargaining leniency system. *Nandu academy*, 36(06), 65-69.
- Joshua, D. et al. (2009). *American Criminal Procedure Law in a Nutshell (Volume I)*. Wu Hongyao translation. Beijing: Peking University Press.
- Ma, M. L., & Zhang, X. S. (2005). An empirical analysis of criminal legal aid in China—With an account of the impact of legal aid on the modern litigation system (Chen, R. H.). In *An empirical examination of the criminal defense system* (p. 152). Beijing: Peking University Press.
- Moriichi, T. (2010). *Criminal Procedure Law* (Zhang, L., & Yu, X. F., Trans., p. 170). Beijing: China University of Political Science and Law Press.
- Qian, C. (2020). Effective defense in the leniency system of plea bargaining: From origin to embedding. *Academic Exchange*, 2020(03), 72-85, 19.
- Wayne, R., LaFever et al. (2001). *The Law of Criminal Procedure (First Book)*. Translated by Bian Jianlin et al. Beijing: China University of Political Science and Law Press 2001 edition.
- Xiong, Q. H. (2014). International standards and localized thinking on effective defense and ineffective defense. *Chinese Journal of Criminal Law*, 2014(06), 129-135.
- Xu, J. L. (2019). Legal aid duty lawyer system revisited. *Jiangxi Social Science*, 39(09), 194-201.
- Yang, J. G., & Li, Y. Y. (2017). The Composition and Application of Effective Defense under the View of Trial Center—Analyzing the Implications of Nian Bin’s Case on Defendants’ Access to Effective Defense. *Journal of Politics and Law*, 34(01), 42-50.
- Zhang, W. (2020). *Research on the Construction of Effective Defense System in China*. Changjiang University.
- Zhang, W. (2020). *Research on the Construction of Effective Defense System in China*. Changjiang University.
- Zhao, X. L. (2019). *Research on Effective Defense System*. Henan University.
- Zhao, X. L. (2019). *Research on effective defense system*. Henan University.
- Zong, Y. K. (2013). *German Code of Criminal Procedure* (p. 239). Beijing: Intellectual Property Press.