

# China Criminal Legal Aid: the Legislative development, challenges and Suggestions

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*The Decision on Amending the Criminal Procedure Law of the People's Republic of China* was examined and approved by the fifth session of the 11<sup>th</sup> National People's Congress on March 14, 2012. This amendment to *Criminal Procedure Law*, which is based on the socialist concept of rule of law, implements the criminal policy to balance leniency and stringency, puts into practice the requirements of the Central Committee of CPC to deepen the reform of judicial system and work mechanism and focuses on addressing the present problems in the judicial practice that need immediate solution. It is a major amendment to *China's Criminal Procedure Law*. The amended *Criminal Procedure Law*[hereinafter referred to as "*CPLaw(2012)*")] demonstrates and implements the constitutional principle of respecting and protecting human rights, satisfies the needs to reinforce and innovate social management and maintain social order, makes clearer the code of conduct to be obeyed by authorities in criminal procedure and improves the

procedural rights of both parties involved and their defenders.<sup>1</sup>

*CPLaw(2012)* has many highlights: the establishment and improvement of the procedure, the distribution of the power among judicial authorities and the concrete regulations of the criminal procedure are more scientific and appropriate. The development and improvement of relative legal aid is among these highlights, which shows the improvement of China's criminal procedural system and demonstrates that the legal aid has gradually become an indispensable and important part thereof.

This paper consists of four parts: the first part is about the background of the amendment of *CPLaw(2012)*, including the social-economic development, the increased attention on the criminal procedure of the society, the problems existing in the criminal procedure system and so on; the second part is about the provisions on legal aid in *CPLaw(2012)*, including the expansion of legal aid, early legal aid at the police investigation stage, the obligation of public security authorities(that is police authorities), procuratorates and courts to inform of the right to criminal defense and legal aid of the suspects and defendants and so on; the third part is about the challenges brought by the amendment to legal aid, such as insufficient fund for legal aid, staff shortage and the low quality of legal aid service; and the fourth part is the

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<sup>1</sup> Commission of Legislative Affairs of the Standing Committee of National People's Congress (ed.), *Interpretation on the Criminal Procedure Law of PRC (the newest revised version)*, Law Press, April 2012, the first edition: Preface.

countermeasures and suggestions made by the author, including promoting governments at all levels to increase the fund for legal aid, intensifying trainings and systems for service quality control, innovating ways of service delivery, borrowing good experience and practices from other countries and regions.

### **1. Background of *CPLaw(2012)***

Firstly, the social development requires the amendment to Criminal Procedure Law. After 30 years of reform and opening up, achievements have been continuously made in political, economic, cultural and social fields and people's thoughts have changed fundamentally and the consciousness to protect their rights has gradually increased, which brings up higher requirements for the criminal procedural justice and the protection of civic rights. For example, there was a minor case in one province where the gate logo of a court was stolen. The logo was found by the police under the bed of the lawsuit party involved, who said that he was saving money to go to Tiananmen Square with the logo on his shoulder to show the people of the whole country how the court handled cases.<sup>2</sup> From this case, we can conclude that people, after their basic economic needs are satisfied, are more and more concerned about the effective protection of other important rights, such as the rights to personal freedom, property and life. People's personal freedom, property

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<sup>2</sup> Chen Guangzhong, "The Background, Problems and Vision of the Amendment to Criminal Procedure Law of PRC", <http://dyzy.chinacourt.org/public/detail.php?id=17352> (visit on April 20, 2013).

safety and even lives cannot be measured by property or money. When the society begins to concern about these issues, it means that its economy has developed to a certain level. Therefore the social-economic development and people's increasing needs are the deepest motive for the amendment to Criminal Procedure Law. Within 5 years before *CPLaw(2012)*, 81 proposals concerning the amendment to Criminal Procedure Law were made by 2,485 representatives and 1 delegation.<sup>3</sup> In recent years, all kinds of media, especially various network media, have conducted wide and deep reports on many criminal cases in an unprecedented scale, which implies that the whole society is paying close attention to the problems of criminal procedure and at the same time promotes the process of the amendment to the Criminal Procedure Law.

Secondly, *CPLaw(2012)* shows that all sectors of the society are paying more and more attention to the criminal procedure, which used to be neglected for a long time in China. In the legal field, the concepts of “substance first, procedure second” and “procedure nihilism” have long been in existence in Chinese legal tradition and have exerted deep and far-reaching influence on the country's legal theory, legal system and judicial practice, especially in the field of criminal procedure.<sup>4</sup> As a result,

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<sup>3</sup> Commission of Legislative Affairs of the Standing Committee of National People's Congress (ed.), *Interpretation on the Criminal Procedure Law of PRC* (the newest revised version), *Instructions of the Amendment to Criminal Procedure Law of PRC (Draft)*, Law Press, April 2012, the first edition, Instructions of the Amendment to Criminal Procedure Law of PRC (Draft).

<sup>4</sup> Li Yaxin: *How far will “Value Substantive than Procedure in Law” go in our country?—the Reflection of Procedural on Fang Zhouzi's case of being attack.* <http://wenku.baidu.com/view/3b5ef9264b35eefdc8d33397.html> (visit on April 20, 2013).

the criminal justice in China has long been inclining to focus on finding out the facts of cases in order to punish criminals and maintain social order, regardless of what kind of procedure to be used. However, along with the development of the criminal theoretical study and the criminal judicial practice, people have gradually realized that a perfect and just criminal procedure is the strongest measure to protect the rights of the suspects and defendants and a good way to restrict the state power and protect civil rights. Therefore, judicial procedure has been emphasized more and more in judicial practice recently. The society has transferred from only caring about the facts to caring the procedure at the same time, so do the leaders of judicial authorities and judicial officers. The equal importance given to substance and procedure is also one important reason for the amendment to Criminal Procedure Law.

Thirdly, some problems with the criminal procedure mechanism itself need solving. It's not very difficult to come to the conclusion that China's Criminal Procedure Law falls behind other countries around the world simply by comparison. In order to change the situation, the Criminal Procedure Law needs revising and systematic amendment. As for the problems existing in the Criminal Procedure Law, National People's Congress conducted a survey on the enforcement of the law. The final report pointed out some major problems, especially the torturing for evidence, overtime detaining and lack of defending for the suspects,

which have affected the effective protection of the rights of the suspects and defendants.<sup>5</sup> For example, some miscarriages of justice caused by torturing for evidence occurred in recent years and had significant negative impacts on the country as a whole. Therefore, all sectors of the society demand to revise the Criminal Procedure Law so that the rights of the suspects and the defendants can be protected effectively.<sup>6</sup>

As the problem of suspects' lacking legal defense, according to statistics, the rate for suspects to access to legal defense is about 30%.<sup>7</sup> "Six kinds of difficulties" exist in the present criminal system of defense, that is, it is difficult to interview the suspects and defendants, investigating and collecting evidence, difficult to apply for the change of enforcement measures, such as detention, arrest and residential surveillance, difficult for the right opinions of lawyers to be adopted, difficult to protect the lawyers' rights and even more difficult for the lawyers to have access to the case files. According to the modern requirements and criteria of criminal procedure, criminal procedure has

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<sup>5</sup> Chen Weidong, "The Background and Basic Ideas of the Amendment to Criminal Procedure Law", [http://www.jcrb.com/zhuanti/fzzt/60fzjs/60flfg/0708/200908/t20090827\\_256541\\_2.html](http://www.jcrb.com/zhuanti/fzzt/60fzjs/60flfg/0708/200908/t20090827_256541_2.html) (visit on April 21, 2013).

<sup>6</sup> For example, the case of Du Peiwu has a great influence all around the country. Du Peiwu was a police officer in Kunming, Yunnan Province and so was his wife. Someday, people found that his wife was shot and killed in a car with one of the leaders thereof. At then it's reasonable for the investigators to suspect Du Peiwu, because everybody knew that his wife had an affair with that leader. Du Peiwu, as a police officer, certainly couldn't tolerate this, and he could have killed them both for he also had the gun to do so. Therefore, he was naturally suspected as the murderer and caught. He denied the charge at first, but due to the torture he finally admitted how he killed them both with his gun. He was sentenced to death by the Intermediate People's Court of Kunming, which was approved by the High People's Court of Yunnan. When he was going to be executed, the real murderers were found, because the criminals of other cases confessed that it's their crime. When they were robbing a car, they found that a man and a woman were in the car. They found that both of them were policemen and they got frightened, so they killed them both. Such kind of cases happened more than one time, which lead people's attention to the evidence acquired by torture. Chen Weidong, "The Background and Basic Ideas of the Amendment to Criminal Procedure Law".

[http://www.jcrb.com/zhuanti/fzzt/60fzjs/60flfg/0708/200908/t20090827\\_256541\\_2.html](http://www.jcrb.com/zhuanti/fzzt/60fzjs/60flfg/0708/200908/t20090827_256541_2.html) (visit on April 20, 2013).

<sup>7</sup> Chen Guangzhong, "The Background, Problems and Vision of the Amendment to Criminal Procedure Law", <http://dyzy.chinacourt.org/public/detail.php?id=17352> (visit on April 21, 2013).

three functions: charging, defending and judging, and whose effective combination and balance is the sign of modern criminal procedure system. However, lawyers are not willing to provide criminal defense and courts and procuratorates don't welcome lawyers to do so either, so it's hard for the Parties involved to hire a lawyer and the legal aid policy of assigning a lawyer to provide defense service is not effectively implemented. The lack of effective defense leads to the occurrence of miscarriages of justice. Additionally, in terms of evidence system, the Criminal Procedure Law lacks systematic principles of evidence. "The recently exposed miscarriages of justice show that, in the procedure of our work, we have a lot of defects and some principles and abstract ways of investigating and applying evidence are far behind the times."<sup>8</sup> These problems existing in the criminal procedure mechanism must be solved, which is also a major background for the amendment.

Fourthly, the amendment is to implement *the Amendment to the Constitution of the People's Republic of China*. As mentioned in the reports of the 15th and the 16th CPC National Congress, the State respects and protects human rights. *The Amendment to the Constitution of the People's Republic of China*, which was adopted by the second session of the tenth National People's Congress on March 14, 2004, included in *the Constitution* the provision that "the State respects and protects human

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<sup>8</sup> Chen Guangzhong, "The Background, Problems and Vision of the Amendment to Criminal Procedure Law", <http://dyzy.chinacourt.org/public/detail.php?id=17352> (visit on April 21, 2013).

rights” as an amendment to Paragraph 3 of Article 33 under Chapter 2 “Basic Civil Rights and Obligations”. From then on, “to respect human rights” is raised from a political concept to a constitutional regulation. The provision on respecting and protecting human rights is to be implemented by the “State” instead of the Ruling Party, thus acquiring the highest legal effect, which means that respecting and protecting human rights is elevated from the will of the Ruling Party to that of the people, and from the political concept and values of the Ruling Party to those concerning national development and construction.”<sup>9</sup> The constitutional regulation about human rights, especially the issue of human rights protection, shall be reflected in the Criminal Procedure Law, where the criminal procedure is regulated, and become the cornerstone thereof. In view of the constitutional rules to respect and protect human rights, in terms of the protection of both the human rights and the litigious rights of the litigant participants, given to their existing problems, the regulations and implementation of the Criminal Procedure Law still has a wide gap to the requirements of the judicial criteria, such as those on the protection of the right of defense, appeal and the establishment of the procedural criteria and sanction measures. It is one of the reasons to amend the Criminal Procedure Law to implement the principle of human rights protection in and bring the humanistic spirit into the criminal procedure

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<sup>9</sup> Jiao Hongchang, “*The Constitutional Analysis of that ‘The State Respects and Protects Human Rights’*”, <http://www.china-review.com/sao.asp?id=20739> (visit on April 22, 2013).

in order to establish a new and people-oriented criminal procedure which can promote social harmony.

Fifthly, the amendment is the result to follow the international trend to protect human rights. China signed *the International Covenant on Civil and Political Rights of the United Nations* in 1998. Recently, China has also signed many other international conventions, which include the international conventions ratified by National People's Congress and those signed though not finally ratified thereby. Most of these conventions are closely related with the criminal procedure process in China. China, as a member state of these conventions, should transfer the regulations thereof into domestic criminal legislation and regulations to implement, which is also a major background for the amendment.

II. Provisions of Legal Aid in *CPLaw(2012)* and relevant legislative documents

As to the its contents, *CPLaw(2012)* contains not only adjustment and rebuilding of the original procedural system, but also construction of new systems and procedures, including both micro standard adjustment which made new provisions and amendments in problem-prone areas in practice, and macro system rebuilding and construction which have improved existing institutional arrangement and constructed a new institutional framework. Therefore, *CPLaw(2012)*, as a whole, is practical, pertinent and institutionally prospective with a lot of highlights. For

example: first, the provision of “respecting and protecting human rights” is included in the law. The Criminal Procedure Law is referred to as “small Constitution”, because it is closely related to basic civil rights and freedom. As a result, whether it moves forward reflects the guarantee level of a country’s human rights to some extent. When the Constitution was amended in China in 2004, the provision of “respecting and protecting human rights” was included. The Criminal Procedure Law, a department law closely related to the Constitution and civil rights, is supposed to provide correspondingly to feature its value ideas of the protection of human rights. For this purpose, the provision of “respecting and protecting human rights” is added in Article 2 of *CPLaw(2012)*, which not only conforms to the mainstream value orientation of the society, but also demonstrates the progress in the protection of human rights in China. It can be assumed as the most brilliant highlight in *CPLaw(2012)*; second, evidence system is improved. Evidence system is an important part of the criminal procedural system and an important guarantee for the quality of criminal cases. It is adjusted in an overall aspect in *CPLaw(2012)*. As to categories of evidence, documental evidence and material evidence are listed separately and become new evidence categories, while expert conclusions are changed into “expert opinions” and records of “identification and investigation” and “electronic data” are added. The principal of voluntary testimony is

confirmed in *CPLaw(2012)* by providing that “Nobody shall be forced to attest his own guilt”, which is a big highlight in the amendment of evidence system. *CPLaw(2012)* has confirmed the sharing of the burden of proof and amended the standards of proof, providing detailed requirements on “sufficient and reliable evidence”. The biggest highlight of evidence system is the provision concerning the exclusionary rule of illegally obtained evidence. *CPLaw(2012)* has provided the scope of illegally obtained evidence to be excluded and excluding procedures, thereby constructing an institutional framework for the exclusion of illegally obtained evidence in China from the perspective of basic law. The protection of the witnesses testifying in court is also an important content in the amendment of evidence system. *CPLaw(2012)* has confirmed protective measures for witnesses to give evidence in specific cases and included subsidies of witnesses into the scope of guarantee; third, the guarantee of the right to defense is strengthened. The right to defense is a basic right of criminal suspects and defendants. The guarantee of the right to defense has been confirmed in the Constitution as a basic principle in criminal procedure. *CPLaw(2012)*, aiming at specific problems in conditions where it is hard to defend criminal suspects and defendants in practice, and for the purpose of solving problems related to *the Law on Lawyers*, has further improved the system of defense and strengthened the guarantee of the rights of lawyers and

other defenders. Specifically, great improvements have been made in the guarantee of the right to defense. These include: the guarantee of exercising the right to defense has been clearly put forward in the part of basic principles; the scope of those eligible for legal aid has been expanded; the time get legal aid has been advanced to the police investigation stage; the interview and paper inspection right of lawyers in *the Law on Lawyers* has been absorbed and improved; the channels of remedy against the acts of hindering the performance of defense duties has been set up.<sup>10</sup>

When it comes to criminal legal aid in particular, in recent years, as the current criminal legal aid system in China falls behind the economic and social development of the country and is hard to meet increasing practical needs for criminal legal aid, the voice for strengthening the construction of criminal legal aid is becoming louder. It is just under the above background that *CPLaw(2012)* made a big step forward in the aspect of criminal legal aid.<sup>11</sup> The adjustment of legal aid in

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<sup>10</sup> Chen Weidong: “*Eight Highlights in the Draft Amendment to Criminal Procedure Law* “ <http://www.rmlt.com.cn/News/201203/201203081058063737.html> (visit on April 22, 2013)

<sup>11</sup> In terms of criminal legal aid, The Criminal Procedure Law (1996) had made great improvements than before. Not only can the people’s court assign lawyers who had the obligation to provide legal aid to provide defense for the defendants who had no defenders due to economic difficulty or other reasons, but the people’s court should also assign lawyers who had the obligation to provide legal aid to provide defense for the defendants who were under age, were both deaf and mute or were likely to be sentenced to death. However, according to the situation of the actual operation of criminal procedure, the rate for Chinese lawyers to participate in criminal procedure was very low and at the same time the self-defending ability of the suspects and defendants was also very low due to their low level of cultural education and their low social status. Take for example an empirical study on legal aid for criminal defense conducted by Professor Gu Yongzhong from China University of Political Science and Law in Beijing from 2010 to April 2011. Among the 300 investigated defendants, their educational background and social

CPLaw(2012) is mainly demonstrated in the following aspects: the application and eligible recipients of legal aid have been expanded; legal aid agency has been included in the adjustment scope of *CPLaw(2012)* for the first time; and the notification obligation of judicial authorities has been confirmed. Besides, China is a country of statute law. For the purpose of implementing *CPLaw(2012)*, relevant departments have issued a series of legislative documents which made detailed adjustments to the provisions on legal aid in *CPLaw(2012)*, making the relevant articles more feasible and enforceable. These legislative documents mainly include: first, *Interpretations on the Application of the Criminal*

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status were as follows: educational background: preliminary school (57 persons, 19%), middle school (168 persons, 56%), high school (55 persons, 18%), junior college (11 persons, 4%), college (8 persons, 3%), postgraduate college (1 person, 0.3%); profession: employed (34 persons, 11%), unemployed (266 persons, 89%); household registration: Beijing (58 persons, 19%), outside Beijing (242 persons, 81%); residence: fixed residence (91 persons, 30%), no-fixed residence (209, 70%). In addition, none of them had hired lawyers to defend them, and nor did they belong to the group who were qualified for legal aid. In terms of the actual need, the suspects needed no less legal aid than the defendants who were undergoing criminal procedure, but on the contrary, they needed more legal aid and their needs were much more urgent. This point was well demonstrated by the results from a survey conducted among 200 detained suspects at Haidian District, Beijing. One of the questions of the survey was: "On which stage do you need legal support?" 143 persons answered this question and 109 of them chose the investigation stage, accounting for 76.2%; 19 persons the procedural stage, 10.5%; and 19 persons the trial stage, 13.3%. As for the reasons, among the reasons listed on the questionnaires, of those who chose the investigation stage (one can choose more than one choice) 71% wished to know more about the case through lawyers in order to prepare the defense; 70% wished to consult lawyers because they didn't know how complicated their cases were when they were detained; 66% wished to provided information through lawyers in order to protect their legal rights and interests for they feared that they may be tortured, attempted or cheated in the investigation stage; 45% wished their lawyers to apply for bail in the investigation stage. The above statistics show the common characteristics and trend of criminal cases in big cities and developed areas and at the same time show the actual need to improve the legal aid system of China's criminal laws. Also, just like other industries, the development of lawyers is out of balance. According to media, in spite of the rapid development of law firms, there are still many counties where there is no lawyer at all, which also shows the urgent need to strengthen the construction of China's criminal legal aid system. Gu Yongzhong, "*The Scope of Legal Aid is Expanded and the Time Advanced*",

[http://news.jrb.com/jxsw/201204/t20120409\\_839343.html](http://news.jrb.com/jxsw/201204/t20120409_839343.html), (visit on April 22, 2013)

*Procedure Law of the People's Republic of China* promulgated by the Supreme People's Court; second, *Provisions on the Legal Aid in Criminal Action* jointly formulated by the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and the Ministry of Justice; third, *Procedural Provisions on Handling Criminal Cases* by Public Security Authorities formulated by the Ministry of Public Security; fourth, *Several Issues Concerning Implementation of the Criminal Procedure Law* jointly issued by authorities including the Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security. With these new legislative provisions, criminal legal aid is available in even earlier judicial stages, and the scope of criminal legal aid is expanded. Besides, the protection of criminal legal aid to vulnerable groups in criminal action is strengthened, and respect for the protection of human rights in the Criminal Procedure Law is manifested.

(I) The scope of legal aid is expanded, which is mainly reflected in the following aspects: First, Article 34 of *CPLaw(2012)* provides that "(I) If a criminal suspect or a defendant has not entrusted any defender due to financial difficulties or other reasons, he or his close relatives may file an application with the legal aid agency for help. To those who meet the requirements for legal aid, the legal aid agency shall designate lawyers as their defenders; (II) If a criminal suspect or a defendant is blind, deaf or mute, or suffers from psychosis, not having lost his ability completely to

identify or control his behaviors, and has not entrusted any defender, the people's court, the people's procuratorate and the public security organ shall notify legal aid agency to designate a lawyer as his defender; (III) Where there is possibility that a criminal suspect or a defendant be sentenced to life imprisonment or death and he has not entrusted any defender, the people's court, the people's procuratorate and the public security organ shall notify legal aid agency to designate a lawyer as his defender. Among these three paragraphs of the article, paragraph 1 provides the application for legal aid due to financial difficulties or other reasons. The scope of its application covers the conditions where a criminal suspect and a defendant does not entrust a defender due to financial difficulties or other reasons, i.e. a criminal suspect or a defendant cannot afford a lawyer due to financial reasons or nobody serves as a defender for a criminal suspect or a defendant due to reasons other than financial difficulties. It shows that people with financial difficulties or other difficulties in China are provided with legal aid and that any defendant is entitled to entrust a defender, which cannot be deprived due to poverty or other reasons. Paragraph 2 provides the conditions where a criminal suspect or a defendant is blind, deaf or mute, or suffers from psychosis, not having completely lost his/her ability to identify or control his/her behaviors and has not entrusted any defender, he/she shall be provided with legal aid. Article 18 of the Criminal Law

provides that a mental patient who does not completely lose the ability to recognize or control his/her own act shall bear criminal responsibility but may receive a lighter or mitigated sentence if he/she commits a crime. These criminal suspects and defendants shall be provided with legal aid, as, in consideration of their physical defects, they may be lack of legal knowledge and have deviated identification of external things and suffer obstacles in identification of evidence and defense in actions, and therefore shall have defense lawyers to protect their legal rights. Paragraph 3 provides the conditions where there is possibility that a criminal suspect or defendant be sentenced to life imprisonment or death and he/she has not entrusted any defender, he/she shall be provided with legal aid. As death sentence is the most serious penalty, and life imprisonment is a very serious penalty, a criminal suspect or a defendant possibly to be sentenced to such penalties shall be guaranteed to fully exercise their right of defense and legal aid in criminal legal actions.<sup>12</sup>

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<sup>12</sup> The present criminal legal aid of China can be divided into discretionary aid and statutory aid.

Discretionary aid means in the case of public prosecution the people's court can assign a lawyer to provide defense if the defendants have no defenders due to economic difficulties or other reasons. It's because the court "can" assign lawyers to provide legal aid that it is called discretionary aid, which means the court can decide whether to assign legal aid lawyers according to concrete situations. Statutory aid is applied in the following three categories of cases: the defendants are blind, deaf and mute; the defendants are juveniles; or the defendants are likely to be sentenced to death. If the defendants hire no defenders, the people's court shall provide the defendants with legal aid lawyers. No matter why do they fail to hire defenders, as long as they belong to one of the three categories, the people's court shall assign legal aid lawyers for them without condition. It's because the requirement is mandatory that it is call statutory aid. The amendment to the criminal procedure law this time expanded both kinds of legal aid. The recipients of discretionary aid has been expanded from the defendants who hire no defenders due to economic difficulty or other reasons in public prosecution to all the suspects and defendants who hire no defenders due to economic difficulty or other reasons. The statutory aid has been applied to two more categories: one is the cases where the defendants are psychos who have not totally lost their ability of discernment or self-control, and the other is the cases where the defendants are likely to be sentenced to life imprisonment. According to Article 18 of the present Criminal Law, psychos are free from criminal liability only when they completely lose their ability of discernment or self-control as confirmed by legal procedures. Those who have not totally lost their ability of discernment or self-control shall bear criminal liability but in a lighter or mitigated way. Since those people commit crime when they lose part of their cognitive ability or self-control, their self-defending ability in the criminal procedure is as weak as those who are blind, deaf and mute and the juveniles. Therefore, they are added

Second, Article 267 of *CPLaw(2012)* provides that “Where a minor criminal suspect or a minor defendant has not entrusted any defender, the people’s court, the people’s procuratorate or the public security organ shall notify legal aid agency to designate a lawyer to undertake the defense”. Third, Article 286 of *CPLaw(2012)* provides that “(II) When the people’s court tries a case involving compulsory medical treatment, it shall notify the legal representative of the applied person or the defendant to appear on the scene. If the applied person or the defendant has not entrusted an agent ad litem, the people’s court shall notify legal aid agency to designate a lawyer to provide legal aid to him/her”. Fourth, Article 43 of *the Interpretations of the Supreme People’s Court on the Application of the Criminal Procedure Law of the People’s Republic of China* provides that “Under any of the following circumstances, where the defendant entrusts no defender, the people’s court may notify the legal aid agency to appoint a lawyer to defend for him/her: (I) other criminal suspects and defendants in a joint crime case have already entrusted defenders; (II) the case has significant social influence; (III) a people’s procuratorate protests; (IV) where the activity of the defendant may not constitute any crime; (V) other circumstances as necessary to appoint lawyer to provide defense”.

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into the scope of recipients of legal aid in the amendment to the criminal procedure law. As for those who are likely to be sentenced to life imprisonment, it’s because the punishment of life imprisonment is a severe punishment next only to death penalty. If the defendants potentially subject to such a penalty have no defenders, the justice of the case can’t be secured. So it is necessary to put them into the scope of legal aid. Gu Yongzhong, “*The Scope of Legal Aid is Expanded and the Time Advanced*”, [http://news.jcrb.com/jxsw/201204/t20120409\\_839343.html](http://news.jcrb.com/jxsw/201204/t20120409_839343.html), (visit on April 22, 2013)

(II) The time of providing legal aid is advanced to the stage of investigation, which is a major breakthrough in *CPLaw(2012)*. Previously, legal aid, no matter discretionary or statutory, is provided for defendants in the trial stage. It is hard for criminal suspects to acquire legal aid in the procedures before trial. *CPLaw(2012)* and relevant legislative documents have obtained breakthrough in the stage of providing legal aid. That is to say, criminal suspects in the stage of investigation and review and prosecution, as long as they conform to the conditions for legal aid, can obtain legal aid the same as defendants in trial stage. Therefore, the people's court, the people's procuratorate and the public security organ are required by law to assume the responsibility of guaranteeing criminal suspects and defendants to be included in legal aid scope to acquire legal aid and "to notify the legal aid agency to designate a lawyer to defend for them".

(III) Notification obligation of the people's court, the people's procuratorate and the public security organ on legal aid is confirmed. *CPLaw(2012)* and relevant legislative documents not only confirm the right to defense of criminal suspects, but also provide the obligation of the investigation organs, the people's procuratorate and the people's court to inform criminal suspects and defendants of the right to criminal defense and legal aid. For example, Article 33 of *CPLaw(2012)* provides that "A criminal suspect shall have the right to entrust persons as

defendants from the date on which the investigatory organ conduct interrogation or take mandatory measures against him for the first time. During the period of investigation, only lawyers may be entrusted as defenders. Defendants shall be entitled to entrust defenders at any moment. The investigatory organ shall inform the criminal suspect of his right to entrust defenders when it conducts interrogation or takes mandatory measures against him for the first time. The people's procuratorate shall do so within 3 days as of the day it receives the file record of a case transferred for examination before prosecution. The people's court shall inform the defendant of his right to entrust a defender within 3 days from the day it accepts the case. Where a criminal suspect or a defendant under detention requires entrusting a defender, the people's court, the people's procuratorate and the public security organ shall forward his request promptly". Article 41 of *the Procedural Provisions on Handling Criminal Cases* by Public Security Authorities provides that "The public security organ shall inform the criminal suspect of his/her right to entrust a defender when it conducts interrogation or takes mandatory measures against him for the first time, and of his/her right to apply for legal aid with legal aid agency where he/she doesn't entrust a defender due to financial difficulties or other reasons. The conditions of notification shall be put down on record". The obligation of the public security organ, the people's procuratorate and the people's court to notify

legal aid can be referred to the provisions of Article 34 of *CPLaw(2012)* mentioned above.

(IV) Relevant time limits are confirmed. Time limits are mainly demonstrated in relevant legislative documents, including 24 hours, 3 days, 7 days and etc. Article 7 of *the Provisions on the Legal Aid in Criminal Action* provides that “Where a criminal suspect or a defendant under detention files an application for legal aid, the public security organ, the people’s procuratorate and the people’s court shall forward his/her application to or notify legal aid agency 24 hours within the receipt of the application, and inform the applicant's legal representative, close relatives and other members they entrusted to assist to provide legal aid agency with credentials, certificates and other relevant documents”; Article 8 of *the Provisions on the Legal Aid in Criminal Action* provides that “Legal aid agency shall make examination promptly after the receipt of application and make decisions within 7 days”. Article 12 of *the Provisions on the Legal Aid in Criminal Action* provides that “Legal aid agency shall determine the lawyer undertaking the case and send a letter to inform the public security organ, the people’s procuratorate and the people’s court 3 days upon making decisions of providing legal aid or upon receipt of official letter of defense notification and of agency notification”.

Besides, the manner and language used by the public security organ,

the people's procuratorate and the people's court to perform notification obligation are confirmed in *CPLaw(2012)* and relevant legislative documents. Article 6 of *the Provisions on the Legal Aid in Criminal Action* provides that "The notification can be made verbally or in writing, and the contents of notification shall be those easily understood by the persons informed. Where the notification is made verbally, a record shall be prepared and signed by the person informed; and where the notification is made in writing, the proof of service shall be included in the file. Where the person informed expresses his willing to apply for legal aid on spot, it shall be put down on record."

The above adjustments concerning criminal legal aid have been made in *CPLaw(2012)* and relevant legislative documents for the following reasons: first, legal aid is confirmed to be the responsibility of governments in terms of theory and legislation in recent years. Article 3 of *the Regulations of Legal Aid* by the State Council in July 2003 clearly provides that "It is the responsibility of governments to provide legal aid. The people's governments above the county level shall take active measures to motivate the work of legal aid, provide financial support for legal aid and safeguard the harmonious development of legal aid and economics and society". Second, the understanding of legal aid in China benefits from great achievements in national economic construction and the reform and opening up. In recent years, the governments above the

county level throughout China are equipped with legal aid agencies. Basic fund is guaranteed and increased year by year, and the human resources are gradually increased, providing conditions for legislative breakthrough of criminal legal aid.

(V) The litigation right of defenders in criminal legal aid is expanded. The previous Criminal Procedure Law limits lawyers' rights in criminal action, while *CPLaw(2012)* has made great progress in improving the lawyers' right to defense, which is mainly demonstrated in Chapter 4 "Defense and Representation". For example, Article 35 provides that "The responsibility of a defender shall be to produce according to the facts and law the materials and opinions proving the innocence of the criminal suspect or defendant, the pettiness of his crime and the need for a mitigated punishment or exemption from criminal responsibility, thus safeguarding the lawful rights and interests of the criminal suspect or the defendant"; Article 36 provides that "The defense lawyer may, during the period of investigation, provide legal aids for the criminal suspect, represent him to appeal or accuse, apply to change the mandatory measures against the suspect, learn from the investigatory organ of relevant information about the case and the possible accusation the suspect may involve in and bring forward his own opinions"; Article 37 provides that "The defense lawyer may meet and correspond with the criminal suspect or defendant in custody. Other defenders may do so upon

the permission of the people's court or the people's procuratorate. If the defense lawyer holding a lawyer's practice certificate, a certificate issued by a law firm and a power of attorney or an official letter issued by the legal aid agency requests to meet the criminal suspect or defendant under detention, the detention center shall arrange the interview promptly no later than 48 hours". What is the most important is that a lawyer is defined as a defender in the stage of investigation. It is the legal duty of defenders to make investigation and defense lawyers are endowed with investigation right. The rights of lawyers and other defenders are further extended by these provisions and they can better protect the rights of criminal suspects and defendants in criminal actions.

### III. Challenges to Criminal Legal Aid

Breakthroughs on criminal legal aid in *CPLaw(2012)* and relevant legislative documents signal a great progress in China's criminal legal aid system. They will have great implications on enhancing human rights protection for criminal suspects and defendants, ensuring due process, and promoting the observation of law. In addition, some legal aid agencies at local levels now provide legal aid services at investigation stage and at review and prosecution stage.<sup>13</sup> However, it should also be noted that for a long time, our lawyers have not been actively

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<sup>13</sup> See [http://www.chinapeace.org.cn/2013-03/13/content\\_6988974.htm](http://www.chinapeace.org.cn/2013-03/13/content_6988974.htm);  
<http://www.hzzls.com/content/1479.html> for relevant legal aid cases;  
[http://www.zunyi.gov.cn/ch6983/ch160/ch167/2013/01/22/content\\_2011375321.shtml](http://www.zunyi.gov.cn/ch6983/ch160/ch167/2013/01/22/content_2011375321.shtml);  
<http://news.enorth.com.cn/system/2013/01/09/010500951.shtml> (visit on April 23, 2013).

participating in criminal legal aid as reflected by a low defending rate of lawyers in criminal lawsuits. Therefore, criminal legal aid in China still has a long way to go. There are many problems to be cracked, such as ideas and concepts, financial guarantee, staffing and training. That's why *CPLaw(2012)* has brought not only new chances for the work of legal aid but also huge challenges.

(I) The number of criminal legal aid cases will increase. Statistics from a legal aid center in a city in western China show that, the total number of criminal cases for the last three years is 232, the number of defendants in first instance cases aggregates to 2,134, 11% (232/2134) of criminal defendants has obtained legal aid, the total number of criminals that the people's procuratorates decided to arrest is 1,601, and the total number of criminals that the procuratorates initiated prosecution stands at 2,057. With *CPLaw(2012)* in place, if we calculate at a rate of 11%, the numbers for cases that need legal aid at the investigation stage and at the review and prosecution stage will be 174 and 224 respectively. And this calculation doesn't include the number of cases where legal aid is provided for the mentally ill and suspects and defendants who might be sentenced to life imprisonment after *CPLaw (2012)* becomes effective. In the past three years, legal aid has been provided in 53 cases where the suspects might be sentenced to death penalty. Taking this as a base number and multiplying it by 3 (three stages of investigation, review and

prosecution, and trial), we get the number of legal aid cases where the mentally ill and suspects and defendants possibly to be sentenced to life imprisonment will be given legal aid after *CPLaw(2012)* takes effect, which is 159. Based on these assumptions there will be 557 (174+224+159) extra cases of legal aid every year after *CPLaw(2012)* is in effect. Therefore, there will be an increase in the number of legal aid cases accordingly with *CPLaw(2012)* taking effect.<sup>14</sup>

(II) The funding for legal aid needs to be boosted. Based on the predicted increase in legal aid cases in the said city and calculated by the current local allowance standard (RMB 700 Yuan per criminal case), there should be an extra funding of RMB 467,600 (700×668) Yuan for the increased cases. That's why more funding for criminal legal aid will be needed.<sup>15</sup>

(III) There are insufficient staff and case handlers for legal aid agencies. When *CPLaw(2012)* becomes effective, the number of criminal legal aid cases will increase, and accordingly, the legal aid agencies will experience a bigger workload in accepting cases, arranging lawyers, providing services and so on. In addition, there will be more

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<sup>14</sup> Legal Aid Center in Leshan City, Sichuan Province: “*Opportunities and Challenges for the Work of Legal Aid with the Amendment to Criminal Procedure Law*”, <http://www.leshan.gov.cn/Site/SiteSiFaJu/NewsView.asp?ID=148589> (visit on April 23, 2013). In addition, legal aid agencies in other localities also made predictions on problems of possible increased caseload and funding gap as amendments to the Criminal Procedure Law might bring forth. See Wang Youping: “*Impacts of the Amended Criminal Procedure Law on Legal Aid Work in Guangzhou City and Countermeasure*”, *CHINA LEGAL AID*, Issue 5 in 2012.

<sup>15</sup> Legal Aid Center in Leshan City, Sichuan Province: “*Opportunities and Challenges for the Work of Legal Aid with the Amendment to Criminal Procedure Law*”, <http://www.leshan.gov.cn/Site/SiteSiFaJu/NewsView.asp?ID=148589> (visit on April 23, 2013).

communication and contacts between legal aid agencies and public security organs, procuratorates, courts, and detention centers. There will be more briefings and documents between the relative departments. As a result, legal aid agencies will see a shortage in their staff and lawyers. In order to guarantee the quality of defending service at investigation stage, Article 33 of *CPLaw(2012)* clearly defines that during the investigation period, the suspect shall only appoint a lawyer to defend for him. However, there is a lack of lawyers in some grassroots regions in central and western China.

(IV) The professional level of legal aid staff needs to be improved. At present, the defending quality in criminal legal aid is not very good. *CPLaw(2012)* provides more opportunities for lawyers in criminal legal aid cases to participate in criminal litigation, and bestows more defending rights on them. This, on one hand, will facilitate the full development of criminal defending. And on the other hand, there will be more challenges and requirements for the professional level of legal aid staff. For instance, *CPLaw(2012)* provides systems of witness appearance in court, compulsory appearance of the witness, protection for the witness, compensation for the witness when he appears in court, and the consequences of the failure of the forensic providers or expert witnesses to appear in court. All these will inevitably increase the chances of court appearance of witnesses, forensic providers, and expert witnesses. In past

criminal defending, however, witnesses and forensic providers seldom made any court appearance, and it's common that lawyers of criminal defending lack practice and experience of asking questions in court. Obviously, this is a challenge for future defending practice. Therefore, the criminal legal aid staff need to improve their professional level and skills of handling cases.<sup>16</sup>

#### IV. Countermeasures

(I) The government should shoulder its responsibilities and increase the number of legal aid staff and the funding for legal aid. *CPLaw(2012)* composes an important milestone for China's progress in rule-of-law building. In particular, "respecting and protecting human rights" is written into "the General Provisions" and there are regulations on protecting the practicing rights of lawyers and the legitimate rights and interests of the litigation parties. These are of vital importance for unified and correct implementation of the law and safeguarding social fairness and justice. It is the government's responsibility to provide legal aid. Therefore, government authorities, judicial administrative organs and legal aid agencies at all levels should actively promote the implementation of this government responsibility to enhance criminal legal aid and ensure that the parties in poverty can get access to legal aid. On one hand, measures should be taken to ensure the establishment of a

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<sup>16</sup> Lu Caiping: "the New Requirements of *CPLaw(2012)* for Lawyers", <http://www.124.gov.cn/2012-07/25/cms1090475article.shtml> (visit on April 23, 2013).

team of legal aid volunteers, which should have a certain size and is therefore comparatively stable. For example, we can launch programs to enlarge the team of legal aid volunteers in central and western regions, and start initiatives to specify a name list of criminal legal aid lawyers. Based on relevant documents and regulations, we can also provide appropriate training to grassroots legal workers and students at law schools so that they could play their roles in simple criminal legal aid cases. On the other hand, efforts should be made to make sure that the local government would raise the percentage of legal aid funding in their fiscal expenditure. In particular, it is suggested that the legal aid funding for poverty-stricken areas should be covered by the central budget so that the problem of insufficient legal aid funding for these areas could be resolved.<sup>17</sup>

(II) Information campaigns should be conducted and mechanisms of communication and coordination should be upgraded. We should make full use of mass media such as broadcasting, TV, newspapers and magazines, and the Internet, and special occasions such as “December 4” Legal Publicity Day to disseminate information on criminal legal aid, so that the public could learn about their rights in criminal litigation, know channels and ways to make legal aid applications, and thus increase their awareness and recognition of the work of criminal legal aid. Currently,

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<sup>17</sup> Legal Aid Center in Leshan City, Sichuan Province: “*Opportunities and Challenges for the Work of Legal Aid with the Amendment to Criminal Procedure Law*”, <http://www.leshan.gov.cn/Site/SiteSiFaJu/NewsView.asp?ID=148589> (visit on April 24, 2013).

the Legal Aid Center of the Ministry of Justice has set up service columns including public education for legal aid on its website of China Legal Aid (<http://www.chinalegalaid.gov.cn>), and is continuously enriching the contents and increasing efforts for legal aid publicity. Judicial administrative organs and legal aid agencies should actively communicate and coordinate with relevant departments, so that public security organs, procuratorates and courts and other governmental departments could pay attention to and support criminal defending and criminal legal aid. Only by joining hands can we set up and upgrade the mechanism of connection and coordination for legal aid. During the establishment of such a mechanism, the key is to make the criminal suspects and defendants to really enjoy their right to criminal defending and their right to information on legal aid. At the same time, work efficiency should be enhanced, and relevant procedures should be simplified, so that more criminal suspects and defendants could get easier access to legal aid. We should put in place a long-term connection mechanism to ensure that public security organs, procuratorates and courts at all levels could support and cooperate with the work of legal aid, lawyers and other services of criminal legal aid could defend according to law, the law could be implemented correctly, and justice could be guaranteed.<sup>18</sup>

(III) Efforts should be made to enhance training and management of

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<sup>18</sup> Legal Aid Center in Leshan City, Sichuan Province: “*Opportunities and Challenges for the Work of Legal Aid with the Amendment to Criminal Procedure Law*”, <http://www.leshan.gov.cn/Site/SiteSiFaJu/NewsView.asp?ID=148589> (visit on April 24, 2013).

case quality, and criminal legal aid staff should improve their case-handling capacities and the quality and level of their service. For a long time, legal aid service providers including lawyers have a strong desire to participate in special trainings. The highly professional and demanding cases particularly in the sector of criminal legal aid present more requirements for service providers on their professional skills and capabilities.<sup>19</sup> The enactment of *CPLaw(2012)* means that more training for lawyers and other criminal legal aid staff are needed and the training need is proved through questionnaire survey hold by the National Legal Aid Center of Ministry of Justice. Through training, they can get to know the relevant articles in *CPLaw(2012)*, explore the theoretical explanation of those articles profoundly, correctly grasp the basic theories of criminal litigation, and fully understand the implications of “respecting and protecting human rights” written into “the General Provisions” of *CPLaw(2012)* on the work of criminal defending. The training can help lawyers and other criminal legal aid staff to strengthen their awareness of evidence, and not be afraid to use their rights to take evidence in investigation period. What’s more, they can learn how to use the exclusionary rule of illegally obtained evidence to enhance the defending

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<sup>19</sup> Gu Yongzhong, professor of China University of Political Science and Law, led a group to conduct researches in different localities in China. In a questionnaire on the needs for training on criminal legal aid, there was a question on “whether you hope to participate in training on criminal legal aid”. Three options were provided as A. Very much; B. Average; C. Don’t care. Among more than one thousand questionnaires returned, the percentage for choosing A respectively stood at: 83.6% for Zhongshan City, 81.9% for Xi’an City, 85% for Shenyang City, 85% for Shanxi Province, 75.8% for Qinghai Province, and the average was 82.26%.  
<http://www.criminallegalaid.org/a/rdpl/2997.html> (visit on April 25 2013 ).

quality in criminal legal aid cases and fully protect the lawful rights and interests of the accused. At present, on the new contents of the *CPLaw(2012)*, the Legal Aid Center of the Ministry of Justice is conducting trainings across the country with the focus on tasks and features when handling cases at investigation stage and at review and prosecution stage. Videos of relevant trainings are available on the website of China Legal Aid so that legal aid staff and providers could watch for free. Meanwhile, many local legal aid agencies are conducting similar training activities.<sup>20</sup> Besides, in order to meet the new challenges posed by *CPLaw(2012)* on the quality of legal aid service, based on experience of its foreign counterparts on evaluation mechanism and the practice of legal aid in China, the Legal Aid Center of the Ministry of Justice is conducting a pilot project in some provinces to evaluate the quality of legal aid cases in order to explore methods and mechanisms of improving the service of criminal legal aid.

(IV) The forms of service should be upgraded and innovated. For instance, the current “12348” legal service hotline should be upgraded. Legal aid agencies provide free legal services for the society, the disadvantaged in particular, through the hotline in forms of manual, voice, message and fax, etc. But practice shows that there are many problems with the hotline. For example, there are too many service platforms, lack

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<sup>20</sup> Website of Legal Aid in Qinghai province: <http://www.qhfy.gov.cn/NewsDetail.aspx?id=694F17A2F0487E10>.

of unified management, ambiguous service standards, low service quality, insufficient funding, aging equipment and backward technologies, etc. *CPLaw(2012)* has urged a smooth legal aid channel to make sure public security organs, procuratorates, and courts can carry out their obligation to inform the criminal suspects and defendants. This provides a good opportunity for upgrading 12348-hotline. Now, the Legal Aid center of the Ministry of Justice is taking effective measures to push the 12348-hotline to play its due role. In addition, the pilot project of on-duty lawyer being explored in some places in recent years can be expanded. Modern IT technology can also be used to manage the work of criminal legal aid and provide legal aid service.

(V) Experience of other countries and regions should be learned from. In terms of criminal legal aid, many foreign countries and regions have some good practices and experience. Some of the practices and experience have been learned and adopted during *CPLaw(2012)*. In future, in order to better implement *CPLaw(2012)*, we need to further compare and learn from other countries and regions' good practices and experience in criminal legal aid, for instance, legal aid hotlines, system of public advocates, system of on-duty lawyers and online legal aid services. In December 2012, the General Assembly of the United Nations adopted *the Principles and Guidelines on Access to Legal Aid in Criminal Justice System*, which is formed by summing up experience of legal aid work in

many countries and regions and will actively guide China to do a better job in criminal legal aid development.