

# The Establishment and Improvement of the Legal Aid System for the Death Penalty Review Process in China

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## Abstract

Since the Supreme People's Court took back the right of death penalty examination in 2007, defense counsels have come to play an important part in the Death Penalty Review Procedure. But for the defendants who haven't chosen a defense counsel, the past laws and regulations do not clearly specify if they access to legal aid in the Death Penalty Review Procedure. Until 2021, China passed the Legal Aid Law and relevant regulations, the new laws makes it clear that the defendant of death penalty review can obtain legal aid to defend. This paper focuses on the construction and improvement of the legal aid system of China's death penalty review procedure. Firstly, it combs the development context of China's death penalty review system. Secondly, it analyzes the theoretical basis of the legal aid system of death penalty review procedure, discusses the necessity of introducing legal aid defense into the death penalty review procedure, and puts forward the connotation and value of criminal procedure in the construction of the system. Finally, it puts forward views and suggestions on the further improvement of the system around the shortcomings of the existing provisions and the possible difficulties in judicial practice.

## Keywords

Death penalty review procedure; Legal aid system; Right of criminal procedure; The defence counsels' right of defense.

## 1. Introduction

China's Criminal Procedure Law establishes the death penalty review procedure as a special trial procedure within the criminal justice system. Since the Supreme People's Court assumed authority over death penalty approvals from lower courts in 2007, the state has accelerated efforts to safeguard the defense rights of suspects and defendants in the death penalty review process. Following the revision of the Criminal Procedure Law in 2012, it was clarified that the Supreme People's Court should involve the procuratorate and defense lawyers in the review of death penalty cases. However, the legislation did not address the issue of whether defendants who have not retained defense lawyers are eligible for legal aid defense in the death penalty review process. The absence of legal aid defense undermines the protection of defendants' rights and the realization of judicial justice in the death penalty review process. As China's rule of law continues to advance, it is urgent to strengthen legal aid defense for defendants to implement China's current policy of "strictly controlling the application of the death penalty." To this end, it is necessary to establish a legal aid system for defendants in the death penalty review process. In August 2021, the Legal Aid Law was enacted, clearly establishing this system. Subsequently, in December, the Supreme People's Court and the Ministry of Justice issued the "Provisions on Providing Legal Aid to Defendants in Cases of Death Sentence Review (for Trial Implementation)" (hereinafter referred to as the "Provisions"), which made more detailed provisions for the implementation of this system, including qualifications requirements for lawyers providing legal aid services, emphasizing the protection of defense rights for legal aid lawyers in the death penalty review process, and specifying the procedures for legal aid lawyers

to participate in death penalty review cases and the deadlines for submitting defense opinions, among other matters. The new provisions explicitly address the issue of whether the legal aid defense system can be applied in the death penalty review process, laying a normative foundation for the development and improvement of China's legal aid system for the death penalty review process. However, the existing provisions still cannot resolve the numerous issues arising from the practical operation of the legal aid system for the death penalty review process and require further refinement. This article focuses on the legal aid system for the death penalty review process, reviewing the current legislative status of lawyer participation in legal aid within the death penalty review process, exploring the underlying criminal procedural principles and theoretical foundations of the legal aid system for the death penalty review process, and addressing the various issues reflected in existing academic research and judicial practice. It also offers its own perspectives and recommendations for the development and improvement of China's legal aid system for the death penalty review process.

## **2. The Development of the Legal Aid System for the Death Penalty Review Procedure in China**

### **2.1. Lawyer Participation in the Death Penalty Review Procedure**

China's Criminal Procedure Law, promulgated in 1979, included the "death penalty review procedure" as a chapter in Part III, "Trial," clearly stipulating that death penalty cases must be submitted to the Supreme People's Court for approval, and that the Supreme People's Court must approve death penalty cases through a "three-judge panel." However, for a significant period thereafter, the authority to review death sentences for certain offenses was repeatedly delegated to higher people's courts and military courts of the People's Liberation Army. At the time, academic discussions primarily focused on the nature and jurisdiction of the death penalty approval authority, with few scholars conducting theoretical research on the issue of lawyer participation in the death penalty review process. Meanwhile, the Supreme People's Court also excluded lawyers from participating in death penalty review cases, citing reasons such as "the death penalty review is a special procedure and cannot be handled in the same manner as first-instance or second-instance proceedings" and "there is no legal provision allowing lawyers to participate in the death penalty review process." As a result, the Supreme People's Court, as well as higher people's courts and military courts of the People's Liberation Army with partial authority to approve death sentences, have long relied on closed-door review of case files as the primary method for reviewing death penalty cases. The entire review process was not conducted openly, and the procuratorate and lawyers could not participate in the death penalty review process in the same manner as in first-instance and second-instance proceedings.

After the Supreme People's Court reclaimed the authority to approve death sentences in 2007, it issued relevant regulations stipulating that in death penalty review cases, the defense opinions of lawyers commissioned by the defendant may be heard and recorded in the case file. These provisions were explicitly codified in the revised Criminal Procedure Law five years later. The revised Criminal Procedure Law of 2012 stipulated the participation of lawyers and the procuratorate in death penalty review cases, including: the Supreme People's Court shall interrogate the defendant in death penalty review cases, hear the defense opinions of lawyers, and notify the Supreme People's Procuratorate of the review results; and the Supreme People's Procuratorate may submit opinions to the Supreme People's Court during the handling of death penalty review cases. The new provisions provide pathways for defense lawyers and the Supreme People's Procuratorate to participate in the handling of death penalty review cases, and also reflect the Supreme People's Court's intention to reform the traditional "written review" model of death penalty review, integrating the participation of both prosecution and

defense into the death penalty review process to achieve an ‘adversarial’ and “litigious” effect, thereby making the previously closed death penalty review process more open.<sup>[1]</sup>

## 2.2. The Legal Aid Law establishes legal aid in the death penalty review process

As defense lawyers increasingly participate in the death penalty review process, it is gradually moving toward greater openness and litigation-oriented procedures. Concurrently, with the advancement of legal thinking and public awareness of rights, China's legal aid system is also evolving. From the pilot implementation of legal aid work in multiple cities nationwide in 1994, to the introduction of “appointed defense” in Article 34 of the Criminal Procedure Law in 1996, which designated three categories of defendants as eligible for appointed defense—those “prosecuted but unable to afford a defense attorney,” “blind, deaf, mute, or minors,” and “those facing the possibility of the death penalty” as eligible for designated defense, and the promulgation of the Legal Aid Regulations in 2003, China's criminal legal aid system has evolved from nothing to a framework tailored to China's national conditions and judicial environment.

Since the 2012 amendment to the Criminal Procedure Law, lawyers have played an increasingly important role in the death penalty review process. Defense lawyers can intervene in the death penalty review process by submitting new factual evidence, legal opinions, or appealing to the procuratorate to safeguard the defendant's legitimate rights and interests.<sup>[2]</sup> Meanwhile, the long-standing absence of legal aid defense in the death penalty review process has also drawn attention and discussion from the academic community. Professor Chen Guangzhong argues that defense lawyers must assist defendants in death penalty review cases, and that the state should provide legal aid services to defendants in death penalty cases without requiring them to apply for it. This is of great significance for achieving fairness and justice in both the substantive and procedural aspects of death penalty cases.<sup>[3]</sup> Professor Chen Yongsheng points out that legal aid defense is severely lacking in death penalty review cases handled by the Supreme People's Court, and that ensuring defendants can obtain legal aid at any stage of the criminal litigation process is the bare minimum requirement.<sup>[4]</sup> Professor He Hongqiang analyzed 755 death penalty review rulings published by the Supreme People's Court from 2013 to 2017 and pointed out that the current lack of appointed defense counsel is in sharp contrast to the strong demand for defense counsel among defendants in death penalty review cases. He suggested promoting the litigation-based reform of the death penalty review process to safeguard the defendants' right to defense counsel.<sup>[5]</sup> The academic community generally agrees that ensuring economically disadvantaged defendants have equal access to legal assistance in death penalty review proceedings is an inherent requirement of procedural fairness and a safeguard of defendants' basic human rights.<sup>[6]</sup>

In response to academic calls, the Central Committee of the Communist Party of China and the State Council's “Two Offices” issued the “Opinions on Improving the Legal Aid System” in 2015, which stated that the state should establish a legal aid system to assign legal aid defense lawyers to participate in the handling of death penalty review cases. In 2018, the Criminal Procedure Law was amended to further expand the scope of legal aid defense beyond the original provisions, covering all stages of the investigative, prosecutorial, and judicial processes, and adjusting the methods of appointing defense counsel, thereby advancing the legislative process of criminal legal aid in China. In 2019, the “Opinions on Accelerating the Construction of a Public Legal Service System” further pointed out that the system for appointing defense counsel in death penalty review cases should be improved, and pilot programs for full coverage of lawyer defense in criminal cases should be promoted.<sup>[6]</sup> Although some regulations have been issued, there are still no clear provisions at the legislative level regarding legal aid in death penalty review procedures. It was not until August 2021 that the “Legal Aid Law” was passed by the Standing Committee of the National People's Congress, marking a new phase in the

legalization of criminal legal aid. Article 25, Paragraph 1, Item 5 of the Law explicitly states that defendants in death penalty review cases may “apply for” legal aid defense, and requires that legal aid lawyers in death penalty review cases “have more than three years of relevant professional experience.” In December 2021, the Supreme People's Court and the Ministry of Justice issued the “Provisions on Providing Legal Aid to Defendants in Cases of Death Sentence Review (for Trial Implementation),” which made more detailed and specific provisions for legal aid work in the death penalty review process.

### **3. The Theoretical Foundation of the Legal Aid System for the Death Penalty Review Procedure**

#### **3.1. An Intrinsic Requirement of Respecting and Protecting Human Rights**

In 2012, “respecting and protecting human rights” was incorporated into China's Criminal Procedure Law. As the level of rule of law in society has increased, the importance of protecting human rights in China's criminal procedure philosophy has grown steadily. Respecting and protecting human rights has become one of the core principles explicitly stipulated in China's Criminal Procedure Law. The United Nations' Universal Declaration of Human Rights states: Everyone has the right to life, liberty, and security of person.”<sup>[7]</sup> Legally speaking, human rights encompass foundational rights such as the right to life, freedom, property, and defense. The primary component of human rights is the right to life, which can be regarded as the carrier and foundation of human rights<sup>[8]</sup>—the basic right enabling an individual to exist and continue as a natural person with various physiological and psychological characteristics. Protecting the human rights of defendants is a core value pursuit of modern criminal procedure.<sup>[9]</sup> The legislative and judicial status of the death penalty is an important indicator of a country's level of human rights protection in criminal law. China is unlikely to completely abolish the death penalty in the short term. Strictly controlling and cautiously applying the death penalty is an important policy to respect and protect human rights and achieve substantive judicial fairness. Strengthening the protection of the right to defense for defendants in death penalty review cases is an important aspect of implementing this policy, and expanding the application of the legal aid system is an important means of achieving this.

As the scope of legal aid continues to expand, it can now cover all stages of criminal proceedings, including investigation, prosecution review, and trial. The availability of legal aid defense at every stage of criminal proceedings demonstrates a full guarantee of the defendant's rights. However, the death penalty review process has become the “last mile” for legal aid defense. Due to the long-standing absence of a legal aid system for death penalty review in China, the death penalty review cases handled by the Supreme People's Court have exhibited the distinct characteristics of a high approval rate and a low defense rate. According to scholarly research, among the 589 death penalty review cases handled by the Supreme People's Court from 2013 to 2018, involving 635 defendants, only 58 defendants had lawyers providing defense opinions, accounting for just 9.13% of the total number of defendants, while a staggering 90.87% of defendants lacked legal representation.<sup>[10]</sup> “Death penalty cases involve matters of life and death, and every step of the process must be handled with the utmost caution.”<sup>[11]</sup> This is because the death penalty is an irreversible form of capital punishment. If an innocent person is executed due to a miscarriage of justice, it is too late to correct the error once it is discovered. Only through strict procedural controls can the possibility of wrongful executions be minimized. The low defense rate in the death penalty review process stems from multiple factors, with the absence of legal aid being a significant one.<sup>[12]</sup> Therefore, providing legal aid defense to defendants in the death penalty review process is necessary, as it facilitates the discovery of case facts, prevents wrongful convictions, and ensures the accuracy and reliability of outcomes in death penalty cases. Therefore, introducing legal aid defense into the death penalty review

process reflects the state's high regard for the defendant's right to life. The defendant should receive comprehensive and effective defense in this final "opportunity" of the death penalty review process. This is necessary to respect and protect the defendant's human rights, to safeguard the defendant's right to defense, and to achieve substantive fairness and justice.

### **3.2. Achieving procedural justice in criminal litigation**

Procedural justice is a core principle of modern criminal litigation, requiring participants in criminal proceedings to have ample opportunities to engage in the litigation process, obtain favorable opinions and evidence, and have the chance to refute opposing arguments.<sup>[13]</sup> The death penalty review process has traditionally been characterized by non-publicity and written approval. Following legislative confirmation of lawyers and prosecutorial agencies entering the death penalty review process, the increased number of participants in the review process indicates a certain degree of enhanced procedural transparency. Establishing a legal aid system for the death penalty review process holds unique value in achieving procedural justice in criminal proceedings during the death penalty review stage.<sup>[1]</sup>

First, the provision of legal aid defense for defendants in death penalty review cases embodies the principle of equality between prosecution and defense in China's criminal proceedings. Compared to judicial authorities, defendants possess significantly weaker individual capabilities. To balance the disparity in litigation status and capacity between judicial authorities and defendants, it is essential to fully safeguard the defendants' right to defense. In death penalty review cases, the materials are submitted to the Supreme People's Court by lower-level judicial authorities. At this stage, judges primarily have access to evidence materials provided unilaterally by the public security, procuratorial, and judicial authorities. The absence of the defendant's defense opinions may lead judges to form preconceived notions, thereby influencing their judgments. The adversarial structure of criminal proceedings requires judges to adjudicate impartially, as hearing both sides leads to clarity while hearing only one side leads to bias. Providing legal aid defense to the defendant allows them to present new factual evidence and raise defense arguments regarding sentencing, which procedurally facilitates judges in discovering the truth of the case and conducting a fair and impartial review.

Second, the Criminal Procedure Law stipulates that the Supreme Court must hear defense opinions from lawyers when reviewing death penalty cases to safeguard the defendant's right to defense. However, from the perspective of institutional fairness, for defendants to equally enjoy this right, the prerequisite is that every defendant has a defense lawyer to represent them. If some defendants cannot afford to hire a lawyer due to financial difficulties, this provision becomes "a mere formality" for them. This would result in only those defendants who can afford to hire defense counsel being able to apply the provisions of Article 240, thereby potentially turning it into a "privilege for the wealthy" and undermining the realization of procedural justice. A law should not be applied differently to the wealthy and the poor. The death penalty review procedure, which concerns the life and death of the defendant, must ensure procedural fairness and equality and must not violate the principle of procedural fairness and justice.<sup>[1]</sup>

### **3.3. Meeting the needs of the development of the death penalty review procedure system**

From the establishment of the death penalty review procedure in legislation in 1979 to 2007, the most contentious issue in academic circles was the nature and jurisdiction of China's death penalty review procedure. Before the Supreme People's Court assumed the authority to approve death sentences in 2007, China's death penalty review procedure had distinct administrative and closed characteristics, differing from the first-instance and second-instance procedures in the following prominent ways: First, the death penalty review procedure was initiated by the people's courts that issued the death penalty judgment, which voluntarily

submitted the case to the Supreme People's Court for review. According to China's Criminal Procedure Law, death penalty cases sentenced by intermediate and higher people's courts are submitted to the Supreme People's Court for review without requiring an appeal by the defendant or a prosecution appeal. The death penalty review procedure is the final mandatory procedure for every death penalty case. Compared to the traditional "no complaint, no action" principle in criminal litigation trials, this proactive reporting and review process resembles an approval process between superior and subordinate courts, bearing a strong administrative character. Second, the operational model of the death penalty review process is "written review," meaning that judges comprehensively review case files, interrogate defendants, and then review death penalty cases. The entire process is led by the presiding judge, and the death penalty review process is not open to the public. Over the years, it has lacked supervision by the procuratorate and the involvement of defense lawyers. Between 1983 and 2006, over a 23-year period, more than 90% of the authority to review death penalty cases was delegated to higher people's courts and military courts of the People's Liberation Army, using a completely closed written review method. Meanwhile, the Supreme People's Court did not promptly disclose the presiding judges and progress of the death penalty review process, as it did in the first and second instance proceedings. This led to situations where lawyers could not track the progress of death penalty review cases, and lawyers handling such cases had to rely on "multiple inquiries" to locate the judges and progress of the review process. Thus, the death penalty review process had a certain degree of closedness.

The 2012 revision of the Criminal Procedure Law broke away from the traditional "completely closed" written review model, acknowledging the role of lawyers and the procuratorate in the death penalty review process. This marked the beginning of breaking away from the traditional completely closed review model and pointed toward the development direction of "openness and litigation" for China's death penalty review process. The Legal Aid Law enacted in 2021 explicitly permits legal aid to participate in the death penalty review process, further opening up the previously closed review process and reforming the administratively oriented review model, thereby better safeguarding the defendant's right to defense. The death penalty review process has gradually opened its previously closed "doors," evolving from a system where only judges conducted reviews to one where defense lawyers and prosecuting authorities were involved, and later to one where legal aid lawyers entered the review process. "Litigation-oriented" has become the direction of development for the death penalty review process.

Additionally, the establishment of a legal aid system for the death penalty review process addresses the strong demand from defendants for defense lawyers. The primary purpose of establishing the death penalty review procedure through legislation is to fully safeguard the rights of defendants and prevent miscarriages of justice. Defendants in death penalty review cases often have low educational levels and weak defense capabilities, and only the involvement of lawyers can effectively safeguard their defense rights.<sup>[12]</sup> However, hiring a lawyer for defense is not a cheap service, and defense counsel may choose to waive the right to the final opportunity for defense due to the high costs involved. The low participation rate of lawyers in death penalty review cases has been a long-standing issue in China. Most defendants in death penalty review cases do not hire lawyers on their own to defend them. They have a strong desire to survive but are unable to obtain legal representation due to insufficient financial resources.<sup>[12]</sup> The introduction of legal aid defense into the death penalty review process undoubtedly brings hope to those desperate to survive. Regardless of whether the death penalty can ultimately be avoided, meeting the defendants' defense needs is an essential aspect of modern criminal litigation in safeguarding human rights.

### 3.4. Implementing the “kill fewer, kill cautiously” death penalty policy

Discussions on the abolition of the death penalty have never ceased throughout history and across cultures. In 1764, Beccaria proposed the abolition of the death penalty in his work “On Crimes and Punishments.” By the late 19th century, many countries began to abolish the death penalty or effectively cease its implementation. As of 2020, 108 countries worldwide have abolished the death penalty, while another 50 countries have suspended its application in law. During China's feudal historical period, “severe punishment ideology” prevailed. With societal progress and development, public perceptions of the death penalty have evolved, and the idea of restricting or even abolishing the death penalty has gradually gained mainstream acceptance. China's Criminal Law of 1979 restricted the application of the death penalty to “criminals who have committed heinous crimes,” reflecting the death penalty policy proposed during the Mao Zedong era of “retaining the death penalty, adhering to the principle of sparing lives, and preventing arbitrary executions.”<sup>[14]</sup> The 1997 Criminal Law reduced the number of crimes subject to the death penalty, ending the policy of expanding its application that had begun around 1980. In 1998, China signed the International Covenant on Civil and Political Rights, formally aligning itself with the global trend of restricting the death penalty and maintaining a consistent stance with the international community. Especially after the reform and opening-up, China implemented a “strict crackdown” policy for a period of time, but this did not reduce China's crime rate. Compared to Hong Kong and Macao, which had already abolished the death penalty, China's crime rate remained persistently high despite its harsher penalties, further driving the implementation of China's “kill fewer, kill cautiously” policy.

In 2007, the Supreme People's Court reclaimed the authority to review death sentences, which had been delegated for many years. Over a decade of judicial practice has demonstrated the significant importance of reclaiming this authority, as it has made a major contribution to reducing the application of the death penalty and preventing miscarriages of justice in China.<sup>[15]</sup> Not only researchers, but also judges working in judicial organs, as well as ordinary citizens, generally support China's policy of “retaining the death penalty, strictly controlling its application, and exercising caution in its use.” As some wrongful convictions from earlier periods of inadequate rule of law have been corrected, ensuring the rights of defendants in death penalty cases, uncovering the truth of cases, and avoiding wrongful convictions are all requirements for handling criminal litigation cases. The death penalty review procedure serves as the final stage of trial in death penalty cases and also represents the defendant's last opportunity to avoid the death penalty. However, issues such as the lack of defense lawyers' participation and prosecutorial oversight have long been prominent. Even after the 2012 amendment to the Criminal Procedure Law, legal aid defense remains absent from the death penalty review procedure, which fundamentally contradicts China's overarching policy of strictly controlling the use of the death penalty.

Establishing a legal aid system for the death penalty review process holds multiple significances. Defense attorneys' role in correcting and supervising the litigation process can reduce the likelihood of judges handling cases in violation of procedures. Attorneys' discovery of factual evidence can assist judges in reconstructing the truth of the case. Additionally, defense attorneys' presentation of defense arguments may persuade judges to impose a relatively lighter sentence on the defendant rather than the death penalty through their superior defense skills and capabilities. The function of punishment is not only to punish criminals but also to reform them. The “less lethal” death penalty policy means that courts may apply probation instead of imposing the death penalty immediately when handling death penalty cases, thereby giving offenders an opportunity to reform themselves.

## 4. Further Improvement of the Legal Aid System in the Death Penalty Review Procedure

### 4.1. Promoting Full Coverage of Legal Aid Defense in the Death Penalty Review Procedure

Article 25(1) of the Legal Aid Law stipulates the scope of application for courts, procuratorates, and public security organs to notify court institutions to assign defense lawyers. Among the five categories listed, the fifth category, “defendants in death penalty review cases who apply for legal aid,” imposes an additional restriction compared to the other four categories: the defendant must “actively apply” for legal aid. This means that defendants in death penalty review cases may only receive assigned defense lawyers if they actively apply for legal aid; if they do not apply, judicial authorities are not required to assign lawyers for them. In the previously published draft of the Legal Aid Law, there was only the category of “defendants in death penalty review cases” without the additional condition of “voluntarily applying.” The legislative body added this condition to grant defendants in death penalty review cases the right to decide whether to apply for legal aid defense. This provision raises the following two issues: First, this provision fundamentally contradicts the spirit of Article 34 of the Criminal Procedure Law regarding the appointment of defense counsel for defendants in death penalty cases. The death penalty review procedure falls under the “trial” section, and from a legislative perspective, it should be treated as part of the trial process alongside the first-instance and second-instance procedures. The effect of Article 34 should apply to all suspects and defendants in trial procedures. Although China operates under a two-instance final adjudication system, a death sentence cannot take effect or be executed without approval through the death penalty review procedure. This procedure involves a comprehensive review of the case by criminal judges of the Supreme People's Court, including both a review of the facts of the case and a determination of the application of the law. Therefore, prior to approval, based on the principle of presumption of innocence, the defendant remains a suspect who may be sentenced to life imprisonment or the death penalty as stipulated in Article 34 of the Criminal Procedure Law. Thus, defendants in the death penalty review process should be eligible for designated defense under Article 34 without needing to apply for legal aid defense.

Second, the requirement for an “active application” conflicts with China's policy of “minimizing and exercising caution in the imposition of the death penalty.” The defendant in a death penalty review case should be entitled to appointed defense counsel, which not only fully safeguards the defendant's human rights but also reflects the implementation of China's policy of strictly controlling and cautiously applying the death penalty. The death penalty review is the last opportunity to prevent the defendant from facing the ultimate punishment, closely tied to the defendant's right to life. Refusing defense counsel effectively means forfeiting the chance to discover potential grounds to avoid the application of the death penalty. Although judicial authority is generally passive in most cases—meaning that judicial authorities are not required to appoint a lawyer to defend a defendant if the defendant does not apply for legal aid—death penalty cases have an irreversible nature. Exercising judicial initiative is also an important means of controlling the application of the death penalty. Therefore, even if the defendant does not apply, judicial authorities should appoint a defense lawyer for them.

In 2017, the Supreme People's Court and the Ministry of Justice jointly issued the “Measures for the Pilot Program on Full Coverage of Legal Defense in Criminal Cases,” which defines “full coverage of legal defense in criminal cases” as ensuring that legal defense is fully covered in the trial process during the trial stage of criminal cases. The purpose is to fully safeguard the defendant's litigation rights, fully leverage the role of lawyers in criminal cases, and promote judicial fairness and justice. The current regulations do not explicitly include the death penalty review procedure within the scope of full coverage of criminal defense. However, as mentioned

earlier, the death penalty review procedure falls under the “Trial” section of the Criminal Procedure Law, and procedurally should be considered part of the trial process. Therefore, appointing legal aid lawyers for defendants in death penalty review cases should not require a prior application, ensuring that every death penalty review case has lawyer participation is a requirement for achieving substantive and procedural fairness in criminal litigation, and reflects the state's commitment to fully safeguarding defendants' defense rights.[3] Therefore, for defendants and their close relatives who have not applied for legal aid in the death penalty review process, to ensure that every death penalty review case has legal representation, legal aid defense should be assigned to them, the application process for legal aid defense should be simplified, or legislation should stipulate that the assignment of legal aid defense lawyers by judicial authorities in the death penalty review process does not require an application from the defendant.

#### **4.2. Adjusting the eligibility criteria for lawyers in the death penalty review process**

The 2013 “Provisions on Legal Aid Work in Criminal Proceedings” stipulates that defense lawyers handling death penalty cases must have a “certain number of years” of experience, but does not specify the exact number of years or the types of cases handled. However, it is clear that the legislative body aims to designate defense lawyers with case handling experience and professional capabilities to defend major cases such as those involving life imprisonment or the death penalty, thereby ensuring high-quality defense. Compared to “junior” lawyers, those with longer criminal defense practice experience possess richer case handling experience, better meet the defense needs of defendants, and are more conducive to safeguarding the rights of defendants. A notable feature of the newly enacted “Legal Aid Law” is the restriction on the qualifications of legal aid defense lawyers entering the death penalty review process, requiring them to have at least three years of “relevant professional experience.” The “Provisions (Trial)” issued by the Supreme People's Court and the Ministry of Justice require the Legal Aid Center of the Ministry of Justice to assign lawyers with “three years of criminal defense practice experience” as defense counsel for defendants in death penalty review cases and notify the Supreme People's Court in writing. This is the first explicit requirement for legal aid defense attorneys in the death penalty review process to have “three years or more of criminal defense practice experience,” aiming to establish a “threshold” for legal aid attorneys entering the death penalty review process at the legislative level to ensure the quality and effectiveness of defense.

However, the requirement of “three years or more of criminal defense practice experience” is relatively low for defense counsel. First, “criminal defense practice experience” merely requires handling criminal cases, without restricting the type or number of cases, meaning there is no requirement for defense lawyers to have handled death penalty cases, etc.; Second, the requirement of “three years or more” of practice experience is relatively short in terms of duration. In comparison, most states in the United States require defense attorneys handling death penalty cases to have at least five years of criminal defense experience. The Legal Aid Law stipulates that defendants in death penalty review cases must have “three years or more of relevant professional experience,” which, according to the Supreme People's Court's relevant interpretation, should be understood as “three years or more of professional experience in defending death penalty cases.”<sup>[16]</sup> However, subsequent regulations did not adopt this requirement out of concern that the qualification restrictions were too stringent and the review process would be too difficult. However, the current restrictions appear to be too lenient. Death penalty cases, especially those that have gone through the first and second instance proceedings before entering the death penalty review process, require higher standards of professional competence, defense skills, and experience from defense attorneys. Therefore, stricter admission standards should be established. First, it should be explicitly required that

legal aid defense attorneys in the death penalty review process have handled a certain number of death penalty cases during their practice. Attorneys without experience in defending death penalty cases lack the necessary expertise to handle such cases and may also struggle to gain the trust of the defendant; Second, the required years of relevant defense practice experience should be extended. The specific duration should be determined through practical exploration, but generally speaking, raising the “entry threshold” for legal aid defense attorneys to enter the death penalty review process is meaningful for improving the quality of legal aid defense. For example, Professor Chen Guangzhong has suggested that the “certain number of years” should be limited to attorneys with over five years of practice experience.<sup>[17]</sup> Following the U.S. requirement that defense lawyers in death penalty cases have at least five years of defense experience, China could also limit practice experience to five years or more. Third, relying solely on years of practice as a condition for ensuring the quality of defense is too narrow. The Legal Aid Center of the Ministry of Justice should establish a database of legal aid defense attorneys, select criminal defense attorneys with strong professional capabilities, reliable experience, and a sense of responsibility from among qualified attorneys, and regularly organize training for legal aid defense attorneys involved in death penalty review cases to enhance their case-handling capabilities. Only after achieving a certain level of capability should they be granted certification to participate in the death penalty review process for defense.

#### **4.3. Establishing an effective legal aid defense system for the death penalty review process**

The principle of effective defense is an important principle in modern criminal litigation, with at least three implications: first, criminal litigation defendants, as parties to the proceedings, have the right to adequate defense; second, defendants have the right to retain defense counsel who can effectively fulfill their defense obligations; and third, defendants have the right to obtain legal aid assistance.<sup>[13]</sup> Ensuring the defendant's right to defense is an important value of China's criminal litigation system. Currently, China has established a legal aid system, and the scope of legal aid application continues to expand, applying to more defendants and virtually all stages of litigation.

Although legal aid defense is gradually being applied to all stages of criminal litigation, it is often viewed as a “mass-produced” legal service by the state, and compared to the “customized” defense commissioned by the defendant, it has obvious disadvantages in terms of defense quality.<sup>[18]</sup> A long-standing practical issue in China is that, despite the presence of legal aid lawyers defending defendants during the death penalty review stage, deficiencies in the competence and attitude of defense counsel effectively undermine the realization of defendants' defense rights. This not only constitutes a waste of state funds allocated for legal aid services but also undermines the objective fairness of criminal proceedings. This issue is not unique to China; it exists in countries around the world. For example, in 2003, the American Bar Association revised the “Guidelines for Effective Defense in Capital Cases,” setting forth requirements for defense attorneys handling capital cases, including professional competence, attitude toward case handling, and defense skills, and establishing consequences for ineffective defense.<sup>[5]</sup> In 2008, the American Bar Association issued the “Supplementary Guidelines for Reducing Liability of Defense Teams in Capital Cases,” specifying the composition of capital defense teams and the professional capabilities of their members to ensure the quality of capital defense.<sup>[5]</sup> To ensure the quality of legal aid defense and guarantee the “effectiveness” of criminal defense for defendants, we must address two issues: first, we need to establish clear standards for the quality of defense in capital cases; second, we need to establish an evaluation system for effective defense.

First, China should establish minimum service standards for legal aid defense in capital punishment cases. The All-China Lawyers Association issued the “Standards for Lawyers

Handling Criminal Cases” in September 2017, which includes six provisions in Chapter 11 specifically addressing defense work in death penalty review cases. These provisions provide some guidance and norms for defense lawyers' work in the death penalty review process, highlighting issues that defense lawyers should pay attention to in their work. However, using these provisions as the “minimum standard” is insufficient to ensure “effective defense.” Some provincial bar associations have also issued similar guidelines for handling death penalty cases, but these are merely local guidelines and regulations for legal practice, and generally do not address issues such as requirements for legal skills, professional training, or standards for defense work. Death penalty review cases have undergone double scrutiny through the first and second instance proceedings. Discovering new facts or evidence and submitting more compelling defense arguments inherently place high demands on the capabilities and attitude of defense lawyers in fulfilling their duties. Therefore, to elevate the death penalty review process from “having defense” to “effective defense,” it is necessary to establish a set of regulations to guide and standardize defense lawyers in performing their duties meticulously. This requires establishing service standards in areas such as client meetings, reviewing case files, investigating and collecting evidence, and submitting defense opinions, while clearly defining the sentencing factors defense lawyers should consider during defense, including the defendant's personal circumstances, family background, mental state, and attitude toward confession.<sup>[5]</sup>

Second, a post-evaluation system for legal aid defense should be established. The diligence of legal aid lawyers can be evaluated from two aspects. On one hand, a mechanism for legal aid lawyers to report on their work should be established. Legal aid lawyers handling death penalty review cases should record the content and circumstances of each work session and report to the legal aid center or relevant departments. The legal aid center should establish minimum service standards for legal aid defense in death penalty cases and use the materials provided by defense attorneys as a reference and basis for evaluation. On the other hand, defense attorneys involved in the death penalty review process should receive feedback and evaluations from multiple parties, including the legal aid center, the procuratorate, and the defendant and their close relatives. Evaluations of defense attorneys should be based on the opinions of all parties involved in the case. Based on the established minimum service standards for legal aid defense in capital punishment cases, the Legal Aid Center should conduct regular evaluations of defense attorneys, setting up bonus and penalty points on the evaluation form, and implementing corresponding rewards and penalties based on the evaluation results.

#### **4.4. Facilitating communication between lawyers and judges**

China's Criminal Procedure Law stipulates that lawyers have the right to review case files, meet with clients, communicate with clients, collect evidence, and present defense opinions. In terms of safeguarding the defense rights of lawyers in death penalty review cases, the Supreme People's Court has made detailed provisions in previously issued documents. The 2021 “Provisions (Trial)” reiterate the importance of safeguarding defense lawyers' rights to defend, including the Supreme People's Court providing convenience for defense lawyers to exercise their defense rights, the Supreme People's Court and the Ministry of Justice promptly coordinating to resolve difficulties and issues encountered by defense lawyers in performing their duties, and listening to the opinions of defense lawyers. It is evident that safeguarding the defense rights of lawyers is a key issue that judicial authorities should prioritize and oversee. However, in addition to this, the issue of poor communication between defense lawyers and case-handling judges must also be addressed.

Establishing communication channels between judges handling cases and defense lawyers is a necessary measure to ensure that legal aid lawyers involved in the death penalty review process have the right to know about the handling of cases. Many defense lawyers who have

handled death penalty review cases have stated that it is very difficult to contact judges handling cases at the Supreme People's Court, and some lawyers have even stated that they had not yet submitted their defense opinions to the Supreme People's Court before the defendant was sentenced to death and the sentence was carried out immediately. For a long time, the death penalty review process has been closed and inaccessible to the outside world, and the Supreme People's Court has strictly managed external visitors. Many defense attorneys could only obtain information about the status of the death penalty review cases they were handling through "asking around" or "using connections." These factors pose significant challenges for defense in death penalty review cases, not only hindering defense lawyers from fulfilling their duties but also causing delays in the timing of their defense efforts. Therefore, the Supreme People's Court should emulate the practice in first-instance proceedings where courts proactively contact defense lawyers and notify them of case progress, specific timelines, and locations. This approach would similarly enhance case processing efficiency.<sup>[7]</sup>

## 5. Conclusion

China's legal aid system, though established later than those in some Western countries, has developed rapidly. The scope of legal aid defense has finally been expanded to include the death penalty review process, playing a significant role in ensuring judicial fairness and safeguarding the defendant's right to defense. This reflects the dialectical unity of China's socialist criminal procedural legal system between "punishing crime" and "protecting human rights," and fully embodies China's death penalty policy of "retaining the death penalty while strictly controlling and cautiously applying it." The trend toward the "litigationization" of China's death penalty review procedures has become increasingly evident in recent legislation. New provisions allowing defense lawyers to request in-person meetings with death penalty review judges have begun to break down the barriers of "written review," prompting new reflections on the nature and value of the death penalty review process. The introduction of legal aid defense into the death penalty review process not only promotes the development and improvement of China's death penalty system and legal aid system but also adds luster to China's socialist rule of law construction.

It can be anticipated that new issues will inevitably arise during the implementation of the new provisions, and reforms to the existing death penalty review system will encounter resistance. It can be said that the construction and development of any system not only involves conflicts between various litigation concepts but also adjustments and reconstructions of the interests and responsibilities of all parties. Therefore, reform should not merely seek speed but should prioritize a smooth transition and effective implementation. The legal aid system for the death penalty review process must continuously draw experience from judicial practice and nourishment from theoretical research, evolving and improving to become increasingly better, so that China's death penalty review system shines with the justice of the law and the brilliance of humanity.

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