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Research on the Remedy Mechanism of Lawyer's Right to Defense

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Abstract

Through analyzing the current lawyer's defense right, this paper finds some problems such as the lack of guarantee for the exercise of lawyer's right to meet the suspect and lawyer's right to consult the case materials, the lack of guarantee for lawyer's right to gather evidence, and the lack of guarantee for lawyer's defense right at trial, etc. To solve the above problems, first, this paper analyzes the existing remedy mechanism for lawyer's right to defense through three aspects: the complaint remedy mechanism, the accusation and petition remedy mechanism, and the appellate remedy mechanism, respectively. Then, the paper puts forward the suggestions to improve the remedy mechanism of the lawyer's right to defense: first, establishing the judicial remedy mechanism of lawyer's right to defense in the pre-trial procpretrialcond, improving the judicial remedy mechanism of lawyer's right to defense at trial, and third enhancing the legal force of lawyer's right to defense.

Keywords: the lawyer's defense right, the complaint remedy mechanism, the accusation and petition remedy mechanism, the appellate remedy mechanism

1. Introduction

Using legal expertise to protect the legitimate rights and interests of the accused is the sacred vocation of lawyers. Within the realm of criminal justice, exercising the right to defend is undoubtedly the most important and direct way to perform the duties of lawyers. On this account, *China's Criminal Procedure Law* provides for defense and representation in Chapter IV of the General Provisions.

The right of lawyers to defense is different from the right to defense, "in the original sense, the right to criminal defense should merely belong to the accused himself, and it is a reflexive right of the accused based on the facts alleged."

The accused can respond to the charges of the public prosecution by exercising the right of defense and using its methods and means to achieve the "protection" purpose (Xiong Qiuhong, 1988)[1] of protecting their legitimate rights and interests and reducing or even eliminating potential criminal liability. The exercise of the accused's right to defend can stay on the factual and legal levels. However, this brings a problem: although the accused can make the necessary defense for themselves on the factual level, they are often powerless on the legal level and the logical connection between the facts and the law. For this reason, it is particularly significant for the accused to seek professional legal assistance. Thus the value of the defense right of lawyers is highlighted. "For a party whose lawyer cannot provide effective legal assistance, their situation is as awful as for a party with no lawyer at all (L, Ed.2d, 821)."[2] In China, lawyers have the right to defense is confirmed in Article 14(1)[3] and Article 33(1)(2)(3)[4] of *Criminal Procedure Law*. Although *China's Criminal Procedure Law* does not explicitly state that defense lawyers have the independent right to defense, there is a consensus that defense lawyers do have this right, based on these two articles and the provisions of Article 31 in Lawyers Law, which provides the duties of defense lawyers (Wang YJ, 2018)[5]. Furthermore, this paper believes that, from the content of Chapter 4 of *China's Criminal Procedure Law*, the content of the defense right of lawyers can be divided into two parts

depending on the stages of criminal proceedings: the first part is the lawyer's defense right in pre-trial procpretrialcluding the right to meet, communicate, consult and gather case materials, etc. The second part is the right of defense in the trial stage, including the right to question, cross-examine and argue in court.

The law gives lawyers the right of defense, which has a vital practical significance. The right of defense is closely related to other rights, such as the right to receive state compensation, the right to know their rights and obligations, and the right to professional legal aid (Бойчук, Д. С., 2017)[6].

As one of the protection rights of the accused, the defense right of lawyers has crucial practical significance. Hence, it is meaningful for the law to grant lawyer's defense right. However, due to various reasons, in judicial practice, the exercise of the lawyer's defense right does not reach an ideal stat: the "old three difficulties" consisting of difficulties in meeting, consulting, and gathering case materials, and the "new three difficulties" of difficulties in questioning, questioning and debating coexist. Under these circumstances, lawyers lack approaches to remedy when they encounter such difficulties. This paper explores ways to improve the remedy mechanism of lawyer's defense right by analyzing the current lawyer's defense right implementation progress and the current remedy mechanism's defects.

2. Analysis of the Current Remedy Mechanism of Lawyer's Defense Right

As an essential right to protect the lawful rights and interests of the accused, the adequacy of the exercise of the lawyer's defense right is not only related to whether the accused's rights and interests can be fully protected, but also related to the smooth operation of the entire judicial system and the realization of fairness and justice.

This paper argues that lawyers must have two objective conditions to exercise their defense right fully. One is relatively comprehensive legislation on lawyer's right to defend as the basis; the other is a well-established and effective remedy mechanism. Although a basic system for lawyer's defense right has been established in China's current judicial practice, the remedy mechanism for lawyer's defense right is not mature.

2.1 Legislative Status of the Remedy Mechanism on Lawyer's Defense Right

Although *China's Criminal Procedure Law* strengthens the protection of lawyer's defense right in Chapter 4 and stipulates more details in the content of the lawyer's defense rights, the specific exercise methods, and relevant restrictions, it is difficult for people to find systematic provisions on the remedy mechanism of lawyer's defense right.

Suppose the lawyer's defense right is divided into two parts. In that case, the pre-trial procpretrial and the trial procedure one, *China's Criminal Procedure Law* provides only indirect provisions for the remedy mechanism on violations of the lawyer's defense right at trial. Although the provision of Article 238[7] (3) of the *Criminal Procedure Law* is silent on the lawyer's defense right, we can infer from this provision that the lawyer's defense right, as a legal procedure right of the parties in a broad sense, has the possibility of being revoked and remanded by the court of the second instance if it is deprived or restricted to a certain degree of seriousness.

This article believes that the provisions of *China's Criminal Procedure Law* on the remedy mechanism of the lawyer's defense right only provide for the remedy mechanism when the litigation rights of the parties are violated in a general way. The lawyer's defense right is not the focus of the remedy object in this article.

In 2015, the Supreme Court, the Supreme Procuratorate, the Ministry of Public Security, the Ministry of State Security, and the Ministry of Justice in China (hereinafter referred to as "Two Courts and Three Ministries") jointly issued the *Provisions of the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and Other Departments on Legally Protecting Lawyers' Practicing Rights* (hereinafter referred to as Provisions). The introduction of the Provisions is of great significance to protecting lawyer's practice right. The Provisions explained the safeguard measures of lawyer's practice right more systematically. The provisions on the remedy mechanism of lawyer's defense right are noteworthy and have become one of the highlights of the entire Provisions.

Article 41[8] of the Provisions establishes the complaint remedy mechanism for lawyer's defense right. Meanwhile, Article 42[9] shows the accusation and petition remedy mechanism. According to the content of the above two articles, when a lawyer's defense right is violated, there are two ways to protect his lawful rights and interests: complaining to a related specific organ or making an accusation and appeal to the procuratorates.

According to Article 41 of the Provisions, the complaint remedy mechanism is a mechanism in which lawyers can complain to the infringer or the superior authority of that authority when the defense right is violated. Then the infringement can be corrected by the authority receiving the complaint.

The accusation and appellate remedy mechanism is derived from Article 42 of the Provisions, in which lawyers can file accusations and appeals to procuratorates when the case-handling authorities and their staff infringe their defense rights. Then procuratorates can correct the infringement of the specific authorities and their staff after verifying the facts.

In addition, the Provisions also attempts to ensure the efficiency of lawyer's defense right remedy in terms of institutional construction by requiring the establishment of a rapid disposal mechanism and linkage mechanism for lawyer's practice right[10]. However, it is regrettable that although the Provisions requires judicial, administrative organs, and lawyer's associations to establish these mechanisms, they do not stipulate the legal consequences of not establishing the above mechanisms or not implementing them. Strictly speaking, the rapid disposal mechanism and linkage mechanism guarantees the remedy mechanism for lawyer's defense right, and does not belong to the remedy mechanism for the lawyer's defense right itself.

To sum up, there are three main remedy mechanisms for lawyer's defense right in China's current legislation: the complaint remedy mechanism, the accusation and petition remedy mechanism, and the appellate remedy mechanism (Yang J. F., 2016)[11]. Whether these three remedy mechanisms for lawyer's defense right have reached the expectation depends on their performance in judicial practice.

2.2 The Operation of the Defense Mechanism of Lawyer's Right to Redress in Practice

The author has tried various methods to retrieve the substantive effect of the remedy mechanism for the lawyer's defense right in judicial practice, but with little success. The reason is that the remedy mechanisms stipulated in the Provisions are not judicial remedies. According to the Provisions, the lawyers can not seek a remedy through litigation when their defense right is violated. Thus, it is difficult to glimpse the operation of the Provisions in practice in the public judgments. In addition to the public judgments, I have not seen statistical data on the remedy for lawyer's defense right from other national authorities.

To verify the actual operation of the remedy mechanism for lawyer's defense right in judicial practice, I searched the criminal cases of the second instance nationwide on the *China Judicial Documents' Website*, with the keyword of "defender" and Article 238(3) of *China's Criminal Procedure Law* as the legal basis. During the four years from 2018 to 2021, there were 13, 37, 28, and 13 cases were revoked and remanded to the first-instance court for retrial due to the violation of Article 227(3). However, unfortunately, the author did not find any clear statement that "appealed because of the infringement of the lawyer's defense right" or "the original judgment was revoked and remanded for retrial because of the infringement of lawyer's defense right was violated." This shows that, although legislatively, *China's Criminal Procedure Law* embodies the remedy mechanism for lawyer's defense right, in practice, few lawyer's defense right can obtain remedy upon appeal after being violated.

The most representative problem of investigation and case materials gathering in the "old three difficulties," for example, remedy and infringement, are a corresponding set of contradictions. There is no remedy without infringement. The reason why the investigation and case materials gathering has become a complex problem for lawyers is that during the investigation and gathering evidence from the witness process, in addition to the positive infringement, negative infringements such as witness's non-cooperation and pressure from Article 306 of *China's Criminal Law*[12] are also one of the reasons to that hinder the exercise of lawyer's defense right. It is precise because the problem of complex investigation and case materials gathering is not caused by positive infringement, so the above-mentioned existing remedy mechanisms in China's current laws and provisions cannot provide an effective remedy for the lawyer's difficulties in investigating and case materials gathering.

3. Analysis of Remedy Mechanism for Lawyer's Defense Right's Problems

Presently, China has established three remedy mechanisms for lawyer's defense right: the complaint remedy mechanism, the accusation and petition remedy mechanism, and the appellate remedy mechanism. In this part, I will explore the advantages and shortcomings of these three remedy mechanisms by analyzing the above three remedy mechanisms' characteristics.

3.1 Complaint Remedy Mechanism

From the content of the Article 41 of the Provisions, the complaint remedy mechanism should be the most widely applicable.

This mechanism has the following three main features:

First, this kind of remedy mechanism is an administrative remedy mechanism. The basis of this remedy mechanism lies in the administrative subordination relationship between the organ and its staff, and authorities with organizational affiliations. Therefore, the infringer's authority shall correct the misconducts of the infringer or the lower authority to remedy the infringed lawyer.

Secondly, from the scope of application of the complaint remedy mechanism, it is a universal remedy mechanism. From Article 41 of the Provisions, the article only uses the expression "case handling authority", but this is not a professional legal term. Public securities, procuratorates, courts, and even detention prisons can be regarded as "case handling authority" for criminal cases. Therefore, regardless of the infringement of the lawyer's defense right belongs to which authority, as long as the authority is involved in the case handling

proceedings, the lawyer can complain to its superior authorities.

Finally, from the viewpoint of the complaint remedy mechanism's compulsory power, the author believes it is insufficient. The reason is that the authority that makes a judgment on whether the lawyer's defense right is violated, may be either the infringing authority itself or the superior authority of the infringing authority. In either case, the decision-made authority is not neutral, which makes the decision unreliable. "If the plaintiff is the judge, then only God can act as a defender." This naturally greatly reduces the protection of lawyer's defense rights (Radbruch, 1997)[13]. In the current society in China, the phenomenon of "protect the calf" still exists. Case-handling personnel does not dare to ignore legal provisions and arbitrarily infringe the lawyer's defense right without the instructions of superior leaders. Also, there are often common interests between superior and subordinate authorities. As a result, protecting lawyer's rights is contrary to natural fairness. "The future protection of lawyer's defense rights should at least follow the rule of "not being one's judge (Wu Jin'e, 2020)[14]." On the other hand, the defense lawyer fear that the complaint will offend the case-handling authorities, and that public powers will retaliate against them in the course of their practice in the future, particularly evident in some less-developed. The number of lawyers is small places (Han Xu, 2015)[15].

3.2 Accusation and Petition Remedy Mechanism

From the content of the Article 42 of the Provisions, there are similarities between the accusation and petition remedy mechanism and the complaint remedy mechanism mentioned above.

There are three features of the accusation and petition remedy mechanism:

First, regarding the nature of this remedy mechanism, the author thinks it is a "quasi-administrative" remedy mechanism. The nature of this remedy mechanism can be interpreted in various ways. On the one hand, strictly speaking, this remedy mechanism is based on the procuratorial supervision power of the procuratorate. And what exactly is the nature of procuratorial supervision? I believe that, in this case, the procuratorate undertakes the procuratorial supervision function rather than the judicial function, so the procuratorial supervision power is not judicial in the strict sense. Therefore, the accusation and petition remedy mechanism established on this basis is not a judicial remedy.

On the other hand, unless the infringer is a staff member of the procuratorate or a subordinate procuratorate itself, there is no administrative subordination between the procuratorate and the infringer and the authority to which it belongs, thus it is not a strictly administrative remedy either. After all, the procuratorial authorities, as one of the case-handling organs, are also within the scope of the object of the accusation and petition. In this sense, this kind of remedy mechanism also has the features of an administrative remedy. For this reason, the author defines it as a "quasi-administrative remedy."

Second, is the scope of the accusation and petition remedy mechanism, which is also universal. Article 42 of the Provisions for the exercise of the remedy mechanism to delineate the scope, a total of six, including the sixth as the bottom of the provisions of "other lawyers to obstruct the exercise of litigation rights". As the core component of the lawyer's defense right, the lawyer's defense right is naturally included in the scope of the lawyer's right of litigation. Therefore, when the lawyer's defense right is violated, the lawyer can restore the entire right state through the accusation and complaint mechanism.

Finally, as far as the mechanism's effectiveness is concerned, the author argues that the compulsory power of the remedy mechanism also has certain flaws. First, suppose a procuratorial organ and its staff violate a lawyer's right to defense. In that case, the lawyer can achieve the purpose of defense by filing a complaint or appeal with the organ or the organ's superior organ. However, like the complaint mechanism, such a complaint may also face the problem of the superior procuratorate to the subordinate procuratorate and the procuratorate to its staff, and the adjudicator is not neutral; second, even if the infringer or the infringing organ is not the procuratorate and its staff, what the procuratorate can do to the infringer or the infringing organ is only to "propose corrective opinions". The opinion of whether to adopt depends on the intention of the infringer and the infringing organ. Moreover, if the individual or institution receiving the corrective statement does not assume the opinion of the procuratorate, the procuratorate does not have the power to punish. This means that the legal coercive power of the corrective views proposed by the procuratorate is insufficient.

3.3 Appellate Remedy Mechanism

The appellate remedy mechanism has a different source from the other two remedy mechanisms. The appellate remedy mechanism comes directly from Article 227 of the *Criminal Procedure Law*. Although the original purpose of establishing the principle of the two-trial final adjudication system in China is not simply to provide a remedy mechanism for lawyer's defense right that has been violated, it is one of the most crucial remedy mechanisms for lawyer's defense right.

First, by its nature, the appellate remedy mechanism is a powerful judicial remedy mechanism. This remedy

mechanism operates based on the supervisory relationship between the higher and lower courts, which means that the mechanism is indeed a remedy from the national judiciary.

Secondly, regarding the effectiveness of the appellate mechanism, the author believes that the force of the remedy mechanism is stronger than the two aforementioned remedy mechanisms. However, it still needs to be further strengthened. The reason is that the relationship between the upper and lower courts differs from that between the upper and lower procuratorates of leading and being led. However, the relationship between supervision, and the source of the right behind the verdict or ruling made by the higher courts, such as direct revision and remand, is the independent national judicial adjudication power, which the lower courts must obey and execute. In addition, due to the remedy subject's independence, the remedy procedure's strictness and efficiency, and the compulsory nature of justice, the judicial remedy mechanism has more robust effectiveness than the administrative remedies. However, although the remedy mechanism has strong mandatory power, it is questionable whether it can meet the practice's needs. The reason is that, in the process of consulting the appeal cases, the court of the second instance is more inclined to consult the legal and factual errors in the first instance. The consult of procedural mistakes is more like an incidental consult, influenced by the long-standing and deep-rooted idea of "emphasizing the substance but not the procedure" in China. In practice, there is no shortage of such cases, even if the procedural errors have reached the extent that they should be remanded, but in the case of clear facts and correct application of the law, some courts of the second instance will choose to turn a blind eye, get over it.

Finally, the scope of application of the appellate remedy mechanism is limited in terms of the content of the application of the remedy mechanism. According to the classification of the grounds of appeal in criminal litigation, there are two kinds: substantive errors and procedural errors in the first trial, and substantive errors include errors of fact and law. The infringement of the right of defense of lawyers is neither a matter of fact-finding nor a matter of law application, but a procedural error. However, whether it is a substantive or procedural error, the second-instance court's consulting of the appeal case is almost always concentrated in the trial stage of the first instance, which means that the appellate remedy mechanism can provide the necessary remedy for the "new trilemma" in the trial stage, but for the "old trilemma" in the pre-trial procpretrials means that the appellate remedy mechanism can provide the necessary remedy for the "new trilemma" at the trial stage, but for the "old trilemma" in the pre-trial procepretrial seems helpless. It is also because China has not established a judicial consulting mechanism for pre-trial procepretrialin addition to the evidentiary procedures, the court can not consult and correct the procedural errors in the pre-trial procepretrial, so this remedy mechanism can only remedy the procedural errors in the first trial, but not the procedural errors in the pre-trial procepretrial.

Thus, it can be seen that the remedy mechanisms of China's lawyer's defense right are not yet perfect, and the protection of lawyer's defense right still needs to establish a more effective mechanism.

4. Research on the Reform of the Lawyer's Defense Right's Remedy Mechanism

The lawyer's defense right is ultimately a private right, and individuals complete the specific exercise of the private right. The lawyer's defense right is a pair of contradictions with the right of public prosecution. The object of its confrontation is mainly the public power, which means that the lawyer to exercise their defense right is to fight against the state machinery. The power of the comparison of the disparity is like a mayfly shaking the tree, the difficulty of the great can be imagined.

From the legal point of view, the urgent need for the protection of lawyers to fully exercise the right of defense is to establish a set of relatively sound and complete remedy systems, taking the lawyer's defense right as the entry point for the construction of the remedy system. Our country has a remedy system for lawyer's defense right now. Still, as mentioned above, these remedy systems are either insufficient compulsory force or coverage, so China's related authorities need to establish a set of comprehensive coverage, and mandatory high force of the remedy mechanism.

From the nature of the remedy mechanism, through the aforementioned analysis of the three current remedies, people can see that the judicial remedy mechanism is stronger than the administrative remedy mechanism. Therefore, China's related authorities should build and improve the judicial power of the country.

From the coverage of the remedy mechanism, the current judicial remedy for lawyer's defense right in China only covers the trial stage of criminal litigation. Therefore, to ensure that the lawyer's defense right can receive all-around effective remedy, China's related authorities urgently need to establish a set of judicial remedy mechanisms for lawyer's defense right in pre-trial procpretrial.

4.1 Establish a Judicial Remedy Mechanism for Lawyer's Defense Right in Pre-trial Procpretrial

Through the analysis of the three existing remedies for lawyer's defense right, we can see that the effectiveness of judicial remedies is more potent than administrative remedies. Therefore, based on the existing administrative

and "quasi-administrative remedies," it is imperative to establish and improve the judicial remedy mechanism of lawyer's defense right with broader coverage.

In terms of the judicial remedy mechanism for lawyer's defense right in pre-trial procepretrial, this paper argues that lawyers should be allowed to have the opportunity to seek judicial remedy at the first time when their defense right is infringed, so that lawyers can acquire remedies as soon as their defense right is violated. If the lawyer's defense right is broken by the detention center, procuratorial organs, or other non-court organs, the lawyer should be allowed to apply for a remedy to the court immediately; if it is the court that violates the lawyer's defense right in the pre-trial procpretriale lawyer should be allowed to apply for therapy to its upper court immediately. The court may issue "opinions on correcting illegal acts" to require them to make corrections, to protect the lawyer's defense right in the pre-trial procpretrial. However, such a remedy mechanism will take up relatively more judicial resources, it has undeniable advantages. Not only the timeliness of the lawyer's defense right can be guaranteed, but also the lawyer's defense right in the pre-trial procpretrialactually doubly guaranteed, because the guarantee of the defense right through the pre-trial judipretrialdy mechanism does not mean that the lawyers can no longer apply to the court to exclude the illegal evidence obtained by the organ in charge of the case during the trial process as a result of the previous infringement. In other words, even if a lawyer fails to restore his defense right through the judicial remedy mechanism of pre-trial procepretrial, the lawyer can still assert his rights through the subsequent trial stages.

The judicial remedy mechanism under the double guarantee gives the defense strong protection. Still, to confirm this compulsory power, the legal consequences of violating the lawyer's defense right in the pre-trial procpretrial should also be stipulated in the system construction to avoid the remedy mechanism eventually becoming a formality. For example, once the violation of lawyer's defense right in the pre-trial procpretrial found to be illegal, then in the second remedy, that is, in the trial procedure, the focus should be on examining whether the relevant illegal evidence thus obtained by the public authority needs to be corrected or excluded. That is to say, we can consider providing a channel of remedy for lawyer's defense right in pre-trial procepretrialy, expanding the scope of application of the rule on the exclusion of illegal evidence.

4.2 Improve the Judicial Remedy Mechanism for the Lawyer's Defense Right in Trial Proceedings

The right to counsel in trial proceedings requires a robust judicial remedy mechanism.

As mentioned above, under the influence of the trial ideology of "emphasis on substance and light on the procedure", the consulting of procedural issues such as infringement of lawyer's defense right by the court of the second instance is more like incidental consulting, regardless of whether there is an infringement of lawyer's defense right in the first instance, as long as there is no factual and legal error in the trial of substantive issues. The lawyer's defense right seems irrelevant as long as there is no factual and legal error in the trial. However, this kind of thinking makes the lawyer's defense right not fully guaranteed in the trial stage.

In the case of limited judicial resources, if the procedural errors, including violations of the right to counsel, all included in the scope of the remand, should be unrealistic, China's judicial trial will be difficult. However, if all procedural errors are not remanded, procedural justice will not be effectively safeguarded, directly affecting the realization of substantive justice.

The author believes efforts can be made to resolve this contradiction in the following two areas.

First, refine the scope of procedural errors remanded for retrial. That is, a more precise line is drawn through legislation to determine the procedural errors that may have a more significant impact on the fairness of the trial, and to specify which procedural errors should be remanded for retrial. This has been developed in the provisions of the *Procedural Provisions for Handling Criminal Cases by Public Security Organs* and the *Regulations of the Five Departments on Several Issues Concerning the Strict Exclusion of Illegal Evidence in Handling Criminal Cases*.

Second, to establish an independent consult mode of procedural errors, i.e., before the court of the second instance conducts substantive consult of the appeal case, the second-instance court can first work on substantive consult of procedural matters. Once procedural violations are found, as long as the procedural violations reach the extent that the trial should be remanded, the court will directly adjudicate and remand the case without asking whether the substantive issues were heard correctly. This can save the judicial resources in the second trial procedure, and provide a potent remedy for the right of defense of lawyers in the trial procedure, thus promoting the realization of procedural justice.

4.3 Enhance the Legal Effectiveness of Lawyer's Defense Right

Strictly speaking, the remedy mechanism only works when the lawyer's defense right is violated. This means that there must be an external force to actively infringe the lawyer's defense right to activate the remedy mechanism of the lawyer's defense right. China's current idea of constructing the remedy mechanism on the

lawyer's defense right is that, by giving the lawyer's defense right to public power remedy, this right, a private right, can be used against another infringing public power utilizing public power.

However, as one of the "old three difficulties" problems of investigation and evidence collection, the other two difficulties have apparent differences. The reason why there is the problem of the challenge to investigate and obtain evidence, in addition to the interference of individual public authorities, the lack of cooperation of the parties, Article 306 of the *Criminal Law*, etc., are causes of the problem. In contrast to the "positive infringement" of the defense right, these reasons are more like the "negative infringement" of the defense right. We also need to find "preventive" for the defense right. We also need to find "preventive" remedies for lawyer's defense right.

The author believes that the lawyer's defense right in the face of the "negative infringement" of the parties does not seem to have the heart, but not enough. The most important reason is that the legal effectiveness of the lawyer's defense right is not enough. Therefore, strengthening the legal force of the right of defense is the solution to the problem. Take the investigation and evidence collection problem as an example. This paper believes that the legal force of the right of defense can be enhanced by establishing the "investigation order" system.

Although Article 41 of the *Criminal Procedure Law* allows lawyers to apply to the procuratorate and the court to obtain evidence, the disadvantages of this way of investigating and getting evidence are also more apparent. In current China, many cases need research and receive a proof. Still, judicial resources are limited, and the country does not have enough judicial resources to protect the lawyer's defense rights in this way. Therefore, perhaps through another method to enhance the right to defend the compulsory power of lawyers, that is, the establishment of the "investigation order" mechanism.

For the victim side of the witness evidence, the *Criminal Procedure Law* established by the lawyer investigation and evidence "double permission"[16] restrictions are necessary. Still, in the case of complex or unique nature of some significant cases, to protect the legitimate rights and interests of criminal suspects and defendants, to prevent the occurrence of wrongful instances, I believe that the deserved breakthrough is to protect the legal rights and interests of criminal suspects and defendants and prevent the occurrence of unjust and false cases, I think we can break through the restriction of "double permission" and change "double permission" into "single permission," that is, if the court or the procuratorate agrees with the examination, the investigation order will be issued to the applicant lawyer. The lawyer can directly take evidence from the relevant witnesses with the investigation order. For the defense witness, if the defense witness does not cooperate with the lawyer's investigation and evidence collection, the lawyer can also apply to the court or procuratorate investigation order, after the court or procuratorate consult and approval, with the investigation order to obtain the witness evidence. This will enhance the lawyer's investigation and evidence of the right to legal coercive force, and, thus, to a certain extent, solve the lawyer's investigation and evidence.

The research on the remedy mechanism of lawyer's defense right is both a theoretical issue and also a practical issue. It is both a right and power coexistence problem and a comprehensive problem of the mutual game. With the Reform of China's Trial-Centered judicial system in recent years, the revision and introduction of the *Criminal Procedure Law* and other related laws and regulations, the exercise of the right of defense and the remedy mechanism of China's lawyers gradually improved, after all, the judicial protection of the lawyer's defense right is also the reasonable goal of trial-centered (Chen Weidong & Kang Jingjing, 2016)[17], to some extent, it can be considered that the trial-centered litigation system is essentially a litigation system to protect the right of defense entirely (Gu Yongzhong, 2016)[18]. In a way, the Trial-Centered litigation system is essentially a litigation system that fully guarantees the right to defense. However, the author believes that we should still be prepared for the danger, face up to some of the painful points in the current criminal proceedings that cannot be avoided regarding the remedy of lawyer's defense right, and adhere to the pursuit of judicial justice. "To promote the construction of China's rule of law is the common responsibility and mission of all legal professionals, including prosecutors and lawyers. Procuratorial organs should firmly establish the concept of the legal professional community, together with the majority of lawyers, adhere to an objective and impartial position in the proceedings, perform their duties in strict accordance with the law, respect each other's rights, respect each other's litigation behavior, jointly safeguard the dignity of the rule of law, safeguard the rights and interests of the people, and improve judicial credibility" (Cao Jianming, 2014)[19].

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[2] 469 U S. 387, 105 S Ct 830, 83 L, Ed.2d 821 (1985).

[3] Article 14(1) of the *Criminal Procedure Law of the People's Republic of China*: People's cpurts, people's procuratorates, and public security authorities shall protect the defense right and other procedural rights legally enjoyed by criminal suspects, defendants, and other litigation participants.

[4] Article 33(1)(2)(3) of the *Criminal Procedure Law of the People's Republic of China*: In addition to defending himself or herself, a criminal suspect or defendant may retain one or two defenders. The following persons may serve as defenders: (1) a lawyer; (2) a person recommended by a people's organization or the employer of a criminal suspect or defendant; and (3) a guardian, relative, or friend of a criminal suspect or defendant.

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[6] Бойчук, Д. С. (2017). To the question about the place of the right to defense in the system of human rights. *Problems of Legality,* (136), pp. 15-20. https://doi.org/10.21564/2414-990x.136.89444. Retrieved from http://plaw.nlu.edu.ua/article/view/89444.

[7] Article 238 of the *Criminal Procedure Law of the People's Republic of China*: Where a people's court of second instance discovers that a people's court of first instance has committed any of the following violations of statutory procedures when hearing a case, it shall render a ruling to revoke the original sentence and remand the case to the original trial court for retrial: (1) the provisions of this Law regarding open trial are violated; (2) the disqualification provisions are violated; (3) a party is deprived of statutory procedural rights or such rights of a party are restricted, which may affect a fair trial; (4) the composition of a trial organization is illegal; or (5) statutory procedures are otherwise violated, which may affect a fair trial.

[8] Article 41 of the *Provisions of the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and Other Departments on Legally Protecting Lawyers' Practicing Rights*: Where a lawyer is of the opinion that a case handling authority and its staff members evidently violate legal provisions, obstruct the lawyer's performance of defense and representation functions in accordance with the law, and infringe upon the lawyer's practicing rights, the lawyer may file a complaint with the case handling authority or its superior authority at the next higher level.

The case handling authority shall smooth the channels for lawyers to report problems and file complaints, designate a special department to be responsible for handling lawyers' complaints, and disclose the contact method.

The case handling authority shall conduct investigation on lawyers' complaints in a timely manner, and if a lawyer requests the reporting of information on the spot, the authority shall listen to the lawyer's opinions on the spot. If the relevant information is verified to be true, the case handling authority shall immediately make correction in accordance with the law, give a reply to the lawyer in a timely manner, effectively make an explanation, and notify the handling information to the administrative authority of justice where the lawyer is located or the bar association to which the lawyer belongs.

[9] Article 42 of the *Provisions of the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and Other Departments on Legally Protecting Lawyers' Practicing Rights*: Where, in criminal proceedings, a lawyer is of the opinion that the following conduct of the case handling authority and its staff members obstructs the lawyer's exercise of his or her procedural rights in accordance with the law, the lawyer may file an appeal or accusation with the people's procuratorate at the same or the next higher level.

(1) Failing to perform the obligation of informing, forwarding, notifying and serving upon the lawyer in accordance with the law. (2) The circumstances based on which the case handling authority determines that a lawyer shall not serve as the defender or litigation representative are erroneous. (3) The application filed by the lawyer in accordance with the law is not accepted or a reply is not given on such an application. (4) The application filed by the lawyer should have been approved in accordance with the law. (5) The lawyer's opinions should have been listened to in accordance with the law. (6) Any other conduct that obstructs the lawyer's performance of his or her procedural rights in accordance with the law.

Where a lawyer files an appeal or accusation in accordance with the provisions of the preceding paragraph, the people's procuratorate shall conduct examination within ten days as of the acceptance, and give a written reply on the handling information to the lawyer. It shall notify the relevant authority to make correction if the circumstances are verified to be true. It shall make an explanation in an effective manner if the circumstances are verified to be false.

The people's procuratorate shall, in accordance with the law, strictly perform the legal supervision functions of protecting lawyers' practice in accordance with the law, and handle lawyers' appeals and accusations. If, during the case handling process, it finds any conduct that obstructs lawyers' exercise of procedural rights in accordance with the law, it shall, in a timely manner, offer correction opinions in accordance with the law.

[10] Article 43 of the *Provisions of the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and Other Departments on Legally Protecting Lawyers' Practicing Rights*: Where the case handling authority or its superior authority at the next higher level or the people's procuratorate requires the relevant authority to make correction after conducting investigation and verifying the complaint, appeal or accusation filed by the lawyer, and the relevant authority refuses to make correction or commits repeated offences after making repeated correction, the disciplinary inspection and supervision department of the relevant authority shall investigate and handle the situation in accordance with the relevant provisions, and any relevant liable person who violates the discipline shall be imposed on a disciplinary sanction.

[11] Yang J. F. (2016). Study on the remedy of violation of lawyer's right to defense. *Rule of Law Research, 5*.

[12] Article 306 of the *Criminal Law*: During the course of criminal procedure, any defender, law agent destroys, falsifies evidence, assist parties concerned in destroying, falsifying evidence, threatening, luring witnesses to contravene facts, change their testimony or make false testimony is to be sentenced to not more than three years of fixed-term imprisonment or limited incarceration; when the circumstances are severe, to not less than three years and not more than seven years of fixed-term imprisonment.

If witnesses, testimonies, or other evidences provided, shown, used by a defender, law agent are not true but are not falsified purposely, they do not fall into the category of falsifying evidences.

[13] Radbruch (German). (1997). Introduction to Jurisprudence, translated by Mi Jian and Zhu Lin. Encyclopedia of China Press, p. 121.

[14] Wu Jin'e. (2020). The guarantee mechanism of the right to effective defense in the United States and its inspiration to China. *Judicial Intelligence, 2*.

[15] Han Xu. (2015). An empirical study on the difficulties of lawyer's defense since the implementation of the New Criminal Procedure Law—An analysis of S Province as an example. *Law Forum, 3*.

[16] That is, according to the provisions of Article 43(2) of the Criminal Procedure Law, the defense lawyer may, with the permission of the people's procuratorate or the people's court, and with the consent of the victim or his close relatives or the witnesses provided by the victim, collect materials related to the case from them.

[17] Chen Weidong and Kang Jingjing. (2016). The improvement of China's lawyer defense protection system—Trial centrism as a perspective. *Journal of Renmin University of China, 3.*

[18] Gu Yongzhong. (2016). Study on the salient issues of criminal defense in the context of trial-centeredness. *Chinese Jurisprudence, 2.*

[19] Cao Jianming. (2014). Striving to build a new type of healthy and positive interaction between prosecution and law. Procuratorial Daily, December 9, 2014.