

**Human rights and legal aid in criminal proceedings**  
**- Compulsory defense in criminal legal aid system in Taiwan**

By Mr. Luo Bing-cheng, legal practitioner

## I. Preface

One of the indicators to a country's level of protection of human rights in criminal proceedings usually lies in the degree of substantial and effective defense received by a criminal defendant. Without access to the legal representation from a professional defender, no human rights list could mean much.

In the five years between July 2004 and August 2009 after the legal aid system in Taiwan was put into force, the Legal Aid Foundation has handled 75,804 criminal cases, among which 36,604 cases were granted legal assistance (either full or partial), accounting for 64.78%. In all of the 75,804 criminal cases processed, 27,589 were classified as compulsory defense cases, accounting for 36.4%. Among which, 21,183 cases, that is, 76.78%, was granted legal aid. The percentage is a figure much higher than the 64.78% approval rate in criminal cases granted legal aid classified as non-compulsory defense. Although there is an average of about 4,000 compulsory defense criminal cases handled in the legal aid system every year, the Judicial Yuan would like the number to increase in the hopes of relieving the workload imposed on the few public defenders remaining. As a result, it is imperative and unavoidable for the criminal compulsory defense mechanism in Taiwan's legal aid system to face the problems as to how to integrate the resources for compulsory defense in criminal proceedings and whether it is necessary to extend the scope of compulsory defense to more criminal cases.

## II. Current criminal compulsory defense mechanism in the legal aid system

### A. The trend of extension in the scope of statutory compulsory defense

#### 1. Extension of applicable cases in the 2003 amendment

**a)** The criminal proceeding system in the Code of Criminal Procedure was revised in 2003, replacing the inquisitorial system with refined adversary system. What article 13 specified that compulsory defense is only applicable to felony cases where the minimum punishment is no less than three years imprisonment, or where a high court has jurisdiction over the first instance was manifestly insufficient in providing legal aid to persons otherwise unable to afford legal representation, and failing to meet the what is stated “in addition to procedural justice, judicial proceeding should involve an effective defender in assistance to the defendant so as to protect the legal rights endowed by law and to supervise and facilitate the fulfillment of due process of law.”<sup>1</sup> To provide exhaustive protection, the article was amended to include defendants who were financially disadvantaged (low-income households) or mentally challenged (defendants unable to make a complete statement due to unsound mind) into the scope of compulsory defense.

**b)** Meanwhile, it was also in the 2003 amendment that a presiding judge was given the alternative, in addition to appoint a public defender, to appoint a lawyer to defend the accused if no defense attorney has been retained.

## **2.** Extension of compulsory defense to cases under investigation in the 2006 amendment

**a)** Compulsory defense was only applicable to criminal cases in trial proceedings. In the 2006 amendment, a section 5 was attached in article 31 in the Code of Criminal Procedure, specifying that a prosecutor shall appoint a lawyer for mentally challenged defendants under investigation. Although the extension of compulsory defense to cases under investigation was only open to the accused that were mentally challenged, with felony and financially disadvantaged defendants remaining excluded, the amendment serves as a hallmark of the efforts dedicated to extending human rights protection to cases under investigation.

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<sup>1</sup> Citation from article 31 in Code of Criminal Procedure on the reason for the establishment of the code

## B. Diverse sources of defenders on compulsory defense cases

### 1. A consensus reached in the 1999 National Legal Reform Conference

**a)** The concept of legal aid system was discussed in the 1999 National Legal Reform Conference and the consensus achieved was to establish a system where financially eligible defendants were provided access to pro bono representation. It was planned to construct a pro bono lawyer defense system by the Taiwan Bar Association, to establish a legal aid juridical person, and to phase out public defenders on such agreed basis. The Judicial Yuan stopped hiring new public defenders in June 2006 and there are about only 50 public defenders in the nation to date. It has thus become increasingly challenging for the decreasing group of public defenders to handle the increasing compulsory defense criminal cases.

### 2. Diversification or unification

**a)** The current compulsory defense mechanism is operated through three channels, the public defenders under the court, the pro bono lawyer defense system organized by the Taiwan Bar Association, and the legal aid system provided by the Legal Aid Foundation. However, the pro bono lawyers at the pro bono lawyer defense system organized by the Taiwan Bar Association and the legal aid lawyers in the Legal Aid Foundation are largely the same. Meanwhile, the case intake by regional bar associations has been decreasing by virtue of the extra expenses budgeted for the employment of pro bono lawyers. Consequently, most cases have fallen into the domain of responsibility of public defenders and legal aid lawyers at the Legal Aid Foundation.

**b)** As mentioned above, the judicial authorities will eventually close the public defender system; conceivably, by then all the compulsory defense criminal cases will be transferred to the legal aid system. Such unification will require the integration of the resources available for criminal defense and organizational reform inside the Legal Aid Foundation in response to the new demands brought by new changes.

### C. The scope of legal aid in compulsory defense criminal cases

#### 1. Restrictions of the statutory types of cases

**a)** Cases on third instance are excluded from compulsory defense: According to article 388 in the Code of Criminal Procedure, compulsory defense regulated in article 31 does not apply to cases on third instance. No defendant on third instance is allowed to appeal unless the reason of appeal is violation against the law. Generally, criminal defendants are in great reliance on the assistance from professional lawyers in the legal proceedings on third instance. However, the fact that the current law excludes completely cases on third instance from compulsory defense has aroused much criticism. It is my belief that the scope of compulsory defense should be open to cases on third instance.

**b)** Retrials and extraordinary appeals are not granted legal aid: According to the mandate in article 17 in Legal Aid Act<sup>2</sup>, the Policies on the Legal Aid Scope drafted by the Legal Aid Foundation exclude several criminal cases from receiving legal assistance, such as “retrials and extraordinary appeals” (in section 4, article 3). However, it is my belief that some exceptions should be made after determining if a case is of serious criminal nature (for instance, a finalized death sentence case).

#### 2. Loosening of restrictions on non-statutory cases – allowing the presence of lawyers in the process of first investigations:

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<sup>2</sup> It is regulated in the rule that “the foundation is given the power to determine the types, the representative, and defense of its legal aid provided to individuals based on budget and case difference

**a)** As mentioned above, compulsory defense allowed in the process of investigation is only applicable to defendants who are mentally challenged, with defendants who are on charges of felony and financially disadvantaged not included. However, the fact that the scope of legal assistance has regulated that “the defense in the process of first investigation with the police or prosecutors of non compulsory defense cases” shall not be granted legal assistance has essentially extended the scope of compulsory defense over cases still under investigation.

**b)** On September 17, 2007, a project that allowed lawyer presence in the process of first investigation was launched by the Legal Aid Foundation. The project was further extended to provide legal assistance at night hours as well as on holidays after October 27, 2007. So far, there are fifty police stations engaged in the special project amongst the 158 police stations in Taiwan. In addition to offering mentally-disadvantaged defendants legal assistance, the special project is also made available to the financially-eligible accused and suspects (a signed affidavit is required as eligibility examination) who are on charges of felony with a minimum of three years imprisonment to apply for criminal defense assistance when under arrest or in first investigation with the police or prosecutors. The implementation of the project is a giant step forward in the development of defense for cases under investigation in Taiwan. While a compulsory defense system for defendants under investigation (or prior to trial) is not yet reinforced in the country, the project serves as a hallmark, pioneering to provide individuals under detention timely legal representation. I believe that, before compulsory defense is applicable to all individuals under detention, the Legal Aid Foundation can play such a role as to process legal aid cases and offer assistance to all individuals under detention without placing felony crime as a criterion in order to protect personal freedom in criminal human rights.

### 3. Controversies in the examination of compulsory defense cases

**a)** Although article 14 in the Legal Aid Act, corresponding to article 31 in the Code of Criminal Procedure, include defendants who were financially disadvantaged (low-income households) or mentally challenged (defendants unable to make a complete statement due to unsound mind) into the scope of compulsory defense, article 16 in the Code of Criminal Procedure requires eligible cases to be examined for obvious reasons, causing almost 25% of eligible compulsory defense cases to be rejected by the reviewing authorities.

**b)** In an attempt to bring fairness to the examination for obvious reasons, the Legal Aid Foundation has drafted a policy for examining the reasons in compulsory defense cases to set the definition and standards. It is stated in the policy that individuals 1) on death sentence, 2) mentally challenged or mentally dysfunctional and 3) under eighteen years old when committing his/her crime should not be rejected from legal assistance on account of lacking obvious reasons.

c) The eligibility examination of compulsory defense cases is in conflict with the protection of human rights in criminal proceedings; thus it is my belief that there should be two accesses for the application for a lawyer, one being assigned by the court, and the other on the request of individuals.<sup>3</sup> The examination for obvious reasons to determine legal aid application qualifications should also be removed from the law. According to current law, no eligibility examination or examination for obvious reasons is required of compulsory defense cases where a public defender or pro bono lawyer is assigned by court, whereas other criminal cases applying for legal aid must be evaluated for obvious reasons to be granted legal assistance owing to the limited legal resources. Much of the above mentioned is understandable; however, the purpose of compulsory defense is to protect the procedural rights of defendants and thus should not be evaluated for obvious reason to be granted legal assistance. Before the law can be amended, the procedure should be limitedly and purposefully interpreted to avoid such examination for obvious reasons.

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<sup>3</sup> See page 45 and 46, issue 25, 2009 Legal Aid Magazine, *On the integration of resources for criminal defense-future revolution* by Judge Wu Ciou-hong



### III. Conclusion: prospect of possible reforms for criminal compulsory defense

#### A. Expansion of the applicable scope of compulsory defense

1. In cases where individuals are on felony charges or financially disadvantaged, they should be given compulsory defense under investigation.
2. Individuals under detention should be given compulsory defense irrespective of their crimes

#### B. The setting-up of professional defense attorney offices (or centers) in all branches of the Legal Aid Foundation:

1. There are professional lawyers in the legal aid system in Taiwan, yet we have not seen professional lawyers specializing in criminal defense within the system. The expected increase of criminal defense cases and demand for specialization within the system will give rise to the need to establish a service mechanism in Taiwan similar in nature to the Public Defenders Service (PDS) widely adopted in the United Kingdom, the United States of America, and New Zealand.<sup>4</sup>
2. A professional defense attorney system should be set up in all branches of the Legal Aid Foundation to gradually replace the public defender system under the court. The pro bono lawyer defense system organized by the Taiwan Bar Association should be removed as well. In the future, individuals in criminal compulsory defense cases should be assigned a lawyer on their request or on the court's request to the Legal Aid Foundation which will determine if a professional defense attorney or a legal aid lawyer should be assigned after careful examination of the nature of each case. The adoption of this mechanism will efficiently facilitate not only the integration of criminal defense resources but also the quality of the representation offered by the legal aid system.<sup>5</sup>

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<sup>4</sup> See page 19 to 23, issue 24, 2009 Legal Aid Magazine, *On the public defense systems in legal aid organizations in England, the United States of America and Australia* by Cai Meng-syun, legal practitioner in Taiwan.

<sup>5</sup> According to the analysis of the articles mentioned in the notes, the PDS system adopted in the United Kingdom, the United States of America and New Zealand is more financially efficient than legal aid lawyer system, and received higher praise for their service quality.