

# *The Role Positioning and Integration of Duty Lawyers*

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**Abstract:** In modern society, the establishment of legal aid institutions and projects aims to ensure that everyone has equal access to legal assistance and protection, especially those with weaker economic conditions or vulnerable groups. In this process, on duty lawyers play a crucial role as an important part of legal aid. However, due to its unique responsibilities and work mode, the role positioning of duty lawyers has always been controversial. At present, the role positioning of on duty lawyers is mainly divided into three camps: "legal helpers", "defense counsel", and "quasi defense counsel". Therefore, it is necessary to conduct in-depth research on the identity positioning and connotation of duty lawyers and attempt to decouple their responsibilities and identities. This will provide theoretical support for judicial system reform and serve as a valuable reference for the development of a rule of law society and the realization of judicial fairness in practice.

## 1. Introduction

Duty lawyers refer to lawyers provided by legal aid institutions who set up legal aid stations in places such as detention centers, procuratorates, and courts. They are dispatched or arranged to provide legal assistance to criminal suspects and defendants who do not have their own defense counsel. The duty lawyer system originated from the Legal Aid Act enacted in the United Kingdom in 1988, which specifically stipulated the "duty solicitor scheme" in criminal cases. Subsequently, countries such as Australia, Canada, and Japan have also adopted and introduced this system. In China, the pilot implementation of the duty lawyer system began in December 2010. The establishment of the system was further confirmed in the legislative process of the amended Criminal Procedure Law of the People's Republic of China in 2018. In August 2020, the "Working Measures for Duty Lawyers in Legal Aid" issued by the Supreme People's Court, the Supreme People's Procuratorate, and the Ministry of Justice provided more detailed improvements to the working mechanism of duty lawyers. As a result, the duty lawyer system has gradually gained widespread application and attention.[1]

However, the issue of the role positioning of duty lawyers, as a fundamental and prerequisite aspect of studying the duty lawyer system, has not been explicitly defined in legal documents. Therefore, as an important issue directly related to the development and improvement of our

country's criminal defense system, the role positioning of duty lawyers is the theoretical problem that needs to be addressed first.

## 2. The Role Positioning of Duty Lawyers

After more than a decade of exploration, China finally issued the "Work Measures", but the improvement of legislation has not stopped the discussion and research in the legal community on the role positioning of duty lawyers in China, which has always been the biggest challenge in academia and practice. Scholars argue that the role of on duty lawyers should be positioned as "legal helpers". As a public welfare legal service provided by legal aid institutions, duty lawyers should play the role of emergency doctors. In certain emergency situations, they should act as helpers to provide immediate consultation services and make corresponding diagnoses for suspects and defendants.[2]

But there are also opinions that the role of on duty lawyers should be positioned as "defense counsel". The on duty lawyer system is a transitional system that has emerged to fill the gap in the criminal defense system. In practice, it is faster and more convenient than the traditional lawyer system. However, if the on duty lawyer is refused the right to defend, it will be difficult for the on duty lawyer to have substantial participation in the case, and it will not be able to guarantee that the on duty lawyer provides specific and effective assistance to suspects and defendants.

Scholars have also compromised between the above two perspectives, distinguishing duty lawyers from traditional defense lawyers and categorizing them as "quasi defense lawyers", and distinguishing the roles of duty lawyers at various stages of criminal proceedings.

### 2.1 The role of "legal helper" for duty lawyers

From the context and connotation of Chinese, "legal assistance" is a special term with a specific direction, which is clearly different from "lawyer defense" and "legal aid". Many scholars believe that the role positioning of duty lawyers is "legal helpers", and through the analysis and understanding of existing laws, we can easily come to this conclusion. In November 2016, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security, and the Ministry of Justice jointly issued the "Measures for the Pilot Implementation of Leniency for Confession and Punishment in Some Areas in Criminal Cases." Article 5 explicitly stipulates that if a suspect or defendant who confesses and pleads guilty does not have a defense counsel, the public security and judicial organs shall notify the duty lawyer to provide legal assistance such as legal consultation, procedure selection, and application for changing mandatory measures. The role of the duty lawyer is only that of a helper, and for those who meet the conditions for notification of defense counsel, the legal aid agency will assign a legal aid lawyer to defend them. The fourth article of the Criminal Procedure Law of the People's Republic of China, amended in 2018, mentions that "the right of a criminal suspect or defendant without a defense counsel to obtain legal assistance from a duty lawyer shall be guaranteed," and the sixth article also uses the expression "Duty lawyers shall, in accordance with the law, provide the following legal assistance."[3]

In some expired documents, such as the "Opinions on Carrying Out the Work of Duty Lawyers for Legal Aid" issued by the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security, and the Ministry of Justice in 2017, Article 2, item 5 explicitly stipulates that "duty lawyers for legal aid do not provide court defense services." Duty lawyers are not allowed to appear in court. From the perspective of legislation, even if the legal documents have expired, it is not difficult to see that the legislators' original intention in distinguishing duty lawyers from defense counsel was that the role positioning of duty lawyers is

not "defense counsel" but "legal helper". As helpers, duty lawyers can help suspects and defendants understand the relevant litigation process and legal effects, protect their rights, and also help suspects and defendants make voluntary and rational decisions, ensuring the fairness of the litigation.

## 2.2 The role of the "defense counsel" for duty lawyers

Scholars who hold the view of "defense counsel" believe that currently, there is a consensus in the academic community on the origin of the duty lawyer system. As a reference to foreign systems, the role of China's duty lawyer system can naturally be determined by analyzing the identities of duty lawyers in various countries. Britain is the first country to establish a system of lawyers on duty. The British Legal Service Commission usually appoints lawyers to be stationed in local police stations to provide legal advice to suspect when they arrive. In addition, they will also serve as defendants in courts. The Canadian duty lawyer's office is located in the court and its responsibility is to provide opinions to the defendant on relevant legal issues and how to handle the case. In addition, when the defendant pleads guilty and accepts punishment, the duty lawyer will represent the defendant in negotiations with the judge to assist him in determining the type of punishment or the amount of fine that the defendant should receive; Assist the defendant in applying for extension or remand to obtain legal assistance, and may also assist the defendant in making legal aid requests. If the defendant does not plead guilty and plead guilty, the on duty lawyer does not have the right to represent the defendant in court, and other lawyers will be arranged to defend the defendant at this time.[4]

Through the analysis of the institutional arrangements of foreign duty lawyers, it is not difficult to find that foreign duty lawyers not only provide legal consulting services for clients, but also include providing "defense counsel" services such as court representation and defense activities for clients. Therefore, some scholars believe that duty lawyers in China should also follow their legislative intentions and position their role as "defense counsel"; Although duty lawyers in our country do not serve clients based on commission and application, the responsibilities of duty lawyers stipulated by current laws and regulations all reflect the traditional responsibilities of defense counsel in court and pre-trial defense. The lawyer on duty participates in criminal proceedings with the ultimate goal of safeguarding the legitimate rights of suspect and defendants. Its defense function is inevitable, which is a problem of value judgment. Therefore, the lawyer on duty cannot deny its defense attribute just because he does not enter the court debate. Therefore, positioning the role of on duty lawyers as "defense counsel" is more in line with the needs of China's judicial practice, and it is also conducive to further promoting the full coverage of criminal lawyer defense work.

## 2.3 The Role of the "Semi-Defense Counsel" for Duty Lawyers

Scholars who support the "semi-defense counsel" perspective believe that the newly issued "Working Methods" grant duty lawyers the right to meet clients and review case files. The right to review case files, the right to meet clients, and the right to investigate and collect evidence are the foundation for defense counsel to provide effective defense for their clients. However, the right to appear in court is one of the core elements of criminal defense. If the standard of defense is lowered, and the assistance provided by duty lawyers who do not have the right to appear in court in plea bargaining cases is classified as defense behavior, it will violate the basic requirements of criminal defense in China. Duty lawyers should be diligent and responsible, providing legal advice, procedural advice, and help with applying for changes in compulsory measures to clients. Legal assistance cannot exist independently of its defense function, and the nature of legal assistance is

the same as that of defense, which is a concrete manifestation of defense function.

Duty lawyers provide both legal consultation services and defense services to clients. From the perspective of the function and attribute of duty lawyers, there is no special agency agreement between duty lawyers and suspects or defendants, but they are designated by law and appointed to provide services to various departments. Therefore, even if duty lawyers have some procedural defense functions, they should not be regarded as "legal aid providers" or "defense counsel" by default, but should be given the status of "semi-defense counsel." At different stages of criminal proceedings, the role of duty lawyers should be distinguished: in the investigation stage, the role of duty lawyers is "legal aid provider," mainly engaged in legal consulting work; while in the prosecution and trial stage, duty lawyers should be given the position of "semi-defense counsel," allowing them to review case files so that they can better exercise their role in negotiating sentencing and monitoring litigation.[5]

### **3. The Integration and Decoupling of the Role Orientation of Duty Lawyers**

The system of duty lawyers has a long history in foreign countries, and as a result, its operation is relatively mature. However, in our country, it is still a new phenomenon that requires further exploration and reflection. The legislative body must ensure that every criminal suspect and defendant have the right to legal defense, which is a challenging task. The core of legal transplantation lies in the role it plays at the present moment. As a transitional product of the reform of criminal procedure law, the system of duty lawyers in our country is naturally imperfect due to the low rate of entrusted defense and insufficient resources for legal aid defense.

#### **3.1 The Integration of the Role Orientation of Duty Lawyers**

Due to the insufficient number of on duty lawyers and lack of funds in practice, conflicts among the three roles of on duty lawyers have become apparent. The role integration of the lawyers on duty is mainly to adjust the relationship between the lawyers on duty and suspect and defendants by controlling the number of lawyers on duty and the level of professionalism, so as to adjust the relationship between the lawyers on duty and the investigation and prosecution organs. The role positioning of on duty lawyers is not a black or white opposition relationship. A balance point should be found in it, which is to establish a role transformation mechanism, so that on duty lawyers can have different identities in stages such as reconnaissance, confession, punishment, and prosecution.

Although it is not yet possible to integrate the role of on duty lawyers in the current context of criminal litigation reform in China, with the rapid development of the national economy, China is constantly innovating and making meaningful attempts in the process of judicial reform. After drawing on the successful experience of duty lawyer systems in other countries, China has continuously explored the value of judicial fairness and improved the public welfare legal aid system. In this process, duty lawyers have also fully utilized their efficiency advantages and transformed their functional positioning into a connected legal aid.

As a whole, the people of our country have made great progress, and they have gained a greater understanding of their rights, which has also brought a continuous source of motivation to the development of on duty lawyers. Therefore, it is very meaningful to seek the harmonious coexistence of various roles of on duty lawyers.[6]

#### **3.2 Decoupling Duty Lawyers from Their Role Orientation**

The academic community generally believes that duty lawyers must identify themselves as "legal

helpers", "quasi defense counsel", "defense counsel", and other roles when performing their duties. The role centered "on duty lawyer" system is the deep-seated root cause of its difficulties in judicial practice. When constructing a duty lawyer system, the goal should be "effective judicial assistance" to avoid logical misunderstandings of combining "obligations" and "roles".

When discussing the role positioning of on duty lawyers, it is not limited to theory alone. Based on the analysis of current legal provisions, on duty lawyers should be classified as "legal helpers", "defense counsel", or "quasi defense counsel". The responsibility that duty lawyers should fulfill is not necessarily determined by identity positioning, but by the purpose of establishing a system and the value of the law it aims to protect. The on duty lawyer system emerged with the reform of the leniency system for confession and punishment. Therefore, the main purpose of establishing the on duty lawyer system should be to ensure the authenticity and legality of the parties making confession and punishment decisions. So, whether positioning oneself as a "legal helper," "defense counsel," or "quasi defense counsel," duty lawyers are responsible for legal aid. Therefore, it is necessary to unbind the role positioning of the on duty lawyer and focus on how to help the parties protect their own rights and interests, rather than overly emphasizing a specific identity positioning of the on duty lawyer.

"Help" and "defense" are not opposed, but are mutually unified. Essentially, both of these systems are aimed at avoiding the dilemma that the accused may face when defending their legitimate rights and interests and seeking legitimate benefits without the intervention of lawyers. The future direction of improving the on duty lawyer system is not to define its identity positioning, but to activate the system and make it effective in practice. To change this situation, it is necessary to break free from the theoretical cycle of "role positioning" and explore its rightful meaning in the context of "judicial assistance". Establish effective cooperation mechanisms and collaboration mechanisms to promote close cooperation among law enforcement agencies, procuratorial organs, and judicial institutions, ensuring the protection of the rights of defendants and the implementation of fair justice. In summary, unbinding duty lawyers and role positioning is a crucial step towards a more dynamic, adaptable, and effective legal aid system. This reform aims to enhance the professional competence of duty lawyers, strengthen their role in safeguarding the rights of defendants, and ultimately promote fairness and justice in the criminal justice process.[7]

#### 4. Conclusion

Although the newly revised Criminal Procedure Law of the People's Republic of China and the recently issued Measures for the Work of Duty Lawyers for Legal Aid have provided more detailed explanations regarding the responsibilities of duty lawyers, the issue of the role positioning of duty lawyers remains a controversial focus in the context of criminal procedure law reform in recent years. It can be broadly categorized into three camps: legal helpers, defense counsels, and quasi-defense counsels.

Scholars holding the view of "legal helpers" believe that duty lawyers serve as helpers to provide legal advice and assist defendants in making rational decisions, but they do not provide courtroom defense services. Scholars advocating for the role of "defense counsel" propose that duty lawyers in China should learn from foreign models and position themselves as defense counsels, providing more comprehensive legal services, including defense during trial. This is beneficial for safeguarding the legitimate rights and interests of the defendants and promoting full coverage of criminal defense by lawyers. On the other hand, the camp supporting the idea of "quasi-defense counsels" argues that even if duty lawyers have certain procedural defense functions, they should not automatically be regarded as "legal helpers" or "defense counsels." It is important to differentiate and transform their roles at different stages to ensure the rights of the defendants.

This article provides a review and interpretation of these three roles of duty lawyers and proposes the integration and separation of the role positioning of duty lawyers. The aim is to appropriately transform and construct the duty lawyer system in a way that suits China's circumstances, and further optimize the structure of criminal defense in our country.

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