

# Study on the Necessity and Feasibility of Lawyer's Intervention in the Detention Stage of Discipline Inspection and Supervision

Yunfei Yan

Grammar Institute, Speciality of Law, Henan Agricultural University, Henan, China

13216547225@163.com

**Abstract.** The promulgation of Law of the People's Republic of China on Supervision aims to provide strong support to improve the regulatory system in the past. However, this Supervision Law does not stipulate the specific content of lawyer's intervention at the detention stage, and the legitimate rights and interests of the detained object cannot be guaranteed. This paper will explore the necessity and feasibility of lawyer's intervention in detention work from the perspective of the absence of lawyers in the supervision law. Based on the practical experience of China's supervision system reform, this paper will also put forward some institutional suggestions on the identity, mode and time of lawyer's intervention in supervising detention measures, so as to improve the right protection mechanism of supervision law.

**Keywords:** Supervision Law; Detention; Lawyer's Intervention; Human Rights Protection.

## 1. Raise of the Question

On September 20, 2021, the promulgation of the *Law of the People's Republic of China on Supervision* (hereinafter referred to as the *Supervision Law*) makes the supervision system more perfect and efficient, and meanwhile, provides a solid basis for the supervision work. However, the *Supervision Law* does not explicitly require that the detained person can get legal aid intervened by lawyers in the process of detaining, and before that, lawyers have no right to intervene. The lawyer intervention system could have participated in the duty crime detection, but now it has developed at the expense of depriving the detention holder of his legitimate rights and interests because of the change of the subject of power exercise.

According to the official documents, the right of investigation is not restricted by the criminal procedure law. It is regarded as a political power. [1] The supervisory organ is different from the judicial organ, and it has independent investigation power, instead of compulsory measures to detain or arrest the defendant like the criminal procedure law. This means that lawyers are not allowed to intervene in the detention stage of discipline inspection and supervision. However, the academic circle believes that we should adhere to the basic thinking of rule of law and make a systematic legal explanation of detention in discipline inspection and supervision, rather than simply defining it as the special nature of political organs. Professor Chen Weidong suggested that defense lawyers should be allowed to participate in the process of supervision and investigation on the premise of meeting specific requirements, and they can be appointed according to actual needs. [2] Professor Long Zongzhi, on the other hand, argues that duty crime investigation is actually a kind of criminal detection, not just a nominal detection. [3] Therefore, scholars who support this view take "supervisory organs" and "investigators" as the same to "case handlers of supervisory organs", and all of them are regarded as investigation organs among case handlers. The author affirms the latter point of view, and believes that lawyers should realize the dual goals of supervision of power and protection of human rights in concrete practice with clear defender status and complete defense rights.

## **2. Discussion of the Necessity of Introducing the Lawyer Intervention System at the Stage of Supervision of Detention**

The role of lawyers in a narrow sense is usually limited to the investigation stage and does not involve the process of hearing and trial. In the process of mediation, prosecution and sentencing of criminal cases, lawyers should actively participate in the mediation of cases in accordance with the prescribed procedures and requirements, strive to protect the legitimate rights of both parties, and at the same time, respect and abide by judicial procedures and norms. The author deems that there is a deviation in the research of lawyer's intervention in discipline inspection and supervision from a narrow perspective, so we should examine the feasibility of the lawyer intervention system from a broad perspective and explore a lawyer intervention system that conforms to the law of detention operation. The necessity of lawyer's intervention in supervision and investigation will be analyzed in detail.

### **2.1. Lawyer's Intervention in Supervising the Detention Stage Meets the Needs of Human Rights Protection**

The *Supervision Law* specifies the duration of detention, but does not mention the participation of lawyers. This has led to many individuals who have been detained in an isolated situation, and they need to seek external help. This not only conforms to the principle of the rule of law, but also can safeguard the legitimate rights and interests of individuals. Professor Chen Weidong emphasized that although their cultural literacy in specific cases of duty crimes far exceeds other average levels, they should still enjoy more social welfare, rather than being deprived of more social protection. [4] The fact that lawyers are not allowed to intervene during the retention stage of national public officials suspected of corruption and bribery-related duty crimes is somewhat contrary to the principle of equality before the law.

Both the *Constitution* and the *Criminal Procedure Law* of China are committed to safeguarding the basic human rights of citizens, paying special attention to the legal rights of victims and their families. [5] Therefore, in the process of detention by the Commission for Discipline Inspection and the government, the key to ensure the legitimate rights and interests of the detained person lies in guiding and standardizing the lawyer participation mechanism stipulated in the "externalization of internal rules of political parties", so as to establish and safeguard the basic rights protection of the detained person. At the same time, because the life needs of the detained people are constrained to some extent, their life needs cannot be fully respected and maintained. Hence, the introduction of lawyer intervention system in the detention stage means that once the victim faces criminal punishment, the lawyer will provide comprehensive judicial support and coordination.

### **2.2. Lawyer's Intervention in Supervising the Detention Stage Meets the Needs of Power Restriction**

Although China has established a corresponding supervision and restriction system, it still stays at the principle level as a whole, and lacks clear and specific methods in implementing plans and ways. This perfect situation of "right restraint" is difficult to achieve. At present, there is no specific definition of the supervision behavior of procuratorial organs over supervisory institutions. Because of the passivity and lag of its supervision, it must be corrected effectively after the case is supervised. At present, it is very difficult to implement effective error correction in time. Without strong supervision, power is easy to be abused. In order to ensure justice, we must establish a sound internal and external supervision system to prevent abuse of power. Different from judicial systems such as courts and procuratorates, supervision organs have greater independence and leading ability, and their law enforcement work is stricter. The supervision of detention is conducted in a closed environment, and the staff of supervision institutions can easily obtain illegal evidence by the illegal methods, and may use torture to extract confessions and abuse their power, bending the law.

In this case, the participation of lawyers is necessary. They have professional legal knowledge and rich practical experience, can effectively resist the regulatory agencies, and can achieve power

balance externally, so as to protect the legitimate rights and interests of the detained people as much as possible, thus avoiding the occurrence of unjust, false and wrongful cases.

### **2.3. Lawyer's Intervention in Supervising the Detention Stage Meets the Needs of Improving Efficiency**

After in-depth study, CPC Central Commission for Discipline Inspection found that the current situation of anti-corruption struggle is still very complicated, so a lot of manpower, material resources and financial resources must be invested to crack down on illegal activities. [6] Therefore, it is an effective means for criminal investigation to strengthen the investigation of major cases and minor cases. The development of supervision depends not only on the reform and development of supervision system, but also on the reform and development of management system of supervision. However, criminals lack understanding and responsibility for their legal roles, have no deep understanding of their crimes and punishments, have extremely weak legal awareness, and have a fluky mentality, trying to avoid the investigation by the supervision department in different ways. This has increased the difficulty of the investigation work of procuratorial organs and restricted the overall promotion of anti-corruption work.

By introducing lawyers with legal expertise to supervise the detention measures, the respondents can get due legal help during the detention period, clarify their illegal and criminal acts, clarify their rights and responsibilities, and protect their legitimate interests, so as to make themselves take the initiative to surrender, save law enforcement resources and effectively improve litigation efficiency.

## **3. Feasibility of Introducing Lawyer Intervention System at the Stage of Supervision of Detention**

### **3.1. Pay Attention to the Protection of Human Rights to Provide Ideological Conditions for Lawyers to Intervene in the Supervision of Detention**

In China, due to the increasing awareness of human rights protection, our legislative and practical organs have become more and more aware of it. In 2004, the *Constitution of People's Republic of China* took the protection of citizens' rights as an important content, which stipulated that without trial, citizens should not be taken as having been committed crimes, and should be effectively protected by the Constitution and laws. In recent years, in order to ensure People's Republic of China's justice and social stability, the central government has continuously promoted the reform of judicial organs, and formulated a series of important documents, such as *New Progress in the Legal Protection of Chinese Citizens' Human Rights* and *Growth and Improvement of China's Human Rights Work in the 40 Years of Reform and Opening-up*, so as to strengthen the maintenance of citizens' judicial organs, ensure that victims can effectively participate in the trial of criminal cases in judicial organs, and ensure criminals' right of defense. This is very significant for safeguarding the rights and interests of the parties and ensuring the accurate implementation of the law.

From this, it can be seen that it is justified for the supervisory organ to allow lawyers to intervene in the investigation of the detained person, whether from the spirit of attaching importance to human rights protection or from the perspective of implementation, and it is also an important embodiment of our basic principles.

### **3.2. Improvement of the Judicial System Provides Institutional Conditions for Lawyers to Intervene in the Supervision of Detention**

The *Criminal Procedure Law* of 1979 prohibits lawyers from intervening in the investigation, and lawyers can only intervene in the trial of ordinary courts during the trial. Since 2012, the law stipulates that criminal suspects can get help through the introduction of lawyers. In 2016, the government further strengthened the protection of lawyers. In 2017, the government further broadened the scope of legal aid. In 2018, the government further introduced the duty lawyer system to better protect the

legitimate rights and interests of the parties involved. Over the past 40 years, the process of criminal proceedings has been constantly evolving, and efforts have been made to restrict and narrow the powers of the investigation and judicial departments, especially the right to interfere with lawyers has been deepened and the level of legal intervention has been continuously improved. [7]

In addition, the interpretation of lawyer's identity in the *Act of Lawyer* also reflects the feasibility of lawyer's intervention. It is in line with the provisions of the *Act of Lawyer* that practitioners who have obtained the lawyer's practice license can accept entrustment or assign lawyers to provide legal assistance to the party involved. The introduction of lawyer intervention system to provide legal assistance to the investigated object in the process of supervision of detention will not hinder the investigation work from being carried out in an orderly manner according to law, and also meets the needs of the investigated object to get appropriate legal assistance.

### **3.3. The Hong Kong Independent Commission Against Corruption Provides Practical Conditions for Lawyers to Intervene in Supervision of Detention**

The establishment concept and terms of reference of the Hong Kong Independent Commission Against Corruption are very similar to those of our supervisory committee. They are both specialized anti-corruption institutions under the high-pressure situation of anti-corruption, and the related systems and power operation modes in Hong Kong can provide valuable reference and experience for supervision system of Chinese mainland.

According to Article 4 of the *Hong Kong Independent Commission Against Corruption (Handling of Detainees) Order*, detainees should have a reasonable opportunity to communicate with and discuss with their legal advisers, unless communication or discussion will unreasonably hinder or delay the relevant investigation or law enforcement. In order to fully protect the rights of the detainees, in addition to the provisions of the above laws, the ICAC should post the above rights in the form of "notice to detainees" in the ICAC office, and the list of "detainees, please pay attention" should be posted in the detainees' room, which lists the above rights enjoyed by the detainees in detail. In order to make China's supervision system develop continuously along the right track as soon as possible, as far as the lawyer intervention system in the investigation stage is concerned, we can learn from the relevant system in the Hong Kong ICAC that detainees can discuss and communicate with lawyers.

## **4. The Practical Path of Introducing Lawyer Intervention System at the Stage of Supervision of Detention**

From the perspective of the confrontation between the rights and powers of the detained person, it is in a weak position of relative disadvantage, so the role and value of lawyer intervention can not be underestimated. Based on the above analysis, the author then puts forward relevant legislative suggestions and improvement measures from the aspects of the identity, mode and time of lawyer's intervention in measures of supervision of detention in the *Supervision Law*.

### **4.1. Identity of Lawyer's Intervention in Supervision of Detention**

The identity of lawyer's intervention in the detention measures directly affects the degree of rights protection of the detained person. There are also two views on the orientation of lawyer's identity under such a circumstance:

The first view is that the right of lawyers should be defined as "the right of legal assistant" in the supervision and investigation procedures. [8] The author believes that this is a compromise made by scholars considering that it is difficult for lawyers to intervene in detention measures at present, but it cannot fundamentally solve the problem.

The second view is that the identity of lawyer's intervention in detention measures should be positioned as defenders. The new criminal judicial interpretation in 2012 not only greatly extended

the time limit for lawyers to participate in the trial, but also clearly defined their defense roles. This is a great progress for our law.

Based on this, the author agrees with the second view that the identity of lawyer's intervention in detention measures should be positioned as the identity of defenders. As a defender, a lawyer participates in the supervision procedure and has an independent defense status. In addition to exercising the rights that the detained person can exercise on his behalf, he should also enjoy the exclusive rights and obligations of the lawyer to ensure the effective defense.

#### **4.2. The Way Lawyers Intervene to Supervise the Detention Measures**

At present, the academic community has not yet reached a consensus on the way lawyers intervene in the supervision and investigation stage.

The first view believes that the provisions of the *Criminal Procedure Law* can be used for reference, allowing the investigated person to entrust a social lawyer to represent the criminal suspect during the period of supervision and detention. After being detained by the police or taking compulsory measures, the criminal suspect can choose a lawyer as the defender. This is their legitimate right and interest during criminal investigation. This view is consistent with the inherent consistency among laws.

The second view argues that, under the current conditions, supervisory organs at all levels can provide legal advice and appeal services for the respondents, and set up legal advisers or public lawyers. When conditions permit, the respondents can also hire social lawyers themselves. [9] This view is "temporary" to some extent, and it is intended to alleviate the lack of protection of the rights and interests of the respondents through the intervention of public lawyers.

Combining the two viewpoints of the academic circle, the author holds that during the period of supervision of detention, we can consider allowing social lawyers to intervene and taking the duty lawyer system as the overall protection. That is to say, on the one hand, drawing lessons from the provisions of the *Criminal Procedure Law* on defenders in the investigation stage, the respondents should be allowed to entrust social lawyers as their defenders. In the meantime, considering that if there is no social lawyer, the lawyer on duty provides legal advice for the investigated.

#### **4.3. The Time for Lawyers to Intervene the Supervision of Detention**

On the issue of lawyer's intervention time point, the academic circle mainly has the following views:

The first view believes that lawyers are allowed to intervene when the supervisory organ starts an investigation on the respondent. Some scholars even suggested that lawyers should be allowed to intervene at the beginning of the investigation by the supervisory organ, and lawyers should be allowed to provide legal assistance to the respondents at any time to avoid neglecting the protection of the rights and interests of the respondents. [10]

The second view argues that the time for lawyers to intervene should be counted from the date when the supervisory organ takes measures to detain the respondent. This practice can ensure that the supervisory organ can make an important first inquiry without the intervention of lawyers, and reduce the obstacles caused by lawyers in case investigation. This method is a compromise, which balances the interests of all parties.

However, the author deems that the second view ignores the right of defense of the respondent suspected of duty crime who has not yet met the detention conditions. We can learn from the relevant provisions of the *Criminal Procedure Law*. At this stage, the time point for lawyers to intervene is set as "the day when the supervisory organ makes the first inquiry to the respondent or takes detention measures against the respondent", and this system design has more obvious advantages.

## 5. Conclusion

This paper takes lawyer's intervention in detention measures as the breakthrough point, aiming at standardizing and supervising the detention holder's exercise of basic rights and safeguarding of power. By introducing the lawyer's intervention system, we aim to better understand the behavioral characteristics of the parties involved and the criminal proceedings they may face, so as to provide them with necessary legal support and effectively prevent the abuse of public power. We hope that in the process of deepening the reform of the supervision system, we can put the issue of lawyer's intervention during the period of detention on the agenda as soon as possible.

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