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我们不缺乏激情，也不缺乏思想，但我们缺乏证据。

—— 费孝通

We do not lack passion, nor do we lack the ability to reason, but we do lack evidence.

—— **Xiaotong Fei**

内容摘要

本书作为国内外首部对刑事辩护准入制度进行系统而深入研究的专著，第一次提出并清晰地界定了刑事辩护准入制度的概念，在从法理学、经济学和社会学等多个视角论证刑事辩护准入制度正当性基础上，对在中国建立刑事辩护准入制度的必要性与可行性进行了广泛、深入、扎实而有代表性的实证调查，提出了建立中国刑事辩护准入制度的基本构想、具体制度构建及其障碍性克服。

本专著由理论论证和实证研究两部分组成，共有九章。其中，理论论证部分由八章构成，分别是第一章刑事辩护准入制度概述、第二章刑事辩护准入制度之理论基础、第三章域外刑事辩护准入制度介评、第四章刑事辩护准入制度与有效辩护、第五章刑事辩护准入制度与刑事法律援助、第六章刑事辩护准入制度配套制度建设、第七章刑事辩护准入制度供需及成本收益分析和第八章中国刑事辩护准入制度构建；实证研究为第九章，系建立中国刑事辩护准入制度实证研究报告。

第一章刑事辩护准入制度概述，在学术界首次提出并界定了刑事辩护准入制度的概念，认为所谓刑事辩护准入制度，是指政府部门或者是受委托的行业组织，出于保护被追诉人辩护权有效实现的需要，依法对在刑事诉讼活动中提供刑事辩护法律服务的主体资格进行确认和批准，并对其进行监督和管理的各项规则的总称；对学术界和实务界有关刑事辩护准入制度的研究成果进行了总结与概括；介绍了本课题的主要研究方法和研究内容，指出本课题之研究，立足于中国社会发展与变革之实际，从中国司法制度的现实出发，密切结合国际社会通用规则，特别是中国已经签署批准的国际规则和已经签署、即将批准的国际规则，以扎实的实证研究为特色，同时运用比较分析、规范分析、历史分析和系统分析的方法，本着解决中国刑事辩护制度实际问题的思路，将课题研究的主要内容和核心问题集中于刑事辩护准入制度的正当性基础、刑事辩护的进入机制与退出机制以及与刑事辩护准入机制相关联的监督机制、惩戒机制、防范机制以及环境建设机制等。

第二章刑事辩护准入制度之理论基础，主要分别从法理学、经济学和社

会学三个视角论证了刑事辩护准入制度的正当性基础，提出实现正义与制约权力是刑事辩护准入制度的法理学基础，克服刑事辩护供求双方的有限理性、防止刑事辩护市场失灵、降低辩护成本和适应专业化分工是刑事辩护准入制度的经济学基础，实现刑事辩护职业专业化、确立辩护律师职业信任和明确辩护律师角色定位是刑事辩护准入制度的社会学基础。

第三章域外刑事辩护准入制度介评，从比较法的视角，阐述了域外若干国家和地区有关刑事辩护准入制度的历史沿革，论述了域外刑事辩护准入制度的主要特点和基本制度内容，重点介绍了日本、美国以及欧洲若干有代表性国家的刑事辩护准入制度及其配套制度，指出建立中国的刑事辩护准入制度，应当立足于中国现实，有条件、有选择地借鉴域外的相应制度规则。

第四章刑事辩护准入制度与有效辩护，论述了刑事辩护准入制度与有效辩护原则之间的关系，对中国立法与社会语境中关于辩护人角色定位的误区进行了全面反思，介绍了国际社会公认的辩护人角色定位，重新思考了中国辩护人角色定位，并评析了辩护人角色定位对刑事辩护准入制度规则构建、功能发挥以及制度运行的重要意义。同时，通过理性解读有效辩护原则内涵、综合考评无效辩护制度内容和主张建立中国有效辩护制度，阐述了刑事辩护准入制度与有效辩护功用互动。

第五章刑事辩护准入制度与刑事法律援助，以目前中国刑事法律援助制度的现状考察为始点，剖析了中国刑事法律援助制度的发展、存在问题及其原因，通过考察域外刑事法律援助制度建设的成功经验、回顾中国试图建立政府律师模式的探索之路，提出了完善中国刑事法律援助制度的基本思路，阐述了中国刑事辩护准入制度建立与刑事法律援助制度完善二者之间的内在逻辑关系，指出建立刑事辩护准入制度有助于刑事法律援助制度的完善，而刑事法律援助制度完善能促进刑事辩护准入制度的建立。

第六章刑事辩护准入制度配套制度建设，以系统论的方法研究与刑事辩护准入制度密切关联的配套制度建设。研究认为，与刑事辩护准入制度密切关联的配套制度至少包括辩护律师执业标准、辩护律师执业纪律规范和辩护律师教育制度。辩护律师执业标准既有实质性标准，又有程序性标准，前者是辩护律师的辩护行为是否帮助被追诉人获得了无罪、罪轻、从轻或者减轻处罚的实体结果，后者是在刑事诉讼程序中辩护律师是否认真地对待每一个程序并提出自己的意见以维护被追诉人的合法权益。辩护律师执业纪律规范是指辩护律师在进行刑事辩护时所应遵守的具体行为规则，包括执业行为规范和执业纪律。辩护律师教育制度既包括执业能力、执业经验、职业道德和

修养教育等内容的基本教育，也包括辩护律师学历、知识等方面的继续教育。

第七章刑事辩护准入制度供需及成本收益分析是本书的一大亮点。以跨学科研究方法，使用经济学分析中的两大工具——供求分析和成本收益分析的工具对在中国建立刑事辩护准入制度的必要性和经济性进行了分析论证。通过对刑事辩护市场中刑事辩护服务和刑事辩护准入制度的供给和需求情况分析，认为，刑事辩护准入制度的设立，能够使得刑事辩护市场的供给状况从现阶段低位的非常态均衡状态逐步过渡到常态的均衡状态；通过对刑事辩护准入制度相关主体及刑事辩护准入制度自身运行中涉及的成本、收益进行分析，认为，刑事辩护准入制度的建立，能够促使刑事辩护准入制度的供给者和需求者高度关注刑事辩护准入制度投入与产出比，合理利用资源，降低刑事辩护准入制度成本，实现制度运行的高效率。

第八章中国刑事辩护准入制度构建是本书的核心内容。该章从规范刑事辩护市场、提高刑事辩护专业化程度以及促进律师业的健康发展等方面论证了在中国建立刑事辩护准入制度的现实必要性，从政治环境、法治环境和市场供求环境等方面进一步论证了在中国建立刑事辩护准入制度具有的完全可行性，提出了在中国建立刑事辩护准入制度的基本构想：在中国现实国情允许的情况下，从死刑案件开始，分步骤、分阶段地设立刑事辩护准入门槛，同时设置相应的监督机制、惩戒机制和退出机制，且为刑事辩护准入制度的实施营造良好的制度环境。

第九章建立中国刑事辩护准入制度实证研究报告是本书最有特色、最有价值，也是最具说服力的部分。课题组斥资、费时、耗力，深入中国东部、西部、南部、北部、中部具有代表性的地域，在其各地的公安局、检察院、法院、律师事务所、监狱、看守所、国家机关、企事业单位、城镇街道办事处、农村、学校等不同单位，对于建立中国刑事辩护准入制度可能涉及其权利和利益的警察、检察官、法官、律师、被追诉人以及可以代表一般社会公众的社会各阶层人员，进行了广泛的问卷调查和个别访谈，运用科学的分析方法，得出了令人信服的实证研究结论，为本书的理论论证成果提供了翔实可靠的实证支撑，实现了理论研究和实证研究的有机结合。

Abstract

This book is the first monograph in or outside of China to perform in-depth and systematic research on systems of access to criminal defense. It is the first time that the idea of access to criminal defense has been discussed in a clear and defined manner. Using the perspectives of legal theory, economics and sociology to describe the reasonable prerequisites for systems of access to criminal defense, this book includes an extensive, reliable, and representative empirical survey on the necessity and feasibility of establishing a system of access to criminal defense in China, proposing a conceptual basis for establishing a system of access to criminal defense n China, the specifics of constructing such a system, potential obstacles, and manners in which to overcome those obstacles.

This monograph is composed of two major parts – a theoretical argument and empirical research – consisting of nine chapters in total. The theoretical argument consists of eight chapters. Respectively, chapter one is a summary of systems of access to criminal defense, chapter two discusses the theoretical basis for systems of access to criminal defense, chapter three introduces and evaluates foreign systems of access to criminal defense, chapter four covers systems of access to criminal defense and effective assistance of defense counsel, chapter five describes the interaction between systems of access to defense counsel and criminal legal aid systems, chapter six explains the establishment of accompanying systems related to systems of access to criminal defense, chapter seven conducts supply-demand and cost-benefit analyses, and chapter eight speaks to the issue of establishing a system of access to criminal defense in China. Chapter nine is composed of an empirical research study and an empirical argument regarding the establishment of a system of access to criminal defense in China.

Chapter One, Overview of Systems of Access to Criminal Defense, is the first time that the notion of systems of access to criminal defense has been not only raised but also clearly defined in academic circles. We posit that existing systems of

access to criminal defense are a set of regulatory mechanisms that allow government-run systems and systems that entrust this responsibility to professional organizations to control the qualification, assessment, management and oversight of individuals and groups who provide criminal legal defense services, in order to protect the right of accused persons to an effective defense. In this chapter, we summarize and describe the conclusions of research in academic and applied fields regarding systems of access to criminal defense, and introduce the principal methods and substance of our own research. Our research took place in the context of the development and transformation of society and the reality of the Chinese justice system, utilizes the methodologies of comparative analysis, regulatory analysis, historical analysis and systems analysis, and carefully integrates commonly used international legal instruments, especially those treaties that China has already signed and ratified and those that China has signed and is on the point of ratifying. In order to solve the real problems of China's criminal defense system, the main substance and issues raised in this book focus on the reasonable prerequisites for systems of access to criminal defense, mechanisms of qualification and disqualification from the practice of criminal defense, oversight mechanisms, sanctioning mechanisms, precautionary mechanisms and environmental efficiency mechanisms associated with access to criminal defense.

Chapter Two, Theoretical Bases for Systems of Access to Criminal Defense, is divided into analyses using the three perspectives of legal theory, economics, and sociology. These perspectives enable a description of the reasonable prerequisites for systems of access to criminal defense. From the standpoint of legal theory, practical justice and restricted rights are the conditions within which systems of access to justice must operate. Economically speaking, the prerequisites to implementing systems of access to criminal justice consist of overcoming the rational limitations of supply and demand of criminal defense, preventing the failure of the criminal defense market, reducing the costs of defense, and adapting to a specialized division of labor. From the sociological point of view, the specialization of the criminal defense profession, the establishment of the credibility of the criminal defense bar, and the clarifying the role and status of criminal defense attorneys must all underlie a system of access to criminal defense.

Chapter Three, Introduction and Evaluation of Foreign Systems of Access to

Criminal Defense, describes the historical development of systems of access to criminal defense in several foreign countries and regions from a comparative perspective. It also discusses the important characteristics and basic substance of foreign systems of access to criminal defense. The focal points of this chapter are introductions to the systems of access to criminal defense and related systems in Japan, the United States, and several representative European countries. This chapter argues that the establishment of a system of access to criminal defense in China should be based on China's current reality, conditions, and options, while learning from the examples of analogous foreign systems.

Chapter Four, Systems of Access to Criminal Defense and Effective Assistance of Counsel, discusses the relationship between systems of access to criminal defense and the principle of effective assistance to defense counsel, conducts a thorough examination of current misperceptions in China regarding the role and status of defenders in legislative and social contexts, describes the roles and status of defenders as recognized by the international community, rethinks the role and status of defenders in China, and evaluates the significance of the role and status of defenders with respect to the establishment of the system of access to criminal defense, the development of its functioning, and its general operation. At the same time, through a rational analysis of the essence of the principle of effective assistance of defense counsel, this chapter synthesizes and assesses standards of ineffective assistance of counsel and advocates the establishment in China of a system of effective assistance of defense counsel, setting forth the functional interactions between the system of access to criminal defense and effective defense.

Chapter Five, Systems of Access to Criminal Defense and Criminal Legal Aid, uses the current state of China's criminal legal aid system as a point of departure to analyze the development of the criminal legal aid system in China, its problems and their origins. Next, this chapter uses the research methods of problem-solving law to observe and study successful foreign experiences in establishing criminal legal aid systems, review China's attempts to establish a government attorney model, raises the prospect of improving China's criminal legal aid system, sets forth the intrinsic logical relationship between the two notions (of establishing a system of access to criminal defense in China and improving the system of criminal legal aid), discusses ways in which establishing a system of access to criminal

defense can assist in the improvement of the criminal legal aid system, and ways in which the improvement of the criminal legal aid system could serve to promote the establishment of a system of access to criminal defense.

Chapter Six, Building the Systems Related to the System of Access to Criminal Defense, researches systems closely related to the system of access to criminal defense using the methodology of systems theory. According to our study, systems related to the system of access to criminal defense in China include, at the least, professional standards, criteria for professional discipline, and educational systems for defense lawyers. Practice standards for defense lawyers include both substantive and procedural criteria. The former refers to whether or not the result obtained by the defendant with the assistance of defense counsel constitutes an improvement in his situation, such as a verdict of innocent、a diminution of the offense、a milder punishment or reduced sentence term, or not; The latter refers to whether a defense lawyer earnestly treats every aspect of procedure seriously, by putting forward his suggestions to safeguard the defendant's legitimate rights and interests, or not. Professional disciplinary criteria, including practice standards and discipline, refers to concrete rules of action that must be obeyed by a defense lawyer when he is handling a criminal case. The concept of an educational system for defense lawyers contains elements of basic education such as practice ability、practice experience、professional morality and ethical education, and also continuing education, which includes practical and theoretical continuing education, and so on.

Chapter Seven, Supply-Demand and Cost-Benefit Analyses of a System of Access to Criminal Defense, is a major highlight of this book. Using interdisciplinary research methods, making use of the two major tools of economic analysis – the tools of supply-demand analysis and cost-benefit analysis, we conduct an analytical argument regarding the necessity and economy of establishing a system of access to criminal defense in China. In analyzing the current state of supply of criminal defense services and the demand for access to those services in the criminal defense market, we have come to the conclusion that the establishment of a system of access to criminal defense could lead to a progressive increase in the supply of defense services, taking the system from the current imbalance of supply and demand, through a transition, to a state of market equilibrium. By analyzing

the costs and benefits to the relevant actors and the operations involved in the system of access to criminal defense, we have come to the conclusion that the establishment of a system of access to criminal defense can promote increased focus, by suppliers and demanders, on the ratio of yield to investment, can promote the rational use of resources, the reduction of the costs of the system, and can increase the system's efficiency.

Chapter Eight, Constructing a System of Access to Criminal Defense in China, constitutes the core of this book's contents. This chapter argues in favor of the establishment of a system of access to criminal defense because such a system will help to normalize the criminal defense market, increase the professionalism of criminal defense, and enhance the healthy development of the legal profession. From the political environment, the rule-of-law environment, and the situation of supply and demand in the market we go a step further and argue that establishing a system of access to criminal defense in China is completely feasible. We describe the basic form that a system of access to criminal defense would take in China: given the circumstances of the current situation in this country, we would establish a base level of access to criminal defense step-by-step, in a series of phases beginning with death penalty cases, while simultaneously establishing relevant oversight, sanctioning, and disqualification mechanisms for attorneys, and working to create a positive environment that is conducive to the development of the system of access to criminal defense.

Chapter Nine, Report on the Empirical Study on Establishing a System of Access to Criminal Defense in China, is the most unique, convincing, and most meritorious portion of this book. The research team spent a great deal of funding, time, and effort traveling to representative locations in the East, West, South, North, and Center of China, reaching Public Security Bureaus, Prosecutor's Offices, courts, law firms, prisons, detention centers, government offices, private and state-run institutions, neighborhood committees, the countryside, schools, and other work units all over the country. In this manner, we were able to conduct an extensive, questionnaire- and individualized interview-based survey of people of all social strata, including police, prosecutors, judges, lawyers, the accused, and representative members of the general public whose rights and interests might be affected by the establishment of a system of access to criminal

defense. We were then able to apply scientific methods of analysis, and obtained convincing empirical results. The full, accurate, and reliable empirical results supported the theoretical argument, creating an organic combination of theoretical and empirical research.

序　言

自2000年我在《法学论坛》第4期发表《建立刑事辩护专业资格的法律思考》一文至今，已经整10年。从刘桂明先生所谓的“律师中的学者”到“学者中的律师”，对建立中国刑事辩护准入制度的思考研究一直是我从未间断过的孜孜以求。我时常在想，尽管刑事辩护专业化早已进入法治发达国家的司法制度，律师垄断刑事辩护业务已经习以为常，但是，中国刑事诉讼法第32条依然允许人民团体或者犯罪嫌疑人、被告人所在单位推荐的人和犯罪嫌疑人、被告人的监护人、亲友作为辩护人。加之，不仅普通公民可以做辩护人，而且只要取得律师执业资格即可为所有案件的当事人出庭辩护，使得辩护质量不断下降，辩护率持续走低，辩护人地位日趋尴尬。我坚持认为，如同只有获得医师专业资格的人才能做医生一般，只有获得律师专业资格的人方能做辩护人。有鉴于此，我在《政法论坛》、《法学论坛》、《法学杂志》、《中国司法》、《中国律师》等期刊上发表了数篇关于建立刑事辩护专业资格的论文后，决定对该问题进行深入系统的研究，故于2008年申报了中国社会科学院重点课题并获批准立项。

本课题在我的主持下，从构思立项到课题成果完成历经三年多的时间。在这期间，发生了许多让人欣喜的事件：2008年6月1日起实行的新律师法赋予了辩护律师更多的权利。2008年5月21日，最高人民法院、司法部联合发布的《关于充分保障律师依法履行辩护职责确保死刑案件办理质量的若干规定》的第三条规定“法律援助机构在收到指定辩护通知书三日以内，指派具有刑事案件出庭辩护经验的律师担任死刑案件的辩护人”。虽然该规定略显粗略，却是在中国构建刑事辩护准入制度中迈出的一大步。2008年11月1—2日，由中国社会科学院法学所、国际司法桥梁与中国行为法学会律师执业行为研究会共同主办的“中国刑事辩护30年暨刑事辩护准入制度”国际研讨会在北京昆泰大酒店成功举办，本次研讨会对在中国建立刑事辩护准入制度的必要性和可行性、具体制度构想及其障碍性克服等重大问题进行了热烈而富有成效的讨论。与会专家对该制度构建的疑虑、甚至反对的声音，不仅使得我们对该问题的研究更加谨慎和全面，而且也益彰显出其

学术研究的价值。在此，我代表课题组对所有建言献策的学者和律师表示诚挚的感谢。

本书由两部分组成：第一部分是理论论证。该部分通过八大章节对刑事辩护准入制度的理论基础、配套制度建设、供需和成本收益等进行了系统分析，介绍了域外刑事辩护准入制度概况、刑事辩护准入制度配套制度建设，并在此基础上提出了在中国建立刑事辩护准入制度的基本构想。第二部分是实证研究。费孝通先生说："我们不缺乏激情，也不缺乏思想，但我们缺乏证据。"在本课题的研究中，我主张"不凭感觉判断，而是靠数据与事实说话"。2010年1月15日至3月6日，课题组就建立中国刑事辩护准入制度的必要性与可行性等问题，分别深入到北京、辽宁沈阳、河北石家庄、河北秦皇岛、河北廊坊、河北宣化、山东泰安、山东烟台、河南郑州、福建福州以及新疆库尔勒等中国北部、东部、中部、南部和西部的七大省、直辖市、自治区的十多个城市乡村，在其各地的公安局、检察院、法院、律师事务所、监狱、看守所、国家机关、企事业单位、城镇街道办事处、农村、学校等不同单位，对于建立中国刑事辩护准入制度可能有利益关系的警察、检察官、法官、律师、被追诉人以及可以代表一般社会公众的社会各阶层人员，分别进行了广泛的问卷调查和访谈。本次实证调查，在问卷的设计上，力图清晰而明确；调查地点和对象的选择上，力图广泛而典型；调查分析方法的运用上，力图严谨而先进；研究结论的形成上，力图详尽而客观。凝聚了课题组成员千里跋涉、走街串巷、挑灯夜战等辛苦和汗水的实证研究报告，为课题研究的理论论证提供了坚实的基础，而实证调查结论与理论研究成果的高度契合，无疑使课题相关制度构建的可行性有了令人信服的保障。在此，我代表课题组对提供帮助的公安局、检察院、法院、律师事务所、监狱、看守所、国家机关、企事业单位、城镇街道办事处、农村、学校等单位的相关人员表示由衷的谢意。

本课题系我指导我的研究生共同完成的。杨瑞清同学参与了本课题的部分内容撰写和文稿合成编辑，沙洪洲、刘晨琦、刘阳、李士涛、褚晓娇、刘妤俊、潘晓利、郑博、滕秀梅、曹翠瑶、师玮等同学和北京大学法学院的冀放同学参与了实证调查分析以及部分资料收集和部分内容撰写，王崇华、石善东、张达、李天昊、陈金涛等同学参加了部分地区的问卷调查，课题的策划、内容安排、结构布局、制度构建设想及部分内容撰写和统稿工作由我负责。中国社会科学出版社为本书的出版给予了很大帮助，在此一并致谢。

在金色的秋季，我应邀来到传说中"女娲补天"的"华夏文明摇篮"，