

A research of article 306 of the Criminal Law of PRC on whether the lawyer is eligible subject of legal perjury

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Исследование статьи 306 Уголовного кодекса КНР: может ли адвокат быть субъектом лжесвидетельствования в суде

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Abstract: *article 306 of Chinese Criminal Law (2015 version) known as the lawyer's perjury, is criticized as the legislative branch tailored for the lawyer group only. And in practice, the lawyer is investigated by the scout in discretion whose occupations are investigating crime in china by this article. This phenomenon has a serious impact on the development of the Chinese legal profession. In spite of discussion the question of implementing of this article in practice, this article is emphatically from the angle of the criminal crime in criminology, witness system, and contrastive analysis of the litigation system between China and the United States: whether the lawyer is eligible subject of legal perjury.*

Аннотация: *статья 306 Китайского Уголовного Права (2015 г.) известна как лжесвидетельство адвоката и подвергается критике как законодательная ветвь, которая создана именно для адвокатской группы. В Китае расследованием дел по этой статье занимается частный следователь. Такое явление оказывает серьезное влияние на развитие китайской юридической профессии. Несмотря на обсуждение вопроса о реализации данной статьи на практике, эта статья решительна с точки зрения уголовного преступления в криминалистике, системы свидетелей и сопоставительного анализа судебной системы между Китаем и Соединенными Штатами: может ли юрист быть предметом лжесвидетельствования в суде.*

Keywords: *the lawyer's perjury, subject of the crime, the litigation system.*

Ключевые слова: *дача ложных показаний адвоката, субъект преступления, система судебных разбирательств.*

The lawyer as an essential part of the legal profession community, on the one hand, play a valuable role in protecting the procedural rights of criminal suspect and defendant, and promoting the process of judicial justices in one nation, it can be say that the level of the lawyer development in one nation is the symbol of the standard of judiciary civilization ; on the other hand, lacking the protection of the rights and interests of lawyers on the legislation weaken the lawyers' function, for instants, the lawyer privilege and speech immunity in the court are vacancy no matter in the laws and the regulations in China. The reason is the short length development of the road of rule by law in China. Especially article 306 Amendment (IX) to the Criminal Law of the People's Republic of China (2015 version) (which will call Chinese Criminal Law (2015 version) for short in this paper) that remain reserved in last year *Chinese criminal law amendment*. This article is highly argued by Chinese scholar in theory and professor in practice, and the reason is not only the boundary of guilty is vogue but also the lawyer can easily become a suspect in the process of handling a criminal case, in particular the process of investing and checking evidence in the pretrial.

Most case have proved that article 306 become a tool for revenge lawyers by the prosecutor. But in the ninth amendment of *Chinese Criminal Law* (2015 version), article 306 is still preserved as it was first written in the

law in 1996. After the amendment of Chinese criminal law in 1996, China introduced the adversarial trial system from the common system, and abolished the inquisitorial system. Owing to this great reform of Chinese litigation system, the lawyer group develops very fast with Chinese government good policy to support the legal education. But one thing must be pointed out, the position of the lawyer in China is still very low although the speed of the construction of the lawyer is fast. There are many elements to this phenomenon, such as the weak protection of the laws and regulations, the wrong concept about the function of the lawyer among common people, the lower quality of lawyer in a whole, the state power is too strong and so on.

Can the lawyer be the subject of the eligibility subject of perjury Crime as the lawyer is not the witness? If the answer is positive, and the following is whether the prosecutor can be the subject as well.

1. Witness system

The article 48(a) of *Chinese Criminal Procedure Law* (2012 version) stipulates: All those who have information about a case shall have the duty to testify. Chinese apply the legal evidence system, and each type of evidence is listed in the *Criminal Procedure Law*. Only the evidence conform to the legal type can be presented in the court. Testimony of witness belongs to one of the eight legal evidences. In civil law litigation, the witnesses refer to the people who are not the two parties of the case, experience by sense organizations of under testified fact in the sue. They think that the witness only focuses the facts related the law and fact, and gives the statement only by the detection of five sense organs [1]. The witness refers to the one who gets the information of the fact outside the court, and, gives his statement in oral as what he knows to prove the essential fact in the courts. Witnesses and legal representatives, agents AD litem, defenders, appraisers and interpreters constitute other criminal lawsuit participants in the criminal proceedings according to *Chinese criminal law*. So the lawyer no matter the defense lawyer or the agents AD litem is not the category of witness in certain.

1.1 The analysis of Chinese witness system

Perjury crime refers to the behaviors of appraiser, the recorder, translator intentionally make false testimony, conceal or make up important plot relevant to the case. According to article 305 [2], it can be seen that not only the witness is the subject of perjury crime, such as appraiser, the recorder; translators may become the subject of perjury crime just because these people have convenient conditions to access to the evidence. The appraisal opinions belong to the one kind of legal evidences, but the recorder's records and the translator's translated documents do not belong to the statutory classification of criminal procedural law evidence in China. Regard these two kinds of people as the subject of the perjury, is considering the working characteristic of the recorder and translators. They have more opportunity to forge or damage evidence during their work, such as recording important plot which related the facts of the case untrue or forging or making false translation, etc. Those behaviors will affect the determination of the fact of the case by the judge, and also have similarity influence as the witness make false statements in the court at the same time. Especially in some felony crime, it can make the innocent people verdict by the judge unfairly and the true criminal escapes the punishment of law.

1.2 Chinese criminalization pattern

"The task of criminal law, namely, refers to the responsibility of criminal law to accomplish historical and realistic mission of combating and protection" [3]. Chinese criminal legislation is influenced deeply by former Soviet Union criminal law in thoughts and traditional ideas, and the principle of criminalization is legality, necessity, and feasibility. "Retribution and prevention are the two aspects of the ontology of the criminal law" [4]. Article 2 of *Chinese Criminal law* (2015 version) stipulates the basic task of the criminal law in our country: punishing crime and protecting human rights at the same time [5], which follows the modern trend of international criminal law and adds the human rights provisions into the code. Making sure of the right of defense of the criminal suspect, defendant in litigation is the presentation of protecting human rights, as well the defense right of the criminal suspect, defendant. Throughout the principle of setting of *Chinese criminal law*, the

pattern of quantitative about criminalization is defined as the legislation model. "Considering certain quantitative factors, apart from qualitative of antisocial behavior, and regulate the degree of social harm" [6]. From the view of social harmfulness degree, the establishment of lawyer's perjury is in accordance with the basic requirement of the crime in criminal law. Since Chinese reform and opening up police (in 1978), with the constantly development of domestic economy and the improvement of national legal system, the nature of the lawyer transform from state civil servants to the common party in market-oriented economy. That's to say that the nature of the lawyer has changed from possessing power to the one who should be regulated by the state. The concept of defense and the mandatory is not change yet but the impelling change from the duty of one's job to the defense cost which is paid by the mandator. Charge mechanism of the lawyer is related with the final verdict of the court. In order to win the lawsuit or gain the reputation, some lawyers take advantage of the convenient conditions in the litigation to entice their mandators to forge some important plots, conceal the fact, coerce or entice the witness to give false statement in the court, which seriously violate the lawyers' professional ethics, obstruct judicial justice and affect the normal procedure progress at the same time. And it has caused bad influence in society, which provides a due reason for the criminalization of such behaviors. "When adding a behavior into criminal law, there are two reason given by Chinese legislature basically: one is that the lawyer has certain privilege according to criminal lawsuit activity, and enjoy the rights of which other citizens do not have; Second is that the lawyers are all law professors, if they are motivated by interests or other elements, they would be easier to violate the law" [7]. Just as the old saying: there is no such a right which is not attached by the obligation, and so as the obligation. It is rational that the criminal law draws such a boundary for the lawyer considering the privilege the lawyer has.

2. The objective analysis of article 306 of *Chinese Criminal Law* (2015 version)

Witnesses have irreplaceability position and priority right in the criminal law, the same lawsuit participates cannot be witness, the defender and agent AD litem at the meantime, and these positions exclude each other, that's to say one only can be one of the three participates in a litigation. And the defenders and agents AD litem do not belong to the category of witness, and if a person know some information about the case, he need be the witness first, because it is a compulsive obligation for citizen to help his country to punish criminal or there he should take responsibility for the adverse consequences in law. Since witness cannot be the defenders or agents AD litem at same time, the subject of the article 305 cannot contain the defenders or agents AD litem, so does it accurate of article 306 of *Chinese Criminal Law* (2015 version), which stipulate: If, in criminal proceedings, a defender or agent ad litem destroys or forges evidence, helps any of the parties destroy or forge evidence, or coerces the witness or entices him into changing his testimony in defiance of the facts or give false testimony, he shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention; if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years. It is short for lawyer's perjury. And the question is that does the lawyer can constitute the eligibility subject of perjury crime?

This article causes academic controversy for a long time for many criticisms. The reason is that this crime defines the subject of the component elements of crime only as the defenders and agents AD litem, and in practice, the defenders and agents AD litem are always practicing lawyer, which is to say this crime customize for the lawyer group only. So this crime is also considered as true identity crime [8], only defenders and agents AD litem can be the subject of the crime. The subjects of article 305 of *Chinese criminal law* (2015 version), the perjury crime are the witness, appraiser, recorder, translator, which are not contain the defenders and agents AD litem. Article 306 is the special terms of article 305, which stipulate some particular behaviors of article 305, usually are the circumstance of lighter or heavier punishment of the common article. This is a common phenomenon in the legislation tradition of Chinese criminal law, such as crime of intentional injury and its

special term intentional injury which causes death and the later punishment is much heavier than the former in maximum punishment. The special term shows the determination and intensity of cracking down serious crime of Chinese government, and article 306 belongs to this situation. Some theorists propose that: the defenders and agents AD litem are not witness, whether they can be the eligibility subject of this crime? To analysis this problem in detail, should begin at the objective aspect of crime constitution, mainly includes three aspects:

2.1 To destroy or forge evidence

The defender and AD litem implement the behavior of destroying or forging evidence, they, themselves commit crimes, though they are not witness and cannot testify in the court just like a witness, they can take advantage of the convenient condition to destroy or forge evidence. Making forged evidences present in the court, or destroying some important evidence can also achieve the goal of helping the guilty person escape the law, or making the innocent people be investigated by law. That is to say, the behavior of destroying or forging evidence by the defender and AD litem bring the same consequence as the same perjury behavior of witness, appraiser, recorder, translators, this behavior has similarity influence to find or verify the evidence which is the key to the criminal case.

2.2 To help any of the parties destroy or forge evidence

The parties in one criminal case make oral presentations related to the fact which belong to the victim statement or the criminal suspect or defendant confession and defense. Because the parties are not eye witness and the statements of the parties belong to the other type of the legal evidence according to Chinese criminal procedural law rather than witness testimony. The type of the evidence differs from the different subject, such the statement which gives by witness called testimony, and the victim called victim statement and so on. The reason of this difference is Chinese criminal evidence system. Due to the verdict which has a close concern with the parties involved, the desire of the two parties to win the litigation is much stronger than any other participants in the criminal procedural. Even the parties want to spare no effort to win the case, but lacking of professional legal knowledge make the parties relied on their the defenders and agents AD litem intensely, who have the great possibility to help any of the parties to destroy, forge evidence for the benefit of their mandators to achieve the aim of win the lawsuit. "Defenders and agents AD litem are equipped with professional legal knowledge, proficient in judicial proceedings, and debating skills" [9]. And this kind of behavior not only hamper the enforcement of Chinese evidence system, at the same time it also brings serious damage to the judicial justice, more detrimental to the legal profession ethics and the lawyer's practice environment. Other countries also regard these behavior as crimes in the criminal legislation, but the criminal subject is not limited to attorney, includes the scout and prosecutor as well [10]. Nearly all kinds of Chinese perjury behaviors of lawyer can be found in the foreign legislative cases corresponding provisions; even to criticism behavior of "coerce or entice"

Under this circumstance, the parties who implement the action of destroying or forging evidence in fact, while the defenders and agents AD litem only have the assistant function objectively can belong to accessory crime according to the criminal law theory. General provisions of *Chinese criminal law* have special stipulation about accessory crime. If these behaviors of different criminal constitute of a joint crime, and they will be given a certain criminal punishment according to their role in a joint crime. The parties can be punished in accordance with the article 305-perjury, and defenders and agents AD litem can be sued according to article 306-lawyer's perjury. Some behavior is punished by different article because of the different identities of the subject.

2.3 To coerce the witness or entice him into changing his testimony in defiance of the facts or give false testimony

Giving statements which relate the fact of the case in the court, is legal obligation of the witness, and belongs to the category of the testimony of witnesses. In the behavior of coercing, enticement witness to change their testimony, the witness only acts as a tool and his will is independent at all. Although the witness carries out the intention of the defender, agent ad litem by misleading by others, he himself is the person who implements crime

in the criminal case. Regardless of whether the witness has *mens rea*, as long as the witness implements the *actus reus* of changing testimony or perjury that will hinder the discovery of the truth by the judge, or even infringe citizens' rights objectively. According to article 305 of the Chinese criminal law (2015 version), the witness, appraiser, recorder, translator give perjury or effect the fact finding of the judge deliberately, for which it constitutes perjury as such. If the witness was coerced or enticed by the defenders and agents *AD litem*, which should belong to this situation that the defenders and agents *AD litem* use the people who have purpose or not but possess a certain identity to commit this crime that belongs to the indirect-crime stipulated in Chinese criminal law. Since the recorder, the translator can become the subject of perjury, the defenders and agents *AD litem* can also be the eligibility subject of perjury of lawyer in the same way.

3. The rationality of the lawyer's perjury

Chinese criminal lawsuit adheres to the principle of "the defendant and prosecutor are equal, the judge maintains neutrality", the procuratorial organization are on behalf of the state to prosecute crime, and the evidence which can prove the criminal suspect guilty are obtained by the scout, then transferred to the procuratorial organization, and the prosecutor presents the evidence in the court, including the main records of the witness and the victim statement, the suspect or defendant confession or defend, etc. Performance appraising system of procuratorial organization is based on the ratio of prosecution rate to conviction rate. Compared with pursuing pecuniary benefit of the defenders and agents *AD litem*, the prosecutor is more likely to coerce or entice the witness into changing testimony in defiance of the facts or give false testimony for the sake of the ratio of conviction by the judge. In practice, most wrongful convictions cause by the scout organization.

To maintain the social stability is always the target of the administrative system and the judicial system in China. When a serious crime happened in a place, the first task of the scout (police) is to find criminal of the crime to avoid society panic. In order to pursue rapid detection and verdict of the serious criminal case, the scout organization maybe torture the criminal suspect or defendant, force them to make false confession or fake statement [11]. So it is possible for the prosecutor and the scout to use these kinds of similar behaviors, and should the prosecutor and scout be the subject of lawyer's perjury according to article 306 of *Chinese criminal law* (2015 version)? This is one of the reasons that the academic professors criticize this crime. The prosecutor as the legal professional community members as well, why does this article only stipulate the lawyer as the subject of this crime, and exclude of the scout and prosecutor? Is it fair for the lawyer community?

3.1 Analysis from the subject of the behavior of this crime

The procurators belong to procuratorial organizations, who exercise their litigation rights on behalf of the state power, and the prosecutors are civil servants, which belong to state personnel in Chinese criminal law. If similar behaviors occur that the article 306 stipulated, the procurators will be punished in accordance with the relevant article of ninth chapter legal malpractice of *Chinese criminal law* (2015 version), instead of article 306. And malfeasance has the same legal sentence with article 306, which embodies the rationality of criminal law. What must be marked is that China has different prosecution system with the United States. People know that in China the scout is the police or the prosecutor, and the police belong to the administrative institution. But the United States implements the separation of powers; judicial system and administrative system are independent with each other. The prosecutors in the United States belong to the judicial system; the hired lawyer by the prosecutor is responsible for accusation instead of the prosecutor. The charged lawyer and the defense lawyers have equal status in the lawsuit. If the hired lawyer of the prosecutor destroys or forge evidence to win a lawsuit, and the hired lawyer shall be punished by criminal law as the defense lawyer.

3.2 The influence of this crime in practice

The highly discussion of this crime in theory and practice mainly because higher professional risk of this article bring to the lawyer group, and even affect the long-term development of the criminal defense system. And

in practice, the defenders and agents AD litem are sued by article 306, the phenomenon of high charges rate and a low rate of verdict make the charges that become the tool of revenge by procuratorial organization for the lawyer in fact. In the lawsuit, the prosecutor and the defender stand in the opposite position, the responsibility of a defender shall be present, according to the facts and law, materials and opinions proving the innocence of the criminal suspect or defendant, the pettiness of his crime(罪轻)and the need for a mitigated punishment or exemption from criminal responsibility, thus safeguarding the lawful rights and interests of the criminal suspect or the defendant[10].And the opposite position of the two parties, it is easier for the prosecutor to form resentment about the defender in the lawsuit. If the witness changes his testimony after meeting the lawyer, the prosecutors ascribe the reason to the lawyer that who may coerce or entice the witness, then prosecute the defense lawyer by 306. According to a set of data, most prosecution were acquitted, only a small fraction be convicted and punished in the end, which can prove what we have discuss above.

Due to the ambiguity of legal provision, such as "entice", the specific meaning of this character related judicial interpretation which is still not very clear, such as the famous case of Zhuang Li [13], the defendant Gangmo Gong consider the meaning of body langue of blinking one's eyes is to make confession to the police. The human body movement is various; the same body movement may have different interpretations to different people. It has to admit that the word " entice " is difficult to identify no matter the scope and the meaning in practice, considering the occupation, knowledge background, living environment of criminals are different, and the capacity level of understanding the words of the defenders and agents AD litem will have diversity different, some even appear deviation to decided. This is the reason why law professionals and scholar have so many comments on this article.

Conclusion

In General, while other countries, such as Italy, Japan, Germany, etc., the conduct of the lawyer's perjury is also criminalization in the criminal law, but basically the rights of the defense lawyers relatively broad, apart from the lawyer have the right of free speech in the court, and the speech is immune the state grace, the lawyer also have the right to meet their mandators in a free way, they can check the evidence without monitoring of the police, so it's hard for the judge to verdict the lawyer in the name of perjury, which is relatively reasonable for the development of the rule of law. The article 306 of *Chinese criminal law* is too generalized, and the vague language is easily to cause ambiguity, which lead to the fact that the defense lawyer is easily to be accused by this article in practice, and the attempt to prove the innocent of the defense lawyer is extraordinarily difficult, which make the occupational environment of the defense lawyer behavior is too harsh. In the concept of striking the criminal crime legislation, Chinese judicial activity pay more attention to maintain social stability, to a certain extent, it ignores the important of protecting the lawyer's rights. And lawyers representing the interests of the criminal suspect or defendant, in a certain extent, the article 306 of *Chinese criminal law* also infringes the interests of the criminal suspect or defendant.

References

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less than three years but not more than seven years.

3. *Mingxuan Gao*. The Principles of Criminal Law. Beijing: China Renmin University Press, 2005. Pp. 97.
4. *Xingliang Chen*. Philosophy of Criminal Law. Beijing: China University of Political Science and Law Press, 2009. Pp. 419.
5. Article 305 of *Chinese criminal law* stipulates: Article 2 The aim of the Criminal Law of the People's Republic of China is to use criminal punishments to fight against all criminal acts in order to safeguard security of the State, to defend the State power of the people's democratic dictatorship and the socialist system, to protect property owned by the State, and property collectively owned by the working people and property privately owned by citizens, to protect citizens' rights of the person and their democratic and other rights, to maintain public and economic order, and to ensure the smooth progress of socialist construction.
6. *Zhanguo Sun*. Research on the Basic Problems of Criminalization. Beijing: China Legal Publishing House, 2013. Pp. 138.
7. *Qiulan Chen*. A Topic that has to be said: The Lawyer Perjury. Journal of R & D Management, 2000. Pp. 67-71.
8. Identity crime: real status crime refers to the special identity as a main body important document, if not, it is impossible to set up the crime of special identity.
9. *Yongzhong Gu*. International Standard and the Practice of China. Beijing: Peking University Press, 2012. Pp. 69.
10. Such as Germany, Japan, Russia and other countries have some regulations to this behavior, such as article 303 of *the penal code of Russia* stipulate: the inspector, scout, the prosecutor or defender give perjury in the criminal case, he shall be sentenced to deprive of liberty not more than three years, and deprive of the right of taking a certain position or practicing in some kinds of action not more than three years.
11. In Chinese investigation proceeding, due to all kinds of reasons, such as the underdeveloped scout skill, police are all emphasis on the suspect, the defendant statement and confession, which meet to Chinese traditional investigation habit.
12. 'People Republic of China – criminal law' (2012 version), Article 35.
13. Zhuang Li case (2009) is the most famous case about the defense lawyer is accused by the article 306 of Chinese criminal law (2015 version), just because when he met his mandatory (Gangmo Gong), he blink his eyes to Gangmo Gong, and then Gangmo Gong changed his statement. The prosecutor attributed to the lawyer blinking his eyes, and the difficult is whether the behavior of blinking ones eye can ascribe to entice.