

# A CASE FOR THE DEFENSE

BY TOM KELLOGG

Article 306 of China's criminal code is a major obstacle to effective criminal defense, Tom Kellogg writes. It is time to re-explore the possibility of eliminating this provision altogether.

Pan Ling (not his real name) suffered greatly during the Cultural Revolution, enduring struggle sessions and living through years in a Reeducation Through Labor camp. He even survived on his own in the wilderness for several months, hiding from his pursuers and foraging what food he could. Pan's broad face, hidden partially by a thick swath of long grayish hair, contorts in pain at the memory of those years, and his voice is full of anger as he recounts the experience.

Stories like Pan Ling's are common enough among those who came of age during the Cultural Revolution; some suffered a bit more, some a bit less, but most have stories to tell. The Cultural Revolution generation, forever marked by this common experience, nonetheless followed a diverse range of paths that opened up in Deng Xiaoping's China: some took advantage of the newly-liberalized economy to seek fortune, others made their way to the universities that had been closed to them when they first came of age and took up subjects that had been forbidden for decades. A small handful, perhaps still radicalized by the rhetoric of their younger days, became political dissidents, pushing for reform, democratization and human rights, fighting the government and sometimes among themselves. Perhaps the majority merely welcomed the return to normalcy and general stability, found jobs, raised families and tried to forget about the horrors of that time.

Pan Ling did none of these things. Although he did well financially, he could not be counted among the truly rich of China's new economy. And while he was by no means a dissident, he did not divorce himself from the larger questions of China's future. When the Cultural Revolution finally ended and the Gang of Four was purged from the scene, friends who remembered Pan's suffering and his unwillingness to betray others asked him if he'd like to take a government post of his choosing in his hometown, the provincial capital. The offer had much to recommend it: there was the promise of stability, of a modicum of power and influence,

and perhaps an opportunity for Pan, then still relatively young, to rise through the ranks.

Instead, Pan Ling chose to go into private law practice, an unusual choice in the early 1980s. The legal profession had all but withered away over the three decades since Liberation, and despite all of the changes promised by Deng Xiaoping in his early days in power, there was no way to be sure that those who gambled on Deng's words would not end up deeply regretting it if the conservatives surged to power once again. But Pan wanted to be able to help society without getting too deeply involved with the Communist Party, in which he had lost all trust as a result of his experience during the Cultural Revolution.

Now, midway through China's third decade of reform, Pan Ling's choice seems far-sighted as Chinese society becomes increasingly legalistic and top leaders in Beijing tout the rule of law as one of the nation's key goals. Pan has certainly benefited from the meteoric rise of his chosen profession: a stream of would-be clients made their way to his somewhat messy but reasonably well-appointed office during our two-hour talk, and a handful of the young lawyers who work for him occasionally poked their heads in to ask a question or shake hands with the foreign guest.

Although he has done well in law, Pan Ling's choice of some twenty-five years ago has not been without its hazards. The most serious challenge he has faced began roughly four years ago, when in the course of representing a client Pan was falsely charged with violating Article 306 of the criminal code. In Article 306, which outlaws the manipulation or destruction of evidence by lawyers in the course of defending a client in a criminal case, Pan had fallen victim to one of the most often-abused provisions of the criminal law, and he once again faced the prospect of needless persecution at the hands of the Chinese government.

Added to the criminal code during the revision that went into effect in 1997, Article 306 reads as follows:

**Article 306** If, in criminal proceedings, a defender or law agent destroys or forges evidence, helps any of the parties destroy or forge evidence, or coerces the witness or lures 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.

Where a witness's testimony or other evidence provided, shown or quoted by a defender or legal agent is inconsistent with the facts but is not forged intentionally, it shall not be regarded as forgery of evidence.

The most easily manipulated provision of Article 306 is its provision barring a lawyer from "enticing a witness into changing his testimony in defiance of the facts or give false testimony." Because the lawyer's role in coaching clients before they give testimony before the court is often not fully appreciated or well understood by many government officials, what is taken as normal preparation of a witness in most countries can be seen by Chinese officials as "luring a witness to change his testimony," and thus a violation of Article 306.

Any suggestion that a witness make even the slightest or most inconsequential change to his testimony can lead to problems. In one case, when a lawyer suggested that a witness make a small stylistic change in his written affidavit, he was taken in and held by the Public Security Bureau for nine days before being released.<sup>1</sup> Especially in politically sensitive cases, the vagueness of the term "luring" may help PSB officials render a defense attorney ineffective through intimidation or the threat of incarceration, even without evidence of wrongdoing. Because the attorney knows that the authorities are watching him closely, and because he knows that they have Article 306 at their disposal, he may decide to do less for his client than he otherwise might, for fear of crossing the Procuratorate and the consequences that may follow.

The chilling effect of Article 306 is particularly troubling in the context of an investigative environment in which coerced confessions are all too common and torture is not unheard of. Even if a lawyer suspects that testimony was extracted by illegal means and is false, he or she may be unwilling to question it if any resulting alteration might render the lawyer culpable under Article 306.

In addition to being vague, Article 306 is also duplicative. The actual crime that Article 306 guards against, tampering with evidence or witness testimony, is covered by Article 307. As a result, Article 306, which is both too broad by virtue of its vagueness and too narrow by virtue of its application only to lawyers, is both redundant and dangerously susceptible to abuse. Given the blanket coverage under Article 307, eliminating Article 306 from the criminal code would have no effect on the state's ability to prosecute legitimate cases of evidence tampering or encouraging perjury. Removing the provision would also reduce concern over systemic discrimination voiced by some members of the Bar, who object to Article 306's departure from the principle of general applicability.

Article 306 also contributes to the imbalance in the Chinese justice system between the prosecution and the defense. In order for the criminal justice process to work properly, the myriad advantages that the state has over the individual should be minimized to create a level playing field that will

allow the accused to receive a fair trial. Article 306, instead of minimizing these differences, exacerbates the problem by giving an extra legal tool to the prosecution, one that, instead of targeting the accused, targets his or her lawyer.

The government's unwillingness to part with this tool may be related to a fundamental misunderstanding among Chinese government officials about the crucial role of the criminal defense attorney in the criminal prosecution process. According to one prominent criminal law expert, many in the Public Security Bureau and the Procuratorate see the defense attorney as at best a barrier to punishing criminals, and at worst as a co-conspirator with the accused.<sup>2</sup>

In short, Article 306 is symptomatic of a fundamental misunderstanding of the relationship between the prosecution and the defense. As another scholar has noted, "the prosecutor and the defense are not life-and-death enemies. . . . Article 306 changes a relationship that should be based on equality and reciprocity and makes it into something much more imbalanced."<sup>3</sup> There are many other signs of this imbalance, some of them almost comical. For example, some courtrooms have lower chairs for the defense attorneys, so that the prosecution literally looks down upon them; in others, only the defense rises when the judge enters, while the prosecution remains seated. After repeated complaints from Bar associations across China, the government has begun to address some of these inequalities. Article 306 is of course a much more serious institutionalization of this dynamic – one which, in the words of one expert, accomplishes its goals by weakening the defense Bar rather than strengthening the Procuratorate.<sup>4</sup> For that reason, action on Article 306 would provide both practical and symbolic relief to this situation.

Western legal systems recognize that although defense lawyers and the prosecution are not enemies, their relationship is oppositional and often must be adversarial in order for the accused to get a fair hearing. A Chinese attorney, himself targeted by the Procuratorate for his vigorous defense of a corruption case in Guilin, pointed out that this relationship is also increasingly recognized among members of the Chinese public. "The vision that common folk have of a lawyer is of someone who will stand up in court and 'take on' the prosecutor and the judge. This word 'take on' is hard to define, but to talk a bit more specifically, it means challenging the evidence, vigorously debating, or protesting unjust decisions." This vigorous contestation is crucial to the legal process: "If you don't have a lawyer who is willing to take on the other side, then you won't be able to achieve civil justice," this lawyer noted.<sup>5</sup>

China's Procuratorate, on the other hand, still sees this adversarial relationship as an indication of the defense lawyer's complicity in the illegal acts of the accused. "Because I was a defense attorney (in a sensitive case), I of course became *persona non grata* as far as the Procuratorate was concerned," one lawyer remarked, reflecting on his own troubles. As the case went on, members of the Procuratorate made threatening statements about him in public, and one prosecutor told a group of journalists that he was "messing up" the government's case.<sup>6</sup>

Such stories are well known among practicing attorneys in China. In part because of the implied threat of Article 306, many lawyers are unwilling to take on criminal defense cases, preferring instead to stick with other areas of law that pose less of a risk. “No one wants to do it (criminal defense work),” one expert remarked. “It’s too dangerous.”<sup>7</sup> Yet the need for criminal defense lawyers is acute: one law professor estimated that a full 70 percent of criminal prosecutions take place without any defense counsel whatsoever.<sup>8</sup> Other factors contribute to the dearth of attorneys specializing in criminal defense work; as in many jurisdictions around the world, criminal defense work pays less and carries less prestige than other fields of law. These social factors make the removal of Article 306 all the more pressing.

One of the more well known cases of abuse of Article 306 is that of Liu Jian, a lawyer in Jiangsu province.<sup>9</sup> While working for the Southeastern law firm in Nanjing in 1998, Liu Jian,

though many of the changes cited by the prosecution were minor and did not exculpate the defendant, Li Zheng. For example, one witness changed the language of his affidavit slightly from the original, in which he stated that he had paid Li Zheng a bribe of 10,000 yuan “in order to be transferred and promoted,” to a new version in which he stated that the money was used “to buy cigarettes, alcohol and new suits for Li Zheng.” Another witness made a similar change, citing the reason for a 2,000 yuan payment to Li not as “a thank-you to Li Zheng for his help in dealing with funds for a bulldozer” but rather “to buy cigarettes and alcohol for Li Zheng to celebrate the New Year.”<sup>10</sup>

The Procuratorate seemed to think that it was enough that the witnesses’ testimony had changed, and that Liu was involved in the changes. In the eyes of the Procuratorate, these changes and others were evidence of Liu Jian’s “intentional” effort to change the outcome of the case through testimony he



A public execution in Beijing in 1999. How many of these men had an adequate defense? Photo: Sinopix.

then only 29, took on a bribery case in remote Binhai township, a full two hundred miles from Nanjing, defending a man named Li Zheng. The circumstances under which Liu was arrested were particularly dramatic, and illustrate the chilling effect that Article 306 can have, especially as used by the PSB: Liu was taken into custody by the PSB immediately after the court hearing recessed, and three days later the Procuratorate approved his arrest.

The central thrust of the Procuratorate’s case against Liu Jian was that a handful of witnesses had changed their testimony, and that all of them had been “enticed” by Liu into doing so. The Procuratorate decided to press charges even

knew to be false. Other factors that arguably played more of a role in the witnesses’ decision to change their testimony, including emotional appeals for help from Li Zheng’s wife and family, were not deemed relevant.

Defense lawyers for Liu Jian pointed out that each of the witnesses themselves had final say on their own testimony, and that they and not Liu should be held responsible for any inaccuracies. Liu Jian was admittedly guilty of asking “leading” questions in the hope of shaping the testimony of some of the witnesses set to testify against his client. Crucially, however, he did not attempt to convince the witnesses to retract their testimony, nor did he apply any pressure to the witnesses in pur-

suit of the changes that were made. His suggestions for changing the testimony were apparently geared toward getting the court to see the payments made to Li Zheng in a softer light, as typical of the gifts and favors that Chinese businessmen bestow on each other as they attempt to curry favor with one another. These suggestions may have been ill-advised, but given that they did not change the nature of the case, Liu Jian's behavior did not, in the eyes of most legal professionals, rise to the level of criminal activity.

Public interest in Liu Jian's case was intense: his trial was held in the large conference room of a local hotel, with over five hundred people watching the proceedings. Province-level Procuratorate officials, officials from the provincial High People's Court and representatives of the Jiangsu province lawyer's association all made the trip to Binhai, and the hall was filled to capacity. As a further indication of the legal profession's extreme concern over the case, Liu was represented by some of the most prominent lawyers in Jiangsu. Liu's own words spoke to the strangeness of his predicament that day in court: "Three months ago, I was sitting in the defense attorney's chair," Liu remarked toward the end of his trial. "Three months later, I'm standing in the dock. This is a cruel reality."<sup>11</sup>

Despite the vigorous and high-profile defense on his behalf, and despite the fact that his actions would not, in most jurisdictions outside China, be considered illegal, Liu Jian decided to confess his "crime." By pleading guilty he received the relatively light sentence of time served, a total of five months in jail, but his conviction meant that he was no longer eligible to practice law. Even if the harsh treatment Liu had received at the hands of the Procuratorate had not discouraged him from continuing in criminal defense work, he would no longer be allowed to do so.<sup>12</sup>

For Pan Ling, at least, the nightmare of his Article 306 case is now over. Determined to put it behind him, he politely declines to discuss the details, but his bitterness over this latest injury is evident. "The Communist Party hates me," he said, trying unsuccessfully to pass the remark off as a joke. Despite his troubles, Pan continues to practice law, and also continues to do criminal defense work. "If you're going to be a lawyer, you should do this kind of work," he declared, noting his own feeling of social responsibility. But he understood the hesitation that a young lawyer might feel over getting into criminal defense. "Article 306 makes lawyers uncomfortable," Pan said. "The problem is that the PSB and the courts need to play by the same rules as we do."

The leadership in Beijing pays constant lip service to the virtues of the rule of law, but has refused to purge a provision that makes it all but impossible for defense lawyers such as Pan Ling to effectively fulfill their roles in the legal process. The scope of the problem is not fully known: one lawyer estimated that perhaps as many as 150 lawyers have been prosecuted under Article 306, with an unknown number influenced in one way or another by the threat or potential threat of prosecution. Others put the number of lawyers prosecuted at over 400.<sup>13</sup>

The current debate over elimination of Article 306 pits the powerful Public Security Bureau and the Procuratorate

against practicing attorneys and much of the academic legal community. But in spite of a marked disadvantage in political influence, those in favor of reform have made some progress. During the drafting of Article 306, lobbying by the All-China Lawyers' Federation was instrumental in bringing about the addition of the second clause, which provides an element of protection by exempting unintentional violations from prosecution.<sup>14</sup>

In May 2000, the National People's Congress debated a resolution to repeal Article 306.<sup>15</sup> Introduced by Zhang Yan, an NPC representative from Shaanxi Province, the resolution stated that removal of Article 306 would "improve our country's criminal procedure system and civil procedure system, advance the rule of law, and advance the progress of the construction of a socialist country ruled by law." Although this initial attempt at reform failed, it generated discussion among the delegates on the problems associated with Article 306, and could serve as a platform for future efforts.

Given the considerable barriers that defense lawyers routinely face in carrying out their work, including limited access to state-collected evidence, intimidation of witnesses by state authorities, and even restricted access to their own clients, repeal of Article 306 is by no means a panacea. But while striking Article 306 from the books would hardly remove the disparity between criminal defense lawyers and prosecutors, it would nonetheless serve as a welcome signal that the central government is in fact willing to take steps to level the playing field. That in itself would make removal of Article 306 a major step forward for the rule of law in China.

1. Wang Li, *Lu shi xingshi zeren bijiao yanjiu* (Comparative studies on the lawyer's criminal liability), Legal Publishing House, 2002, p. 101.
2. Interview with Mainland Chinese legal expert. This article is based in part on a series of interviews carried out over the course of several weeks with legal practitioners and academic experts. Their names have been withheld in order to preserve their anonymity. Although all of the interviews are cited in similar fashion (specifically "Mainland Chinese legal expert"), the citations refer to a number of conversations with different individuals.
3. Wang Li, *supra* note 1, p. 103.
4. *Ibid.*, p. 104.
5. Wang Haiyun, "Qiyuan kuyu hua xingbian," (Bitter words about criminal defense), *Chinese Lawyer*, November 2000, p. 45.
6. *Ibid.*, p. 45-6.
7. Interview with Mainland Chinese legal expert.
8. Interview with Mainland Chinese legal expert.
9. Xi Bin and Dan Cungang, "Lu shi 'weizheng' chongji bo," (The lawyer's "false evidence" tidal wave), *Minzhu yu fazhi*, (Democracy and Law), issue no. 21, November 6, 1998, p. 20.
10. Chi Jian, "Bianhu de dai jia," (The Price of Defense), *Minzhu yu fazhi*, (Democracy and Law), issue no. 22, November 21, 1998, p. 8.
11. *Ibid.*, p. 9.
12. Elisabeth Rosenthal, "In China's Legal Evolution, The Lawyers Are Handcuffed," *New York Times*, January 6, 2000, p. A1.
13. Interview with Mainland Chinese legal experts.
14. Wang Li, *supra* note 3, p. 95-6.
15. "30 wei renda daibiao tichu yian: xiaomie xingfa di 306 tiao," (30 NPC Representatives put forward a resolution: eliminate Criminal Law Article 306), *Chinese Lawyer*, May 2000, p. 16.