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**THE DEVELOPMENT OF  
THE CHINESE LEGAL PROFESSION  
SINCE 1978**

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**M A THESIS**

submitted by  
**Juan HU**

for the degree of  
**Master of Arts in East Asian Studies**



**11 MAY 1999**

Department of East Asian Studies  
University of Durham

September 1998

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**ABSTRACT**

This thesis focuses on introducing the development of, and changes in, the Chinese legal profession over this past twenty years, analysing the reasons that led to these changes, and considering both theoretical and practical problems.

The Chinese legal profession has developed considerably since 1978 when the reform and opening up movement was begun. Major changes have taken place in the lawyer's social status, business, work institutions and in the supervision system. Compared with the end of the 1970s, the legal profession nowadays is much more commercialised and professional. The changes have a symbiotic relationship with the changes in Chinese society: economic and ideological changes have transformed the role of lawyers and the law, which have in turn led to changes in society. The transformation of the Chinese society is still going on, and corresponding future changes are expected in the legal profession.

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## Abbreviations

APL (Administrative Procedural Law of the People's Republic of China) Zhonghua Renmin Gongheguo xingzheng susongfa 中华人民共和国行政诉讼法, April 4, 1989.

ARPL (Administrative Rules of Partnership Law Offices) Hehua lüshi shiwusuo guanli banfa 合伙律师事务所管理办法, November 25, 1996.

ARSL (Administrative Rules of State Law Offices) Guojia chuzi sheli de lüshi shiwusuo guanli banfa 国家出资设立的律师事务所管理办法, November 25, 1996.

CCP (Chinese Communist Party) Zhongguo gongchandang 中国共产党.

CiPL (Civil Procedural Law of the People's Republic of China) Zhonghua Renmin Gongheguo minshi susongfa 中华人民共和国民事诉讼法, April 9, 1991.

Common programme (Common Programme of the Chinese People's Political Consultative Conference) Zhonghua Renmin Gongheguo zhengzhi xieshang huiyi gongtong gangling 中华人民共和国政治协商会议共同纲领, September 29, 1949.

DPL (Disciplinary Rules for Lawyers) Lüshi chengjie guize 律师惩戒规则, October 22, 1992.

ELA (Experiments in Legal Aid in Guangzhou City) Guangzhoushi sifaju falü yuanzhu shixing banfa 广州市司法局法律援助试行办法, 1995.

GPCL (General Principles of the Civil Law of the People's Republic of China) Zhonghua Renmin Gongheguo minfa tongze 中华人民共和国民法通则, April 12, 1986.

JCSI (Joint Circular on Several Issues Concerning Lawyers' Practice in Lawsuits)  
Guanyu lüshi canjia susong de jixiang juti guiding de lianhe tongzhi  
关于律师参加诉讼的几项具体规定的联合通知, April 27, 1981.

OSRL (Opinions on Strengthening and Reforming the Legal Service) Guanyu jiaqiang  
he gaige lüshi gongzuo de yijian 关于加强和改革律师工作的意见, October 8, 1984.

PLA (The Chinese People's Liberation Army) Zhongguo Renmin Jiefangjun  
中国人民解放军.

PRC (The Peoples' Republic of China) Zhonghua Renmin Gongheguo  
中华人民共和国.

PRL (Provisional Regulations on Lawyers of the People's Republic of China)  
Zhonghua Renmin Gongheguo lüshi zanxing tiaoli 中华人民共和国律师暂行条例,  
August 26, 1980.

SWRL (Scheme on Widening the Reform of the Legal Service) Guanyu shenhua lüshi  
gongzuo gaige de fangan 关于深化律师工作改革的方案, January 18, 1994.

SEPRL (Several Explanations of the Provisional Regulations on Lawyers of the  
People's Republic of China) Guanyu Zhonghua Renmin Gongheguo lüshi zanxing  
tiaoli de jidian shuoming 关于中华人民共和国律师暂行条例的几点说明, August  
29, 1980.

TPFL (Temporary Provisions for Foreign Law Firms Setting Up Agencies in China)  
Guanyu waiguo lüshi shiwusuo zai Zhongguo jingnei sheli banshichu de zanxing  
guiding 关于外国律师事务所在中国境内设立办事处的暂行规定, May 26, 1992.

1954 Constitution (Constitution of the People's Republic of China) Zhonghua Renmin  
Gongheguo xianfa 中华人民共和国宪法, September 20, 1954.

1954 OLPC (Organic Law of the People's Court) Renmin fayuan zuzhifa  
人民法院组织法, September 21, 1954.

1979 CPL (Criminal Procedural Law of the People's Republic of China) Zhonghua  
Renmin Gongheguo xingshi susongfa 中华人民共和国刑事诉讼法, July 1, 1979.

1996 CPL (Criminal Procedural Law of the People's Republic of China) Zhonghua  
Renmin Gongheguo xingshi susongfa 中华人民共和国刑事诉讼法, March 17, 1996.

1996 Lawyers Act (Lawyers Act of the People's Republic of China) Zhonghua  
Renmin Gongheguo lüshifa 中华人民共和国律师法, May 15, 1996.



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## Introduction

Whether in Western or Eastern countries, law is a basic means for the maintenance of social order. As a profession, lawyers have existed for hundreds of years in most Western countries, and in a sense have come to be seen as a mark of modern civilisation. In contrast to the Western idea that the legal profession can help to interpret the law, and guarantee the correct enforcement of the law and the enjoyment of human rights, Chinese people are accustomed to thinking that 'no lawsuits' is the ideal situation and that going to court means losing face. Moreover, China had always been an authoritarian, highly-centralised state, with the legislative power, judicial power and executive power all exercised by a single entity. This consolidated the position of rulers wanting to control society who naturally discouraged private legal assistance since it was thought to encourage disputes thereby bringing about social disorder. Thus the legal profession did not emerge in China until the beginning of this century, partly due to the state ideology and partly due to the monopolistic system.<sup>1</sup> The early legal profession developed in a period of constant wars,<sup>2</sup> and was rejected by the CCP government in 1949 as part of the destruction of the old system and the establishment of a completely new state. Though a socialist legal profession was established in the middle of the 1950s in order to make the law more than mere scraps of paper, political movements<sup>3</sup> led to its

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<sup>1</sup> For more details, see I.1.

<sup>2</sup> 1912, Xinhai geming (the Xinhai Revolutionary); 1921-1925, Beifa zhanzheng (the Northern Expedition); 1938-1945, Kangri zhanzheng (the Anti-Japanese War); 1945-1949, Jiefang zhanzheng (the Civil War). For further details, see Hsü, I.C.Y., *The Rise of Modern China*, Oxford: Oxford University Press, 1995.

<sup>3</sup> 1957 onwards, Anti-rightist movement; 1966-1976, the Cultural Revolution.



destruction again. When the legal profession was re-established in 1979, Chinese society had undergone a twenty-year period without a legal profession. Therefore, it was not surprising that the legal profession was unfamiliar to Chinese people and in a very underdeveloped state. However, it has developed enormously to become one of the most popular professions in the past twenty years. Lawyers have changed from a low-status, low-income group to a comparatively high-status, high-income group. Every year, many people take the qualifying examination to practise as lawyers. According to statistics for 1995 (see Table 2), there were 90,602 people working in various law offices. They were not only engaged in criminal lawsuits, civil lawsuits and other lawsuits, but also dealing with all kinds of economic disputes and business transactions. Where there are disputes, there are lawyers.

Nevertheless, there are still many theoretical and practical problems facing the legal profession. Some of these have been obstacles to the development of the legal profession, such as the influence of government officials in lawsuits, the limited rights of lawyers to investigate cases, and so on. How to eliminate or resolve such problems has still not been determined.

Generally speaking, the Chinese legal profession is now very different from what it was in 1979; many problems have emerged in the course of the development of the legal profession while great successes have also been achieved. The development of the legal profession has come to epitomise the development of Chinese society. How has the legal profession been able to develop so quickly in a society where lawsuits were not encouraged and the legal profession was regarded as unnecessary? Apart from the superficial reason that complicated legislation has made legal services provided by lawyers indispensable to the life of society, what is the

internal momentum for the development of the Chinese legal profession? This is one of the subjects of this thesis.

My experience of working in two law offices as a trainee lawyer in 1993 and 1995, and experiencing a little of a lawyer's life has also encouraged me to write a thesis about lawyers. This thesis sets out to introduce the development of, and changes in, the Chinese legal profession since 1978, and to analyse the reasons that led to these changes, and consider both the theoretical and practical problems.

This thesis is divided into four chapters. Chapter One describes the legal profession in China before 1978. This is a very simple introduction since it is not the main focus of my work, but has links with the development of the legal profession after 1978. This is especially true of Chinese traditional legal concepts and the framework of the legal profession in the 1950s, which had a deep influence on the present legal profession. Chapter Two describes the development of the legal profession since 1978, the changes and some theoretical arguments. Chapter Three analyses the reasons for the way it has developed, which mainly consist of political and economic factors and the way of thinking of Chinese people. The problems that have hindered the development of the legal profession are also discussed in Chapter Three. Chapter Four, the conclusion, gives the findings of this study, and some thoughts on the likely future trends of the Chinese legal profession based on the present situation.

This thesis mainly focuses on the development of the legal profession over the past twenty years. This includes changes in the number of lawyers, the work, the obligations and rights of lawyers and their professional organisations. The development of the Chinese legal profession since 1978 can be traced through three

remarkable events. Firstly, the promulgation of the Provisional Regulations on Lawyers of the PRC<sup>4</sup> in 1980 signalled the official re-establishment and the legalisation of the legal profession. Before the PRL was issued, there was no law relating to lawyers and lawyers' work. Therefore the PRL laid the framework for the legal profession and legal practice in the PRC for the first time. Secondly, the establishment of the qualifying examinations for practising as lawyers in 1986 meant the legal profession further advanced. Using the qualifying examinations instead of assessment not only established a fair and competitive system, but also fed into the legal profession a great number of people with legal expertise and guaranteed the quality of lawyers. It laid a foundation for the healthy development of the legal profession in the following years. Thirdly, the promulgation of the Lawyers Act of the PRC in 1996<sup>5</sup> led to the further modernisation of the legal profession. After eighteen years' development, the legal profession had undergone many major changes: the PRL became out of date and not suited to the new situation. Therefore, promulgating a new lawyers' law to replace the PRL was very necessary. The 1996 Lawyers Act consolidated many experiments over recent years, especially in 1993 and 1994, and through it further reform of the legal profession was launched. It rejected the restrictions placed on the legal profession by the system of ownership and the concept of applying government official rank to lawyers and applying the format of administrative organs to the legal service. It gave a more open framework to the legal profession and benefited the modernisation of the legal profession.

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<sup>4</sup> Hereinafter <PRL>, promulgated on 26 August 1980 by the 15th Session of the Standing Committee of the Fifth National People's Congress, in 1980 Zhonghua Renmin Gongheguo fagui huibian (Collection of Laws and Regulations of the PRC), hereinafter <Collection LR>, Beijing: Falü Chubanshe, 1986.

<sup>5</sup> Hereinafter <1996 Lawyers Act>, promulgated on 15 May 1996 by the 19th Session of the Standing Committee of the 8th National People's Congress, Zhonghua Renmin Gongheguo lüshifa, Beijing: Falü Chubanshe, 1996.

The legal profession discussed in this thesis mainly refers to qualified lawyers, but there is some discussion of legal assistants and other law office staff, since their appearance has been a sign of the modernisation of the legal profession. Excluded are those who have qualified but are not practising law. Also excluded are those who work in the legal departments of companies or public institutions. Judges are discussed but not included in the scope of the legal profession.

Two remarkable phenomena in the development of the legal profession can be noted. Firstly, it seems that practice is always ahead of legalisation. This is not only a reflection of practice being the foundation of theory, but also accords with the current thinking of Chinese people as initially proposed by Deng Xiaoping of: "Mozhe shitou guohe" (cross the river feeling for the stones). Therefore, the development of the legal profession not only contributes to a comparatively liberal policy and flourishing economy, but also to the desire of the Chinese people to establish a more reasonable and richer society.

Secondly, foreign theories about the legal profession are attached much importance by the Chinese government and legal scholars. This fact is reflected in some new rules and academic opinions, such as in the establishment of a legal aid system, the strengthening of the role of law societies, and so on. It seems that the legal profession will absorb an increasing amount from other countries and comparative research between Chinese and foreign legal professions will become more and more important.

# I. The Legal Profession in China before 1978

## 1. "Lawyer" in Ancient China

It is hard to say that there was a legal profession in the strict sense in ancient China, though we know from historical records that the first criminal code *Fa Jing liu pian*<sup>6</sup> (Six Codes of Law) was produced as early as the Spring and Autumn Period (B.C.770-476). There are two main sources for traditional Chinese attitudes to the law. One is Confucian ideology, which dominated traditional Chinese society for thousands of years. The Confucians claimed that for an orderly society, a man's status should be clearly defined, and that his roles be properly performed. This depended not upon the rule of law but upon the presence of a body of approved behaviour patterns, *li*.<sup>7</sup> Therefore, law and punishment were considered only the secondary means to maintain social harmony.<sup>8</sup> The other is the ideology of the legalists, who held that law was the key to a stable government because it provided an exact instrument with which to measure individual conduct, and severe punishments were necessary in order to ensure a stable and orderly society.<sup>9</sup>

Both ideologies influenced the Chinese traditional society deeply. In ancient China, the power of state was highly centralised in the hands of the emperors. The manner of their rule was described as "*Wai ru nei fa*", that is to say, they flaunted their

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<sup>6</sup> Fang, X.L. *Jin shu*, Vol.1, Beijing: Zhonghua Shuju, 1974, p915.

<sup>7</sup> For further details, please see Feng, Y.L., *A History of Chinese Philosophy*, Princeton, N.J.: Princeton University Press, 1953.

<sup>8</sup> Chen, P.M., *Law and Justice*, New York, N.Y.: Dunellen Publishing Company, Inc., 1973, p27.

<sup>9</sup> For further details, please see Han Feizi, Han Feizi, (Chinese edition, Durham University Library, n.p.); or see *The Complete Works of Han Fei Tzu*, translated by Liao, W.K., London: Arthur Probsthain, 1939.

Confucian ideology among the common people, but actually used law and severe punishments to rule people.<sup>10</sup> Therefore, on the one hand, for Chinese people, going to court meant losing face since it was condemned by the Confucianists,<sup>11</sup> and the common people rarely sought to protect their interests through going to court. On the other hand, the rulers made use of law and punishment as one of their most important instruments. Since the sole purpose of the law was to strengthen the control of the rulers, criminal law was taken very seriously while civil law was ignored entirely or given only limited treatment under criminal law.<sup>12</sup> Furthermore, the principle of criminal law was presumption of guilt, that is to say, defendants were presumed guilty by judges before being brought to trial. Inquisition by torture was the most common way for the courts to try cases and not only the defendant, but sometimes even the plaintiff, was subjected to severe torture.<sup>13</sup> The negative attitude held by the common people and the fact that the litigants did not have any rights whatsoever at court led to the absence of legal practice in ancient China.

In addition, the monopolistic system also contributed to the failure to develop legal practice. In the Chinese political tradition, legislative and judicial functions were not separated from executive power. Normally the local chief executives were also judges, so rules and directives were made and used for the convenience of the rulers,<sup>14</sup> not the protection of individual's interests, which is just the opposite to the

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<sup>10</sup>For further details, please see Fan, Z.X., *Qingli fa yu Zhongguoren*, Beijing: Renmin Daxue Chubanshe, 1992.

<sup>11</sup> Chen, P.M., *op.cit.*, p4.

<sup>12</sup> *ibid.*, p11.

<sup>13</sup> Deng, X.R. "Woguo xingshi susongfa wuzui tuiding yuanze de queli", in *China Lawyer*, Vol.5, 1996, p34.

<sup>14</sup> Chen, P.M., *op.cit.*, p38; Unger, J., *The Pro-Democracy Protests in China: Reports from the Provinces*, New York: M.E.Sharpe, p67.



aim of the legal profession of protecting individual interests. Thus, no private legal profession existed to help individuals go to law.

However, it can be seen from history that to a certain extent some ancient practices were just like modern legal practices.

It was said that an official named Deng Xi in the Spring and Autumn Period was well-known for his eloquence and understanding of legal affairs. He often helped other people to bring lawsuits and his arguments were firmly based and very logical. His willingness to help others with legal affairs and publicise legal knowledge later resulted in his death. Deng Xi was regarded as an early prototype of the lawyer by many modern jurists and historians.<sup>15</sup>

In traditional Chinese society, clearly defined class distinctions and strict social hierarchy were a reflection of the influence of Confucianism with nobles and officials enjoying all kinds of privileges. This was also reflected in the law. Nobles and officials were ashamed of being summoned to court, especially of standing in court with the common people. Therefore, legal privileges enabled them to avoid some of the humiliation suffered by common people. In many lawsuits it was the family members or servants who appeared in court, not the officials themselves. For example, in the Ming (A.D 1368-1644) and Qing (A.D 1644-1912) dynasties, the law specified that officials involved in lawsuits concerning marriage, debt or property could send their family members or servants to represent them in the court.<sup>16</sup> Such family members and servants took on the role of lawyers, and acted as "attorneys" in a sense. Also in the Ming and Qing dynasties, it was very common for *zhixian* (district

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<sup>15</sup> Chen, B.Q., *Zhongwai lüshi zhidu bijiao yanjiu*, Beijing: Falü chubanshe, 1995, p8; Xiao, S.X., *Lüshi yu gongzheng zhidu jiaocheng*, Beijing: Zhongguo Zhengfa Daxue Chubanshe, 1996, p12.

<sup>16</sup> Chen.P.M., *op.cit*, p37.

magistrates) to employ *xingfang shuli*<sup>17</sup> to help them on trial. This is regarded as the beginning of the government legal advisor.<sup>18</sup> A further important phenomenon relating to the legal profession was *songshi*.<sup>19</sup> Due to financial and educational limitations, most people in traditional China were illiterate and completely ignorant of legal knowledge. Once they became involved in lawsuits they had to seek help from other people who were not only familiar with the law and literate but also willing to provide this kind of service. This was the origin of *songshi*. However, the *songshi* were banned by emperors in every dynasty because the ruling class held that assisting in lawsuits would bring about ideological confusion and public disorder, although *songshi* existed almost throughout the whole of traditional China.<sup>20</sup> In the *Da Ming lü* (Ming Code)<sup>21</sup> it is stated that the people who write legal documents and help others with their lawsuits should be punished. However, despite this, *songshi* continued to flourish due to the needs of society, especially in the Ming and Qing Dynasties. Many intellectuals who failed the imperial examination to become officials and many retired officials became *songshi*. Books on how to write legal documents were published and spread clandestinely during the Ming and Qing dynasties. A notable example is the *Zuo zhuang shi duan jin* (Ten Key Points on How to Write Complaints).<sup>22</sup> Nevertheless, being a *songshi* remained an underground

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<sup>17</sup> Popularly called *shiye*, private assistants attending to legal, fiscal or secretarial duties in local government.

<sup>18</sup> He, E.T., "Liangzhong butong xingzhi de lüshi zhidu", in *Tianjian Shehui Kexue*, Vol.4, 1983, p41; Sybille van de Sprenkel, *Legal Institutions in Manchu China*, London: The Athlon Press, 1962, chapter 6.

<sup>19</sup> Professionals who wrote legal documents for others. Sometimes they were called *songgun*, which means litigation trickster. This reflects the fact that many Chinese people held a hostile attitude to *songshi*.

<sup>20</sup> Zeng, X.Y., *Taiwan lüshi zhidu*, Beijing: Falü Chubanshe, 1993, p3.

<sup>21</sup> The basic code of Ming Dynasty. Its text can be found in *Gujin tushu jicheng, jingji huibian, xiangxing kao*, vol.37.

<sup>22</sup> Xiao, S.X., op.cit, p13.

profession and never received any legal status in Chinese traditional society. Thus a form of lawyer existed in ancient China, but not in the modern sense of the word.

## 2. The Introduction and Development of the Legal Profession in Modern China

The Chinese legal system developed in isolation for many centuries, but this situation was ended by the Opium War in 1842.<sup>23</sup> Chinese law was held to be too primitive and too severe in punishment by Western people at that time. After China was defeated in the war, one privilege that was demanded by Western countries was extraterritorial rights.<sup>24</sup> The loss of part of China's legal sovereignty made many Chinese intellectuals realise the importance of reforming the legal system.<sup>25</sup> It was widely believed that modernisation of the law would assist China in overcoming her weakness and enable her to become a strong country.<sup>26</sup> New legislation was drawn up based on both traditional Chinese law and the law of Western countries. In the "Da Qing xingshi mingshi susongfa" (Civil and Criminal Procedural Law of the Qing Empire), greater human rights were introduced, such as the defendant's right to a defence, and following that the legal profession was first mentioned. There is one chapter concerning lawyers, including restrictions on becoming lawyers, the work of lawyers, the rights and obligations of lawyers, the ratifying procedure for foreign lawyers practising in treaty ports, and so forth.<sup>27</sup> These new legal provisions illustrate how the modern legal profession was introduced from Western countries, though it

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<sup>23</sup> Chen, P.M., *op.cit.*, p40.

<sup>24</sup> Fairbank, J.K., *The Cambridge History of China*, Vol.10, part I, Cambridge: Cambridge University Press, 1978, p189.

<sup>25</sup> *ibid*, part II, 1980, p195.

<sup>26</sup> Chen, P.M., *op.cit.*, p40.

<sup>27</sup> Chapter 4, *Da Qing xingshi minshi susongfa*, (Chinese edition, the Library of Renmin University of China, n.p.)

was not fully implemented due to the collapse of the Qing Empire, the last dynasty in China.

When the Republic of China was established on January 1, 1912, the new provisional government in Nanjing made great efforts to enact laws and reform the legal system, but this work was interrupted when Yuan Shikai took up the presidency in April 1912 and formed Beiyang government with a cabinet controlled by warlords.<sup>28</sup> The Beiyang government issued much new legislation on the basis of earlier Chinese law and modern Western law. These included regulations on the legal profession, consisting of "Lüshi zanxing zhangcheng" (Provisional Rules on Lawyers), "Lüshi denglu zanxing zhangcheng" (Provisional Rules on Lawyers' Register), "Lüshi chengjieshui zanxing guize" (Provisional Rules of the Professional Discipline Committee) and "Lüshi zhenbie zhangcheng" (Rules on Lawyers' Review). Of these, it is "Lüshi zanxing zhangcheng" issued in September 1912 that marks the real beginning of the legal profession in China.<sup>29</sup> Its main content includes the qualifications for practising as a lawyer, admission to the legal profession, the license to practise, the work of lawyers, the rights of lawyers, the obligations of lawyers, the Law Society and disciplinary proceedings, etc. Its particular features are as follows: firstly, only men could be lawyers; secondly, the minimum age limit was 20 years old, therefore, only men over 20 years old could practise as lawyers; thirdly, admission to the legal profession was depended on connections rather than expertise. Seven exemptions from qualifying examinations were decreed and professional knowledge was not very strictly required, so there were many incompetent lawyers; finally,

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<sup>28</sup> Hsü, I.C.Y., *op.cit.*, p475; Tao, M., *Lüshi zhidu bijiao yanjiu*, Beijing: Zhongguo Zhengfa Daxue Chubanshe, 1995, p16.

<sup>29</sup> Xiao, S.X., *op.cit.*, p14.

qualified lawyers could practise throughout China, that is to say, there was no regional limitation on the work of lawyers.<sup>30</sup> In spite of the limitations of the "Lüshi zanxing zhangcheng" and the fact that they were not strictly implemented, nevertheless the legal profession came into being and these regulations were instrumental in that. We can see from the famous opera *Yang San Jie gaozhuang* (The Yang's third daughter goes to law)<sup>31</sup> that lawyers played an important role in that society.

One significant feature of the legal profession during this period which should be pointed out is that non-Chinese could practise as lawyers in China.<sup>32</sup> This was a phenomenon relating to extraterritoriality. It reflected the fact that the government could not enjoy complete judicial power.

After the Northern Expedition and the establishment of the Nationalist Government (Kuomintang) in Nanjing in 1928, a new "Lüshi zhangcheng" (Lawyers Rules) was issued to replace the "Lüshi zanxing zhangcheng". In comparison with the former, the new rules included the following differences, they 1) lifted the ban on women; 2) increased the right to propose to the Law Society modifications to the regulations; 3) raised the age limit to 21 years old; and 4) included retrial as a disciplinary action against lawyers.<sup>33</sup> These changes contributed to the democratisation and legalisation of the legal profession, in particular lifting the ban against women, which not only contributed to the progress of the legal profession, but also contributed to the democratisation of the whole nation. The legal profession developed further and law societies were set up in most major cities.

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<sup>30</sup> Zeng, X.Y., *Taiwan lüshi zhidu*, p14.

<sup>31</sup> This opera reflected a case happened in Lanxian county, Hebei province in 1918. A sister of Yang sanjie suffered persecution by a noble and died. Yang sanjie went to court again and again for a just verdict. In the end, Yang sanjie won the case with the assistance of a lawyer. For further details, see Sun, H., *Pingju xiao xikao*, Shanghai: Shanghai Wenyi Chubanshe, 1985.

<sup>32</sup> Tao, M., *op.cit*, p17.

<sup>33</sup> *ibid*, p17.

In May 1929, the Law Society of the Republic of China, the first national organisation for lawyers in China, was established following a proposal from the Shanghai Law Society.<sup>34</sup>

In 1935, the Judicial Ministry of the Kuomintang Government drafted the "Lüshi fa" (Lawyers Act), which was put into effect in 1941, and the "Lüshi zhangcheng" enacted in 1928, was abolished at the same time. "Lüshi fa" had more complete professional articles and promoted greatly the growth of the legal profession in the following few years. On September 9th, 1948, the Law Societies' Union of the Republic of China was formed on the initiative of the Kuomintang government, and this day was fixed as "Lawyers' Day". Much importance was attached to the social role of lawyers by the government.<sup>35</sup>

In 1949, with the withdrawal of the Kuomintang from the mainland China, "Lüshi fa" and the rules concerning it were abolished in mainland China and only continued in Taiwan.

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<sup>34</sup> Xiao, S.X., *op.cit*, p15.

<sup>35</sup> Zeng, X.Y., *Taiwan lüshi zhidu*, p8,9.

### 3. The Legal Profession in China in the 1950s

In September 1949, just one month before the foundation of the People's Republic of China, the Communist Party of China promulgated the Common Programme,<sup>36</sup> a provisional constitution, of which Article 17 stated: "All laws, decrees and judicial systems of the Kuomintang reactionary government oppressing the people are abolished and laws and decrees protecting the people shall be enacted and the people's judicial system shall be set up." Thus all preceding legislation, including rules concerning lawyers, was abolished in line with this principle. Old lawyers, as a class, were regarded as tools of the bourgeois capitalists. 7% of the 60,000 old lawyers were punished; 70% were dismissed and were given other jobs, and 20% were retained in legal work.<sup>37</sup>

However, the government still recognised litigants' rights in court. In order to protect litigants' interests, the Central Judicial Ministry began to consider establishing a socialist legal profession. To fill the vacant posts a great number of revolutionary cadres were entrusted with legal work. When the first national judicial conference was held at the end of July 1950, the Central Judicial Ministry submitted the "Jing, Jin, Hu sanshi bianhuren zhidu shixing banfa caoan" (Draft of Proposed Advocates Act in Beijing, Tianjin and Shanghai) to the conference for discussion. The main contents of the draft were as follows:

#### 1. The work of the lawyer

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<sup>36</sup> Promulgated on 29 September 1949 by the Chinese People's Political Consultative Conference. See A Documentary Survey of the People's Republic of China (1949-1979), Vol.1, Wilmington: Scholarly Resources Inc, 1980.

<sup>37</sup> Ladany, L., *Law and Legality in China*, London: C.Hurst & Co. (Publishers) Ltd., 1992, p64.



- (1) Drafting legal documents, advocacy and conducting cases.
- (2) Investigating and collecting evidence appertaining to cases.
- (3) Publicising the government's decrees and policies.

## 2. The constitution of the Legal Profession

(1) Public Lawyers, designated by the court, to act as defenders in criminal actions and conduct civil actions, working for poor people without charge. This was to be the main part of the constitution.

(2) Private Lawyers, ratified by the Central Judicial Ministry and admitted by the courts, to provide a service to people who were willing and able to pay remuneration.

(3) Legal Assistants, designated by non-governmental organisations and authorised by the courts, to work for the organisation.<sup>38</sup>

Though a framework for a new legal profession was drafted, the legal profession was not immediately established since the government was concentrating on setting up new courts in order to suppress counter-revolutionaries.<sup>39</sup>

Chairman Mao held the view that law was an instrument of the state for the realisation of socialism and the suppression of enemy classes,<sup>40</sup> so much new legislation was enacted with the purpose of establishing a socialist country. On September 20, 1954, the first Constitution of the PRC was issued.<sup>41</sup> Article 76 stated: "Cases in the People's Courts are heard in public unless otherwise provided for by law.

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<sup>38</sup> Zhang, G., *Zhongguo lüshi zhidu fazhan de lichengbei*, Beijing: Falü Chubanshe, 1997, p2.

<sup>39</sup> Chen, P.M., *op.cit.*, p189.

<sup>40</sup> *ibid*, p55.

<sup>41</sup> Hereinafter <1954 Constitution>, promulgated on 20 September 1954 by the 1st Session of the 1st National People's Congress, in 1954.9-1955.6 Collection LR, 1956; English edition can be found in *A Documentary Survey of the People's Republic of China (1949-1979)*, Vol.1, Wilmington: Scholarly Resources Inc, 1980.

The accused has the right to a defence". Moreover, the Organic Law of the People's Courts<sup>42</sup> issued in the same month also stipulated in Article 7:

"The accused, besides personally defending his case, may designate advocates to defend it, or have it defended by a citizen recommended by a People's Organisation or approved by the People's Court, or defended by a near relative or guardian. The People's Court may also, when it deems necessary, appoint a counsel for the accused."

So a legal profession was deemed necessary in order to implement the principle that 'the accused has the right to a defence'. The Central Judicial Ministry had to reconsider establishing a socialist legal profession. In 1955, a project to re-establish the legal profession was carried out in 26 major cities.<sup>43</sup>

On the basis of the results of the trial, the Central Judicial Ministry submitted a report on establishing a new legal profession to the State Council in January 1956. This was ratified 6 months later. Almost at the same time, the Central Judicial Ministry convened the first conference on how to establish and develop a legal profession throughout the country. Finally, a new legal profession was established in accordance with the report and the conference.<sup>44</sup>

The main difference between the new lawyers and the old lawyers was that new lawyers were not private legal professionals but public servants. There were also no private law offices only state legal advisory offices (Falü guwenchu). Fees were paid by the clients to the legal advisory office rather than individual lawyers, lawyers received their salaries from the legal advisory offices where they practised.<sup>45</sup>

From July 1956 to June 1957 alone, law societies were established in 19 provinces with 820 legal advisory offices, 2,572 full-time lawyers and 350 part-time

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<sup>42</sup> Promulgated on 21 September 1954 by the 1st Session of the 1st National People's Congress, in 1954.9-1955.6 Collection LR, 1956.

<sup>43</sup> Zhang, G., *Zhongguo lüshi zhidu fazhan de lichengbei*, p3.

<sup>44</sup> *ibid*, p4

<sup>45</sup> Chen, P.M., *op.cit.*, p199.

lawyers, most of whom were chosen from cadres in the courts and other state administrative departments.<sup>46</sup> According to calculations based on 9 months in Shanghai in 1956, over 1,800 criminal cases were defended by lawyers and most of the defendants were satisfied with the work of their lawyers.<sup>47</sup> It seemed that lawyers did play a positive role. However, this positive role was mainly focused on criminal cases and was very limited in civil cases. This was mainly due to the establishment of public ownership which reduced civil disputes. Also, underdeveloped civil legislation, the prevailing communist ideology that called for self-sacrifice and the use of non-legal instruments, such as administrative measures, contributed to it.<sup>48</sup>

Just when the legal profession was expected to be further developed, the "Anti-Rightist" movement began, and soon the new legal profession was also regarded as a bourgeois profession. Lawyers were accused in their legal practice of "speaking on behalf of, and in the interests of, the enemy", and many lawyers were treated as rightists. From then on, China entered into a legal vacuum without a legal profession.<sup>49</sup>

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<sup>46</sup> Kong, Q.Y., "Xinzhongguo lüshi zhidu de huigu yu zhangwang", in *Falü Xuexi yu Yanjiu*, Vol.6, 1987, p1.

<sup>47</sup> Zhang, G., *Zhongguo lüshi zhidu fazhan de lichengbei*, p2.

<sup>48</sup> Zheng, H.R., "The Evolving Role of Lawyers and Legal Practice in China", in *The American Journal of Comparative Law*, Vol.36, 1988, p477-482; Chen, P.M., *op.cit.*, p127.

<sup>49</sup> Zheng, H.R., *op.cit.*, p481; also see Xiao, S.X., *op.cit.*, p17.

## II. The Restoration and Development of the Legal Profession in China Since 1978

### 1. Background

The legal system was destroyed and the whole country was in a state of chaos during the period of the Anti-Rightist movement and the Cultural Revolution. When the Cultural Revolution was officially ended following the death of Chairman Mao and the downfall of the Gang of Four in 1976, the country entered into an era of restoration and reconstruction in many aspects. In politics, new leaders represented by Deng Xiaoping came into power; they rejected the class struggle political line of Mao's era, and made great efforts to change the state of chaos brought about by the Cultural Revolution.<sup>50</sup> At the Fifth Plenum of the Eleventh Central Committee in 1980, Deng Xiaoping put forward his policy of "economics in command" instead of Mao's "politics in command".<sup>51</sup> The political line of concentrating on developing the economy was then established and continued during the following years. Since the country was concentrating on developing the national economy, politics was regarded as a thing which should serve the economy. Class struggle was no longer emphasised. As a result, a stable political situation has prevailed for the past twenty years. In economics, the battered national economy was restored and achieved a rapid development after the country adopted the reform and opening up policy. The

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<sup>50</sup> Tang, Y.W., 1976 nian yilai de zhongguo, Beijing: Beijing Jingji Ribao Chubanshe, 1997, p82.

<sup>51</sup> Hsü, I.C.Y., op.cit., p777.

economic reforms in the countryside and city led to the disintegration of the simple planned economy and the establishment of a vigorous diversified economy.<sup>52</sup> Individual household industry, private enterprise and foreign investment appeared and competed, accelerating the development of the economy. Between 1979 and 1996, China's GNP grew at an average annual rate of 9.0 percent.<sup>53</sup> As far as the legal system was concerned, the new leaders had suffered in the Anti-Rightist movement and the Cultural Revolution and so fully realised the importance of law. Thus the reconstruction of the legal system was regarded as a crucial task by the government.<sup>54</sup> Many important laws were successively enacted, such as the Criminal Law of the PRC in 1979,<sup>55</sup> the Criminal Procedural Law in 1979<sup>56</sup> and again in 1996,<sup>57</sup> General Principles of Civil Law in 1986,<sup>58</sup> the Civil Procedural Law in 1991,<sup>59</sup> the Economic Contract Law in 1981<sup>60</sup> and many other economic laws. A new legal system was then established under the new economic and political situation after a decade of efforts. As an important part of the legal system, the legal profession was also restored and developed during these years.

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<sup>52</sup> Goodman, D.S.C., "New Economic Elites", in Benewick, R., *China in the 1990s*, Hampshire: Macmillan Press Ltd., 1995, p132.

<sup>53</sup> *Zhongguo tongji nianjian*, Beijing: Zhongguo Tongji Chubanshe, 1993, p21; also see EIU Country Profile 1997-98, p56.

<sup>54</sup> Tang, Y.W., *op.cit.*, p118, 217.

<sup>55</sup> Promulgated on 1 July 1979 by the 2nd Session of the 5th National People's Congress, in 1979 Collection LR, 1986.

<sup>56</sup> Hereinafter <1979 CPL>, promulgated on 1 July 1979 by the 2nd Session of the 5th National People's Congress, in 1979 Collection LR, 1986.

<sup>57</sup> Hereinafter <1996 CPL>, it is the modified one of the 1979 CPL, promulgated on 17 March 1996 by the 4th Session of the 8th National People's Congress, *Zhonghua Renmin Gongheguo Xingshi susongfa*, Beijing: Falü Chubanshe, 1996.

<sup>58</sup> Hereinafter <GPCL>, promulgated on 12 April 1986 by the 4th Session of the 6th National People's Congress, in 1986 Collection LR, 1987.

<sup>59</sup> Hereinafter <CiPL>, promulgated on 9 April 1991 by the 4th Session of the 7th National People's Congress, in 1991 Collection LR, 1992.

<sup>60</sup> Promulgated on 13 December 1981, by the 4th Session of the 5th National People's Congress, in 1981 Collection LR, 1982.

The re-establishment of the legal profession should be traced to the Third Plenary Session of the 11th Party Central Committee of CCP held on December 18-22, 1978 in Beijing, which was regarded as an important turning point in the history of the PRC.<sup>61</sup> The CCP emphasised at the meeting that:

"To guarantee the people's democracy, the socialist legal system must be strengthened. The democracy must be systematised and legalised. Laws and policies should be stable, consistent and powerful. New laws must be enacted, obeyed and strictly enforced. Those who break law should be punished."

Therefore, the rule of law was officially promoted in the meeting, which laid the essential legal foundation for the re-establishment of the legal profession. The actual practical steps for the restoration of the legal profession were not carried out by the central government but by local government at the very beginning. Before the re-establishment of the Ministry of Justice in 1979,<sup>62</sup> some local governments had started re-establishing the legal profession within their jurisdiction due to the need for legal services. The legal profession reappeared first in Hulan county, Heilongjiang province at the beginning of 1979. Before long, lawyers also appeared in Beijing, Shanghai and some other cities.<sup>63</sup> The legal profession developed very quickly after its restoration. There were 7,200 law offices (Lüshi shiwusuo) and 89,317 lawyers in China by the end of 1995.<sup>64</sup> Now lawyers are playing a very positive role in society. The development of the legal profession is not only a reflection of the stable political situation, the developing economy and legal system in recent years, but it has also propelled the democratic, economic and legal reforms forward.

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<sup>61</sup> Tang, Y.W., op.cit., p82.

<sup>62</sup> Chen, H.S., "Xinzhongguo lüshi zhidu lishi yuange", in *Fazhi Ribao*, July 18, 1989.

<sup>63</sup> Zhang, G., *Zhongguo lüshi zhidu fazhan de lichengbei*, p7.

<sup>64</sup> Li, Y.M., "Lüshi shiwu", Beijing: Falü Chubanshe, 1996, p7.

## 2. The Nature of the Legal Profession and the Status of Lawyers

### 2.1 The nature of the legal profession

The legal profession is regarded as an independent profession in most Western countries, and lawyers are defined as professionals having specialised legal knowledge.<sup>65</sup> However, lawyers were regarded as public servants when a socialist legal profession was established in China in the 1950s. This status was maintained when the legal profession was restored in 1979. Lawyers were also regarded as state employees and many of them were transferred from the courts or the procuratorial organs. They worked at the legal advisory offices<sup>66</sup> established by, and affiliated to, the local department of justice and were forbidden to set up private law offices.<sup>67</sup> When the PRL was promulgated, this point was confirmed in Article 1 in these words:

"Lawyers are state-employed legal workers and their duties are to provide legal assistance to state administrative organs, enterprises, institutions, social groups, people's communes and individuals, in order to ensure the proper implementation of the law and the protection of the interests of the State and the Collective, and the legal rights and interests of individuals."<sup>68</sup>

Therefore, according to the PRL, lawyers were still not independent professionals but state legal workers. Though they were engaged in lawsuits or other legal affairs on the basis of being retained by clients, it did not mean that the relationship between the lawyer and the client was that of employee and employer.

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<sup>65</sup> Greenwood, E., "Attributes of A Profession", in *Social Work*, July, 1957; Harris, P., *An Introduction to Law*, London: Weidenfield and Nicolson, 1980; Abel, R.L., *The Legal Profession in England and Wales*, Oxford: Basil Blackwell Ltd, 1988, p4.

<sup>66</sup> For further details, please see II.5.

<sup>67</sup> Ohtsubo Kenzoo, "Dui zhongguo lüshi zhidu zagan", in *Guowai Faxue*, Vol.1, 1982, p7.

<sup>68</sup> Article 1, the PRL.

What lawyers did was to exercise judicial authority on behalf of the state. It was said that this definition of the nature of the legal profession benefited acceptance of the legal profession by society through treating lawyers as state legal workers.<sup>69</sup> However, these words unfortunately tended to cause confusion with regard to how the legal profession should be understood. As we know, a lawyer provides legal help to other people on the basis of his expertise. He may enjoy rights in his professional capacity, but only on the basis that he is entrusted with that role by the clients, so his rights in his professional capacity come directly from the client not the state. This differentiates the legal profession from other government officials whose rights come from the state. Moreover, it can be seen that lawyers were required to guarantee the proper implementation of the law and protect the interests of the state, while protecting the interests of clients, since they were state legal workers. This created a question of how could lawyers fully protect the rights of clients if their work was to exercise judicial authority, especially in a situation where the interests of the client conflicted with the interests of the state.

The nature of the legal profession was an outstanding issue argued over by law scholars, especially when the co-operative law office (Hezuo lüshi shiwusuo) and the partnership law office (Hehu lüshi shiwusuo)<sup>70</sup> appeared following the diversification of the economy and society, and when they demonstrated their advantages in the market economy and modern society. The definition of the legal profession was further questioned at the beginning of the 1990s since the private aspect of these kinds of law offices was very evident. Despite the fact that some

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<sup>69</sup> Zhang, G., *Zhongguo lüshi zhidu fazhan de lichengbei*, p22.

<sup>70</sup> For further details, please see II.5.



people still insisted that socialist lawyers should be state legal workers, two dominant viewpoints on the nature of the legal profession developed as follows:

(1) Social legal workers

Prof. Wang Chenguang held that lawyers were social legal workers.<sup>71</sup> He considered that the work of lawyers had been impeded under the judicial administrative governance system, and the definition that lawyers were state legal workers did not fit in with the market economy. He suggested that the work of lawyers was still a commodity even in a socialist country. The definition of a lawyer should be changed from that of state legal worker to social legal worker since what lawyers do is to provide a service to society and the reason why the legal profession exists is to cater for the needs of the society. Moreover, the governance of the legal profession should be changed from judicial administrative governance to self-governance in order to accord with the nature of the legal profession.

(2) Independent professionals

Prof. Chen Xingliang held that lawyers were independent professionals.<sup>72</sup> He gave four reasons: a) the legal profession is different from government judicial organs. What lawyers do is professional work not state duties. b) lawyers' rights in their professional capacity stem from their clients not the state. The relationship between lawyer and client is an equal civil relationship, different from the relationship between a judicial official and a litigant. c) what lawyers provide is a paid service, they receive retainers from their clients. The judicial official exercises state power, he does not provide a paid service. d) the legal profession is a self-governing profession. Independence is the most important characteristic of the legal profession. State power

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<sup>71</sup> Wang, C.G., "Lüshi tizhi gaige de shexiang", in Faxue, Vol.4, 1993, p43.

<sup>72</sup> Chen, X.L., "Woguo lüshi de zhiye dingwei", in Zhongguo Lüshi, Vol.5, 1996, p33.

had no place in the legal profession, thus the definition of independent professionals is the most suitable one.

The theoretical argument was a reflection of practice. The nature of the legal profession was regarded as an important topic for discussion during the process of drafting a new lawyers' law.<sup>73</sup> Later, lawyers were defined as personnel who have obtained a license for setting up practice as a lawyer in accordance with the law and who provide legal services for the public. So lawyers were no longer treated as state legal workers. Though no clear definition was given by these words, it is obvious that the nature of lawyers was now close to legal professionals. The reason why the nature of lawyers had changed was given by the Minister of Justice in a report "An explanation of the draft Lawyers Act of the PRC" with following words:

"... The issue of the nature of the legal profession.

The PRL decreed that lawyers were state legal workers. This definition had positive significance for protecting the work of lawyers in the restoration period of the legal profession. Nowadays, the business of lawyers has undergone major changes under the situation of developing a socialist market economy. Besides acting as defenders for criminal defendants, a regular and important business of lawyers is to provide legal assistance to commodity producers and dealers (including foreign investment enterprises, private enterprises and individual household industries). The law office was also developed from the simple state-run form to diversified forms including the state law office (Guoban lüshi shiwusuo), the co-operative law office and the partnership law office. In order to define the nature of the legal profession accurately, the draft decrees that lawyers are personnel who have obtained a license for setting up practice as a lawyer in accordance with the law and to provide legal services for the public..."<sup>74</sup>

The change in the nature of lawyers is a big step for the legal profession. Compared with the old definition, the new one fits in better with the socialist market economy and China's present situation. From this, it can also be seen that the

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<sup>73</sup> Zhang, G., Zhongguo lüshi zhidu fazhan de lichengbei, p23.

<sup>74</sup> Zhonghua Renmin Gongheguo lüshifa, p17.

government no longer sticks to the socialist nature of the profession, but shows a more flexible and practical approach.

## **2.2 The status of lawyers**

The legal profession underwent an arduous process of development as described in the preceding chapters. It did not emerge in China until the beginning of this century and was completely rejected by the CCP government in 1949. In the mid-1950s, a socialist legal profession was established, but it was soon regarded as an anti-socialist profession. Most lawyers were put in prison or dismissed as rightists, and their social status was low. Then followed a twenty-year period when practising lawyers were completely absent. When the legal profession was re-established in the late seventies, it was something totally new to young people and was thought of as a risky profession by the generation who witnessed the vicissitudes of lawyers over the past decades. Added to this was the traditional way of thinking that a lawsuit is something bad, so the legal profession was not regarded as a normal profession.<sup>75</sup> In order to raise status of lawyers, and secure the right to practise as lawyers, the government defined lawyers as state legal workers. So the legal profession was officially acknowledged as a socialist profession and lawyers deserved respect since they were "official" legal workers.<sup>76</sup> Thus, though the definition that lawyers were state legal workers did not accurately describe the nature of lawyers and was not beneficial for the development of the legal profession, it was conducive to an improvement in the social status of lawyers at that time. In the years following the

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<sup>75</sup> Chen, H.S., *op.cit.*

<sup>76</sup> The ultra-leftist ideological trend that private ownership is opposed to the socialist system still existed at that time.

restoration of the legal profession, lawyers' social status gradually improved along with the acceptance of the legal profession by society. Especially when the Chinese economy improved and foreign trade significantly increased through the reform and opening up policy, lawyers became involved in internal and international business transactions. Both government officials and managers of enterprises realised that legal services were essential in economic transactions, otherwise the economic interests of the state or the enterprises could not be safeguarded. Moreover, complicated economic legislation was no longer easily accessible to those without specialised expertise, which made the legal service provided by lawyers more important. Chinese lawyers have also made great efforts to improve their social status, they are well aware of the high social status and incomes of lawyers in Western countries, and argue they should receive similar treatment.<sup>77</sup> As a profession having an important social role, the legal profession deserves to be respected by society and this is also the main reason why the social status of lawyers improved quickly. In addition, the appearance of new forms of law offices changed lawyer's financial status and thereby contributed to the improvement in their social status. Before, all lawyers worked in state law offices and received salaries according to a standard government salary system no matter what they did. Now more and more lawyers work in co-operative law offices or partnership law offices and receive remuneration and bonuses from the law office on the basis of their work. Their financial situation is much better than before. That change in the financial situation is a reflection of the higher value that society puts on their work. When the nature of lawyers was officially changed in 1996, some people were worried that lawyers' status would be reduced if they were no

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<sup>77</sup> Clarke, D.C., "Justice and the Legal System in China", in Benewick, R., *China in the 1990s*, 1995, p91.

longer treated as state legal workers.<sup>78</sup> However, the fact is that in recent years the status of lawyers has not gone down but up. The lawyer's role has become more and more important in modern society, and the legal profession is seen as a potentially lucrative one in the market economy.

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<sup>78</sup> Zhang, G., *Zhongguo lüshi zhidu fazhan de lichengbei*, p23.

### 3. Practising as a Lawyer: Qualification and Admittance

#### 3.1 Qualification for practising as a lawyer

The education system was destroyed during the Cultural Revolution and did not return to normal until 1977; this included the legal education. It was impossible to fill the legal profession with people who had received a good legal education immediately after such a long time of chaos. It was said that in 1981 Chinese law schools produced, for the first time in many years, a small number of qualified graduates.<sup>79</sup> Thus, the only way to fill vacancies in the period of restoration was to find people who had some level of legal knowledge. Old lawyers who were still able to work were the most suitable but there were not many left.<sup>80</sup> Most lawyers were enrolled according to a certain administrative standard by the department of justice. Some of them came from the courts or the procuratorial organs, having a certain legal practice experience, while others were just politically qualified and had no legal practice experience.<sup>81</sup> Therefore, an assessment procedure for practising as a lawyer was carried out at that time, and there were no rules on how lawyers could be considered qualified. The assessment procedure for the lawyer's qualification was confirmed in legislation when the PRL was enacted. In Article 8, it was stated:

"Those who love the People's Republic of China, support the socialist system and have the right to vote and to stand for election may become qualified and practise as lawyers after passing the assessment procedure

A. Those who have graduated from higher education law school, and have more than two years of experience in judicial work, teaching law or researching.

B. Those who have received legal training, and have experience of practising as judges of the People's Court or prosecutors of the People's Prosecutor organs.

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<sup>79</sup> Zheng, H. R., *op.cit.*, p488.

<sup>80</sup> Ladany, L., *op.cit.*, p103.

<sup>81</sup> Ohtsubo Kenzoo, *op.cit.*, p7.

C. Those who have received higher education, practised economic or science and technology work for over three years, are familiar with the legal profession and the relevant laws, have received legal training and are suitable to be a lawyer.

D. Others who have the same professional level as described in clauses A and B, have received higher education and are suitable to be a lawyer".

The authorised assessment body is the department of justice of provinces, autonomous regions or municipalities under the direct jurisdiction of the central government, with the Ministry of Justice having supervising authority.<sup>82</sup>

The assessment procedure did provide a great number of people to fill the vacancies and contributed to the restoration of the legal profession. However, with the development of the legal profession, the disadvantages in the assessment procedure became very evident. In comparison with standard examinations for qualification, assessment was more variable and more easily influenced by the time, the place, and the person in charge. Moreover, it was easy to bring bureaucratic pressure to bear on the legal profession since the assessment standard lay in the hands of judicial officials. Therefore, the system of assessment could not guarantee the essential quality of lawyers, and was easy for unfair competition in obtaining the qualification to arise, thereby hindering the further development of the legal profession. After several years of improving the assessment system, the government realised that the only way to avoid problems brought about by it was to change it, so the standard qualifying examination was initiated to replace it.<sup>83</sup>

In 1984, a standard qualifying examination for practising as lawyer was initiated in Jiangxi province. Following that, standard examinations were also held in Beijing and some other provinces in 1985.<sup>84</sup> On the basis of provincial practice and

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<sup>82</sup> Article 9 & 12, the PRL.

<sup>83</sup> Tao, M., *Lüshi zhidu bijiao yanjiu*, p56.

<sup>84</sup> Xiao, S.X., *op.cit*, p29.

the experience of other countries, the Ministry of Justice decided to set up a nation-wide standard qualifying examination, with nation-wide standard examination papers. They were set by law experts and scholars, and approved by the Ministry of Justice. The work of organising the examination was carried out by local departments of justice.<sup>85</sup>

From 27-28 September 1986, the first standard nation-wide examination was held. There were 11,024 entrants altogether and 3,307 of them passed the examination and became qualified.<sup>86</sup> The subjects of the examination were principally the following: criminal law, marriage law, inheritance law, economic law, legal practice theory, the constitution and basic legal theory. These were arranged into 4 papers of 100 marks each. Those who got scores of 240 or above qualified. The participants were required to be: (1) those who worked at law offices and had finished higher education or (2) trainee lawyers who had finished the training for practising as lawyers or (3) law teachers or researchers who had a higher education degree.<sup>87</sup> Essentially, the examination in 1986 was an internal test and most participants were persons who had been practising in law offices.

The qualifying examination for practising as lawyers was carried out once every two years from 1986 to 1992, and was changed to once a year from 1993.<sup>88</sup> In 1996, there were already 73,000 people who had passed the qualifying examination and were qualified.<sup>89</sup> Therefore, the qualifying examination became the main way to qualify as a lawyer. There have been many changes since the establishment of the

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<sup>85</sup> *ibid*, p29.

<sup>86</sup> Zhang, G., *Zhongguo lüshi zhidu fazhan de lichengbei*, p236.

<sup>87</sup> Xiao, S.X., *op.cit*, p30,31.

<sup>88</sup> Chen, B.Q., *op.cit*, p52.

<sup>89</sup> Pu, J.Q., "Woguo lüshi zige shouyu zhidu de gaige shexiang", in *Zhongguo Lüshi*, Vol.6, 1996, p31.



qualifying examinations. The requirements for participants were reduced from 1988; those who have finished higher education can enter for the examination with no other limitations. The power to decide the qualifying enrolment score was transferred from the Ministry of Justice to the department of justice at provincial level in 1992, but went back to the Ministry of Justice in 1994. It seemed more flexible if the power to decide the qualifying score was exercised by the department of justice at provincial level, because the local department of justice could decide on the enrolment on the basis of the local education level and the local demands for the legal profession. However, it was hard to maintain a national unified qualifying standard for lawyers. This seems to be the reason why the power to decide the qualifying score was transferred back again. In 1993, some examination topics were changed to more practical ones.<sup>90</sup>

After ten years' practice, the system of qualifying examinations for practising as lawyers improved. The requirements on the participants, the scope and form of the examination, qualifying and admittance as lawyers were basically fixed. Looking at examinations up to 1996, the main characteristics of the system may be described as follows: (1) in principle, passing the examination is the essential precondition to becoming a qualified lawyer; (2) the participant must have finished higher education; (3) enrolment is basically a national unified one.<sup>91</sup>

The qualifying examination for practising as lawyers produced a fair system by establishing a unified standard throughout the country. Moreover, it guaranteed the quality of lawyers since it included most aspects of law. Therefore, it was fixed by the 1996 Lawyers Act as an obligatory system. Articles 5 and 6 of the Lawyers Act

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<sup>90</sup> Xiao, S.X., *op.cit.*, p30.

<sup>91</sup> Tao, M., *Lüshi zhidu bijiao yanjiu*, p56.

described qualification and practising certificates as prerequisites for practising as lawyers. Following the Lawyers Act, "Lüshi zige quanguo tongyi kaoshi banfa" (Directive on the National Qualifying Examination for Practising as Lawyers) was decreed at the end of 1996, which went into more detail about the examinations.<sup>92</sup>

Though the qualifying examinations have been the main avenue for people to become lawyers, qualifying assessment for practising as lawyers still exists in parallel with the examination system. Article 7 of the Lawyers Act decrees that those who have undergraduate level legal education or higher, are engaged in legal research or teaching, and have a senior professional title can be qualified if they apply to practise as lawyers after being assessed by the Judicial Administrative Department of the State Council according to the terms laid down. So senior law teachers and researchers can still be qualified by assessment procedure. On the basis of this Article, the Ministry of Justice stipulated the Directive on the Qualifying Assessment for Practising as Lawyers<sup>93</sup> to limit the scope of the assessment system. Since the people acceptable under the assessment procedure are limited to a very small number and there are strict rules on procedures for the assessment, the disadvantages of assessment are almost entirely avoided and assessment has been an important supplement to the examination system.

### **3.2 Admission as a lawyer**

Just after the legal profession had been restored, lawyers were able to practise as soon as they had qualified. However, according to present Chinese law, people

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<sup>92</sup> Promulgated on 2 December 1996 by the Ministry of Justice, in 1996 *Zhonghua renmin gongheguo sifa xingzheng fagui huibian* (Collection of Judicial Administrative Directives), hereinafter <Collection JAD>, Beijing: Falü Chubanshe, 1997.

<sup>93</sup> Promulgated on 25 October 1996 by the Ministry of Justice, in 1996 Collection JAD.

who have qualified as lawyers are not automatically able to practise. Normally, they are also required to have a practising certificate. It is decreed that those who uphold the Constitution of the PRC and meet the following three requirements can apply for a lawyer's practising certificate: 1) possess the qualification to practise as a lawyer; 2) have undertaken a one-year training at a law office; 3) be of good moral quality.<sup>94</sup> The conditions for disqualification are also indicated. The following people are disqualified: 1) those who as a result of mental or physical incapacity are incapable or partially incapable of legal responsibility; 2) those who have been convicted of criminal offences, with the exception of those who have committed an involuntary offence; 3) those who have been discharged from public employment or have had their license to practise revoked.<sup>95</sup> The department of justice at or above provincial, autonomous regional, and municipal level shall issue the lawyer's practising license to an applicant if his or her application meets the requirements stipulated in this law within 30 days after receipt of his or her application. It shall deny applicant the practising license of a lawyer if his or her application fails to meet the requirements stipulated in this law and shall serve notice in writing to the applicant within 30 days after receipt of his or her application.<sup>96</sup> Those who do not have a practising certificate are prohibited from practising as a lawyer or acting as a legal agent or defending a case in court for monetary gain.<sup>97</sup>

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<sup>94</sup> Article 8, the 1996 Lawyers Act.

<sup>95</sup> Article 9, the 1996 Lawyers Act.

<sup>96</sup> Article 11, the 1996 Lawyers Act.

<sup>97</sup> Article 14, the 1996 Lawyers Act.

### 3.3 The relationship between qualification and practice

When assessment was the main way for people to become lawyers, a person could practise as a lawyer as long as he was qualified by the department of justice at provincial level. This situation changed in 1988. The limits on entering for the qualifying examinations were relaxed from that year and the examination system became the main way for people to become lawyers. A person who had completed higher education could take the examinations no matter whether he was practising legal work or not. Moreover, he could become qualified as long as he had passed the examinations no matter whether he was practising as a lawyer or not. Nevertheless, he could not practise as a lawyer automatically when he qualified. Thus, qualification has been separated from practice. This change created theoretical arguments. There have been two different views on this issue. Some people held that the separation brought many problems which need to be resolved. For example, Song Yinghui stated:<sup>98</sup>

"The separation of qualification and practice has brought many problems, which can broadly be expressed in the following points:

(1) There were many people who possessed the qualifying certificate but did not practise as lawyers. This brought many difficulties in the governance of lawyers and also created chaos for the legal profession. Sometimes it even led to a situation where many people illegally practised as lawyers with just a qualifying certificate. They did not register with the department of justice at all.

(2) Part-time lawyers<sup>99</sup> increased too quickly. Because of the separation, many people who had a qualification but were not willing to practise as full-time lawyers registered as part-time lawyers. Many part-time lawyers were government officials and had some administrative power, so it was hard to achieve fully impartial justice. Moreover, having too many part-time lawyers brought many difficulties over the specialisation and governance of the legal profession."

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<sup>98</sup> Tao, M., *Lüshi zhidu bijiao yanjiu*, p57.

<sup>99</sup> For details, please see II.2.

In the end, Song Yinghui suggested changing the system of conferring the qualification so as to solve problems brought by separation. He held that those who passed the qualifying examination should not become qualified immediately. They should get a certificate certifying that they had passed the examination. Only when they had also finished going through the enrolment procedure, could they be qualified lawyers and engage in legal affairs. From this, it can be seen that one is not qualified at the time when one passes the examination, but at the time when one is permitted to practise, so it seems the actual result brought by this change was the unification of qualification and practice. Most legal scholars held that the separation of the two followed market forces since many people who were qualified could not practise as lawyers when supply exceeded demand, and they could engage in legal business when demand exceeded supply.<sup>100</sup> Therefore, they held that separation was appropriate for the legal situation in China and benefited the development of the legal profession. In practice, problems such as administrative authorities interfering with the independence of justice do exist, but it is not brought about by the system of separation itself. This seems to be better now that government officials are forbidden to practise as lawyers. Moreover, the problem in governance is mainly created by inefficient bureaucratic administration, so it should be solved by improving the system of governance itself, not by changing the aims of governance.<sup>101</sup>

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<sup>100</sup> Zhang, G., *Zhongguo lüshi zhidu fazhan de lichengbei*, p37.

<sup>101</sup> Article 13, the 1996 Lawyers Act.

## 4. The Growth in the Number of Lawyers

The legal profession in China is not divided into solicitors and barristers as in England. All practitioners are described as lawyers.<sup>102</sup> When the legal profession was first restored, part-time lawyers (*jianzhi lüshi*) were encouraged by the government because full-time lawyers (*zhuanzhi lüshi*) were insufficient to meet the needs of society. Thus two basic types of lawyer came into existence: the full-time lawyer and the part-time lawyer. The full-time lawyer was affiliated to a legal advisory office which is a public institution under the organisational leadership and the professional supervision of the department of justice;<sup>103</sup> their number was limited by government planning. The part-time lawyer was not affiliated to a legal advisory office, but engaged in legal business when entrusted to do so by a legal advisory office,<sup>104</sup> so their number was not limited by government planning. Encouragement of part-time lawyers can be found in the PRL. Article 10 stated that

"Those who have qualified to be a lawyer but cannot leave their present posts may practise as part-time lawyers. The work unit to which they are affiliated should support them in this. The current personnel of the People's Court, the People's Procuratorial Organs and the police should not practise as part-time lawyers."

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<sup>102</sup> Shum, C., "The Role of Chinese Lawyers in Criminal Proceedings", in *China Law Reporter*, Vol.5, 1989, p213; Abel, R.L., *op.cit.*, p30.

<sup>103</sup> For details, please see II.5.

<sup>104</sup> Zhang, G, *Zhongguo lüshi zhidu fazhan de lichengbei*, p17.

Thus except for judges, prosecutors and police officers, all other people who were able to meet the requirements of Article 8 of the PRL including government officials could practise as part-time lawyers. This reflected the urgent need for legal service at that time and strongly promoted the development of the legal profession. From Table 1, it can be found that lawyers increased quickly in number once they had been encouraged by the government. For instance, the number of lawyers increased by 269.0% in 1985 over 1981. The most remarkable increase was in the number of part-time lawyers, which jumped to 18,218 in 1985 from 2,358 in 1981, rising by 672.6%. The reason why the number of part-time lawyers increased much quicker than that of full-time lawyers was that the former did not depend on the government planning but on the demands of the market.

**Table 1: Number of lawyers from 1981 to 1985**

	1981	1982	1983	1984	1985	1985:1981
Lawyers:	8,571	12,114	15,471	20,090	31,629	+ 269.0%
Full-time lawyers	6,213	7,859	8,774	10,262	13,411	+ 115.9%
Part-time lawyers	2,358	3,530	5,770	9,828	18,218	+ 672.6%

Sources: unpublished internal statistics of the Ministry of Justice, Beijing, 1997.

Though the rapid increase in part-time lawyers benefited the needs of society by providing additional legal services, it also created some problems. Many people preferred to engage in legal work while keeping their current post, so as to minimise the risk. In 1985, there were 18,218 part-time lawyers compared with 13,411 full-time lawyers. The first problem was how much attention part-time lawyers could devote to legal affairs since they were engaged on two different jobs at the same time. Another problem was that many part-time lawyers were concurrently government

officials. The fact that people who have state power can practise as lawyers and engage in legal affairs clearly may prejudice the principle of judicial independence. In practice, some government officials did prejudice the impartiality of justice through the use of state power when they were practising as part-time lawyers, especially in the case of a few retired judges and senior government officials. It was not legal knowledge but the relationship between them and their former colleagues and subordinates which became a primary factor in their handling of cases. This aggravated the problem of improper competition and other unhealthy tendencies among the judiciary. In view of this situation, it was proposed at the National Lawyer's Work Meeting in July 1986 that the development of part-time lawyers should be limited.<sup>105</sup> At this meeting, some scholars suggested abolishing part-time lawyers. Their reasoning was as follows: 1) what lawyers provide is a professional service, thus the independence of lawyers is very important. Any possession of administrative authority by a lawyer will interfere with the impartiality of justice; 2) malpractice of part-time lawyers had influenced judicial circles; 3) part-time lawyers were not affiliated to any law offices, bringing a problem of accountability; 4) it was hard for a part-time lawyer doing two different jobs at the same time to provide a high-quality service; 5) the part-time lawyer was just a transitional phenomenon, which would not exist in a legally mature society. The development of the legal profession depended on full-time lawyers not part-time lawyers.<sup>106</sup>

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<sup>105</sup> *ibid.*, p42.

<sup>106</sup> *ibid.*, p43.



However, some scholars held<sup>107</sup> that part-time lawyers contributed to the development of the legal system: problems were caused by the legal system not the part-time lawyer, so the part-time lawyer should be retained and developed.

The argument over part-time lawyers continued for a long time. The part-time lawyer genuinely brought about some problems, such as problems of accountability, interference in the judicial process, and so on. However, a deeper analysis suggests that a sound legal system might avoid these problems. For example, government officials were forbidden to practise as part-time lawyers, so the phenomenon of administrative power interfering in the judiciary was reduced. In reality, having some law teachers or researchers practising as part-time lawyers is good for the development of the legal profession. This is because they have a rich fund of legal knowledge and sufficient free time, but no administrative power. This is one reason why the 1996 Lawyers Act does not forbid part-time lawyers in explicit terms but stipulates on-the-job government officials are forbidden from practising as part-time lawyers.<sup>108</sup> In addition, lawyers who have acted as judges or public procurators are prohibited from acting as agents or defenders in lawsuits within two years on leaving their posts at the People's Court or the People's Procuratorate.<sup>109</sup> Further restrictions on part-time lawyers show that part-time lawyers are no longer encouraged by the government and are being reduced following the increase in the number of full-time lawyers, and the greater maturity of the legal services market.

Another heated argument concerning the types of lawyer was over the establishment of public lawyers (*gongzhi lüshi*). Some scholars held that the work of

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<sup>107</sup> Wang, C.G., "Lüshi tizhi gaige de shexiang", p43.

<sup>108</sup> Article 13, the 1996 Lawyers Act.

<sup>109</sup> Article 36, the 1996 Lawyers Act.

the public lawyer was already carried out by different organs at present in China. For example, acting in court on behalf of the government was carried out by the procuratorial organ, some lawyers acted as long-term legal advisors to the government, and so on. Thus there was no need to establish public lawyers in China.<sup>110</sup> The opposing view was also held by some scholars, who thought that handling government affairs based on the law was at the heart of government administration. It was very important for government officials to get advice from regular legal advisors. Public lawyers existed in many countries, and were beneficial for the successful functioning of government. China should also have public lawyers in order to accord with the normal practice in most countries.<sup>111</sup> This view was further supported by following grounds: 1) what the procuratorial organ does is on the behalf of the state, not the government. What it is involved in is public action not administrative action; 2) complicated laws and regulations lead to an elaborate division of legal business. Some lawyers will be experts in business transactions while others will be experts in civil law or criminal law or other area. Public lawyers are people who are trained in both legal knowledge and government affairs, so their legal assistance and advice can help to ensure the legality of decisions of the government. The establishment of public lawyers fits in with the diversified legal business; 3) public lawyers, in contrast to lawyers in the regular sense, are civil servants and cannot handle private legal affairs. The separation of the functions of lawyers helps overcome unhealthy tendencies in judicial circles.<sup>112</sup>

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<sup>110</sup> Zhang, G., *Zhongguo lüshi zhidu fazhan de lichengbei*, p109.

<sup>111</sup> Li, W.H., et al, "Lüshi zhidu gaige cutan", in *Xibei Zhengfa Xueyuan Xuebao*, Vol.1, 1987, p55; Chen, B.Q., *op.cit.*, p17.

<sup>112</sup> Wang, Y.H., et al, "An hangye xitong jianli zhuan ye lüshi jigou shizaibixing", in *Faxue yu Shijian*, Vol 5, 1987, p61.

Though the types of lawyer have remained unchanged, the number of lawyers has changed greatly. Generally speaking, the number of lawyers has developed very quickly since legal services were re-established. Apart from the rapid development period from 1980 to 1985 which is reflected in Table 1, it can be seen from Table 2 that the number of lawyers also showed a big increase from 1986 to 1995. The number of full-time lawyers was 14,500 in 1986, but increased to 45,094 in 1995, 3 times as many. The number of part-time lawyers was 29,690 in 1995 in compared with 7,046 in 1986. Two notable changes during the period shown in the Table are: 1) legal assistants and other staff appeared in 1991 and developed quickly afterwards, especially other staff, which jumped to 10,355 in 1995 from 5,865 in 1994. This phenomenon is related to the growing influence of modern business methods on lawyers: they have found that good facilities and assistants can help them extricate themselves from the burden of mundane tasks and improve efficiency. Thus a large number of legal assistants and other staff are needed. It is clear that they will steadily expand alongside the rapid expansion of lawyers. (2) The quantity of lawyers increased rapidly in 1993 and 1994. As indicated in the Table, the number of full-time lawyers jumped to 30,401 in 1993 from 22,124 in 1992; Again, it jumped to 40,730 in 1994. At the same time, the number of part-time lawyers increased to 26,956 in 1993 and 29,808 in 1994. This is a reflection of the present legal situation. In the fourteenth national congress of the CCP in 1992, a "Socialist market economy" and a further development of the legal system were promoted. As a response, the Ministry of Justice formulated new policies on widening the reform of the legal

profession in 1993. In the Scheme on Widening the Reform of the Legal Service,<sup>113</sup> the Ministry of Justice indicated,

"...the 1990s is a key period in the process of our socialist modernisation, and is also the key time in the development of the legal profession. We should have a sense of urgency and historical responsibility, promote the reform of the legal profession, gradually establish a legal profession fitting in with the socialist market economy, bring the role of lawyers in the national economy and people's lives into full play, thereby pushing the development of the legal profession into a new era."

As a part of the reform, more lawyers were encouraged. One of the measures adopted to improve the quantity of lawyers was to change the qualifying examination for practising as lawyers from once every two years to once a year. As a result, the quantity of lawyers rose quickly in 1993 and 1994.

**Table 2: Lawyers and other staff from 1986 to 1995**

	Full-time lawyers	Part-time lawyers	Lawyer assistants	Other staff	Total
1986	14,500	7,046	--	--	21,546
1987	18,308	8,972	--	--	27,280
1988	21,051	10,359	--	--	31,410
1989	23,606	20,109	--	--	48,912
1990	23,727	10,652	--	--	47,461
1991	19,919	14,563	5,294	5,764	41,639
1992	22,124	16,366	5,360	5,791	45,666
1993	30,401	26,959	4,799	6,675	68,834
1994	40,730	29,808	7,216	5,865	83,619
1995	45,094	29,690	6,683	10,355	90,602

Sources: unpublished internal statistics of the Ministry of Justice, Beijing, 1997.

At a press conference held on 22 May 1996,<sup>114</sup> Mr Zhang Geng, the Vice Minister of Justice, said that the number of lawyers was to reach 150,000 in 2000 and

<sup>113</sup> Hereinafter <SWRL>, promulgated on 18 January 1994 by the Ministry of Justice, in 1994 Collection JAD, 1995.

<sup>114</sup> Zhang, G., Zhongguo lüshi zhidu fazhan de lichengbei, p204.

300,000 in 2010, or about 2 lawyers per 10,000 population. Then it would be able to meet the demands of society. How many lawyers China needs and whether more lawyers means better are still questions for debate. Currently, the ratio of lawyers to population is about 7 per 10,000 population in Germany, 9 per 10,000 population in the UK, and even higher in the USA. However, the ratio in Japan is less than 1 per 10,000, and also is very low in some other developed countries with mature legal professions.<sup>115</sup> Therefore, the number of lawyers per se is not an accurate measure of the development level of a country's legal profession.

## **5. From Legal Advisory Office to Multiform Law Offices**

The appellation Legal Advisory Office was copied from the Soviet Union when the legal profession was established in the 1950s,<sup>116</sup> continued to be used at the end of 1970s and was adopted by the PRL. According to the PRL, the work unit to which lawyers are affiliated is the legal advisory office, a public institution affiliated to and supervised by the state judicial administration organs. Several Explanations on the PRL<sup>117</sup> further stated that the deployment, assessment, rewards and punishments, ideological education and professional training of lawyers, the management of lawyers' funding, the establishment of lawyers' work institutions and the development of all kinds of material facilities should be, and only could be, carried out by the department of justice at different levels. This means that the establishment,

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<sup>115</sup> Chen, B.Q., op.cit., p21.

<sup>116</sup> Xiao, S.X., op.cit., p95.

<sup>117</sup> Hereinafter <SEPR>, in Fazhi Ribao, 29 August, 1980.

management and business of legal advisory offices are controlled by the state judicial administration organs. The legal advisory office was responsible for the professional work of lawyers, and arranged for lawyers to study political and legal knowledge and to summarise and exchange experiences.<sup>118</sup> Retainers were to be received and charged by the legal advisory office; these were then assigned to lawyers nominated by the client.<sup>119</sup> The legal advisory office provides salaries to lawyers according to a standard scale. At the very beginning, the legal advisory office was established based on the administrative divisions formed by counties, municipalities and municipal districts.<sup>120</sup> When necessary, specialised legal advisory offices could be established with the approval of the Ministry of Justice. These specialised legal advisory offices were affiliated to government offices, enterprises or institutions, not affiliated to the department of justice; they employed lawyers as legal advisors and received supervision from the department of justice.<sup>121</sup>

There was no subordinate relationship between legal advisory offices according to Paragraph 2, Article 14 of the PRL. In other words, each legal advisory office was basically independent. That was determined by two factors: one is that the legal advisory office was under the department of justice and established on the basis of administrative areas, so it was impossible for a legal advisory office to possess branches in other administrative areas; the other is that as the legal advisory office had only been restored for 2 years, there was no legal advisory office strong enough to establish branches. On the other hand, Article 18 of the PRL stated that a legal advisory office might send lawyers to other cities for business and that the local legal

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<sup>118</sup> Article 15, the PRL.

<sup>119</sup> Article 17, the PRL.

<sup>120</sup> Article 14, the PRL.

<sup>121</sup> Chapter 5, the SEPRL.

advisory office should provide help when necessary. Therefore, there was still to be a certain level of co-operation between legal advisory offices.

In the first half of the 1980s, legal advisory offices were set up in almost every county, municipality and municipal district. Their rate of increase was not spectacular due to the limitations imposed by the administrative divisions. From Table 3, it can be seen that the number of legal advisory offices was already 2,023 in 1981, and was 3,131 in 1985, i.e., it had only increased by 54.8% even in a period when the legal profession was very much encouraged by the government.

**Table 3: Legal advisory offices from 1981 to 1985**

	1981	1982	1983	1984	1985	1985:1981
Legal advisory offices	2,023	2,350	2,472	2,773	3,131	+ 54.8%

Sources: unpublished internal statistics of the Ministry of Justice, Beijing, 1997.

With the widening of the reform and opening up policy, the PRL became inappropriate for the new economic structure and legal practice. It was argued that the legal advisory office was not able to reflect appropriately the nature and business of lawyers' work units, and was not in line with the common appellation of lawyers' work units world-wide.<sup>122</sup> Therefore, many local departments of justice began to reform the structure of lawyers' work units under the supervision of the Ministry of Justice. On July 1, 1983, three young lawyers named Wu Nianzhu, Yao Feng and Wang Xiaonan set up Shekou Law Office in Shenzhen City, the first Special Economic Zone. This was the first lawyers' work unit named a Law Office in the PRC.<sup>123</sup> After that, many legal advisory offices in Special Economic Zones changed their name one after

<sup>122</sup> Tao, M., *Lüshi zhidu bijiao yanjiu*, p124.

<sup>123</sup> Xiao, S.X., *op.cit.*, p95.

another. Considering international legal business needs and avoiding confusion between normal legal advisory offices and specialised legal advisory offices affiliated to government offices, enterprises and institutions, the Ministry of Justice made a decision to change the appellation Legal Advisory Office to Law Office at the National Conference on Judicial Work in 1984. At the same time, setting up legal advisory offices on the basis of administrative regions is disadvantageous to their development, so they were encouraged to break out of the situation where there was only one law office in a county, a municipality or a municipal district.<sup>124</sup> The establishment of law offices which did not need government financial support, but would still be under the governance of the local department of justice was encouraged, while private law offices were still forbidden.<sup>125</sup> In March 1988, an experimental co-operative law office, which is more independent in organisation and business, was launched in Baoding City, Hebei Province. After several years' trial, the co-operative law office was confirmed as one form of law office.<sup>126</sup> In 1992, the national situation had changed greatly following demands for further reform by Deng Xiaoping during his famous "southern tour". The economy was switched from a "socialist commodity economy" to a "socialist market economy" and the government became more liberal in politics. To fit in with the new situation, the Ministry of Justice pointed out that the law office should be an autonomous institution based on agreement between lawyers. Diversified forms should be permitted in order to establish law offices that meet the demands of the socialist market economy.<sup>127</sup> As a result more independent partnership law offices emerged.

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<sup>124</sup> Zhang, G., *Zhongguo lüshi zhidu fazhan de lichengbei*, p20.

<sup>125</sup> "Opinions on Strengthening and Reforming the Legal Service", hereinafter <OSRL>, in 1984 Collection JAD, 1985.

<sup>126</sup> Li, Y.M., *op.cit.*, p26.

<sup>127</sup> The SWRL.



Therefore, the structure of law offices developed from a single type to diversified forms. At present, there are the following three main kinds of law offices, defined according to their ownership and the internal management:

(1) State law offices

The state law office is the kind having the strongest relationship with the judicial administration organs. They are established by and affiliated to the department of justice. The members of staff and finances of state law offices used to depend on government planning, which resulted in their lacking decision-making power. They could not decide their own budgets, financial distribution or employees. Lawyers were remunerated on the basis of a national salary system, not their work load. This brought about many problems in state law offices, such as low efficiency and a lack of enthusiasm on the part of lawyers to increase their work. In order to overcome these disadvantages and make the law offices competitive in the new economic situation, the Ministry of Justice changed its policies on state law offices in 1984 and 1994, permitting them to keep their profits, giving them more decision-making power and encouraging them to institute work-related wage systems.<sup>128</sup> The 1996 Lawyers Act indicates that these law offices are independent in finance.<sup>129</sup> The Administrative Rules of State Law Offices<sup>130</sup> issued on 25 November 1996 further emphasised that state law offices should carry out professional activities independently. Government organs, groups or individuals are forbidden from misappropriating the funds and property of law offices, or interfering with lawyers' lawful practices.<sup>131</sup> Moreover, the director of the state law office is no longer

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<sup>128</sup> The OSRL; the SWRL.

<sup>129</sup> Article 16, 1996 Lawyers Act.

<sup>130</sup> Hereinafter <ARSL>, promulgated on 15 November 1996 by the Ministry of Justice, in 1996 Collection JAD.

<sup>131</sup> Article 7, the ARSL.

designated by the department of justice, but elected by lawyers of the law office.<sup>132</sup> Democratic management is due to be set up at law offices, and important issues should be decided jointly by the lawyers of the law office. However, the reforms have not fundamentally changed the management of state law offices and they are still in a predicament, especially state law offices in remote areas. The remuneration of lawyers is still not linked to their work. Compared with the new forms of law offices, the state law offices lack competitiveness. Most of them have to survive on financial subsidies from the government, though financial independence is demanded of them. It has been suggested<sup>133</sup> changing state law offices to partnership law offices, but there are many problems in such a transition. For example, how to determine the fixed assets of state law offices. Moreover, the development of the economy is uneven in different areas. It is hard to require some law offices in remote areas to be completely independent since the income of the law office is influenced by the regional economy. A solution to these problems is still under discussion.

## (2) Co-operative law offices

Except for some co-operative law offices which have been formed by a change of status by state law offices, most co-operative law offices are set up by lawyers of their own free will. The members of staff and the finances of the co-operative law office do not depend on the government, and the income and expenditure are controlled by the law office not the local department of justice.<sup>134</sup> In comparison with the state law office, the co-operative law office has more rights and is more independent. Above all, it is completely independent in financial affairs and

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<sup>132</sup> Article 14, the ARSL.

<sup>133</sup> Li, J.L., "Toushi xianxing lüshi zhidu", in *Fazhi Jianshe*, Vol.2, 1988; Kong, Q.Y., "Lüshi zhidu de gaige fangxiang", in *Faxuejia*, Vol5/6, 1993.

<sup>134</sup> "Administrative Rules of Co-operative Law Offices", promulgated on 25 November 1996 by the Ministry of Justice, in 1996 Collection JAD; Li, Y.M., *op.cit.*, p26.

personnel matters: it may quickly adjust its expenditure, investment and employment in accordance with its operating situation, so it is more competitive. Secondly, the co-operative law office was set up by individuals not the state, and the initiators were required to be lawyers who have a certain practising and management experience, otherwise the office could not survive the competition. Thus the co-operative law office had sound fundamentals from the very beginning. Finally, the co-operative law office is a product of the market economy, so it fits in better with the demands of the new society.

The co-operative law office has demonstrated its advantages compared with the state law office over several years of operation. However, since the law did not provide the co-operative law office with a clear definition, problems exist. For example, the privileges and obligations of law offices are determined by their ownership. The uncertainty in this aspect will bring about many problems if these law offices are involved in debt. Some co-operative law offices were changed from state law offices, so they occupy state property. Others were established by lawyers from the very beginning and had no state property. The ownership of the co-operative law office is not clear and there are no rules in this regard. Normally, co-operative law offices are regarded as collective ownership law offices because private law offices were not sanctioned in 1988, and the property of the law office could not be distributed to lawyers if it were dissolved.<sup>135</sup> Obviously this view was not accepted by co-operative law offices whose initial capital was raised by the lawyers themselves. The question of ownership of this kind of Co-operative Law Office is still in doubt.

### (3) Partnership law offices

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<sup>135</sup> Tao, M., *Lüshi zhidu bijiao yanjiu*, p138.

Partnership law offices were established in 1992 when law offices were encouraged to be autonomous institutions and this was confirmed as one type of law office by the 1996 Lawyers Act.<sup>136</sup> The foundation of the partnership law office is an agreement of the co-partners. Its initial capital is raised by the co-partners themselves and its property is owned by the co-partners.<sup>137</sup> There are no financial relations nor organisational affiliations between partnership law offices and the department of justice. The employees, the expenditures and the payments are decided by a co-partners meeting.<sup>138</sup> Therefore, the partnership law office is the most independent type. It has developed quickly since its establishment and achieved good results. From June 1993 to January 1994, 824 partnership law offices were established, and represented 19.6% of state law offices and co-operative law offices at that time.<sup>139</sup> In an investigation carried out by the Beijing Department of Justice in 1992,<sup>140</sup> it was found that six partnership law offices achieved a high degree of success within six months of their establishment. Lawyers at these law offices were contracted as long-term legal advisors by 98 enterprises. More than 180 court cases, 57 cases of arbitration involving a foreign party, 137 foreign projects and 85 disputes were undertaken. The income totalled RMB 3 million. The investigation indicated the advantages of partnership law offices.

Since its establishment, the partnership law office has become one of the main types of Chinese law offices. There are several reasons for this: above all, compared with other forms of law offices, the partnership law office is the product of a

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<sup>136</sup> Article 18, the 1996 Lawyers Act.

<sup>137</sup> Article 2, "Administrative Rules of Partnership Law Offices", hereinafter <ARPL>, promulgated on 25 November 1996 by the Ministry of Justice, in 1996 Collection JAD.

<sup>138</sup> *ibid.*, Article 9 & 15.

<sup>139</sup> Chen, B.Q, *op.cit.*, p69.

<sup>140</sup> Beijing Department of Justice, "Lüshi tizhi gaige de chengong changshi", in *Zhongguo Lüshi*, Vol.3, 1993, p18.

comparatively mature stage in the development of the market economy and the legal system in China, so it is more advanced and more suited to the demands of society. Secondly, partnership is the commonest form of law offices throughout the world, one which has existed for a long time and contributed to the development of the legal profession. Thirdly, the adoption of the partnership law office may bring further exchanges between law offices in China and other countries since the systems and organisation are similar. Finally, it was found in the above investigation that most lawyers in a partnership law office had received a higher level of legal education, so they had an advantage in their professional knowledge. Therefore, the partnership law office has developed rapidly.

Further forms of law offices were discussed in theory. It has been suggested that the individual law office (*geren lüshi shiwusuo*) should also be permitted since there is no fundamental difference between the individual law office and the partnership law office.<sup>141</sup> However, it has been felt that the individual law office is not suitable for the socialist system and would result in many negative effects as a result of lack of restrictions, such as unreasonable increases in retainers, the encouragement of the bribery and corruption in judicial circles, and so on.<sup>142</sup> Therefore, the individual law office is still on trial and was not sanctioned by the 1996 Lawyers Act.

At present, the state law office, the co-operative law office and the partnership law office make up the legal services market, and take a joint role in the development

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<sup>141</sup> Yang, H.L., "Gaige woguo lüshi zhi wo jian", in *Faxue Jikan*, Vol.1, 1985, p80.

<sup>142</sup> Zhang, G., *Zhongguo lüshi zhidu fazhan de lichengbei*, p80; Wei, Z.Z., "Gaige woguo lüshi zhidu qianxi", in *Faxue Jikan*, Vol.2, 1985, p87.

of the legal profession. Their development record in the 1980s and 1990s is shown in Table 4.

**Table 4: Law offices from 1986 to 1995**

	Law offices	Partnership law offices*
1986	3,198	--
1987	3,291	--
1988	3,473	--
1989	3,646	--
1990	3,716	--
1991	3,748	73
1992	4,176	198
1993	5,129	505
1994	6,419	1,193
1995	7,247	1,625

\* Including co-operative law offices whose initial capital is raised by lawyers themselves.

Sources: unpublished internal statistics of the Ministry of Justice, Beijing, 1997

Law offices developed steadily from 1986 to 1990, but did not increase in number at a rapid rate. In 1991, co-operative law offices without state financial support appeared, and partnership law offices were established in 1992. Since then, the rate of development has quickened. Almost 1,000 new law offices appeared annually from 1992 to 1995, and the number of partnership law offices and co-operative law offices without state financial support jumped from 73 in 1991 to 1,625 in 1995. These figures indicate that state law offices still make up 70% of law offices and are the main type of Chinese law offices. The biggest characteristic apparent in the development of the law office during this period is the increasing diversity in law offices and the legal profession. The partnership law office, as the most vigorous type and the most typical new law office, has developed quickly, and further development is expected.

## 6. The Business of Lawyers

In the 1950s, the role of lawyers mainly focused on criminal lawsuits, and was very limited in civil and economic disputes. When the legal profession was first restored in 1979, the legal business of lawyers was also limited by the economic situation and therefore was very simple. Lawyers' business mainly consisted of acting as legal advisors in government affairs or business transactions for enterprises, and acting as defenders in criminal cases and agents in civil cases.<sup>143</sup> After one year's operation, legal business had expanded a little and the work could be summarised as follows:<sup>144</sup>

1. Acting as legal advisors when retained by administrative organs, enterprises, institutions and social organisations. Following the emphasis on re-establishing the legal system, more and more economic disputes between the state, collectives and individuals needed to be solved by economic and legal means. At the same time, the increasing number of economic disputes made government officials and directors of enterprises aware of the importance of legal services, since lawyers' participation in economic activities could help to avoid or settle disputes. Therefore, providing legal services to enterprises became a principal aspect of legal business. Here, the duty of a legal advisor is to provide legal advice in business transactions, draw up and check contracts, and act as agent when employees are involved in lawsuits, mediation or arbitration. Legal advisors were mainly of two kinds: temporary legal advisors and

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<sup>143</sup> Zeng, G., "Jianli he jianquan woguo de lüshi zhidu", in *Renmin Ribao*, June 19, 1979.

<sup>144</sup> *ibid*; Chapter 1, PRL; Huo, Z., "Renmin lüshi zai xingshi fating shang de susong diwei he zuoyong", in *Zhengzhou Daxue Xuebao*, Vol.2, 1981, p70.

long-term legal advisors. The difference between them is that the temporary legal advisor only provided legal services to the client on a certain issue and his work for this client would be terminated when the issue had been resolved, while the long-term legal advisor provided legal services for all business transactions over a long period. After several years of operation, legal advisors became very popular in China. It can be seen that 39,453 entities hired legal advisors in 1985 according to Table 5.

2. Acting as agent in civil cases when retained. The role of lawyers in civil cases mainly focused on matters of inheritance or divorce, when economic relations were not dominated social relations. Moreover, many people still felt they were losing face going to law, so the role of lawyers in civil cases was still very limited at the early stage of the 1980s. In Table 5, it can be seen that civil lawsuits dealt with by lawyers was only 8,123 in 1981. Though it developed to 52,923 by 1985, it was still a very low rate in a population of over one billion.

3. Acting as defence attorney when retained by a criminal defendant or appointed by the People's Court; acting as agent when retained by private prosecutors, victims or victims' close relatives. The right to a defence is an essential right of people. Legal services provided by lawyers is a basic means to ensure this right. The duty of a defence attorney is to put forward evidence and opinions of benefit to the accused on the basis of the facts and laws, thereby protecting the lawful interests of the defendant.<sup>145</sup> Dealing with criminal lawsuits was the main part of the legal business at that time since other legal business was not developed, and many verdicts made during the Cultural Revolution had to be reviewed. This is also reflected by the

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<sup>145</sup> Article 28, the 1979 CPL.



statistics. The number of criminal lawsuits dealt with by lawyers was already 65,179 in 1981, almost eight times as many as the civil lawsuits in the same year.

4. Answering inquiries on legal affairs, preparing complaints and other relevant documents. The inquiries lawyers answered numbered 1,190,831 in 1984 and 1,224,028 in 1985. This is also an important part of legal business of lawyers.

5. Providing professional services or acting as agents when retained in non-contentious business. This includes in summary:

- (1) Drafting legal documents for clients;
- (2) Carrying out legal transactions and signing all types of contracts in the name of the client when retained as an agent;
- (3) Negotiating with the opposite party on behalf of the client;
- (4) Participating in mediation in an agent's capacity;
- (5) Participating in mediation in an intermediary's capacity;
- (6) Acting as agent in the arbitration.

6. Publicising the socialist legal system through professional activities. This reflects the socialist nature of the legal profession. As we know, the retainer is the foundation upon which the relationship of lawyer and client rests. Without a retainer that relationship cannot come into being. However, the PRL emphasised at the same time that the legal profession was a state-employed profession and the lawyer's role was to exercise state judicial authority. This dual capacity determined the role of the lawyer at that time, so socialist characteristics were very evident in lawyers' legal practice, and it is not surprising that the law decreed that publicising the socialist legal system was one of tasks of lawyers.

In comparison with the work of lawyers in the stage immediately following restoration, legal business after 1981 was wider in range, especially in the field of non-contentious business, which did not exist during the earlier period. The appearance of this new business was the result of the development of society and changes in the legal awareness of Chinese people. Since the function of the legal profession was more widely recognised, more and more people came to employ lawyers in various fields, not only in lawsuits. For example, companies found it was safer to sign contracts with the advice of a lawyer, so companies which did not have legal advisors would employ a lawyer to check a contract before it was signed.

**Table 5: Statistics on legal business from 1981 to 1985**

	1981	1982	1983	1984	1985
Legal advisory affairs*1	--	411	3,846	15,349	39,453
Civil lawsuits	8,123	23,231	37,311	31,956	52,923
Economic lawsuits	--	--	20,257	55,313	--*2
Criminal lawsuits	65,179	93,712	103,492	163,476	101,707
Non-contentious business		4,550	12,100	20,194	41,136
Legal business involving foreign factors	--	--	709	1,997	4,324
Inquiries	338,044	58,2613	99,1528	1,190,831	1,224,028
Document-drafting business	62,502	13,5625	20,4431	2431,66	316,413

\*1 Based on how many units employed the legal advisor

\*2 Economic lawsuits were included in the civil lawsuits

Sources: unpublished internal statistics of the Ministry of Justice, Beijing, 1997

"One distinctive feature of legal practice in modern China is the growing role of lawyers in business transactions."<sup>146</sup> This is fully supported by the statistics (Table 6, Table 7). The economic cases, non-contentious business and legal business involving foreign factors increased extremely quickly from 1986 to 1996. This is a

<sup>146</sup> Zheng, H.R., op.cit., p486.

reflection of the developing economy. The Chinese economy made considerable progress from 1986 to 1996, especially after 1992. The GNP of the country increased annually by about 1,000 billion yuan from 1992 to 1996, and the growth rate was maintained at 10% over the whole period.<sup>147</sup> With the development of the economy, foreign trade increased and business transactions became more and more frequent, relevant disputes also correspondingly increased. This provided a large market for lawyers' legal practice. Moreover, the increasing business transactions and disputes have led to an increase in economic laws. Complicated laws and regulations also give lawyers a vital role in legal questions. From Tables 6 and 7, it can be found that the number of non-contentious affairs increased from 41,185 in 1986 to 452,021 in 1995, the number of economic lawsuits increased from 173,111 in 1991 to 324,909 in 1995 and the quantity of foreign related business increased from 4,375 in 1986 to 20,444 in 1995.

In addition, a remarkable phenomenon indicated by Table 7 is that the number of administrative lawsuits, which first appeared in 1991 according to statistics, showed a very modest increase over the five year period. To understand this phenomenon, it is very important to analyse its background. According to the traditional way of thinking of Chinese people, the interests of the state override these of the individual, and individual's interests should be subordinated to that of the group. This traditional way of thinking still influences modern Chinese society. Therefore, the interests of individuals are often infringed by government departments and officials with the excuse that individual's interest should be subordinated to that of the state. Though the People's Court began to handle administrative lawsuits according to civil procedure

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<sup>147</sup> EIU Country Profile: 1997-98, p17, 56; 1996-1997, p16; 1995-1996, p13; 1994-1995, p11.

from 1982, there was no specialised law to secure the interests of individuals when their rights were infringed by state administrative organs.<sup>148</sup> This problem concerned the government for a long time. In 1989, the first Administrative Procedural Law of the PRC<sup>149</sup> was finally promulgated in order to provide legal procedures for solving administrative disputes. It seems that the APL was badly needed at that time because lawyers were involved in 14,307 administrative cases in the year after it was put into effect. On the other hand, the number of cases where government administrative organs infringed individual's rights did not show a significant increase, indicating a strengthening of the legal awareness of government officials.

That lawyers were involved at all in administrative lawsuits is an indication of how far the legal system had developed. However, there are still many difficulties when lawyers act as agents in administrative lawsuits. The rule of law is still not paramount in China and administrative power still sometimes overrides the law.<sup>150</sup> There are still many obstacles to be surmounted when a lawyer acts against government departments.

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<sup>148</sup> "Wang Hanbin tan xingzheng susongfa", in *Liaowang*, Vol.49, 1988.

<sup>149</sup> Hereinafter <APL>, promulgated on 4 April 1989 by the 2nd Session of the 7th National People's Congress, in 1989 Collection LR, Beijing: Zhongguo Fazhi Chubanshe, 1990.

<sup>150</sup> Wang, G.G. et al, *Legal development in China*, Hong Kong & London: Sweet & Maxwell, 1996, p7; Wang, C.G. et al, *Introduction to Chinese Law*, Hong Kong & Singapore: Sweet & Maxwell Asia, 1997, p26.

The system of governance became a key issue in the reform of the legal profession. At a meeting of directors of provincial departments of justice on 26 June 1993,<sup>183</sup> reform of the system of governance was on the agenda and a system of combined governance was adopted. It was confirmed that the role of judicial administration should be one of macro-control, concentrating on planning, co-ordinating, supervising and serving. At the same time, the role of the law society in governance should be brought into full play and then a system of combined governance would exist:

(1) Judicial administration

At the meeting mentioned above, it was determined that the judicial administration organ should exercise judicial administration over the legal profession, with its responsibilities summarised as follows:

A. To formulate a long-term development plan for the legal profession, and relevant policies and rules.

B. To examine and ratify the establishment of professional institutions of lawyers, and to abolish them when necessary.

C. To qualify and disqualify lawyers.

D. To be in charge of annual examinations, registers, legal training, rewards and punishments, and important issues relating to finance.

E. To strengthen ideological work among lawyers.

(2) Law society governance

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<sup>183</sup> Fang, X., "Lüshi gongzuo gaige de zhongda tupo", in *Zhongguo Lüshi*, Vol.7, 1993, p3.

The National Law Society of China was established on 5 July 1986.<sup>184</sup> It is the national professional body for lawyers under the direction of the Ministry of Justice. Lawyers who agree to pay membership fees regularly can be adopted as members. Local law societies are local professional bodies of lawyers under the supervision of the local department of justice. All lawyers registered at the local department of justice are adopted as members on the condition that the membership fees are paid regularly. There are no affiliated relations between the National Law Society and local law societies, and a lawyer may be a member of both the local law society and the National Law Society.<sup>185</sup>

According to Article 40 of the 1996 Lawyers Act, the responsibilities of the law society are as follows:

A. To guarantee that lawyers pursue their practice in accordance with the law, and maintain the legitimate rights and interests of lawyers;

B. To sum up and exchange experiences acquired by lawyers in conducting their work;

C. To organise training legal practice;

D. To conduct education in, inspection of, and supervision over the professional ethics and discipline of lawyers;

E. To organise lawyers to conduct exchanges with foreign counterparts;

F. To mediate in disputes arising from lawyers' pursuit of their practice;

G. Other duties stipulated by law. The law society shall give awards or punish lawyers in accordance with their articles of association.

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<sup>184</sup> Zhang, G., *Zhongguo lüshi zhidu fazhan de lichengbei*, p236.

<sup>185</sup> Tao, M., *Lüshi zhidu bijiao yanjiu*, p166.

The law society has really played an increasingly important role in recent years. Moreover, the SWRL indicated that combined governance would gradually develop to a self-governance system under the overall control of the judicial administration organ. However, it was argued that the power of the law society was still very limited compared with law societies in other countries. In reality, the law society is an organisation directed by the judicial administration organ; it can only supervise lawyers in the field of professional work, and has little power in the real sense. This is not in keeping with its nature as a professional body. Furthermore, as a professional body, its independence is very important. Any affiliation between it and the administrative organs will affect its function. The role of the law society is yet to develop to its full extent.<sup>186</sup>

## 8.2 Discipline

It was decreed in Article 12 of the PRL that a very incompetent lawyer could be deprived the right to practise by the decision of the local department of justice and with the ratification of the Ministry of Justice. It was further decreed in a supplementary article that the Ministry of Justice would, at a later point, determine a system of rewards and punishments for lawyers. However, there was no rule on discipline until the Disciplinary Rules for Lawyers<sup>187</sup> was issued in 1992. It provided concrete rules on disciplinary issues, details of the disciplinary committee, what types of behaviour merited punishment, disciplinary procedure before the disciplinary committee and at appeal, thereby filling a gap in this respect. According to the DPL,

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<sup>186</sup> *ibid.*, p159.

<sup>187</sup> Hereinafter <DPL>, promulgated on 22 October 1992 by the Ministry of Justice, in 1992 Collection JAD, 1993.

disciplinary measures included disciplinary warning, suspension from practice and revocation of the license to practise. The lawyers disciplinary committee is affiliated to and set up by the local department of justice, and consists of practising lawyers, people from the local law society and people from the local department of justice. The Chair of the committee is chosen by the local department of justice. The DPL was a further step in the legalisation of the legal profession, and benefited the development of the legal profession. Moreover, the fact that in the constitution of the disciplinary committee lawyers and the law society were involved in decisions on discipline, indicated a measure of a progress towards self-governance.



## 9. The Establishment of a Legal Aid System

### 9.1 Background

From the story of Alice, we know that legal aid emerged in England as early as the middle ages.<sup>188</sup> In modern society, many countries have established or are establishing a legal aid system for poor people in order to guarantee all citizens the opportunity of getting legal help regardless of wealth, thereby ensuring the impartiality of justice.

Since the founding of the PRC, "the right to a defence" and "the equality of all people before the law" were repeatedly stated by the law, and there were some regulations relating to legal assistance to the poor. For example, it was decreed that the court should appoint a lawyer for the defendant when necessary.<sup>189</sup> However, there was no legal aid scheme in the modern sense. At the beginning of the 1990s, the national economy was developed rapidly and the construction of democracy and legality was pushed to new heights with the widening of the reform and opening up movement. The lawyer's role in society became more important and legal assistance from lawyers became indispensable to the life of society. However, following the change in the national economy from a planned economy to a market economy, the legal profession also became market orientated and the retainer was much higher than it had been ten years before, so some poor people could not afford the expense of legal services when they needed them. How to help the poor get essential legal assistance from lawyers became a prominent issue.

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<sup>188</sup> For further details, please see Cappelletti, M., *Toward Equal Justice: A Comparative Study of Legal Aid in Modern Society*, Dobbs Ferry: New York-Oceana Publications, Inc., 1975, p.5.

<sup>189</sup> Article 7, 1954 OLPC; Article 27, 1979 CPL.

In practice, besides the fact that the courts used to reduce or remit charges when it was reasonable to believe that a litigant was unable to afford them, some lawyers provided free legal assistance or advice to the poor on the basis of sympathy or a sense of justice. For example, Wuhan University set up a Rights Protection Centre in May 1992. The purpose of this centre is to provide free legal assistance to those who need legal assistance but cannot afford the expense. People who have been provided with free legal assistance include the disabled, the old, the young and others.<sup>190</sup> This legal assistance did help some poor people. However, it is not enough to have legal aid based only on the spontaneous decision of a lawyer since we know that their personal ability to provide it was very limited. Legal aid needed a system, then the poor really could get effective protection from the law. In the 1990s, the possibility of establishing a legal aid system in China was provided for by the development of the national economy, exchanges between lawyers in China and overseas, and the strengthening of the role of law societies.<sup>191</sup> As a result legal aid became a serious issue not only in theory, but also in practice and legislation.

## **9.2 Academic views on the establishment of legal aid in China**

In recent years, many law scholars and lawyers have come to pay close attention to the issue of the legal aid. They have written articles introducing the legal aid systems of foreign countries and appealing for the establishment of a legal aid system in China. Moreover, they have put forward their proposals on how to establish legal aid in China on the basis of Western legal aid theory and Chinese practice. The opinion of Professor Tao Mao was typical. He thought that now it was necessary and

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<sup>190</sup> Sun, H.N., "Xiang canjiren shenchi yuanzhu zhi shou", in *Fazhi Ribao*, August 4, 1997.

<sup>191</sup> Tao, M., "Jianli woguo lüshi falü yuanzhu zhidu de gouxiang", in *Lüshi yu Fazhi*, Vol.8, 1996, p14.

possible to develop systematic legal aid in China, and suggested establishing a system according to the following five criteria:<sup>192</sup>

(1) Legislation on legal aid should be enacted and it should be an important part of the national legal system. It should include: instruction on legal aid, its nature and role, organisation and management, people to be assisted and the conditions attached, and so on.

(2) A national Legal Aid Committee should be established to have control over the legal aid scheme.

(3) The social welfare system should be developed so as to benefit the legal aid system.

(4) A legal aid fund should be established, its sources to include: a) government financial allocation; b) a subscription from lawyers; c) donations from enterprises, social organisations and others.

(5) The cost of a legal aid should be paid by the assisted person if his income changed and made normal payment possible during or after the proceedings through, for example, inheriting a legacy.

### **9.3 Legal aid legislation**

In view of the good results achieved by voluntary legal assistance from some lawyers, the Ministry of Justice came to take the establishment of a legal aid system as one of its important tasks. It not only encouraged local authorities to establish legal aid systems,<sup>193</sup> but also did much work to bring it about through legislation.<sup>194</sup> The

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<sup>192</sup> *ibid*, p15.

<sup>193</sup> Xu, L., "Zhongguo falü yuanzhu jijinhui chengli", in *Fazhi Ribao*, 27 May 1997.

<sup>194</sup> Zheng, G., *Falü yuanzhu zhidu bijiao yanjiu*, Beijing: Falü Chubanshe, p13.

efforts showed in some newly-enacted laws. In the 1996 CPL, it was indicated that legal aid could be provided to a defendant who does not engage a defender because of his/her poor financial situation or other reasons. It should be provided to a defendant who is blind or deaf or dumb, or a minor without a defender. Also, it should be provided to a defendant without a defender who is liable to a death sentence.<sup>195</sup> The 1996 Lawyers Act also decreed that when citizens need legal assistance to request support, or compensation, or the provision of a pension for the disabled, or for the family of a person deceased as a result of injury suffered on the job, or to file a criminal suit where the person cannot afford counsel's fee, they may receive legal assistance according to state regulations.<sup>196</sup>

However, there is no specific directive on legal aid up to now though Article 43 of the 1996 Lawyers Act indicated that a specific directive for legal aid would be drawn up by the Judicial Administration Department of the State Council. A national unified system for legal aid is still lacking.

#### **9.4 Local authority practices**

Since legal aid was encouraged by the Ministry of Justice in 1994, many local departments of justice have begun to set up legal aid centres and enact legal aid regulations with the support of the local government. In this the Guangzhou Department of Justice has achieved considerable success. The Guangzhou Legal Aid Centre provided legal assistance in 316 lawsuits and advice to more than 1,000 people in just one year after it was established in 1995. It was praised by the people.<sup>197</sup>

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<sup>195</sup> Article 34, the 1996 CPL.

<sup>196</sup> Article 41, the 1996 Lawyers Act.

<sup>197</sup> Zhang, G., *Falü yuanzhu zhidu bijiao yanjiu*, p101.

Experiments in Legal Aid in Guangzhou City,<sup>198</sup> the legal basis for legal aid in the city, was relatively well thought-out and was made use of by other cities. Its main contents are as follows:

(1) The aim of legal aid

In Article 1, it states that

"In order to carry out the socialist legal principle of "all people being equal before the law", and cause the social obligations of lawyers to be carried out, to secure poor people's rights in enjoying legal help from lawyers, to safeguard the interests of the state, the collective and individuals, and to promote the construction of democracy and legality in this city, the ELA is enacted on the basis of the Constitution of the PRC, the SWRL and the situation in this city."

(2) Guangzhou Legal Aid Centre

Article 2, Section 1 and Article 3 indicate that the government has established a Guangzhou Legal Aid Centre to deal with legal aid affairs, appoint lawyers to provide legal assistance and advice to citizens who are not able to afford lawyer's fees and have an interest in legal questions or actions on which legal advice or aid is sought.

(3) Legal advice and legal aid

The legislation provides four different kinds of professional help by Article 2: A. legal advice; B. legal help on writing and modifying legal documents; C. legal aid in criminal actions, civil actions and administrative actions; D. legal aid in non-contentious business.

(4) Who is eligible for legal aid

A. any person who is a permanent or temporary resident in Guangzhou city can apply for legal aid from the Guangzhou Legal Aid Centre; (Article 7)

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<sup>198</sup> Hereinafter <ELA>, promulgated in 1995 by the Guangzhou Department of Justice. The text can be found in Zhang, G., *Falü yuanzhu zhidu bijiao yanjiu*, p241-255.

B. legal aid is available to an applicant who meets the following criteria: a) he is a litigant in a lawsuit or an arbitration, or he can show that it is reasonable to offer him legal help from lawyers to protect his legal interests; b) he has the possibility of winning a lawsuit or gaining interests; c) he has evidence that he is not able to pay all or part of the lawyer's fees. (Article 8)

#### (5) Panel Membership

All practising lawyers enrolled in Guangzhou City have an obligation to provide legal aid, (Article 18). Panels of lawyers who are willing to act for legally aided persons are maintained by the Guangzhou Legal Aid Centre. (Article 19)

#### (6) Cases or disputes beyond the scope of legal aid

- A. cases involving indemnity for defamation and slander;
- B. debt disputes involving an amount of less than 3,000 yuan;
- C. simple cases which normally do not need legal service;
- D. cases on which legal aid has been exhausted;
- E. other cases where the Legal Aid Centre has rejected requests for legal assistance with the ratification of the competent authority;

#### (7) Source of Legal Aid Funds

These were mainly from five sources in Article 24: A. financial allocations from local government; B. subscriptions from the law office or institution concerned; C. subsidies from the Judicial Administration; D. social donations; E. others.

The ELA provided a good legislative frame work for legal aid. The practice and theory of legal aid in Guangzhou City provided a model throughout China and benefited the development of the legal aid system.

## 9.5 Prospects for a legal aid scheme in China

Nowadays, China is at a stage of rapid development. The market economy has inevitably brought the problem of greater differences between rich and poor. It has become harder for the poor to get some services, including legal assistance from lawyers. To secure poor people's rights in getting essential legal help from lawyers, the legal aid scheme is very important. The legal aid system is a measure of society's fairness. Legal aid has been included in some newly-enacted laws, which have provided the poor with grounds for getting legal assistance. Also, many legal aid centres have been established, such as the Legal Aid Centre of the Ministry of Justice, the Guangzhou Legal Aid Centre,<sup>199</sup> and so on. The establishment of legal aid is going well in China. However, there are still many problems, such as the absence of a national legal aid law and the unbalanced development of legal aid in different areas. Legal aid has been paid much attention by society and the government, a national legal aid law is expected to be enacted in the near future and further development is expected to be achieved. It will become a basic feature of the legal system in China.

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<sup>199</sup> "Quanguo lüshi guangfan kaizhan fayuan gongzuo", in *Zhongguo Lüshi Bao*, 23 August, 1997; Xu, L., *op.cit.*

## 10. Internationalisation

With the development of the modern economy and high technology, the world has become smaller. Internationalisation has become a tendency for all trades and professions. The legal profession in China is also in the process of internationalisation, which is manifested in the following aspects:

### 10.1 Increasing contacts between Chinese and foreign lawyers

In January 1987, the National Law Society of China, which had been established for less than six months at that time, joined the Asian-Pacific Law Society. In May of the same year, it joined the International Law Society.<sup>200</sup> This showed that the Chinese lawyers' organisation had become internationalised, and Chinese lawyers would have more opportunities for exchanges and co-operation with foreign lawyers since they were members of the same organisation.

International conferences are another important channel for Chinese lawyers to communicate with their foreign colleagues; they were very rare before the mid-1980s, but became frequent from the end of the 1980s. Now Chinese lawyers not only go abroad for conferences, but also organise international conferences in China. For example, the Fourth Annual Meeting of the Asian-Pacific Law Society was held in Beijing in April 1990, the first time that the Asian-Pacific Law Society had held a meeting in a socialist country.<sup>201</sup>

In addition, the Ministry of Justice and the National Law Society of China made many efforts to organise lawyers to go to other countries to observe and study.

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<sup>200</sup> "Lüshi lifa gongzuo dashi ji", in Zhang, G., *Zhongguo lüshi zhidu fazhan de lichengbei*, p236.

<sup>201</sup> *ibid*, p237.



According to the "Summary of the Foreign Affairs of the National Law Society (1995-1997)", lawyers' overseas visits were more frequent during these two years, and included a regular exchange of lawyers' delegations between China and Canada since 1995.<sup>202</sup>

## **10.2 Increase in legal affairs involving foreign factors**

From Table 5, it can be seen that the work of lawyers in 1981 and 1982 did not include any legal business involving foreign factors. Lawyers began to be engaged in this business in 1983 and the number of the cases was 709 at that year. After a decade's development, it increased to 26,718, over 20 times in comparison with the 1983 figure. The internationalisation of legal practice is in line with the internationalisation of the Chinese economy. Since foreign capital was encouraged in China at the end of the 1970s and the beginning of the 1980s, more and more foreign enterprises have invested in China and many Chinese-foreign joint ventures have been established. The proportion of foreign capital in the Chinese economy increased year by year. For example, China attracted US\$42.4bn of actual overseas investment in 1996, a rise of 13.6% on the previous year.<sup>203</sup> Also, foreign trade developed very quickly. It has been pointed out that "every year since 1978, with exception of 1989, China's exports have outpaced world export growth".<sup>204</sup> Disputes involving foreign factors increased following the increase in foreign investment and trade. It became very important for businessmen to get legal assistance in international business transactions in order to make provision against possible trouble. Professional

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<sup>202</sup> Unpublished material, provided by the Ministry of Justice, 1997.

<sup>203</sup> EIU Country Report, 1st Quarter, 1997, p44.

<sup>204</sup> EIU Country profile: 1996-1997, p46.

knowledge gave lawyers an important role in these transactions. Therefore, dealing with international business transactions and disputes has become an important and increasing part of the work of lawyers.

### **10.3 The internationalisation of law offices**

#### **(1) Chinese law offices set up branches in other countries**

In the first few years after the legal profession was restored, law offices were run by the state and established according to administrative region, so it was impossible for these law offices to set up branches in other administrative regions, let alone setting up branches in other countries. Moreover, their funds were not abundant since they were not profit-making but public institutions. This also made setting up branches impossible. With the development of legal practice, the disadvantages of this non-profit-making approach were realised, so law offices were required to be financially independent, profit-making institutions as part of the reform of the legal profession.<sup>205</sup> The administrative regional limits also disappeared with the emergence of new types of law offices. Thus it became possible for law offices to establish branches. In 1995, a directive on this was issued by the Ministry of Justice, in which the requirements and related procedures for Chinese law offices setting up branches in other countries were decreed.<sup>206</sup> Under this directive, some Chinese law offices came to set up overseas branches. According to statistics for May 1996, seven Chinese law offices established agencies in other countries, mainly in Russia, Singapore and the United States.<sup>207</sup> Obviously establishing agencies abroad is still

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<sup>205</sup> See the OSRL and the SWRL.

<sup>206</sup> "Directive on Law Offices Setting Up Overseas Branches", promulgated on 20 February 1995, by the Ministry of Justice, in 1995 Collection JAD, 1996.

<sup>207</sup> Zhang, G., *Zhongguo lüshi zhidu fazhan de lichengbei*, p204.

uncommon for Chinese law offices. There are several reasons to this. Above all, most law offices are state law offices, they are not very competitive in the market. If survival is still a problem for them, it is impossible for them to establish affiliated institutions. Secondly, co-operative law offices and partnership law offices were set up very recently, and are established by lawyers themselves, so they are characterised by being small-scale and lacking in funds. Thirdly, though the government permits law offices to set up overseas branches, it is not very much encouraged. It is unknown for a law office wishing to do so to obtain financial help. Finally, the legal education level of the country is still very low. Lawyers who can use foreign languages well and understand foreign laws are very few. This is also an obstacle in the way.

## (2) Foreign law offices setting up branches in China

On 26 May 1992, the "Temporary Provisions for Foreign Law Firms Setting Up Agencies in China" was enacted,<sup>208</sup> Article 2 of it indicated that foreign law firms can establish agencies in China after being ratified by the Ministry of Justice and registered at the National Bureau of Industrial and Commercial Administration. An experiment concerning this has been launched since then. The first five experimental cities are Beijing, Shanghai, Guangzhou, Haikou and Shenzhen. In 1995, the trial cities were increased to 15. Fifty-seven foreign and Hong Kong law offices have established agencies in China according to statistics from the end of 1996.<sup>209</sup> These agencies have introduced a large number of investment, trade and technology co-operation projects to China. They explain the laws of their own countries and relevant

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<sup>208</sup> Hereinafter <TPFL>, promulgated on 26 May 1992 by the Ministry of Justice and the National Administrative Bureau of the Industry and Commerce, in 1992 Collection JAD, 1993.

<sup>209</sup> Zhang, G., *Zhongguo lüshi zhidu fazhan de lichengbei*, p108.

international treaties to Chinese clients, handle legal affairs abroad for Chinese clients and provide legal advice to relevant Chinese government departments and enterprises.<sup>210</sup> All of these promote foreign trade and the exchange of legal services between China and other countries. Moreover, modern facilities and advanced management at these foreign law agencies have provided a model for the reform of the Chinese legal profession.

What should be pointed out is that foreign lawyers are forbidden to offer advice on Chinese laws. In addition, Chinese agencies of foreign law offices cannot employ Chinese lawyers.<sup>211</sup>

The experience of these years has shown that internationalisation is an inevitable tendency for the legal profession, and its scope and contents will be widened and deepened with the development of the economy and the legal system.

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<sup>210</sup> Article 16, the TPFL.

<sup>211</sup> Article 17, the TPFL.

## 11. Legal Education

China's legal education started from the end of the Qing Dynasty. The first legal educational institution was established in 1904 by the Qing government.<sup>212</sup> Law became the most popular subject during the period of Beiyang government, and legal education made giant strides. It continued developing in the Republic of China as a system controlled by the government.<sup>213</sup> When the PRC was established, the CCP government abolished the old legal educational system and copied the soviet legal education model as appropriate for a socialist system, but this socialist legal education only continued for ten years, and then was disrupted by the Cultural Revolution.<sup>214</sup>

Legal education was restored following the restoration of higher education in the country in 1977 and over twenty years developed into a multiple-form system consisting of higher legal education, adult legal education and legal training.<sup>215</sup>

### 1. Higher legal education

Higher legal education is the major part and highest level of legal education. There were few law departments or schools when higher education was just restored at the end of the 1970s. It has developed rapidly since then to meet the demands of society for high-quality legal workers. In 1995, there were 140 universities with law departments or schools.<sup>216</sup> These universities were normally divided into a) comprehensive universities and b) politics and law universities under the Ministry of

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<sup>212</sup> Fang, L.F., "Zhongguo faxue jiaoyu guan cha", in He, W.F., *Zhongguo falü jiaoyu zhi lu*, Beijing: Zhongguo Zhengfa Daxue Chubanshe, 1997, p9.

<sup>213</sup> Tang, N.S., *Tansuo de guiji--zhongguo falü jiaoyu fazhan shilüe*, Beijing: Falü Chubanshe, 1995.

Fang, L. F., "Zhongguo faxue jiaoyu guan cha", p9-15.

<sup>214</sup> Fang, L.F., "Zhongguo faxue jiaoyu guan cha", p15-17.

<sup>215</sup> Zeng, X.Y., *Zhongguo de faxue jiaoyu tizhi* (provided by the Law School, Renmin University of China, 1996, n.p.)

<sup>216</sup> *Zhongguo falü nianjian*, Beijing: Falü Chubanshe, 1987, p892.

Justice. Representatives of the former are Beijing University and Renmin University of China, which have the leading law departments in the country. The latter includes the following five universities: the Politics and Law University of China (Zhongguo Zhengfa Daxue), the Politics and Law University of East China (Huadong Zhengfa Daxue), the Politics and Law University of Southwest China (Xinan Zhengfa Daxue), the Politics and Law University of Northwest China (Xibei Zhengfa Daxue) and the Politics and Law University of Central South China (Zhongnan Zhengfa Daxue). The students of higher legal education are normally enrolled from graduates of high schools who succeed in the entrance examinations for higher education.<sup>217</sup> The number of law students at universities was about 80,000 in 1995.<sup>218</sup>

Since legal education was restored in a reform and opening up era when the development of the economy was emphasised by the state, it inevitably has the characteristic of suiting the socialist market economy. Economic law, business law and other relevant types of law are required courses for undergraduate students. Moreover, almost every law department has set up an economic law major and half of their undergraduate students are studying this major. This was argued by some law professors who held that this emphasis and a too elaborate division of undergraduate study were disadvantageous to undergraduate students who need to absorb all kinds of knowledge.<sup>219</sup> Comparing the required courses for law students and economic law students at the Politics and Law University of China,<sup>220</sup> it can be found that the economic law student does not need to study some basic law courses, such as the history of western legal systems, administrative law, theory of the legal profession,

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<sup>217</sup> Zeng, X.Y., *Zhongguo de faxue jiaoyu tizhi*.

<sup>218</sup> Fang, L.F., "Zhongguo faxue jiaoyu guan cha", p28.

<sup>219</sup> *ibid*, p39.

<sup>220</sup> Li, X.W., *Jiaoxue gailan*, Beijing: Zhongguo Zhengfa Daxue Jiaoyuchu, 1996, p19, 26.

criminology, legal document writing and criminal psychology, but is required to study many economics courses such as finance, real estate, accounting and so on. Though there are no survey figures to show the advantages or disadvantages of this course set-up, the influence of the market economy on legal education is apparent in it.

A new form of higher legal education in recent years was the establishment of Falü zhuanye shuoshi (Master of Professional Law) courses at eight designated universities.<sup>221</sup> The Falü zhuangye shuoshi is regarded as equivalent to the J.D in America<sup>222</sup> by some people.<sup>223</sup> The purpose of the Falü zhuangye shuoshi is to train high level legal professionals, judges and judicial officials. Compared with normal higher legal education, it emphasises legal practice more. This new form of legal education has been approved by the government and many law professors, although some law scholars have complained that this course is not a regular one since the admission and graduation requirements are not as strict as for the LL.M.<sup>224</sup>

## 2. Adult legal education

Adult legal education is one kind of part-time study, and students attend taught courses in their spare time or are given correspondence courses. Now it has become a very important part of the legal educational system and has the biggest number of students. Statistics from 1992 showed that the number of students who were receiving adult legal education was 11 times greater than those receiving higher legal education.<sup>225</sup> Compared to higher legal education, adult legal education is not as strict

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<sup>221</sup> "Quanguo basuo gaodeng yuanxiao 1996 nian shouqi zhaoshou falü zhuanye shuoshi yanjiusheng gonggao", in *Guangming Ribao*, October 27, 1995.

<sup>222</sup> Juris Doctor.

<sup>223</sup> Wang, J., "Zhongguo de J.D.?", in He, W.F., *Zhongguo falü jiaoyu zhi lu*, 1997, p85.

<sup>224</sup> Zeng, X.Y., *Zhongguo de faxue jiaoyu tizhi*; Wang, J., *op.cit.*, p91-95.

<sup>225</sup> *Zhongguo jiaoyu shiye tongji nianjian*, 1993, Beijing; *Zhongguo Jiaoyu Chubanshe*, p26, 28, 100.

in its admission and examinations requirements, so it is easier for access and thus has many more students than others.<sup>226</sup>

### 3. Legal training

In recent years, a remarkable feature of legal education is the appearance and rapid development of the legal training scheme. From 1985 to 1995, about 110,806 judges and judicial officials received a higher education certificate from temporary universities set up by the courts. This was regarded as a great success in legal education.<sup>227</sup> However, the legal training scheme has been criticised as a way of giving those judges and judicial officials who had never received any legal education a decent certificate appropriate to their status.<sup>228</sup>

Legal education in China has achieved considerable progress in this past twenty years. It has provided society with a number of judges, public prosecutors and lawyers, and pushed forward the development of the legal system and society. However, there are still many problems. For example, the legal profession has no formal links with regular legal education; all kinds of low-quality adult legal education and training are competing with regular legal education, and the structure of the courses is not very sensible.<sup>229</sup> How to develop a reasonable, effective legal education system is still an unresolved problem.

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<sup>226</sup> Fang, L.F., "Zhongguo faxue jiaoyu guan cha", p29; Zeng, X.Y., Zhongguo de faxue jiaoyu tizhi.

<sup>227</sup> "Huihuang shinian banxue lu" in Renmin Fayuan Bao, September 12, 1995

<sup>228</sup> Fang, L.F., "Zhongguo faxue jiaoyu guan cha", p29.

<sup>229</sup> *ibid*, p28; also see Su, L., "Faxue benke jiaoyu de yanjiu he sikao", in He, W.F., Zhongguo falü jiaoyu zhi lu, 1997, p54; and Pang, D., "Zhongguo falü jiaoyu de wenti jiqi biange luxiang", in He, W.F., Zhongguo falü jiaoyu zhi lu, 1997, p298.



### III. Reasons for the Development of the Legal Profession and Unresolved Problems

#### 1. Reasons

Since its restoration in 1979, the legal profession has seen significant changes and undergone a process of diversification. Several important factors have significantly influenced the legal profession and contributed to its development.

Firstly, a firm political line and a relatively stable political situation are essential. One of the most important reasons why the legal profession was almost totally absent in the first thirty years of the PRC was the chaotic situation and changeable policies.<sup>230</sup> When the Cultural Revolution ended in 1976, the importance of a stable political situation and steady policies was fully realised by new leaders who had been through the tribulations of previous political movements. A firm and steady political line was regarded as one of the four most important prerequisites of the modernisation of China.<sup>231</sup> At the Third Plenary Session of the 11th Party Central Committee of the CCP in 1978, the reform and opening up policy was put forward and confirmed as a basic policy of the country.<sup>232</sup> Li Xiannian<sup>233</sup> pointed out in the meeting that

"To achieve socialist modernisation, all production relations which are unsuitable to the development of the productive forces, and the superstructure which is unsuitable to the development of the economic base, should be reformed; economic and cultural exchanges with foreign

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<sup>230</sup> Anti-Rightist Movement commenced in 1957 and lasted 3 years, the Cultural revolution commenced in 1966 and lasted 10 years. These movements led to political disorder.

<sup>231</sup> Deng, X, P., *Deng Xiaoping wenxuan*, Vol.2, Beijing: Renmin Chubanshe, 1993, p248.

<sup>232</sup> Zhang, G., *Zhongguo lüshi zhidu fazhan de lichengbei*, p6.

<sup>233</sup> A senior leader of the CCP, and the Chairman of the PRC from 1983 to 1988.

countries should be carried out. Self-reliance does not mean closing the country to international intercourse. It is definitely wrong if we do not study the advanced things of other countries..."<sup>234</sup>

After nine years' practice, the policy of reform and opening up was reaffirmed as correct at the 13th national congress of the CCP in 1987.<sup>235</sup> Moreover, it was developed into "Yi ge zhongxin, liang ge jibendian" (one core, two basic points). One core refers to the construction of the economy, two basic points refer to keeping up the Four Cardinal Principles<sup>236</sup> and maintaining the policy of reform and opening up.<sup>237</sup> In January 1992, Deng Xiaoping made a highly publicised tour of the South of China and had important talks with local leaders. The talks were actually an affirmation of the achievements over the past few years and of the policy of reform and opening up.<sup>238</sup> At the following 14th National Congress of the CCP in 1992, the policy of reform and opening up was again reaffirmed. The report of the Congress pointed out the following: "For the past fourteen years, what we have been engaged in is reaffirmation of the basic line of the Party, building socialism with Chinese characteristics and through the reform and opening up policy, liberating and developing productive forces."<sup>239</sup> Thus the basic line of the CCP has been kept consistent since 1978.

At the same time, many efforts were made by the government to keep a stable political situation while carrying out the reform and opening up movement.<sup>240</sup> At the end of the 1970s and the first five years of the 1980s, a stable political situation was achieved, then it changed a little. The protests of students in 1986 and 1989 provoked

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<sup>234</sup> Tang, Y.W., *op.cit.*, p90.

<sup>235</sup> Hsü, I.C.Y., *op.cit.*, p888.

<sup>236</sup> The socialist line, the proletarian dictatorship, the leadership of the Communist Party, and Marxism-Leninism and the Thought of Mao (Hsü, I.C.Y., *op.cit.*, p873).

<sup>237</sup> Tang, Y.W., *op.cit.*, p284.

<sup>238</sup> Hsü, I.C.Y., *op.cit.*, p841.

<sup>239</sup> Tang, Y.W., *op.cit.*, p368.

<sup>240</sup> Hsü, I.C.Y., *op.cit.*, p841; also see Tang, Y.W., *op.cit.*, p431.

a certain political crisis and led to the dismissal of General Secretaries of the CCP at that time.<sup>241</sup> The disintegration of the socialist system in the Soviet Union and Eastern Europe in 1991 also aroused doubts over the socialist system in China.<sup>242</sup> However, the leadership of the CCP did not change and a relatively stable political situation was again achieved in the 1990s.<sup>243</sup> Thus, a stable domestic political situation was basically achieved after the reform and opening up movement was initiated.<sup>244</sup>

The stable political situation and consistent policies laid the foundation for the development of every aspect of the country, including the legal profession. Since the basic line was consistent, other policies which depended on this could also be kept consistent. So the legal profession could get guidance from firm policies, thereby developing steadily. Moreover, since a stable political situation has been achieved, the government and the people can concentrate on developing the national economy and legal system. Therefore, the consistent development of the legal profession has an important link with political stability. It is frequently said in China that the backwardness of China since the end of nineteenth century was partly because there were only successful revolutions, no successful reforms in the history of Modern China. In this sense, it can be said that the achievements of China in recent years are mostly the result of political stability.

Secondly, the high-speed development and diversification of the economy provided the stimulus to the development of the legal profession and led to its diversification. In the 1950s, "because of the relatively underdeveloped economy,

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<sup>241</sup> Saich, T., "China's Political Structure", in Benewick, R., *China in the 1990s*, 1995, p36.

<sup>242</sup> *ibid.*, p37.

<sup>243</sup> Tang, Y.W., *op.cit.*, p434.

<sup>244</sup> *ibid.*, p336.

particularly its underdeveloped industry and commerce, there was little demand for professional legal assistance in the conduct of economic activities."<sup>245</sup> Moreover, the land revolution and agricultural collectivisation in 1952 and the industrial nationalisation in 1956<sup>246</sup> decreased the need for legal services in commercial disputes. The emphasis on administrative means in the settlement of disputes also diminished the need for legal services. Therefore, the role of lawyers in the 1950s was mainly in criminal lawsuits. When the legal profession was restored in 1979, the damaged national economy had still not recovered and the economic structure was still very simple, accordingly the structure of the legal profession was also simple. China's economic reforms began in the countryside in 1979, the rural collectives were changed by the introduction of a responsibility system<sup>247</sup> known as "household production contract" (bao chan dao hu).<sup>248</sup> The reform led to the disintegration of the simple rural collective economy and the emergence of complex economic relations in rural areas. Comprehensive urban reform too was carried out in 1984.<sup>249</sup> In October of that year, the CCP passed a new "Resolution on the Reform of the Economic System" to accelerate the pace of urban reform.<sup>250</sup> The resolution ended the idea that a planned economy is the opposite of a commodity economy, and put forward the idea that the socialist economy is a planned commodity economy on the basis of public ownership.<sup>251</sup> This resolution laid a theoretical foundation for further economic

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<sup>245</sup> Zheng, H.R., *op.cit.*, p478.

<sup>246</sup> Hsü, I.C.Y., *op.cit.*, p652.

<sup>247</sup> Under this system, individual households contract for the use of a plot of land, a piece of machinery, or even a workshop or enterprise, and they assume full financial responsibility for operating it. Land contracts specify a quota of crops to be grown on the land, which must be turned over to the collective partly as taxes and partly as a fee for use of the land; contracts to run workshops or machinery specify a cash fee. The contracting villagers keep all profits, but must also bear any losses.

<sup>248</sup> Blecher, M., "Collectivism, Contractualism and Crisis in the Chinese Countryside" in Benewick, R., *China in the 1990s*, 1995, p108.

<sup>249</sup> Tang, Y.W., *op.cit.*, p171.

<sup>250</sup> Hsü, I.C.Y., *op.cit.*, p853.

<sup>251</sup> Tang, Y.W., *op.cit.*, 179.

reform. The urban economy had been a highly administered, planned economy with a predominant state sector. After several years' reform, it operated through the market with a pattern of diversified ownership.<sup>252</sup> At the Fourteenth National Congress of the CCP in 1992, the "socialist market economy" was put forward and later it was interpreted as supporting a diversified economic structure in which public ownership, individual household industry, private enterprise, and foreign investment all competed on an equal basis.<sup>253</sup> The diversified economic structure led to an increase in economic disputes. There had been no private enterprises over the past decades, consequently there were no economic cases as reference material for owners of private enterprises and their businesses. The legal profession in turn diversified in order to conform to the diversified economic situation. Moreover, structural changes in the economy brought remarkable economic achievements. Between 1979 and 1992, China's GNP grew at an average annual rate of 9.0 percent, and exports increased 16.7 percent annually. Per capita income for urban families was 316 yuan in 1978, and increased to 1826 yuan in 1992; the corresponding figures for rural families were 133.6 yuan and 784 yuan.<sup>254</sup> The high-speed development of the economy provided a growing market for legal services. Increasing commercial and business transactions added to legal business and became the most important part of it. Thus, a flourishing diversified economy brought with it the development and diversification of the legal profession.

Thirdly, Chinese laws have undergone great development since 1978. The rule of law has been repeatedly emphasised by the government. For example, Mr

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<sup>252</sup> Zhou, X.Z., "Industry and the Urban Economy" in Benewick, R., *China in the 1990s*, 1995, p145.

<sup>253</sup> Hsü, I.C.Y., *op.cit.*, p947

<sup>254</sup> *Zhongguo tongji nianjian*, Beijing: Tongji Chubanshe, 1993, p21, 279.

Zhao Ziyang<sup>255</sup> said at a meeting that "only through strengthening the rule of law, can the stability of the country be achieved and can the economy and culture be developed."<sup>256</sup> In 1993, Mr Qiao Shi<sup>257</sup> also said that "law has a guidance function in relation to social and economic development. In particular, law is needed for the purpose of guiding, regulating, safeguarding and controlling the development of the socialist market economy."<sup>258</sup> Therefore, legislative work was accorded much importance by the government. Important laws were enacted successively, especially legislation relating to business, which has developed a complicated framework. Comprehensive laws not only laid a legislative foundation for the legal profession, but also created a complex legal system that was no longer easily accessible to those without specialised expertise.<sup>259</sup> Legal services provided by lawyers then became necessary. This also contributed to the development of the legal profession.

Finally, the change in legal ideology is also a motive force in the development of the legal profession. The differences between traditional Chinese and Western thinking concerning dispute resolution were summarised by Thomas Stephens as follows:

"In Western thought, the antithesis of chaos is order, and order is conceived of ... as an artificial objective deliberately brought about, managed, and controlled ... according to the conscious will of a transcendent power external to the flux, by the enforcement of codes of rigid, universal, specific imperatives constraining conduct. In Chinese thought ... the antithesis of chaos is harmony, which is thought of simply as a natural characteristic of a state of affairs that arises and persists automatically in a hierarchical universe so long as all the individual parts of that universe ... perform their duties and offices faithfully ... in whatever

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<sup>255</sup> A senior leader of the CCP in the 1980s. He had acted as the Premier of the PRC from 1980 to 1986, and the General Secretary of the CCP from 1987 to 1989.

<sup>256</sup> "Zhao Ziyang zhongli tan fazhi jianshe", in *Zhongguo Fazhi Bao*, 15 October 1982.

<sup>257</sup> Chairman of the Standing Committee of the National People's Congress (1993-1998).

<sup>258</sup> "Qiao Shi zhuxi tan jiakuai jingji lifa", *Zhongguo shangye fazhi*, Vol.5., 1993.

<sup>259</sup> Cohen, "Foreword to A Symposium on Chinese Law", *Harvard International Law Journal*, No.28, 1987, p239.

station or function of life they find themselves born to or assigned to by superior authority."<sup>260</sup>

These words reflected two important characteristics of Chinese traditional legal ideology. One is harmony. The explanation of harmony in Chinese legal thought means no lawsuits. Since this idea was expressed by Confucius, it had almost always been the ideal of Chinese people.<sup>261</sup> Accordingly lawsuits were regarded as a bad thing by Chinese people, and going to court meant losing face. This situation was described by Philip M.Chen in following words:

"Going to court for a decision means that, even if you are the aggrieved party, you do lose face. If you are not the aggrieved, you lose face because you somehow violated the laws of society. But if you are aggrieved, going to court is an admission that the other person does not have sufficient respect for you to settle properly outside of court. It is, therefore, an admission of loss of face."<sup>262</sup>

Since both common people and the government held a negative attitude to going to court, nobody wanted to be involved in lawsuits even when their interests were violated, so it was no surprise that in traditional China those who assisted litigants in framing complaints to bring before government officials should be labelled "litigation tricksters" and punished.<sup>263</sup> Influenced by this ideology, most Chinese people looked down on lawyers and did not want to get legal assistance from them. The other characteristic is that it was not the law, but superior authority which was regarded as the effective way to solve disputes. A civil or economic dispute was often solved by the head of a family or a clan in traditional China.<sup>264</sup> it developed into the custom that when a dispute arose, people often sought administrative ways, not legal

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<sup>260</sup> Stephens, T.B., *Order and Discipline in China*, Seattle, University of Washington Press, 1992, p4.

<sup>261</sup> Fan, Z.X., *op.cit*, p157

<sup>262</sup> Chen, P.M., *op.cit*, p4

<sup>263</sup> Clarke, D.C., "Justice and the Legal System in China" in Benewick, R., *China in the 1990s*, 1995, p89.

<sup>264</sup> *ibid*, p84.



ways, to solve it. This custom caused not only a reduction in the number of lawsuits and the role of lawyers, but also a loss of awareness of human rights. Following the widening of the reform and opening up movement, imported commercial concepts challenged traditional concepts, and western legal ideology and ideas on human rights were also disseminated in China. People became more sensitive over their rights, and found it was more fair and reasonable to protect themselves through the law rather than using superior authority since the latter was more changeable. Moreover, under the new economic policy, state administrative control over the economy has been greatly reduced.<sup>265</sup> So when economic disputes happen, people no longer just depend on the relevant administrative organs to solve it by administrative means, but prefer to bring cases to court or solve them through legal means. The change in thought created an incentive for the Chinese to seek professional legal service to safeguard their interests thereby enhancing the role of lawyers in social life.

Thus, a stable political situation and policies, flourishing diversified economy, complex laws and the change in legal ideology have combined together to lead to the development of the legal profession.

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<sup>265</sup> Zheng, H.R., op.cit, p484.



## 2. Problems

The legal profession has undergone considerable development in recent years, but there are still some problems which hinder the further development of the legal profession and need gradually to be solved by the country. These problems are principally the following:

### 2.1 Influence of traditional ideology

Though traditional legal ideology has changed a lot, it still influences Chinese society. The idea that no lawsuits means harmony is still held by some people. Going to court still means losing face, and discrimination against lawyers has still not been eliminated. The rights, even the personal rights, of lawyers were often infringed by people who discriminate against lawyers.<sup>266</sup> The Ma Haiwang incident was an example.<sup>267</sup> Ma Haiwang is a lawyer at the Linfen Law Office in Linfen City, Shanxi Province. He acted as the agent for a woman in a divorce case in April 1995, and was intentionally injured by the woman's husband and adult children. The right eyeball of Ma Haiwang was taken out by the offenders. The crime shocked the country because the behaviour of the offenders was very cruel and they showed no remorse. The reason why the offenders did this was said to be because they held that the lawyer's work in the divorce case was destroying the family, and it was acceptable to injure a lawyer. Though this is an extreme case, it shows that lawyers are still discriminated

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<sup>266</sup> Li, X.P., "Lüshi, wei ziji chuting"; Hu, Z., "Quanguo shouli lüshi su jianchayuan shunhan peichang and de daili"; in *Lüshi yu Fazhi*, Vol.10, 1994 & Vol.3, 1996.

<sup>267</sup> Sun, G.D., "Zhenjing quanguo de canhai lüshi an", in *Lüshi yu Fazhi*, Vol, 10, 1995, p8,9.

against by some people and their work is still not fully understood. Therefore, discrimination against lawyers has a negative influence on the development of the legal profession. Eliminating discrimination is still a crucial task for society.

## **2.2 Economic influence**

The Chinese economy has had a remarkable degree of development since 1978 and the GNP has maintained a high growth rate of about 9% in recent years. The flourishing economy has spurred on the development of the legal profession. However, China is still a developing country, and the national economy still lags behind developed countries. From Table 8, we can find that the GDP of China was US\$ 824 billion in 1996, while that of Japan and the United State for the same year was US\$ 4,582 billion and US\$ 7,636 billion, respectively. The per capita GDP in China was US\$ 680 in comparison with US\$ 36,410 in Japan and US\$ 28,790 in the United States. The underdeveloped economy has influenced the development of the legal system and legal profession. For example, the legal aid system has had much importance attached to it by the government, but since strong financial support was absent, a nation-wide unified legal aid system has still not been established and legal aid is still not systematised. Moreover, the diversified economic structure was just adopted after 1978, and the "socialist market economy" was just put forward in 1992, so China's economy is still relatively simple in comparison with some developed countries. For example, acting as a stock agent is an important part of the legal services of lawyers in developed countries, but it is unusual in China since stock markets were just set up in 1989 and are still limited to a few cities.<sup>268</sup> Therefore, the

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<sup>268</sup> Hsü, I.C.Y., *op.cit.*, p953.

underdeveloped economy has limited the nature of the legal profession. Further development of the legal profession relies on the further development of economy.

**Table 8: Comparative economic indicators, 1996**

(\$ bn unless otherwise indicated)

	China	India	Russia	Brazil	Japan	USA
GDP	824	329	441	749	4,582	7,636
GDP per head (\$)	680	350	2,980	5,750	36,410	28,790
Exports of goods	151	33	90	48	402	614
Imports of goods	132	39	67	53	309	803

Source: EIU Country Profile: 1997-1998, p18.

## 2.3 Influence of regional variations

**Table 9: Gross domestic product**

	By region		Per head 1996 (Rmb)
	1996 % of total	1991-96 Annual average % change	
Guangdong	9.6	11.8	8,445
Jiangsu	8.9	13.0	6,820
Shandong	8.8	14.8	3,688
Zhejiang	6.1	25.9	7,664
Henan	5.5	27.9	5,329
Liaoning	4.7	25.8	4,017
Shanghai	4.3	14.2	5,103
Hubei	4.4	18.3	4,117
Hunan	3.9	18.0	7,997
Fujian	3.9	17.6	6,441
Heilongjiang	3.6	18.5	3,854
Anhui	3.5	14.9	4,073
Beijing	2.4	13.4	3,701
Jiangxi	2.2	14.3	3,692
Yunnan	2.2	11.6	5,123
Jilin	2.0	18.3	4,198
Shanxi	1.9	16.3	3,320
Tianjin	1.6	12.4	6,117
Inner Mongolia	1.5	9.3	5,397
Xinjiang	1.4	10.1	2,028
Guizhou	1.1	11.5	2,891
Gansu	1.1	10.1	5,336
Hainan	0.6	9.3	3,747
Qinghai	0.3	8.4	3,723
Ningxia	0.3	9.3	2,696
Tibet	0.0	11.6	5,520

Source: EIU Country Profile 1997-1998, p31.

China has always been a country with big regional variations.<sup>269</sup> Since the reform and opening up policy was initiated, the east coastal area has developed more quickly than the central and western area due to advantages in geography and governmental policies. As a result, regional economic variation has further increased in the past few years.<sup>270</sup> According to statistics for 1994, the per capita GDP in 1994 was RMB 5,438 in the coastal area, RMB 2,913 in the central area and RMB 2,392 in the western area. The difference between the coastal area and the western area is more than double.<sup>271</sup> Even greater regional inequality is shown in 1996 in Table 9. Taking the richest province and the poorest province as examples, the per capita GDP in Guangzhou was RMB 8,445 in 1996, while it was RMB 2,028 in Xingjiang. The former was almost 4 times greater than the latter.

Regional inequality lies not only in the economy, but also in education. Pupils completing elementary education in 1994 was 91.32% in Beijing in comparison with 55.57% in Tibet.<sup>272</sup> Regional economic and educational inequality has caused regional variations in the legal profession. According to statistics from 1996, the number of law offices is 625 in Guangdong province, 263 in Beijing, but only 10 in Tibet. The number of lawyers is 4,275 in Guangdong province, 2,169 in Beijing, and 47 in Tibet.<sup>273</sup> From this striking contrast, we can imagine the differences in legal services enjoyed by people in different areas. Take legal aid as an example. In coastal area and big cities, such as Guangdong province, Beijing and Shanghai, legal aid has

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<sup>269</sup> Wang, H.Y., *Zhongguo kua shiji quyu xietiao fazhan zhanlue*, Beijing: Jingji Kexue Chubanshe, 1997, p3.

<sup>270</sup> Xu, Q.Y., "Woguo san da didai xiangzhen gongye quxu chayi de chengyin jiqi xietiao fazhan yanjiu", in *Jingji Dili*, Vol.17, No.3, 1997, p20.

<sup>271</sup> Lü, M.L., "Zhengshi diqu chaju, chujin xietiao fazhan", in *Jingji Dili*, Vol.16, No.4, 1996, p1.

<sup>272</sup> *ibid*, p4.

<sup>273</sup> 1996 nian quanguo sifa xingzheng gongzuo tongji zijiao (provided by the Ministry of Justice, 1997, n.p.)

been implemented since 1995, but in Tibet and some other western provinces, legal aid has not been implemented until now. Therefore, regional inequality has been a big obstacle in the progress of the legal profession. A balanced development of the legal profession depends on a reduction in regional inequality.

## 2.4 Quality of judges

An important part of legal business is all kinds of lawsuits. So lawyers inevitably make frequent contact with judges. Whether the role of lawyers in court can be fully realised depends not only on lawyers themselves, but also on judges. However reasonable and excellent an advocate is, it is useless if the judge does not accept his pleas. Cases are often reported in China where judges have ejected lawyers from court.<sup>274</sup> Therefore, the quality of judges has a deep influence on the legal practice.

In China, admission to become lawyers and judges is separate.<sup>275</sup> If a person wants to become a lawyer, normally he should sit the qualifying examination for being a lawyer. However, there is no unified examination for being a judge in China. Moreover, many judges have no professional educational background before they become judges.<sup>276</sup> This situation was described by Ladany as follows:

"At the beginning of 1988, there were 180,000 people working in the courts. Of these, 40,000 had taken only a short course of training in legal work. Some heads of court, and some heads of prosecution offices, also, did not have even a basic knowledge of law. Ignorant but politically reliable demobilised soldiers and retired Party officials were acting as judges and prosecutors, while trained lawyers were being squeezed out of their jobs."<sup>277</sup>

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<sup>274</sup> Ladany, L., op.cit, p101.

<sup>275</sup> Liao, Z.H., "Sifa congye zige yitihua tantao", in *Xiandai Faxue*, Vol.2., 1998; Fang, L.F., "Duanceng--touxu faxue jiaoyu he falü zhiye", in *Falü yu Shenghuo*, Vol.4, 1998, p24.

<sup>276</sup> Fang, L.F., op.cit., p24.

<sup>277</sup> Ladany, L., op.cit, p102.

Chinese judges did not have a good reputation from the point of view of their educational level. A report in a court newspaper said that 17% of judges in Shanghai had a higher education background in 1984, increasing to 68.45% in 1993.<sup>278</sup> The purpose of this report is to show that the quality of judges has improved rapidly in recent years. However, it was argued that the definition of higher education was not clear and 68.45% was still a very low percentage. Moreover, Shanghai is a big city and has a very good economic and cultural base. If the percentage of judges who have received higher education in Shanghai is only moderate, it can be imagined how bad the situation is in other places, especially remote country areas.<sup>279</sup>

A remarkable phenomenon is that demobilised soldiers occupy a big proportion of the judicial positions,<sup>280</sup> though the exact figure cannot be found.<sup>281</sup> This phenomenon created an interesting argument recently. He Weifang, an associate professor in Beijing University carried out an investigation<sup>282</sup> and found many excellent judges as reported by newspapers were demobilised soldiers. Then he referred to the phenomenon that there were many judges who are demobilised soldiers with no professional background. He compared judges with doctors and questioned why the government did not arrange for demobilised soldiers to be sent to hospitals. In the end he drew the conclusion that this phenomenon was abnormal and not conducive to an improvement in the quality of judges. He Weifang's view was contradicted by Cao Ruilin, an editor of the PLA Newspaper,<sup>283</sup> who thought that

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<sup>278</sup> Xia, Y., *Zouxiang quanli de shidai*, Beijing: Zhongguo Zhengfa Daxue Chubanshe, 1995, p224.

<sup>279</sup> *ibid*, p225.

<sup>280</sup> The Chinese government has an obligation to arrange a job for a demobilized soldier. Therefore, most demobilized soldiers get work in State organs, state-run enterprises and institutions.

<sup>281</sup> Xia, Y., *op.cit*, p228.

<sup>282</sup> He, W.F., "Fuzhuan junren jin fayuan", in *Nanfang Zhoumo*, January 20, 1998.

<sup>283</sup> Cao, R.L., "Fuzhuan junren yuanhe buneng jin fayuan", in *Zhongguo Guofang Bao*, February 10, 1998; and also in *Nanfang Zhoumo*, February 20, 1998.

many demobilised soldiers had very good educational backgrounds and were of high quality, so they certainly could be judges. He Weifang's investigation itself proved that demobilised soldiers did well when they made judges.

That demobilised soldiers act as judges is only one example of the origin of judges. Since few people had received higher legal education at the early stage of the restoration of the legal system, most judges were people transferred from other jobs, including demobilised soldiers. Demobilised soldiers have significantly contributed to the construction of the legal system. However, since now there are more and more people who have received higher legal education, it is no longer reasonable to arrange for demobilised soldiers to be judges. Anyway, it is hard to believe that a demobilised soldier without any legal education background can deal with cases better than a specialised person. In fact, the divorce of legal education from gaining a professional post has been a serious problem.<sup>284</sup> The government is aware of the problem of the quality of judges, so many judges have received on-the-job training.<sup>285</sup> However, many training courses at present are not regularised and there is no standard requirement for trainees. Therefore, regularising the source of judges is a basic way of improving the quality of judges.

## **2.5 Quality of lawyers**

When the legal profession was restored in 1979, most lawyers were former government officials, or the staff of the courts or the procuratorial organs. Because the education system was destroyed during the Cultural Revolution and had only been restored for 3 years in 1979, it was impossible to require lawyers to have a

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<sup>284</sup> Fang, L.F., "Duanceng--touxu faxue jiaoyu he falü zhiye".

<sup>285</sup> Xia, Y., *op.cit.*, p227.



background of higher legal education. Obviously the government was aware of the importance of the quality of lawyers at the very beginning, so higher education was required in order to become a lawyer in the PRL, though this rule was not strictly enforced since it did not fit in with the situation. In 1985, 40.11% of lawyers had a certificate of higher education, and 20.07% of lawyers were graduates of law schools.<sup>286</sup> The establishment of the qualifying examination for practising as lawyers contributed much to the improvement of the quality of lawyers. It not only required participants to have a certain professional knowledge, but also required that they have a higher education background. At the end of 1995, there were more than 90,000 lawyers, of these, 71.6% had a certificate of higher education including over 3,000 MA and PhD graduates.<sup>287</sup> The educational level of lawyers appears rapidly to have improved. However, the proportion of lawyers who had graduated from law schools was still less than 25% in 1997.<sup>288</sup>

In addition to the low rate of higher legal education, there are many other problems affecting the quality of lawyers. Many lawyers have been criticised for not being concerned over how to improve their professional knowledge, but only caring about how to build good personal relations with judges. This led to a popular saying that 'da guansi' (go to court) is 'da guanxi' (strike up a relationship).<sup>289</sup> Moreover, some lawyers muddled through their work, charged extra fees of their clients, cheated their clients, and even offered bribes to judges or colluded with their clients.<sup>290</sup> These phenomena seriously affected the image of lawyers and encouraged bad trends in judicial circles, and disrupted the healthy development of the legal profession.

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<sup>286</sup> 1986 nian quanguo sifa xingzheng gongzuo tongji ziliao, op.cit.

<sup>287</sup> Zhang, G., *Zhongguo lüshi zhidu fazhan de lichengbei*, p204.

<sup>288</sup> Fang, L.F., "Duanceng-touxu faxue jiaoyu he falü zhiye", p25.

<sup>289</sup> Li, B.D., "Zhongguo lüshi yao zou lianhe zhilu", in *Zhongguo lüshi*, Vol.5, 1996, p25.

<sup>290</sup> Zhang, G., *Zhongguo lüshi zhidu fazhan de lichengbei*, p228.

## IV. Conclusion

The Chinese legal profession has developed significantly over the past twenty years. Many aspects of the legal profession, including the number of lawyers, legal practice, the governance of lawyers and the law offices, have made considerable progress. Compared with the end of the 1970s, the legal profession is nowadays much more mature. Though there are still many problems facing Chinese lawyers and their work, a diversified and vigorous legal profession has basically come into being.

The transformation of the legal profession is one of the results of changes in Chinese society. What is the main internal impetus to it? A historical analysis may help to answer this question. Comparing traditional China with the first thirty years of the PRC, two periods when there was almost no legal profession, two similarities can be found:

One is the political structure and the ideology promoted by the government. Looking back over Chinese history, both under monarchical governments and the CCP government under Chairman Mao, China was ruled by a monopolistic system with legislative power, judicial power and executive power all exercised by a single entity. Under this system, the role of man was heavily emphasised and the will of a superior authority always overrode the law. This two social structures can be classified as societies ruled by man. The rule of man is built on a network of personal relationships; close personal ties and a clear understanding by the individual of his station in society are needed to maintain it. In ancient China, Confucianism was

promoted by rulers as a system establishing strict hierarchical rules with the inferior submitting to the superior. In Mao's China, a similar self-sacrifice by the individual and giving priority to the interests of the collective were expected. Both ideologies emphasised the individual's duties rather than their rights; this is just the opposite to the purpose of the legal profession in protecting the rights of individuals. Moreover, the settlement of disputes depended on an authority of superior rank to both parties rather than law. In traditional China, this superior rank normally was the head of a family or a clan. While in Mao's China, it was the higher administrative authority. Thus, there was no ideological and practical foundation for the legal profession during this two periods.

The other is the economic structure. Chinese people have always been proud of their 5,000 years' civilisation, but are also disappointed that the industrial revolution did not begin from China but from some much younger countries. The reasons for this are very complicated. Apart from the attitude of governments of "Zhong nong qing shang" (valuing the agriculture and underestimating commerce and industry), there are many other contributory factors, such as the influence of geographical factors. A simple agricultural economic pattern basically dominated the whole of traditional Chinese history. Under this situation, civil disputes were rarer, since personal property was very limited; commercial disputes were also fewer because of the underdeveloped state of commerce and industry; Criminal law had much importance attached to it but only as an instrument of rule, not as a guarantee of human rights and individual interests. In Mao's China, industry was regarded as the key to the national economy, but it was a highly-centralised planned economy, a fact which also had the effect of limiting private property and reducing independent

business transactions. Criminal law was also just an instrument of rule. Therefore, legal services were not very much needed in either society.

The situation of traditional China and Mao's era was broken following the application of the reform and opening up policies at the end of the 1970s. The simple planned economy was abandoned and a diversified market economy came into being. One of the results brought about by the new economy is an increase in private property and the greater independence of individuals: this has laid the foundation for a shift from the rule of man to the rule of law. The rule of law emphasises the role of impersonal law, and people's understanding and use of law, so legal services become an important way to maintain it. Moreover, commercial concepts and the awareness of human rights existing in western countries were introduced and accepted by many Chinese people as a part of modern industrial civilisation. For both human rights and commercial considerations, going to law is an important way for people to secure their rights, especially when their interests are illegally infringed. Consequently, the traditional way of thinking about lawsuits has changed though it still remains true of a small group of people.

A feature of modern industrial societies is the specialisation of roles and the rise of professionalism. Larson sees<sup>291</sup> the rise of the professions as closely connected with economic changes in the system of capitalism. She holds that it was capitalism that brought new markets for professional skills and services, markets which could be tapped by the professionals. In her view, capitalism provided a considerable stimulus to the growth of professionalisation in most western countries.

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<sup>291</sup> Larson, M.A., *The rise of Professionalism: A Sociological Analysis*, California: University of California Press, 1977.

Larson's analysis also appears to apply to legal professionalism in China. The increase in private property and the frequency of business transactions resulting from China's new market economy directly provides a large market for legal services. Moreover, a diversified economy requires a diversified legal framework to cope with it, thereby promoting a complex legislative framework only accessible to people who have legal expertise. Hence the legal service market begins to be monopolised by these people, finally leading to legal professionalisation.

Therefore, the development of the economy not only provided lawyers with an increasing market, but also led to changes in every aspect of society thereby creating a situation conducive to the development of the legal profession. It appears that no other force has changed Chinese society, including the legal profession, so deeply as the market economy.

Two tendencies in the Chinese legal profession appear very prominent when reviewing its development over these years. One is privatisation, which has been evident in recent legal reforms and practices. A number of partnership law offices have been established and proved through competition their obvious advantages (see above page 52). The role of law societies as professional communities is strengthening while judicial administration, i.e. governmental supervision, is being reduced. Moreover, the main role of lawyers is changing from public legal affairs to private legal business following the shift from the priority of public law to the priority of private law.<sup>292</sup> Many of the problems brought by public ownership and the concept that law offices should be non-profit-making institutions have been resolved by privatisation. It has stimulated awareness of the value of competition between law

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<sup>292</sup> Guo, D.H., "Shichang jingji yu fazhi xiandaihua", Faxue Yanjiu, Vol.6, 1993, p5.

offices and lawyers, thereby raising the efficiency of the legal profession. Nevertheless, modernisation of the legal profession is not the same thing as privatisation of it. The disadvantages brought about by public ownership made Chinese people hold a negative attitude to it and place much hope in privatisation. However, though privatisation can overcome some disadvantages brought about by public ownership, it is not reasonable expect it completely to solve all the problems of the legal profession and on its path to modernisation.

The other tendency is the application of western legal theory to the Chinese legal profession. This has also helped solve some problems in the legal profession and provide a theoretical basis for some legal practices. Even the government has advocated that:

"In developing the Chinese law relating to the socialist market economy, Chinese must boldly learn and borrow from the legislative experience of the economically advanced nations of the west, and appropriate legal provisions may even be transplanted."<sup>293</sup>

However, what western legal theories fit in with Chinese society and how best to apply them to the Chinese legal profession is still problematic. One example is the number of lawyers. The ratio of lawyers to the general population is very high in the USA and relatively low in Japan although both are developed countries. At present, the Chinese government holds that more lawyers are needed in China and takes increasing the number of lawyers as one of its crucial tasks. Can increasing the number of lawyers really push forward the development of the legal profession? How many lawyers are needed in China? These questions are still hard to answer.

This is not to deny the positive role of privatisation and westernisation in the development of the Chinese legal profession over recent years. On the contrary, the

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<sup>293</sup> "Qiaoshi zhuxi tan jiakuai jingji lifa", op.cit.

fact that today's flourishing and vigorous legal profession seems to owe a lot to privatisation and westernisation are findings of this research. The problem is how far can the Chinese legal profession go along the road to privatisation and westernisation.

China is still in a transitional period and Chinese society is in the process of further diversification. As a profession having an important social role and great potential in this special historical period, the legal profession seems to have considerable importance attached to it by the Chinese government and people. It is expected to develop and diversify further following the democratisation of politics, the diversification of economy and the modernisation of ideology. In this sense, the development of the Chinese legal profession is just beginning.

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