

ENHANCING THE POLITICAL ROLE OF CHINESE LAWYERS

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I. An Overview of the Chinese Legal Profession

The most prominent changes in the Chinese legal profession since its re-establishment in 1979 are:

- 1) the shift in the function of lawyers from working merely in the public capacity and serving the public authority to also protecting the rights and interests of private parties;
- 2) the initial formation of a legal service market;
- 3) the implementation of joint management of lawyers by judicial administration authorities and by lawyers' associations;
- 4) investigations into establishing the systems of government attorneys and corporate attorneys; and
- 5) the establishment and implementation of a uniform judicial qualification examination for lawyers, judges, and public prosecutors.

The legal profession in China has gradually become an important social service profession. As of June 2004, China has approximately 110,150 practicing lawyers, 30,783 paralegals, and 11,691 law firms. Approximately two-thirds of lawyers are in medium-sized and large cities. Attorneys are playing increasingly important roles in China's political, legal, economic, cultural, and societal realms. Lawyers are widely regarded as among the highly paid class in China, and the legal profession is one of the professions that many people envy or aspire to join.

In recent years, the hopes of lawyers to serve in various levels of the People's Congresses and the Political Consultative Conferences have begun to be realized. Currently, approximately 1,300 lawyers are serving as delegates to People's Congresses and Political Consultative Conferences. Altogether, these delegates constitute about 1 percent of all lawyers in China, and this percentage is the highest among all social professions in China.

II. Principal Problems Facing the Chinese Legal Profession and Their Causes

A. Principal Problems

- 1) many law firms in China are small;
- 2) many law firms provide only a limited range of services (namely criminal defense, counsel for corporations, and ordinary civil representation);
- 3) the vast majority of law firms have limited ability to handle legal practice that involves foreign parties;
- 4) China's lawyers lack experience in systematically managing partnership-based law firms;
- 5) the liability insurance system for malpractice has not yet been fully established;
- 6) most lawyers are concentrated in Beijing, Shanghai, and other economically dynamic areas, leaving Western regions in China with fewer and fewer lawyers and thus contributing to the polarization of the legal profession; and
- 7) the degree of education and overall quality of lawyers are often higher than those of judicial administration officials who are in charge of managing lawyers.

Generally speaking, the Chinese legal profession faces two main challenges. First, many lawyers lack professional ethics, thereby seriously damaging the overall image of the Chinese legal profession.

Second, the political status of Chinese lawyers is not high, the system that protects the rights of Chinese lawyers is deficient, the environment for legal practice is deteriorating, and the risks in providing legal services are growing. Lawyers often encounter four difficulties in criminal defense, namely, difficulty in investigating and obtaining evidence, difficulty in getting access to case files kept by the authorities, difficulty in meeting with the defendants, and difficulty in having judges consider their defense opinions.

The recently uncovered case of She Xianglin in Hubei fully reveals the deficiencies in the Chinese criminal defense system.

Brief description of the case of She Xianglin: Eleven years ago, the court in Jingshan County, Hubei Province, sentenced She Xianglin to fifteen years in prison for allegedly murdering his wife. His mother succumbed to significant despair and anger following his sentencing and soon passed away. Recently, after eleven years of She's imprisonment, his wife unexpectedly showed up. The court declared him not guilty and ordered that he be released from jail. She, however, has become handicapped and is thus unable to work. He recently filed a lawsuit demanding 6 million RMB in compensation.

B. Brief Analysis of the Causes of These Problems

There are numerous reasons for the above-mentioned problems. But I believe that the most fundamental cause is the improper conceptualization of the function and nature of Chinese lawyers:

First, the design of China's lawyers system shows that lawyers are considered to be "businesspersons" who can only make money. Officials subconsciously believe that since lawyers have "jumped into the sea" (i.e. joined the business world), they cannot go back to the "shore." In other words, lawyers have already earned money, they can no longer be officials. They cannot have the best of both worlds.

Second, in the mind of a considerable number of officials who are at relatively high levels of government, lawyers are seen as a marginalized group of individuals who are irrelevant to mainstream political entities. Some leaders even see lawyers as an opposition force in the political realm. This overlooks the qualities, knowledge, and talents of Chinese lawyers, the elites of Chinese society, and this also clashes with the lawyers' own expectation that they can play an important political function.

Third, in the current political system, lawyers do not have a formal path through which they could enter politics or change their identities to enter into the "public power" domain. This results in this attitude among lawyers: "if I cannot influence future political and social developments, why should I be concerned about and hold myself responsible for social and political stability?"

III. Lessons that China Could Learn From the American Experience in Utilizing the Political Knowledge and Talent of U.S. Lawyers

A key to solving these problems in the Chinese legal profession is to strengthen the force for self-discipline within the profession, thus enhancing the overall image of legal professionals. The former practice of relying on external pressure to push for improvements should be changed to encourage more internal forces and demands for better discipline. To this end, it is necessary to discard the old way of thinking and to correctly position the legal profession. This is the main subject that I have studied during my stay in the U.S. My research and analysis include the following three points:

1. The political and legal skills and knowledge of attorneys are valuable intellectual resources for a country's governance.

In the process of providing legal services, lawyers continually consolidate their legal knowledge and enhance their skills and experience in solving practical problems. As such, lawyers are valuable intellectual resources for ruling a country and society. In American history, the proportion of congressmen, governors, cabinet secretaries, and presidents who were previously lawyers is significant. In the current Congress, 163 Representatives (more than one-third of the House) and 58 Senators (more than half of the Senate) were trained in law. No other profession has such a high representation in the Congress. 23 out of 43 presidents in American history were once lawyers. No other profession in the U.S. has produced more American presidents. In fact, some people have even claimed that the "rule of law" in America is, in more accurate terms, the "rule of lawyers." This clearly shows that enhancing lawyers' political function is not a subjective goal but an objective development embedded in the political and legal systems of any rule-

of-law society. As China continues on the path toward the rule of law, it cannot, of course, be an exception to this principle.

2. Lawyers possess the natural inclination to enhance political and social stability.

The biggest wish of Chinese leaders today is to have political and social stability. In this regard, the history and the current state of the United States undoubtedly provide many useful lessons for China. Ever since the Civil War (which ended in 1865), the U.S. has almost not had, on its own soil, any civil military conflict and other internal turmoil that could have significantly undermined social stability. Its territory has expanded, its economy has grown, its technology has rapidly advanced, and its people are generally content and live in prosperous and safe conditions. The U.S. has become the world's only superpower. Legal professionals have played an important role in contributing to this achievement.

Propelled by market forces, the “contingent” of American lawyers has meticulously and cleverly captured every single conflict of interest and social dispute that could become profitable business opportunities. Their primary motivation is, of course, to obtain monetary gain, just as woodpeckers eat worms to nourish themselves and produce offspring. But objectively, lawyers are indeed able to discover these conflicts and direct them, in a timely fashion, to legal channels for resolution. This has brought about the following social effect: conflicts and disputes can, in accordance with the wishes of lawmakers, be timely exposed and legally resolved, thereby enabling society to preserve harmonious, balanced, and beneficial development. Under this mechanism, the country enjoys important political benefits – social stability – without enormous public expenditures. This mechanism has also created a significant number of job opportunities and a good source of tax revenue. Statistics indicate that in 2003, lawyers in the U.S. together earned approximately 187.5 billion US dollars, an amount equivalent to 1.67 percent of GDP. At the same time, 1.2 million legal services jobs were created.

3. A Political Design that Could “Maximize Benefits and Minimize Harm”.

A country ought to have a system that ensures a smooth channel for talents to join the public sector. The legal profession gathers a considerable number of talented individuals who have the skills and good qualities needed for the management of modern society. Opening a path for outstanding lawyers to enter the political system not only resolves the problem of how a rule-of-law country could find political and legal talents, but also helps to somewhat alleviate negative factors in the political realm. Accomplishing two goals with one act, why not? The primary function of a political system is to foster solidarity, consolidate political power, resolve conflicts, and stabilize society. In this regard, the legal profession in the U.S. has become an important component of the American political system.

Today, China has approximately 120,000 legal professionals. Every day, every single lawyer “performs public work,” “represents” the people's interests, and seeks to understand and implement laws and policies of the country. As such, Chinese lawyers can

act as a link to facilitate liaison between the ruling party and the public; they may also have the opposite effect. If an attorney, on average, interacts with 100 clients or corporations per year, then, every year, 120,000 legal professionals may indirectly affect 12 million individuals, families, or corporations and quietly and subtly shape their political direction, as well as that of the ruling party. This illuminates the important function that lawyers in China can play in helping to create a “harmonious society.”

IV. Ideas for Fully Enhancing the Political Function of Chinese Lawyers

To summarize the discussion above, the design of a system that could fully enhance the political function of lawyers is a political choice that China must make to realize the rule of law. To this end, it is extremely necessary to take the following seven steps to steadily enhance the political function of Chinese lawyers:

1. On the basis of China’s current situations and drawing upon the American experience in attracting lawyers to the public sector, China should create channels through which lawyers can assume leadership positions at various levels of party and state organs.
2. China should reform the old system, under which law graduates who pass the uniform judicial qualification examination but who have no prior experience in legal practice are selected to serve as judges and prosecutors. Instead, China should open the channels for lawyers, judges, and prosecutors to change their careers and build a system in which prosecutors and judges are selected from excellent lawyers who have compiled a rich record of litigation experience.
3. China should gradually create the position of “Attorney-General for the President and the Prime Minister,” as well as the positions of Attorneys-General for heads of provinces, ministries, cities, and counties. Henceforth, these attorneys-general (or groups of legal consultants) should participate and be consulted in all major policy decision-making and state and diplomatic activities.
4. Increase the number of lawyers who serve as delegates to the People’s Congresses and the Political Consultative Conferences at the state and provincial levels. Lawyers’ participation in politics will enhance the overall quality of the delegates to the People’s Congresses and the Political Consultative Conferences, reflect more accurately and timely the people’s plights and wishes, and allow the delegates to better exercise their power in representing the people and in participating in and providing advice in the political process. At the same time, this will also improve the legal profession’s understanding of the country’s situation and the government’s difficulties, thereby rationally enhancing their sense of responsibility to the country, to society, and to the public and ensuring the well-functioning of the cooperatively adversarial relationship between lawyers and the government.

5. China should amend and improve the Lawyers' Law, the Criminal Law, as well as three major litigation laws (the Criminal Procedure Law, the Civil Procedure Law, and the Administrative Litigation Law) to fully protect the basic rights of lawyers.

6. China should fully utilize the occupational advantages of lawyers to strongly encourage Chinese lawyers to provide legal aid for socially disadvantaged groups. This would establish a positive image for the legal profession and provide a good social foundation upon which the political role of lawyers could be enhanced.

7. China should improve related systems for managing the legal profession, strictly handle ethical problems and illegal conduct within the legal profession, and enhance professional ethics among lawyers. This would gradually "purify" the profession.