The Role of State in the Development of Legal Profession in China - A Regulatory Perspective

Shu Shang, Shanghai University of Finance and Economics

Available at: https://works.bepress.com/shu_shang/1/
Abstract

Although China has attempted to reorganize its legal profession by privatizing regulation of lawyers since 2000, the tight relationship between Chinese state and its legal profession still seems perplexing to outsiders. This article tries to go beyond the ideological debate to observe this state-legal profession interaction by suggesting that after experiencing political, development-oriented and stability-concerned stages, the current stage of the state regulation of legal profession has been similar to that in developed industrialized nations. However, certain degrees of state intervention of legal profession could be extremely useful in a party-state like China in which the traditional spirit of professionalism is lacking of, and such intervention might also help to prevent the over-stratification of legal professionals in China and promoting lawyers’ image in playing a positive role in the rule of law development.

Introduction

Through years of empirical research, Ethan Michelson of Indiana University, Bloomington in his article Lawyers, Political Embeddedness, and Institutional Continuity in China’s Transition from Socialism has raised the concept of “political embeddedness” by describing the professional structure of Chinese lawyering class. He argued that China’s social transformation is the result of top-down control of the country, although the country has attempted to institute a more complete round of “reorganization” of the legal profession around the year of 2000 by fully privatizing regulation of lawyers, it did not present much success. In fact, in attempts to gain more opportunities of business expansion and upward social mobility, Chinese lawyers have been used to consciously embedding their professional circle and vested rights into the inherent hierarchical political system that already exists in China for generations. Therefore, the full privatization of property rights of legal services did not make Chinese lawyers to form an organic professional community. On the other hand, they have persisted and maintained their link with the institution prior to the privatization, which have caused mainstream Chinese lawyers to lack the public service spirit needed for the social responsibility of cause lawyer1. It has also been observed that if the Michelson’s argument holds true, i.e., before 2010, China’s legal professionals are self-consciously searching for opportunities of “political embeddedness” in the pursuit of being accepted to the bureaucratic political system; whereas after 2010, along with the Communist Party of China (CPC) striving to institute a Party scheme in law firms, government procurement and other measures to increase the proportion of lawyers in politics, China’s ruling party and government have been transformed to be major forces facilitating such “political inclusion”

process\(^2\). By Michelson’s “political embeddedness” concept, one might be inspired to think: For some in the form of market-oriented services, how is the state trying to effectuate their political control. Along with this line of thought, it might as well lead people to question how ruling party could achieve their economic development and social governance goals through the generalization of this bureaucratic system. The goal of this article is to focus on a political sociology and go beyond the idea of ideological debate, to observe the relationship between the state of China and one typical occupation, and then based on China’s unique practice to examine the understanding of existing theory towards the legal profession in the academia.

The article attempts to adopt an analytical framework of “professional regulation” that is not prior defined. This is due to the fact that in China, the fuzzy legitimacy of state intervention in any profession is often a very difficult inquiry. As a profession that is closely tied to the “stability maintenance (wei when)” of the Chinese government, on one hand, under the political system that the Party and government functions are often inseparable, it is often difficult to distinguish between the state intervention in the legal service market and the Party’s political activities conducted in the legal service market with an ideological focus; On the other hand, self-governing functions of professional associations (e.g., All China Lawyers Association and hereinafter “ACLA”) and external regulations coming from the supervisory organ of Chinese Bar, often all levels of Department (Bureau or Ministry) of Justice, is generally difficult to separate\(^3\). In addition, if no special context is provided, the concept of the State should include central and local government agencies, as well as all departments that exercise public power beyond their administrative and judicial authorities. In this context, we will try to present readers with the picture of the evolution of the regulatory objectives of Chinese governments of the legal profession since 1949.

I. The Construction of Profession and the Role of State

It is generally believed that professionalism or profession is social organization that is structurally different from bureaucracy system and market mechanisms\(^4\). For liberalists, the existence of such is considered to be the important guarantee of maintenance of civil groups that could effectively counter the state power. Built upon unique expert knowledge, information asymmetry, regulatory costs and professional motivation to safeguard their professional dignity in addition to a few other factors to

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\(^3\) In addition to the common crossover of personnel, such as that the Secretary-General of Bar Associations in China are often staff of local Bureau of Justice, the funds also tend to be mixed. For example, the city of Hefei, Anhui province set aside a certain amount of the budget that goes to the Bar Association each year, to fund its lawyer management office. "Since 2003, we have been allocated a certain capital contributions from membership fees for Lawyers Association Liaison Group in the three counties, to strengthen lawyer management. In order to strengthen lawyer management in District Bureau of Justice, the city's Bar Association set aside a certain amount of budget to District Bureau of Justice, on the condition that budget did not increase during that particular year, and increased this amount year by year, dedicated to the work of strengthening the judicial counsel Management Board." see 2009 Summary of Hefei, Anhui Province Bureau of Justice Lawyer Management.

be considered, it is logically followed that, professions including the legal profession, the medical profession and a few others must maintain a system of self-regulation\(^5\).

Under the influence of this concept of professionalism, two trends have been displayed in research literature focused on the legal profession: First, research literature of legal profession before the 1980s and 1990s focus more on the description of power structures of the legal profession\(^6\), and the impact of such structure on the society\(^7\). With regard to the relationship between profession and other aspects, these literature focus more on social stratification and market mechanisms, which has the tendency of ignoring the role of state actors that has started to play an increasingly important role in professional regulation\(^8\). Secondly, even those studies that have paid attention to interpreting professional relationship from a state perspective, their focus have largely been put on the legal profession and how it affects the formation of the modern state, especially the effects on the liberal politics. Except for national regulation in setting up an occupational license system to maintain the professional market dominance, research has rarely touched upon topics with things to do the role of the state in professional development\(^9\). For example, in past two years and in the English-speaking academia, the majority of scholars with focus on researching the legal profession have combined historical and empirical methods trying to study how the development of legal profession have promoted the liberalization progresses in the West, Southeast Asia, Latin America, and India\(^10\).

In the past thirty years and in the wave of globalization, the world’s capitalism has experienced a drastic restructuring period that has not been completed, which has led to a dramatic change of the nature of profession. On the one hand, control of profession has been strengthened by flow of capital, and the professional-client relation, a relationship bears with many similarities to the common law fiduciary relationship, have undergone major changes. Namely, powerful capital has tried to impose a strong professional quality service criteria that matches to its only understanding of the profession, rather than leaving professionals in the community to decide what standards to be adhered in the old time\(^11\). Moreover, the relationship between the state and profession has also undergone substantial changes. Many

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8 For an example of literature review see e.g., Jinhua Cheng and Xueyao Li, Structural Balance of Legal Development, China Journal of Social Science, Vol. 7, 2012.
9 For an example of literature review, see e.g., Terence C. Halliday and Lucien Karpik (eds.), Lawyers and the Rise of Western Political Liberalism: Europe and North America from the Eighteenth to Twentieth Centuries, Oxford University Press, 1998.
10 Ibid.
countries have begun to break the myth of occupational autonomy through direct and indirect means, ignoring that requests of professionalism have always been established through allocation of services based on the demands of the public identity of professionalism. And it is usually also through this constant request that such professional prestige has been obtained, due to the fact that market-based allocation of occupational services has the ability to enhance international competitiveness of their national economy, and to reduce the price of professional services as well as to serve other public policy goals. Therefore, to some states, working to directly intervene with the profession is a way to reduce social transaction costs and combat monopolistic behavior in order to reduce public expenditures\textsuperscript{12}.

At the same time, if we restrict our observation to the legal profession itself, then we will find that this process is also accompanied by a loss of homogeneity of the profession. One sect of the profession, the litigators, still largely embrace the idea of serving the society, which is a professionalism that matches their identities as advocate of citizens during their distribution of services; the other sect has been broadly defined as non-litigators, mainly including transaction lawyers or the UK style solicitors, who endorses the commercial professionalism based on the market distribution of their services. In any case, the penetration of this process of commercialization has already led the ethical pursuit of Western law firms to switch to a loyalty that originated from duty of loyalty embraced by common law fiduciary concept, which implies a duty owed to clients themselves rather emphasizing on citizenry duties based on public accountability or aristocratic responsibility\textsuperscript{13}.

Under this background, scholars have switched their attention to focus more on the impact of the state or capital on shaping the legal profession, as well as on the interaction among the three. Among them, in relation to the reemergence of a renewed focus on the state in mainstream Western academia since the 1980s, voluminous articles have started to focus on how state could impact professional structure in the same period\textsuperscript{14}. Organizational scientist such as the British sociologist Gerald Hanlon, in his book *Lawyers, State and Market: Professionalism Revisited*, have managed to conduct systematic analysis on the consequences of the increasingly strengthened intervention due to the development of the British welfare state after World War II and its impact on the legal market and professional endeavors, by comprehensively borrowing theories from fields including political economy, occupational management, occupational sociology, and law and development studies\textsuperscript{15}.

In the other realm of research, commentators explore the impact of the formation

\textsuperscript{15} Gerald Hanlon, Lawyers, State and Market: Professionalism Revisited, Palgrave Macmillan (9 Dec. 1998)
of state on professional autonomy from the perspective of political-social history. This group of researchers categorized different profession-state relations into three groups, namely participation type (e.g. seen in most countries under the Anglo-American Legal System), absorption type (e.g. Germany), and the exclusion type (e.g. France, Italy, and most socialist countries). Those researchers hold that, within the social context, the time sequence of the formations of the state and the profession in modern sense usually plays an essentially decisive role in shaping the profession-state relations. Presumably, if professionalization comes into being earlier than the rationalization of a modern state (which is the case in the UK), the profession will enjoy a better autonomy against the state. Conversely, if the rationalization of a modern state precedes the emergence of professionalization (which is true in Germany), the chances are that the state will be in strong control of profession, and the autonomy of the profession is significantly repressed\textsuperscript{16}.

Within the same theoretical dimension, Ethan Michelson and Sida Liu spent years conducting a large-scale social survey on China’s legal profession after 2000 and came up with the conclusion of their analysis. Employing the traditional ecological theory of the Chicago School of Sociology and the quantitative and qualitative methods, they made a systematical research into the impact of state intervention on legal service market in China. Implicitly, they regard the state power and even the segmentation regime of regulatory authorities on legal profession as key factor influencing the development of legal profession in China\textsuperscript{17}.

Actually in China, over the long period of time following the establishment of People’s Republic of China in 1949, the system of lawyers in the Mainland featured nationalism as a result of modeling after the system in the Soviet Union\textsuperscript{18}. China’s Ministry of Justice launched a pilot program privatizing the legal profession in 1993, and the law firms regularly experienced privatization, mainly in the form of partnerships, ending the history of a system consisting of solely state-owned law firms. China’s system of lawyers embraced privatization basically after the State Council completely conducted the “unhooking and privatization” program of state-owned social intermediate organizations in 2000. Many scholars held high expectations on such professions enjoying private property rights, and they hoped that the professional communities of lawyers would as a whole play an active role in China’s political transformation, just as what their counterparts did in the Western history.

Generally speaking, the intervention by state organs (mainly judicial authorities) on legal profession in China can be exercised in two ways, the practice of dual-track regulations, namely administrative regulation by government agencies and


\textsuperscript{17} Ethan Michelson, Lawyers, Political Embeddedness, and Institutional Continuity in China’s Transition from Socialism, 113 American Journal of Sociology 352-414 (2007)

\textsuperscript{18} For an example of Chinese scholar’s categorization of the legal profession by using tools drawn from nationalism, professionalism and commercialism, see Xueyao Li, Legal Professionalism, Journal of Legal Studies (Fa Xue Yan Jiu), Volume 6, 2005.
self-regulation within the legal profession. In terms of administrative regulation, an institutional framework pursuant to law has been established through legislations at the state level\(^\text{19}\), covering the mechanisms of occupational entry control, price intervention, and disciplinary actions against misconducts. When it comes to the law firms’ internal governance structure and specific operating strategies (which are more of marketing practice), instructional proposals, coordination, and policy regulations by administrative bodies are performed, while the direct intervention by administrative orders is vanishing. In the areas of Jiangsu Province, Shanghai Municipality, and Zhejiang Province, the Bureaus of Justice can still effectively control Bar Associations by utilizing a crossover personnel system (under which the personnel management of Bar Associations is executed by the former) and exercising its reserved decision-making power over substantial events (including nomination of the Chairman candidates for the Bar Associations). However, many affairs concerning the development of the legal profession have been handled by the Bar Associations themselves. To draw a parallel, the integration of administrative regulation and self-regulation for the legal profession in China is quite similar to the intervention mechanism in industrialized countries\(^\text{20}\), especially some European countries like Germany, in which the state-profession relation is fostered by means of corporatism.

II. Evolution of Government-Led Professional Regulations: Goals and Practices

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**Illustration 1 Four Theoretical Models of China’s Development of Legal Profession Since 1949**

Here, the author attempts to interpret and describe China’s dominant concepts in the development of legal profession since 1949 by introducing four theoretical models,

\(^{19}\) For relevant statutes see generally, Law of the People’s Republic of China on Lawyers, Measures for Punishing Outraging Lawyers and Law Firms for Their Illegal Acts (2010), Measures for the Administration of the Practicing Licenses of Lawyers and Law Firms, Measures for the Administration of the Lawyer's Practice License [Expired], Measures on the Administration of Lawyers' Fees.

i.e. political (nationalism), development-oriented, stability-concerned, and profession-based. The professional regulations, reviewed from the state perspective, experienced three phases during the period of 1949-2012 and the features of such regulations in each phase are fused as (a) strong-political (1950-1957), weak-political (1980-1992); (b) weak development-oriented (1992-2000), strong development-oriented (2000-2008), and weak profession-based (1996-2008); and (c) strong development-oriented and strong stability-concerned (2007-2012).

The goal of political regulations can also be labeled as “inside the institutions”, which is reflected that the lawyers are regarded as proponents of the ruling party’s political system or that they are defined as a tool of political rule. For instance, the lawyers can be directly admitted into the bureaucratic system with the same status of public servants, or the lawyers can be defined as “socialist legal workers endowed with the mission to maintain the rule of the Communist Party of China”.

In accordance with the mechanism of the development-oriented regulations, legal service is either considered as an independent industry contributing to the GDP growth or precondition driving the GDP growth and motivating the economic competitiveness in certain areas. The goal of such regulations seems to be in line with the value of commercial professionalism or professional positioning in commercialism, however, the differences are particularly reflected in the patterns of market economy in China and that in Europe or the US.

The goal of profession-based regulations, nevertheless, has been influenced by traditional professionalism in the Western world. It endeavors to establish a fully self-regulated professional community for lawyers within the liberalism thinking framework of political system reforms. In fact, the stability-concerned regulations and political regulations are imbued with the same spirit, which attempts to eliminate the professional characteristics of lawyers in countering or challenging the existing political system through generalization of bureaucracy. Of course, differences between the two can also be found. The presumed premise of the former lies in that the legal profession has changed into a target of stability maintenance, rather than a necessary part of the political system. However, in some areas with more enlightened political environment like Shanghai Municipality and Zhejiang Province, the stability-concerned regulations in legal profession have evolved into an essential way to maintain stability by utilizing the lawyers’ expertise.
(i) The Era of Political Regulations Modeled after the Soviet System
(1950-1992)

During this early period, it is widely known that China’s system of lawyers adopted the form of nationalism soon after the establishment of People’s Republic of China. In 1950, the Ministry of Justice under the Central Government issued Notification on Banning the Practices of Fake Lawyers and Pettifoggers, according to which the former associations of lawyers were dissolved along with the fight against fake lawyers and pettifoggers. In July, 1954, the Ministry of Justice, then the authority in charge of the personnel service in the Supreme People’s Court, circulated Notice on Several Cases in the Pilot Program of Court Organizational System, in terms of which the Soviet-style Legal Advisory Office was piloted and then established nationwide. The model was implemented until long after China’s system of lawyers was revived in 1979. It is evident that the Provisional Regulations on Lawyers (1980) and Law of the People’s Republic of China on Lawyers (1986) still define the lawyers as “legal workers serving for the state”.

(ii) The Period of Profession-based Regulations Driven by National Reform Scheme (1996-2006)

21 Supra note 18.
22 Chinese nationalism in the legal profession institution -building in the 1950s, on the one hand by the great influence of the Soviet Union, but on the other hand, in terms of nationalism to be more thorough than the same period of the Soviet Union. Academia is generally believed that the legal profession Soviet era still retains a great deal of autonomy.
China enjoyed a comparatively easing political atmosphere in the 1980s, and the legal professionals nurtured their hope for an ideal judicial system. Driven by Deng Xiaoping’s speeches during his inspection tour across South China in 1992 and the vow of CPC’s 15th National Congress in 1997 to “build a socialist country under the rule of law”, the plan of establishing a more idealistic judicial system was regularly carried out in the late 1990s by state-level authorities, including the Ministry of Justice, the Supreme People’s Court, and the Supreme People’s Procuratorate. The appeal of “the establishment of the same self-regulation mechanism within the Western countries under the rule of law” has been explicitly raised when setting specific goals for the reform in lawyering administration. As far as the profession positioning is concerned, the Law of the People’s Republic of China on Lawyers (2007), which was amended with the guidance of the Ministry of Justice, clearly sets forth the professional ethics of “serving for the principals”. The cases show that professionalism also exists in China’s official philosophy of formulating professional regulations. An official who serves for the Ministry of Justice and has played an important role in China’s construction of legal profession system described his understanding of professionalism in legal service as follows:

“I don’t know much about legal professionalism...What we were aware of at that time (around 2000) was to set up a legal professional community. The legal profession in our view is labeled with dignity and honor and the legal professional community should be highly specialized and self-regulated, similar to the patterns in the US or Japan. That explains why we actively carry out the National Judicial Examination...Agreement has been reached on this matter within the Ministry of Justice, however, how the matter will be handled at local levels is still determined by local authorities.” (interview excerpt, June 3rd, 2011 in Shanghai)

In terms of the construction of specific systems, efforts should be made to propel the institutionalization of legal professionalism. Thus, a control system of access to legal profession should be enhanced by carrying forward the development program of a professional Juris Master Program, National Judicial Examination, and the professionalization of judges and procurators. Apart from these, the Chairman candidates of Bar Associations should be selected from practicing lawyers, and the associations should endeavor to achieve the goal of self-regulation.

(iii) The Role of Local Government in the Development-Oriented Regulations

In this section, the author tries to explain the role of local government in implementing the regulations of legal profession by referring to a concept of “local state corporatism”. As an academic concept, it mainly represents the role played by China’s local government in local economic growth after the Reforms and Opening-Up. Two characteristics can be observed in the concept, namely (a) in the process of local economic growth local governments have taken on many characteristics of a business corporation, with officials acting as the equivalent of a board of directors; and (b) the workings of a local government that coordinates

23 Opinions of the Ministry of Justice on Accelerating the Reform and Development of the Legal Profession after China’s Accession to the WTO [Ministry of Justice Order [2001]030].
economic enterprises in its territory as if it were a diversified business corporation\textsuperscript{24}.

The author hopes that the concept would help to depict the role of China’s local Bureaus of Justice in carrying out development-oriented regulations on legal profession since 1990s. Inspired by the development-oriented political ambition, local administrative authorities in charge of judicial affairs introduced the macro-control mechanism into legal profession regulations and the legal profession was classified into the tertiary industry. To serve the ultimate goal of economic development and GDP growth, law firms are encouraged to expand in scale, strengthen distinct specialization, and go global, and the legal service market experiences administrative intervention. With the political logic of local state corporatism prevailing, competitions among legal service markets in different regions across China intensified after 2000. Authorities in almost all provinces and municipalities vowed their goals in the legal service market, including the value of output, the number of professionals and the amount of cases handled. To achieve such goals, local governments would support some potential law firms to expand. For instance, around 2000, Shangdong Province and Zhejiang Province, two economic powerhouses in East China, both made the plans to foster 50 competitive large-scale law firms and 100 specialized boutique law firms or alike\textsuperscript{25}. Furthermore, the local governments in some places, including Ningbo and Hangzhou, even compiled specific plans concerning the industrial adjustment of legal services\textsuperscript{26}.

In order to fulfill such planned targets, public resources and public power are both used in each place to support some law firms to expand to certain scale and become more specialized. In some places, measures like reimbursement of membership fees, direct financial subsidies, and grant of more opportunities to participate in the management of state affairs are also adopted to facilitate the development of lawyers in terms of specialization and internationalization. In other places, the local government even refunds part of the expenditures for selected lawyers who attend training courses in the US or the EU\textsuperscript{27}. One official from the Bureau of Justice in Zhejiang Province remarked in an interview:

“The leaders of the (Zhejiang) provincial government and executive officials of the Bureau of Justice are really open-minded...The private enterprises in our province are flourishing and the volume of exports is huge, however, the enterprises have suffered great losses in the cases involving anti-dumping practice and intellectual property rights, and the Committee of Foreign


\textsuperscript{25} Opinions on Further Promoting the Reform of Lawyers, Issued by Shandong Province Bureau of Justice (2002); The Eleventh Five Year Plan of Administration, Issued by Zhejiang Province Bureau of Justice (2006).

\textsuperscript{26} On Promoting the Development of Legal Services, Wen Wei Po, December 30\textsuperscript{th}, 2009.

\textsuperscript{27} “Shandong Will be Sending 20 lawyers to the United States for Anti-Dumping Training”, “Qilu Daily” October 17, 2007; “Under the Controversial Government Paying for Lawyer Training the Anti-Dumping Legal Training Scheme is Almost Certain”, “Youth Times”, May 10\textsuperscript{th}, 2006. In addition, another major economic power house in East China Jiangsu Province is also implementing a similar training program, in the participation of a program sponsored by the Shanghai Bar Association, available at http://www.lawyers.org.cn/info/11e3d863a1bdba3cae44680c00bd08a0 (last visited Feb. 2, 2012)
Trades and Economy is also concerned about this. In 2005 and 2006, the government spent tens of millions yuan to dispatch hundreds of lawyers to take training courses abroad. They were able to handle such foreign-related anti-dumping cases when they returned. The program has brought great fortune to local law firms, and at the same time, it helps a lot to lower the risks posed to our enterprises.” (interview excerpt, August 25th 2011 in Zhejiang)

When the local judicial authorities encourage the law firms to expand scales and enhance specialization through administrative guidance, they usually bear the goal of invigorating local development in mind. Nevertheless, due to its lack of available resources, the judicial authorities usually manage to acquire favorable policies from more powerful departments involving finance, taxation, and personnel management through coordination mechanism. An official of the Bureau of Justice in Nanjing observed that the municipal Bureau of Justice and Bar Association negotiated with other government agencies responsible for taxation, pricing, insurance and press, hoping to gain understanding and support for the construction of large-scale law firms in the city. In the meanwhile, they reported their work back to the municipal People’s Congress, CPPCC, and United Front Work Department of CPC, and recommended excellent lawyers from large law firms to be representatives or committee members in such organizations28. Similar acts can be found in provincial regions like Shanghai, Anhui (Interview HeFei20090830a), and Zhejiang.

By the end of the Twelfth Five-Year Plan Period (2015), the construction of law firms in terms of scale, specialization, brand and internationalization shall be further improved. The practicing lawyering agencies shall be over 110, among which the law firms equipped with over 20 lawyers shall be around 30, the law firms with over 50 staff shall be 3 or more, the law firms enjoying renown brands at provincial or municipal levels shall be around 3, the law firms identified with specialization shall be around 5 to 8, the law firms with over 10 million yuan annual operating sales shall be over 15, and those with over 20 million yuan annual operating sales shall be over 3. The self-regulation of law firms shall be greatly optimized, and the law firms operating in compliance with certain criteria shall be around 80% of all the practicing agencies while the Top Law Firms shall be over 25% of all the law firms (with 3 of them evaluated as excellent nationwide). (The Twelfth Five-Year Plan for the Development of Legal Profession in Wenzhou City, issued by the Bureau of Justice in Wenzhou, No. 63 of 2011)

Conclusion can be drawn that judicial authorities mainly play the roles of brokers and coordinators in the process of law firms’ expansion of scales and specialization. The reason behind the picture is that the privatization of property rights in legal services has been fully implemented and the judicial authorities can hardly utilize any approaches against administrative orders. However, when it comes to specific policies, strong impact of the value concerning development-driven political achievements can be easily detected. Despite of the fact that some administrative measures, including tax reimbursement, administrative reward, superior opportunities to be admitted as representatives of People’s Congress, and even controversial, nontechnical administrative orders of “degrading the administration levels in the event that the law firms fail to reach a certain standard”, would be taken sometimes, the ultimate goal is

virtually to enhance the competitiveness of local law firms in the legal service market as a whole and to realize a better, faster local economic growth.

(iv) The Emergence of Stability-Concerned Regulations

China entered into an era with stability being high government priority after 2008, and the role of lawyers is becoming politically important and thus greatly valued. The state defines lawyers as “socialist legal workers”, and the regulations on lawyers evolve into stability-concerned tasks regularly.

“I regard the year 2008 as a turning point. Before that, especially when Xiao Yang took office as the Minister of Justice, the major tasks ahead of us was how to promote professionalism among legal professionals, and we began to strengthen the construction of Bar Associations around 2000 when the ‘unhooking and privatization’ campaign took place. After 2000, we made efforts to carry forward the National Judicial Examination, develop the training programs for lawyers, and propel the expansion and internationalization of legal profession. In recent years, stability maintenance is becoming arduous work, and we will be very nervous when the lawyers within our administrative area handle sensitive cases. Various authorities concerned in such cases will come to us to seek solutions, and we are really embarrassed being in the dilemma.” (Interview Excerpt, September 7th, 2012 in Zhejiang)

Obviously, the changes of regulations on lawyers after 2008 were closely related to the contemporary policies of judicial reforms, including Active Judiciary, Three Administrative Innovations, Three Priorities (which regard the Party’s cause, people’s interests, and the majesty of Constitution as the top priorities in judicial work), Grand Mediation Mechanism (which resorts to integration of resources and multi-channels in dispute mediations), and the De-Professionalism Movement, which are all outcomes of the top priority of stability maintenance. The goal of stability-concerned regulations can be interpreted into two parts, namely (a) the lawyers themselves are possible targets of stability maintenance; and (b) the expertise of lawyers can be employed in stability maintenance.

“Some lawyers do encourage principals to make appeals or petitions to higher authorities, and there are occasions where the cases initially capable of being mediated become thorny problems after the intervention of lawyers. Thus, we lay particular emphasis on mechanisms of mediation and compulsory registration of sensitive cases when we formulate the rules.” (Interview Expert, September 7th 2012 in Zhejiang)

The practice of maintaining stability through the lawyers’ expertise can be interpreted differently. On one hand, it is a discretionary behavior by some local governments with strong sense of the rule of law or even with intentional resistance to stability maintenance policies. On the other hand, it is a way to disintegrate the lawyer community and degrade their autonomy, allowing the “Sense of Overall Situation” to be shared by mainstream lawyers.

“Our district is located in the suburban area where stability maintenance is more difficult. As part of the social management initiative, we motivate the lawyers to provide services to the community. We have organized legal consulting teams and voluntary teams, including Service Team for the Disabled and Rights Safeguard Team for Employees. The lawyers help the
government to conciliate conflicts raised through a watch system. Various channels have been set up to serve different groups of people, and the lawyers also participate in the petition receptions held on Thursdays.” (Interview Excerpt, May 16th, 2008 in Shanghai)

During this period of time, mainstream legal professionals in China began to split. Some lawyers, with consciousness and in the form of organization, tend to be critical about the government policies and label themselves as defenders of the civil society. Presumably, this phenomenon emerges either as a result of the calling at the heart of some lawyers or due to the saturated legal service market.

“My conclusion from the analysis of the Non-Compromise Lawyers is that many of them are frustrated by the blocking channels of mobility of social stratum, and it is the Great Leap Movement (blind expansion) in legal education that is to blame. Since there is not enough space for the lawyers within the existing institutions, some lawyers naturally choose to defend rights in a stubbornly critical way with the civil society thriving.” (Interview Excerpt, October 5th, 2012 in Shanghai)

Of course, most lawyers are willing to undertake the stability maintenance mission to achieve the goal of “political embeddedness”. For instance, a report in 2011 told that over 200 lawyers in Hangzhou would join in the petition receptions and officials’ inspection tours collecting appeals from grass-roots29. The lawyers’ participation rate is rather high given that the total number of lawyers in the city is only around 3000.

“It is honorable for the lawyers to gain accesses to the handling of stability-concerned cases, for it is evident that these lawyers are trusted by the insiders of the institutions. When President Xi once took office in Zhejiang Province, several lawyers accompanied him to handle petitions, and such experience is beneficial for the lawyers’ professional development. Another example is that the lawyers did very well in comforting the angry property owners after the incident in which a residential building in Shanghai collapsed as a whole.” (Interview Excerpt, March 5th, 2014 in Shanghai)

III. How to Achieve the Goal of Regulations

Thanks to the fact that the legal profession in China is closely related to the comparatively full denationalization reforms of property rights, the intervention of judicial authorities on legal profession appears to be standard, in comparison with the state-profession relations in other fields, and the lawyers and law firms enjoy greater autonomy in the market. In general, China’s current professional regulation systems are closing in on the systems in major developed countries when drawing a parallel in term of forms, both of which combine the state intervention and self-regulation. On one hand, with legislations on professional norms, the state sets up entry control for the legal profession, regulates the material ethical misconducts and grants the supervision rights under the rule of law to public power holders. On the other hand,

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29 According to scholars in fields of Government Regulation, features of Regulatory Government and modern regulatory system are: regulatory regimes are neutral, scientific, transparent and accountable; which contains regulatory incentives; discretion of regulatory institutions is very little, which contains a clear discretion standard; the powers of the regulator are effectively constrained; etc. Although the present relationship between judicial and administrative departments and law firms does not fully meet these standards, it has begun to march on this road. See Stephen Breyer: “Regulation and its Reform”, Harvard University Press; Reprint edition (January 1, 1984).
the specific management work of entry control and conduct restrictions in the legal profession is actually done by the Bar Associations themselves (albeit that the material autonomy of Bar Associations in China is yet to be greatly improved due to the factors like internal democracy mechanism). Currently, the regulations by judicial authorities on legal service markets are principally realized through three approaches, namely entry control, price intervention and disciplinary actions against misconducts. When it comes to the internal governance structure and operational strategies of the law firms, which are entities in the legal service market, instructional proposals, coordination, and policy regulations by administrative bodies are performed, while the direct intervention of administrative orders is vanishing. From this perspective, the legal profession is one of the rare professions in China regulated by rule of law.

With the enactments of an array of laws and regulations, including *Law of the People’s Republic of China on Administration Permission (2003)*, *Law of the People’s Republic of China on Lawyers (2008)*, *Measures for Punishing Outraging Lawyers and Law Firms for Their Illegal Acts (2010)*, *Measures for the Administration of the Practicing Licenses of Lawyers and Law Firms (2009)*, *Administrative Measures for the Practice of Law by Lawyers (2008)* and *Administrative Measures for the Lawyers’ Rate Making (2006)*, a regulatory framework with limited discretion for the legal profession in terms of entry control, price intervention and disciplinary actions against violations has been basically established in China. In the meanwhile, as mentioned above, the complete privatization reform of property rights in legal service market brings an end to the state’s direct intervention on legal profession through administrative orders.

It is notable that the professional positioning of “serving for the principals” contemplated in the *Law of the People’s Republic of China on Lawyers (Revised in 2008)* does encounter challenges in the process of implementation, and the challenges emerge only in criminal defense work and some politically sensitive cases, though. Simply based on individual cases in which the lawyers’ practicing rights are oppressed, some academic research work and news reports have concluded that “the practice of rule of law in China has significantly gone backwards”. However, the sharp contrast between the restrictions on freedom of the press in the past and the explosive effect of new media including internet nowadays may just challenge the conclusion. In 2011, the administrative intervention by the Bureau of Justice and the Bar Association in Wenzhou after the tragedy of the high speed rail accident was dramatic and ironical. The matter shows that the lawyers’ practicing freedom can be widely violated, yet it is safe to presume that the lawyers’ freedom of practice has been widely recognized by the public and the judicial authorities.

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30 Interestingly, the comments restricting the freedom of practicing, Opinions Regarding Counsels Making Representations in Compliant Letter Requests (Xin Fang) Cases are actually published through the China Bar Association publication, which explains this matter from a dramatic point of view that regulatory power recognizes the principle of self-disciplinary in the legal profession.

Generally speaking, the judicial authorities in China mainly resort to the following approaches in order to achieve their goals in profession-based, development-oriented and stability-concerned regulations on legal profession.

(i) Extremely Limited Direct Intervention

As mentioned above, as a result of the continuity of political relation between the state and legal profession, direct administrative intervention in the regulations on the legal profession was quite common before and even after the year of 2000. Around 2000, in order to accomplish the targets of development-oriented regulations on legal profession, i.e. the expansion, specialization and internationalization of the legal profession, local authorities directed the merger activities of law firms by force. However, such phenomenon can hardly be heard of in recent years.

“AllBright Law Offices, the largest law firm based in Shanghai, came into being through the merger of three law firms, including Jinlian, Tianhe and Great Wall, at the request of administrative orders. The large-scale AllBright Law Office was established to compete with other major players in the legal service market like Junhe Law Office, King & Wood Mallesons, and Zhonglun Law Firm. It is hard to say whether the administrative order was wise or not, but what is known for sure is that the operation model is not duplicable. You can never expect the same thing happen again nowadays.” (Interview Excerpt, August 15th, 2012 in Shanghai)

In practice, lawyers’ freedom of practice can be intervened by administrative documents circulated by judicial authorities or Bar Associations now and then. However, once the intervention is made public, the act will be immediately resisted by lawyers and criticized by public opinions. For instance, after the tragedy of the high speed rail accident took place on July 23rd, 2011, the Lawyer Administration Section of the Bureau of Justice and Bar Association in Wenzhou issued documents ordering “all lawyers and law firms shall report the applications for legal aids without any delay, and no suggestions or solutions shall be offered without approvals from competent authorities”32. On rare extreme occasions, “insubordinate” lawyers may even be punished by criminal penalty.

“The administrative intervention carried out by the Bureau of Justice is limited in scope, namely entry control and penalty. Actually, we can hardly have any discretion in performance of functions, because the provisions of the Law of the People’s Republic of China on Lawyers and Administrative Measures for the Practice of Law by Lawyers have explicitly defined what should be done. For instance, we will certify the qualifications of lawyer candidates and punish the lawyers for their violations in accordance with laws and regulations. The Bar Association enjoys other authority apart from the two aspects. Nevertheless, they can hardly go any farther than conducting training programs and professional punishment within authority. The functions of the administrative department of lawyers and Bar Associations mainly lie in negotiations, exchange activities and services.” (Interview Excerpt, August 15th, 2011 in Shanghai)

32 According to the summary of Vice Minister of China’s Ministry of Justice Zhao Cheng, the main target of government procurement include: participation in the research, drafting and evaluation of laws and regulations; handling legal affairs of major government investment projects; acting as a government legal adviser; participating in the handling, coordination and follow up work in major event (zhong da shi jian); participation in complaint letter requests cases; representing government in a lawsuit, etc. See All China Lawyer Association (ACLA) Guidance Opinion on Promoting Government Procurement of Legal Services (Draft) (2013 version).
(ii) Power behind the Violation Inspection: Taking Annual Review System as an Example

It can be detected that the judicial authorities may take nontechnical measures, which are vague in scope and related with political approaches and public policy making, to intervene the legal service market. Annual Review (or annual assessment) of the lawyers’ practices, restrictions on household register, taxation adjustment and control, and requirements on further education are some common examples of such nontechnical measures.

“Annual Review System is essential for the Bureau of Justice to effectively regulate the legal profession. Many indicators will be checked during the assessment process, such as training and education, legal aid practices, and complaints from principals. This serves as a tie to connect the law firms and lawyers with the Bureau of Justice. However, we never expect to deliberately get certain lawyers into trouble. In Shanghai, no lawyers will fail in the annual review process unless serious violations of the professional ethics are detected. In a word, the Annual Review System is established to make sure the lawyers and law firms practice properly under administration and never break the rules.” (Interview Excerpt, June 2012, in Shanghai)

However, the Annual Review System is strongly opposed by lawyers, many of whom have showed their resistance publicly.

“The Annual Review System is disgusting. It may function as a breeding ground for corruption. After all, honest officials are rare in China and the system itself lacks norms to follow. You are likely to be in trouble when the supervisors stubbornly abuse the rules. Consequently, the staff in law firms often show respect to the officials in the Bureau of Justice to save unnecessary troubles. In the event that you are labeled as ‘violators’ by the Bureau of Justice, you will suffer a lot even though you are not required to close down for a while. Say, if you are a cab driver, you are likely to lose some money when you are out of business for two weeks. As for a large-scale law firm with operation sales of over one hundred million yuan, they will suffer considerable losses when required to stop business and reorganize for a month or so. But, to be frank, the Shanghai Municipal Bureau of Justice won’t create troubles on purpose.” (Interview Except, June 20th, 2012 in Shanghai)

(iii) Regulations through Adjustment and Control: Government Procurement of Legal Services

Take into account that the complete privatization of property rights in legal service market and that the booming of We Media, Chinese government is becoming very cautious in employment of “commanding intervention” and other nontechnical approaches beyond regulations under the rule of law, coordination, and negotiation in the legal profession. Whereas, the regulation through adjustment and control emerges as a principal means, the resources under such regulations include the government procurement of legal services, professional training sponsored by public finance, tax breaks for legal services, and rent concession for the office building funded by

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33 Interview of Ji Cuihua, the former Director of Lawyer Administration Section, Bureau of Justice in Nanjing, http://www.njsfj.gov.cn/www/njsfj/2009/lsgl2-mb_a390510241582.htm, last visit August 20th, 2011.
government.

“In 4 years, the governments above county-level in Zhejiang Province shall widely recruit lawyers as legal counsels, over 95% of the villages (or communities) shall be equipped with legal counsels, the legal counsels recruited by enterprises shall increase at a rate of over 8%, and all the enterprises with annual prime operating revenue of over 20 million yuan shall recruit legal counsels.” The General Office of CPC Zhejiang Provincial Committee and the General Office of Zhejiang Provincial People’s Government jointly issued the Implementation Opinions on Further Enhancing and Improving the Profession of Lawyers (Opinions), which vows to strengthen the support in the development of legal profession, bringing good news to the sector. The Opinions requires to promote the legal profession as an essential part of the modern service industry, increase the investment in the training programs for lawyers, cover the necessary expenditures of judicial authorities on training work through financial budget system, and incorporate the continued legal education programs for lawyers into the continued education system for professionals and technical personnel, integrate the construction of talent pool of lawyers into the provincial plan of talent development, and explore the mechanism of selecting judges and procurators form excellent lawyers. The document emphasizes on the proposal of vigorously driving the development of legal profession through favorable policies, encouraging the law firms to go large and strong, and building some competitive, large-scale law firms with specialization and nationwide reputation.

The municipal Bureau of Justice and Development and Reform Commission of Ningbo jointly released the Opinions on Encouraging the Lawyers to Provide Legal Services for the Construction of Substantial Projects, in an effort to build a platform, expand the applicable scope, and pave a way for high-end legal services. The document serves as supporting policies guiding the lawyers to provide legal services or serve as legal counsels for construction of substantial projects.

Through the interviews, we clearly note that the auxiliary conditions of adjustment in legal profession before 2008 primarily concern the demand that the law firms should expand scales as requested by the administrative regulations. Nevertheless, things changed after 2008, and stability maintenance and development (including the expansion of law firms) seemed to be equally crucial auxiliary conditions when the authorities offer favorable policies to legal profession. In the meanwhile, when compared with the Western countries, some measures applied in the regulations through adjustment and control are by nature once interpreted as the lawyers’ inherent privilege in the history and yet are now questioned from the perspective of cost-benefit relations. One example is that the number of legal aid practices and remuneration for single case has been increased with the support of public financial expenditures.

“The Bureau of Justice can be important source of cases for lawyers. The legal aid assignments bring considerable income to young lawyers who are less competitive in the legal service market. The remuneration for each single legal aid case in Shanghai is 2000 yuan. The legal aid cases are usually sponsored through government procurement, and there are no limits in the number of such cases. Since the legal aid cases are easy to deal with, the young lawyers can make a living by handling such cases. As for senior lawyers, the recommendations of the Bureau of Justice will help them to gain accesses to more profitable projects funded by the government or state-owned enterprises.” (Interview Excerpt, June 2012 in Shanghai)

(iv) Political Embeddedness: Simulative Promotion in the Bureaucratic System

Now we go back to the topic put forward at the beginning of this article, i.e. the
phenomenon of political embeddedness among China’s legal professionals. The most powerful incentive of the said political embeddedness lies in nowhere but that the government holds most of the resources. Apart from some large-scale projects or the grants of tax breaks, the most attractive factor in such resources is that the lawyers may gain a significantly huge profit through their legal services, the ultimate goal of which is to help the principals acquire various administrative approvals or concession policies from the government. With the enhancing centralization of state power in recent years, the authority of regulations concentrates on the ministries and departments directly under the Central Government, and the local governments also hold regulatory authority at different levels. Take this into consideration, there is eagerness for the promotion of political embeddedness within the bureaucratic system, thus the simulative promotion phenomenon is very common within the legal profession. Such simulative promotion is realized through a hierarchy system of law firms administrated at the provincial, municipal, and county levels, and the rules of interest distribution based on the said hierarchical bureaucracy come into being. For example, the Chairman candidates of a provincial Bar Association must be selected from the law firm administrated at provincial level, or each of such law firms must be allocated with one seat in the provincial People’s Congress.

“We shall take advantage of the adjustment that the law firms previously administrated at provincial level are now administrated by the municipal Bureau of Justice, formulate the administrative standards and criteria for municipal-level law firms and set forth a timetable for them to acquire corresponding qualifications. The law firms failing to reach the standards shall be administrated by the Bureaus of Justice at lower district or county levels. The law firms administrated at district or county levels shall also expand its scale and enhance its service capabilities by introducing professionals and establishing alliance with other law firms.”34 (Ji Cuihua, the former Director of Lawyer Administration Section, Bureau of Justice in Nanjing)

Additionally, the rules of distributing benefits and honors based on hierarchical bureaucracy system, to some extent, explain why the status of legal service center once enjoyed by Shanghai, China’s shining economic center, has been taken by the capital city Beijing in the last two decades.

“The fact that the law firms in Beijing are more successful than others closely depends on the ministries and departments directly under the Central Government. The law firms in Beijing have more accesses to information and business opportunities, and their functions can be performed comparatively more easily. The administrative departments, Bureaus of Justice, and Bar Associations should play a leading role in the legal service market. Thanks to the big role played by the administrative departments in Beijing, the law firms in Beijing can easily perform functions. In contrast, Shanghai is moderately and even stubbornly following the standards, which can cause inconvenience to the law firms based in Shanghai.” (Interview Excerpt, August 6th, 2009 in Shanghai)

Conclusion: China’s Professional Regulations in a Positive Perspective

In general, the relationship between the state intervention and the development of legal profession in China is regularly defined by the following characteristics: (a) The state intervention on legal profession has multiple targets, including the development of legal profession, administration of legal profession, and even the political reliability of the legal professionals, among which the establishment of a legal profession serving for the development of other industries and a force made up of politically reliable socialist legal workers is the most prominent one. In terms of judicial authorities, the transformation of nationalism into commercialism can be traced in the guiding concept of professional regulation reforms, and the professionalism can also be detected within the background of an intensifying marketization of legal services and the reverse drive of legal professionals35. (b) The state intervention can be carried out by various authorities, including but not limited to judicial authorities, the state-owned assets supervision committee, the Ministry of Commerce, the Bureau of Intellectual Property Rights, and even the Ministry of Education. Thus, sub-types of legal profession like the legal counsels and patent agents emerge in the legal service market and segregated market sectors take forms36. There are also conflicts among the guiding concepts of different regulatory approaches, such as legal education, judicial examination, price intervention, disciplinary actions against violations and ideological control. (c) Compared with the regulation mechanisms in the Western countries, the measures of state intervention in China are more diversified and yet the boundaries of various standards are vague. Apart from the regulations by the rule of law, annual review system of lawyering practices, restrictions of household register, adjustments of taxation, requirements on further continued legal education, and the grant of honor and opportunities to participate in the government affairs are all effective alternatives. Still, the legal professionals may be convinced of the ideological “Sense of Overall Situation”. (d) Despite of difficulties, the collective pursuit of professionalism in the legal profession never stops. Along with the Bar Associations’ lobbying of judicial departments, the lawyers’ consciously organized rights protection activities, the legal academia’s lobbying of the Committee of Political and Legislative Affairs and legislature, and the judicial reforms initiated by the adjudicative organs have all contributed to the promotion of legal professionalism in China. In the design and legislation of legal system, there is broad resistance of the role of the law or lawyers. At the same time, the legal professionals, as an integrated interest group, put excessive emphasis on the construction of an idealized, self-interest guaranteed judicial system and professional system, but sometimes they fail to manage the professional ethics well. These two factors have made the ruling party, government, and people suspicious of the good image of legal profession in the modernization of laws.

In recent years, with the prevalence of law and economics and institutional economics in Western countries, a popular opinion holds that the rigorous requirements of the entry to legal profession cause excessively high cost of legal

35 *Supra* note 3.
services, and that the strict control over the advertising of lawyers’ practices further deteriorates the information asymmetry. Coupled with the flood of marketicism in legal profession, the said two factors make the lawyers only serve for the rich and large companies who can afford huge legal fees, finally damaging the general public’s interests. Additionally, the self-regulation of legal profession also generates costs, along with the failure and capture of regulations, and these adverse consequences are usually bitter pills for clients (or the public) to swallow. Thus, some scholars even argue that the self-regulation of a profession can never achieve its goal. Self-regulation is a fig leaf for the legal profession in rent seeking (even if not for extravagant profits), capture (of regulatory authorities), and anti-competition. The so-called professional system artificially creates a Cartel-like legal service market, making an unequal allocation of legal services and information. Within such a background where the law of the market doesn’t work, the legal services embrace overflow profits. Considering this, consumers’ association, fair trade association and other pressure groups started a blockbuster movement demanding the abolishment of self-regulation in legal profession and enhancement of state intervention. Thus, the administrative organs, courts, and other independent regulators all intensified the external regulations of legal profession.

In response to this, the legal professionals appear to oppose the state intervention in chorus, which is unnecessarily wrong when examined from the perspective of economics and sociology. For instance, China sets limits for the exorbitant fees charged by lawyers. The drawbacks lie in that the legal profession may fail to attract more excellent candidates. However, it should not be ignored that the regulation makes the legal services accessible to more people, helps to change the public’s perception that “lawyers only defend the interests of the rich”, and motivates more brilliant legal professionals to shoulder the responsibility of guarding the legal rights, protecting the interests of the underprivileged, and providing legal services to less profitable sectors. To some extent, this would greatly ease the tension between the legal profession and the public, which is presumably good news for a country lacking of Western style legal professionalism traditions like China. The advantage has been further supported by the fact that the Chinese people enjoy a significantly better medical treatment ahead of the state’s economic development. What really concerns is that how to wisely manage the golden ratio of state intervention and self-regulation. How to define and verify the best role of the state intervention in professional regulations properly is the question worthy of serious considerations in the next step.