

China

China's developing legal system and the recent lawyers' qualification examination

by Roderick O' Brien



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In 1975, when I visited the People's Republic of China with a legal delegation from Hong Kong, we were told proudly that we had come to visit a society without lawyers. Nearly twenty-five years later, the headlines in the Beijing government's English-language paper read 'Law sector progresses rapidly' and 'Legal system sees improvement'. The

Ministry of Justice estimates that China will need 600,000 legal personnel by the turn of the century, of whom 150,000 will be lawyers. More than 100,000 have already qualified.

BACKGROUND: FLUCTUATING FORTUNES

To understand how China could make such a startling change, we need to go back fifty years. At the time when Mao Zedong proclaimed the foundation of the People's Republic of China, there was not a legal vacuum. In the Republic of China, a legal profession was developing, and law schools had been opened following continental European, Japanese and American models. The Communist party abolished the Republican system of law, but not all of the personnel trained under the system followed the Republic's armies in their retreat to Taiwan: some stayed to serve in the new society. Moreover, the Communist party itself had experience of ruling in the areas which had been under its control during the civil war, and could draw on the young legal tradition of the Soviet Union.

But many issues faced the new government in Beijing, and law and the legal system did not enjoy a high priority. The system inherited from the Republic was dismantled but, practically speaking, it was not until the mid-1950s that much attention could be paid to law and lawyers. In 1956, the Ministry of Justice established a new lawyer system and by mid-1957 the country had 2,500 full-time professional and 350 part-time lawyers.

Politics took precedence over law and, in 1957, the government's 'anti-rightist' movement took its toll on all aspects of intellectual life. Among these, the system of lawyers was labelled 'capitalist' and lawyers were among those sent to the re-education camps. The chances of developing a mature legal system, even under the Soviet model, were crippled by the anti-

rightist campaign and were then shattered during the ten years of the Great Proletarian Cultural Revolution from 1966-1976.

With the ending of the Cultural Revolution, the agenda for change was enormous. Law was only one aspect of this and, once again, other items were more urgent. It can be said that in practical terms the changes did not begin until 1979. Moreover, change began slowly. Personnel invited back to their posts feared that the anti-rightist movement could strike them again. After twenty-two years with little or no law (from 1957-1979) Chinese who wished to establish a legal system needed time and courage.

If we look at where China has come from, the achievements of the past twenty years are indeed impressive. But if we look at China's needs, the achievements are only a beginning. So where are we now?

DEVELOPING A LEGAL PROFESSION

Since 1979, China's legal profession has been developing into five groups, each with its own hierarchy and qualification examinations. Recognition and regulation of these groups has been achieved through provisional or draft regulations, and gradually these are being replaced by laws such as the *Judges' Law* of 1995 and the *Lawyers' Law* of 1996.

Judiciary

For any legal system to be effective there must be an effective judiciary. Courts dealt with over 13m civil cases from 1993 to 1997: the workload is huge. China's lack of qualified personnel means that the huge gaps in the system need to be filled, and quickly. But mature judges cannot be found immediately amongst youngsters graduating from the re-opened law schools, so the government's solution is to appoint many army officers to judicial posts on their retirement from active service. This also has the advantage of finding somewhere to place these personnel. The problem then becomes one of training on the job; the solution is being found in a variety of training programmes and examinations for promotion.

Lawyers

Re-opened or newly-opened law schools are turning out thousands of law graduates. Many of them hope to pass the lawyers' qualification examination (see below) and become lawyers. Lawyers can find work in three types of law firms: state-owned, collectively-owned and the most recent version, private partnerships. Once qualified, the lawyers join a profession that is gradually maturing. There is an All China Lawyers Association, now more than a decade old. There are numerous study societies for various specialities. Specialist books and even computer programmes for lawyers' offices are more readily available,

though the distribution of these materials outside major cities may be very limited.

However, the goal of having 150,000 lawyers by the turn of the century does not necessarily translate into ready vacancies for young graduates. A student newspaper struck a note of caution, pointing out that graduates majoring in law are struggling in a tough job market. The law offices can be choosy in their recruitment: a recent exchange in Tianjin City disclosed that all the lawyers' offices wanted personnel who had a good college education or above, had good foreign language levels, could use computers well and were qualified in difficult and new special areas. These would be heavy demands even in the UK!

Procurators

This branch of the profession has its origins in Soviet law and there is no ready parallel in the common law. The procuracy performs some of the functions of the Attorney General's department in prosecution of serious cases. The various security organs, such as the police, handle less serious cases. But the procuracy also has a supervisory function over other government departments and even over the courts. The People's Procuratorate has the distinction of being set up quite early in the history of the new system: by 1950 the rudiments of the office were in place and its Provisional Regulations date from 1951. The constitutional status of the Procuratorate is high: the Supreme People's Procurator-General has the same standing as the President of the Supreme Court. Both are responsible directly to the National People's Congress and its Standing Committee, not to a ministry. The procuracy now has its own organisational law and its own ranks and examinations in parallel with those of the judiciary.

Notaries

Lawyers who have been involved in business dealings with the People's Republic of China may themselves have experienced the high level of formality there can be in documentation. When China began its 'open door' policy in 1979, it seemed that documentation could be informal and that the common law practice of using very detailed contracts (for example) was not applicable to transactions in China. To some extent, this was a myth generated by the fact that China had very few people capable of drafting a contract, or understanding one, written in a foreign language. But in fact the country with the longest bureaucratic history can have some quite complex requirements regarding paperwork. Within China, notaries are responsible for registering an extensive range of cases. The notary is also responsible for ensuring that the situation that is being notarised is according to law. The number of cases handled can be quite large: between June 1993 and June 1996 Beijing's municipal notarial office handled nearly 2,700 notarisation cases just involving Taiwan - extending even to notarisation of graduation certificates. The notary in China performs drafting and advising functions that, in the common law, would be regarded as appropriate for lawyers; the notary also has a range of other functions peculiar to China's socialist economic system. The aim is to have 30,000 notaries by the turn of the century.

In-house counsel

It has been the emerging practice of large and middle-sized corporations to have their own legal office, called a 'judicial

office' or something similar. These offices undertake legal work for the corporation, or for its employees, including even criminal cases. This function was not foreseen in the Lawyers' Law. Rather than try to abolish such offices, the government has decided to make them a separate group, to be regulated by their own legislation. Interestingly, the regulation is to be carried out jointly by the Ministry of Justice and the State Economic and Trade Commission. Only the Ministry of Justice regulates the lawyers. This group is the most recent to emerge and it is not yet clear how the in-house corporate counsel will relate to other groups.

Law teachers and army lawyers

In addition to these five groups, there are two other significant groups of legal personnel. The first group is the law teachers. The explosion in law teaching has meant an explosion in the number of law teachers. Often they are fresh graduates, and there are very few senior staff members. The few old professors surviving from before 1957 have now been pensioned off and the average head of a law department nowadays is probably under forty and not long qualified. Some have come into law from other fields, such as politics. The second group is legal personnel in the People's Liberation Army.

THE LAWYERS' EXAMINATION

On 10 and 11 October 1998, more than 140,000 candidates participated in the two-day nationwide examination for the lawyers' qualification. Looking at this examination can give us a better picture of the emerging profession.

The examination itself is an example of the gradually increasing sophistication of the regulatory process. There needs to be a 'gateway' to the profession: some way of deciding who can call themselves a lawyer and who is excluded. The examination was first introduced in 1986 and was held every two years. Since 1993 it has been held on an annual basis. Successful candidates have confirmed that the examination is increasing in difficulty as the Ministry of Justice seeks to raise the standards of lawyers.

The lawyers' qualification examination is matched by similar national examinations for accountants, real-estate valuers and physicians.

The examination has four papers; the topics are varied and include civil and criminal law and procedure, economic law and the professional regulation of lawyers. In 1998, the test paper included questions about the recent Environmental Law. An interesting innovation has been the introduction in 1996 of an optional language test: candidates can earn some extra points by passing a test in English. By 1998, optional language tests in Japanese and Russian had been added.

Candidates do not need to be university law graduates. Any graduate of a four-year degree course in any field may apply. So too can graduates of a two-year course in law. Many of the candidates have taken their law studies through adult education courses, correspondence courses or even by self-study. The Ministry of Justice publishes and recommends its own textbooks to prepare candidates for the examination.

After last year's examination, the ministry released some statistics indicating the trends among the candidates: they are younger, they have higher educational standards and they include a growing number of government officials.

Perhaps the most interesting statistic was that more than a quarter of the candidates worked in Communist Party or government posts. Zhu Rongji was appointed in March last year as China's premier, replacing Li Peng. His mandate includes government reform and, in particular, the reduction of civil servants from eight million to four million and similar reductions in the numbers employed in state enterprises. A chill wind is blowing through all levels of the Party and government bureaucracy, and candidates for the lawyers' qualification spoke openly to the press of their concern for the future as a motivating factor in taking the examination.

More than 70% of the candidates were aged under thirty. Personal experience of teaching in two of China's law schools suggests that candidates see the legal profession as a modern, outward looking profession, with the possibility of rich financial rewards. Law departments are booming in popularity with students. So there are thousands of young graduates of four and two-year courses ready to take the test. This means that the proportion of candidates with some level of formal legal education is growing, perhaps to two-thirds of the candidates. But even in the major cities of Beijing and Shanghai, only about a third of the candidates had completed a four-year law degree. At the same time, the Ministry of Justice noted with satisfaction that a number of the candidates had masters and even doctoral degrees.

The administration of the lawyers qualification examination is in itself an achievement for the Ministry of Justice. The number of candidates has obviously grown rapidly in the thirteen years since it was first held. In 1998 the examination was held in more than three hundred sites across the country. Readers who have served as examiners can imagine the difficulty of marking consistently more than 140,000 papers!

Passing the lawyers' qualification examination is not the final hurdle for would-be lawyers. They must also complete a requirement of practical experience before they can obtain the lawyers' certificate. Ideally, this would be an internship in a lawyers' office, but the number of available places is far fewer than the number of candidates, so a variety of legal work is acceptable.

A note of caution should be employed here: China's statistics are not always very sophisticated, or well-reported. In addition, care must be taken as to what is read into the statistics: the fact that someone has passed the lawyers' qualification examination and has obtained the lawyers' certificate does not mean that they are actually practising as lawyers on a full-time basis. Just as in England or Australia, qualified lawyers may be engaged in quite different work.

INTERNATIONAL ASSISTANCE

It is encouraging that there are many people in China who wish to see the development of a legal system and who wish to see China ruled by law. Of course, these people may have a variety of views about what this means in practice, but during my first visit in 1957 I could hardly have imagined the changes that have taken place.

Not only within China, but also outside, there are people willing to help China develop its legal system. To list the various projects would fill pages: a couple of examples will suffice.

Just before the candidates sat for their lawyers examination, British Law Week was held in Beijing. It included a mock trial, with Lord Justice Otten of the Court of Appeal presiding. Since limited elements of the adversarial system have found their way into China's new Criminal Procedure Law, the trial would have been a practical lesson for the dozen Chinese legal personnel who made up the jury and the four hundred or so who witnessed it as an audience. For many Chinese, their knowledge of the common law procedure comes only from watching Hong Kong movies of the 'police-action' genre, many of which include dramatic courtroom scenes.

OVERSEAS LINKS


Links between the All China Lawyers Association and its English counterparts over ten years have enabled dozens of young Chinese lawyers to get practical experience in England. Similar support has been provided by Australian and Canadian lawyers' groups and especially by the legal profession in Hong Kong.

China's legal system is basically a Soviet law system, and in its modernisation draws mainly on the civil law system. However, common law jurisdictions can provide alternative models in some areas and the influence has been felt particularly in commercial law and company law.

THE FUTURE

This brief survey can give readers a glimpse of the developing legal profession. Of course, a whole variety of subjects has not been covered here, such as how lawyers are organised, what work they actually do, or legal aid. But from this glimpse, the foundations of a legal profession can be seen, where it seemed in 1975 that none could exist. Legal training is expanding. At least some of China's leaders are concerned about raising lawyers' standards and about regulating a profession. The profession is in practice a divided profession and the divisions are still being worked out.

To predict any aspect of China's future one must be brave, or foolhardy. In the past, there have been so many dramatic swings in policy that it is risky to suggest what could happen in the future. However, I will take the risk. But first let me hedge my bets with three conditions: if the present trend towards a market economy continues, if the country enjoys reasonable stability, and if the signs of a civil society become more widespread, then my prediction is that the legal system will continue to grow and to become more mature. Lawyers' training will become more sophisticated, with the lead being taken by China's top universities. The different branches of the emerging legal profession will influence each other, probably in the direction of rising standards. The profession will increase its contacts with lawyers in other countries and continue to learn from the experience of other legal systems.

If I take my first visit to China in 1975 as my reference point, it is amazing how much has been achieved since then. If I take even China's own leaders' statements as my reference point for the future, it is clear that much remains to be done. 

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