

# **CHINA'S LEGAL PROFESSION: THE NASCENCE AND GROWING PAINS OF A PROFESSIONALIZED LEGAL CLASS**

WEIFANG HE\*

<b>I. INTRODUCTION .....</b>	<b>138</b>
<b>II. BACKGROUND.....</b>	<b>139</b>
<b>III. THE NASCENCE OF CHINA'S LEGAL PROFESSION .....</b>	<b>143</b>
A. SYSTEM CHOICE .....	146
B. PROBLEMS OF QUANTITY .....	148
C. BETWEEN AUTONOMY AND OPENNESS .....	149
<b>IV. PROSPECTS AND CONCLUSION.....</b>	<b>150</b>

## **I. INTRODUCTION**

Beginning in the late 1970s, the process of constructing the rule of law in China has seen more than a quarter of a century of development. During the transitional "Post-Mao Zedong" era, many factors have influenced and guided China's progress towards the rule of law—for example, still-viable socialist theories, the historical inertia of various institutions built on these theories, the emerging market economy's need for a unified, stable, and predictable legal system, the directional uncertainties posed by the diversification of imported knowledge, and the difficulties posed by a virtually static political system.

In this article, I wish to emphasize the difficulties in institutional construction today caused by China's long and unique history. I focus especially on the impact on dispute resolution of the lack of a professional judicature and legal experts, as well as the effects of the inability of adjudication to become a source from which jurisprudence can develop. This is the backdrop of Chinese rule of law construction today. It is also the backdrop of the discussion surrounding the construction of a modern legal system and its attendant difficulties during the past century. In analyzing these difficulties, I focus on issues in the field of legal

---

\* Professor of Law, Peking University Faculty of Law.

education, as it is one of the most important factors in molding the legal profession.

Part of the reason I wish to explore this topic is that a nationalist tide has recently arisen once more, and some scholars have specifically advocated reconstructing China's modern political-legal system using Confucian political principles. Although it is not abnormal to have cyclical anti-Western tides in some countries, the mainstream of Chinese legal studies today, especially in specific areas of law such as civil, criminal, and criminal procedure law, is still based upon Western knowledge and theories. It is, however, necessary to reflect upon the history of governance in China, not only because of its historical significance, but also because doing so enhances our critical ability in this age of intellectual "free trade." If this inquiry serves no other purpose, at least we will not become "lost lawyers."

## II. BACKGROUND

China's classical society, in spite of its long history, failed to produce a legitimate and professionalized class of lawyers. Here, what sets China completely apart from the West is its peculiar system of selecting officials in traditional or classical society and the impact of this system upon social structure, which resulted in an equally peculiar legal process. For a millennium prior to the abolition of the civil service examination in 1905, officials had been selected through examinations. Although the Imperial Exams represented the traditional model of rule with the knowledgeable ruling the ignorant, they did not promote the diffusion of legal knowledge, but rather impeded it by holding to the standards of Confucianism and poetic techniques. In the words of Max Weber:

The Chinese examinations did not test any special skills, as do our modern national and bureaucratic examination regulations for jurists, medical doctors, or technicians. Nor did the Chinese examinations test the possession of charisma, as do the typical "trials" of magicians and bachelor leagues . . . . The examinations of China tested whether or not the candidate's mind was thoroughly steeped in literature and whether or not he possessed the ways of thought suitable to a cultured man and resulting from cultivation in literature. These qualifications held

far more specifically with China than with the German humanist gymnasium.<sup>1</sup>

Though people who succeeded in such examinations were involved in the judgment and resolution of disputes, the officials' judicial activities did not contribute to the growth and development of independent and specialized Chinese legal knowledge due to the narrow focus of their knowledge and background.<sup>2</sup>

The traditional Chinese legal concept was a direct result of a judicial process dominated by laymen. County officials usually had private secretaries to help them when deciding cases.<sup>3</sup> However, their training was, to a large degree, technical in nature. Therefore, secretaries did not pay attention to the inherent logic of law, such as the rules by which cases should be decided and the difference between legal and moral reflections. At the same time, though secretaries played an important role in deciding cases and making policy, they focused more on helping their masters than the strict and precise application of legal principles. They generally balanced all of the factors in a case, applying the law when favorable to their masters and ignoring the law when not. As Ch'ü T'ung-tsu ("Qu Tongzu" in *pinyin*) pointed out, "those secretaries studied law only to help their masters to decide cases and they never intended to study law systematically."<sup>4</sup> In the middle of the Qing Dynasty, legal secretaries were sarcastically said to be "saving the living not the dead, saving the officials not the people, saving the important not the

---

<sup>1</sup> MAX WEBER, *THE RELIGION OF CHINA: CONFUCIANISM AND TAOISM* 121 (Hans H. Gerth ed. & trans., 1964) (examining the Chinese government, Weber found the number of officers was much less than that of European governments and identified a relationship between the rough style of governance and a small number of officers).

<sup>2</sup> Inadequate budgeting for legal services contributes to China's failure to develop a professionalized legal class. Ray Huang noted long-term stability and "low price" as two important characteristics of the organization, legal system included, of traditional Chinese society. As Huang described:

The annual revenue of the government in the late Qing dynasty had never exceeded 100 million silver ounces, a figure that is very insignificant measured against either China's population or the general yardstick of the world at the time. The crudity of organization together with the shallowness of technology make it possible for such a big country to be based on a petty-agrarian economy and to dispense with the need for lawyers and professional judges, even though the population was in its hundreds of millions, a situation that remained unchanged until the Opium War.

黄仁宇, 近代中国的出路 [RAY HUANG, *THE ROAD OF MODERN CHINA*] 72-73 (1995).

<sup>3</sup> See 瞿同祖, 瞿同祖法学论著集 [QU TONGZU, *SELECTED PAPERS IN LAW OF QU TONGZU* 460 (1st ed. 1998) (describing the division of labor between county officials and their private secretaries).

<sup>4</sup> *Id.* at 413.

obscure, saving the old not the new.”<sup>5</sup> In addition, these secretaries were only assistants, and they were not responsible for any judicial decision-making, so they were reluctant to fight for justice in deciding any particular and isolated case.

In Western history, the independence of legal professionals as a group originated from restricted access to the legal profession, which was based on the pursuit of profits. The American jurist Richard Posner considered legal development a side product of this profit-seeking cartel. According to Posner, “professional ideology is a result of the way in which the members of the profession work, the form and content of their careers, the activities that constitute their daily rounds, in short the economic and social structure of the profession.”<sup>6</sup> Actually, while a body of specialized knowledge is indispensable for a profession to attain wider social resources,<sup>7</sup> the way legal professionals work and the formality and essence of their work are also important sources of legitimacy. Judges apply strict legal procedures to cases and make decisions without interference. Those decisions become unshakable once they obtain procedural validity. Such principles are often taken for granted in the West.

In contrast, judges in China were not lawyers and usually did not specialize in law.<sup>8</sup> When they dealt with disputes and cases, there was no certainty of law. What they were applying was a combination of law, moral requirements, and community customs. As sources of applicable norms, these forces did not embody distinctive differences. When local officials handled cases, it is unlikely that they would determine the norm to apply based on a normative structure defined by a hierarchy of related norms. At the same time, because of their background and knowledge, judges relied on resources like Confucianism or historical works, which had no legal ramifications, in order to support certain decisions. Examined from today’s point of view, the records of some of the “famous trials” are more valuable as literary or rhetorical references than as legal documents.<sup>9</sup> County magistrates made decisions based on case-specific

<sup>5</sup> 纪昀, 阅微草堂笔记 – 姑妄听之之四 [Ji Yun, *Jottings from the Thatched Abode of Close Observations – Part IV: Just Listen to Them*], in 郭建等, 中华文化通志/法律志 [GUO JIAN ET AL., GENERAL HISTORY OF CHINESE CULTURE: LAW] 327 (1998).

<sup>6</sup> RICHARD A. POSNER, OVERCOMING LAW 35 (1995).

<sup>7</sup> *Id.* at 37.

<sup>8</sup> Ch’ü Tung-tsu noted that due to the complexity of the law and the pressure of daily work, it was difficult for county officials to conduct a specialized study of law, and so they had to rely on their private secretaries. Yet he also pointed out that “it is a basic requirement for county officials to be well-versed in law when they are involved in the administration of justice, for otherwise they will not be able to render a judgment based on law.” See QU, *supra* note 3, at 460.

<sup>9</sup> See 贺卫方, 中国古代司法判决的风格与精神以宋代为基本依据兼与英国比较 [He Weifang, *The Style and Spirit of Traditional Chinese Judicial Decisions: Based Mainly on the Song Dynasty*]

facts. They did not decide cases on precedent or the continuity and coherence of rules established in previous cases. A French scholar, Jean Escarra, attributed this phenomenon to the inferior status of law in China's value system, which he compared to that in the West:

The Peoples of Western civilisation have lived throughout under the Graeco-Roman conception of law. The Mediterranean spirit, while central to the patrimony of the Latin peoples, has also inspired large parts of the law of Islam, as also of the Anglo-Saxon, Germanic, and even Slavonic nations. In the West the law has always been revered as something more or less sacrosanct, the queen of gods and men, imposing itself on everyone like a categorical imperative, defining and regulating, in an abstract way, the effects and conditions of all forms of social activity. In the West there have been tribunals the role of which has been not only to apply the law, but often to interpret it in the light of debates where all the contradictory interests are presented and defended. In the West the juris-consults have built, over centuries, a structure of analysis and synthesis, a corpus of "doctrine" ceaselessly tending to perfect and purify the technical elements of the systems of positive law. But as one passes to the East, this picture fades away. At the other end of Asia, China has felt able to give to law and jurisprudence but an inferior place in that powerful body of spiritual and moral values which she created and for so long diffused over so many neighbouring cultures . . . . Though not without juridical institutions, she has been willing to recognize only the natural order, and to exalt only the rules of morality . . . . Few indeed have been the commentators and theoreticians of law produced by the Chinese nation, though a nation of scholars.<sup>10</sup>

---

*and Comparing With That of England*], 中国社会科学 [SOC. SCI. IN CHINA], Dec. 1990, at 203-19, as translated in SOC. SCI. IN CHINA, Sept. 1991, at 74-95; also in 贺卫方, 司法的理念与制度 [HE WEIFANG, THE IDEA AND SYSTEM OF JUSTICE] 188 (1998).

<sup>10</sup> JEAN ESCARRA, *LE DROIT CHINOIS; CONCEPTION ET ÉVOLUTION, INSTITUTIONS LÉGISLATIVES ET JUDICIAIRES, SCIENCE ET ENSEIGNEMENT* 3 (Pékin, Éditions H. Vetch, Librairie du Recueil Sirey 1936), quoted in JOSEPH NEEDHAM, *2 SCIENCE AND CIVILISATION IN CHINA* 521 (1956).

## III. THE NASCENCE OF CHINA'S LEGAL PROFESSION

Similar to the Japanese experience, the transformation of China's traditional political and legal system was also achieved under pressure from Western powers. With increasing Sino-Western communications and corresponding legal disputes, Western dissatisfaction with the Chinese legal system grew considerably. Thus, the Treaty of Nanking and the Treaty of Humen signed after the Opium War not only demanded the cession of Hong Kong, the opening of port cities, and payment of certain treaty-mandated tariffs, but also explicitly provided that British citizens in China were subject only to the laws and courts of Britain according to so-called "consular jurisdiction." For the Chinese living in the regent years of Dao Guang, this extra-territorial jurisdiction was not a matter of concern; rather, in their view, "it was no more than a matter of letting the barbarian rule the barbarian, which is supposed to be the most expedient solution without a fuss."<sup>11</sup> However, in the conflicts between Western countries and China, the political concept of nation-state and sovereignty spread to China. As a result, extra-territorial jurisdiction was perceived as a stigma on the country and the Chinese people as a whole. After the Boxer Rebellion, there emerged an increasingly strong movement calling for Chinese legal reform according to Western standards, while at the same time, extraterritorial jurisdiction became an exacerbating factor for Sino-Western conflict as well as a protective regime for Western interests. Thus, the Treaty of Commerce and Navigation of 1901 between China and the United Kingdom declared:

---

<sup>11</sup> 蒋廷黻, 中国近代史: 外三种 [JIANG TINGFU, A HISTORY OF MODERN CHINA] 27 (1987); see also R. Randle Edwards, *Ch'ing Legal Jurisdiction Over Foreigners*, in *ESSAYS ON CHINA'S LEGAL TRADITION* 222 (Jerome Cohen et al. eds., 1980); 展恒举, 中国近代法制史 [ZHAN HENGJU, MODERN CHINESE LEGAL HISTORY] 93-95 (1973).

China deems it as greatly desirable to reform its body of enacted laws and un-enacted case-laws so as to conform with the various states (of the West). The United Kingdom is ready to offer all possible assistance to facilitate China in achieving this end, and agrees to renounce the right to extra-territorial consular jurisdiction once it is satisfied that China has reformed with adequacy its body of enacted laws and un-enacted case-laws, its trial procedures, and all other relevant aspects.<sup>12</sup>

It was only at this point that China officially initiated legal reform.

However, Chinese legal reform during this period had three shortcomings. First, because the government was forced to reform, it was hard to know whether government efforts were truly sincere.<sup>13</sup> Second, as the Qing dynasty was established by the Manchu people, a minority nation within the Chinese population, long-existing conflicts between the Han and Manchu crippled its progress. Lastly, and most important, government officials emphasized short-term benefits rather than long-term effects. Basic underlying conditions for judicial reform were brushed aside, and consequently the newly-established legal system was inconsistent with Chinese social reality.

Nevertheless, with the economic, political, and cultural influence of the West, a new political and legal system was established. The role played by the missionary schools and universities established by Westerners cannot be overstated.<sup>14</sup> Likewise, domestic initiatives should not be ignored. Even though the government was not as zealous as certain extra-governmental advocates, more and more schools of law and politics were established, including those in national universities. When the Imperial civil service examination was abolished, Western legal education was considered a close substitute and younger generations found it particularly appealing. In addition, as foreigners swarmed into China through port cities, there were more and more disputes between Chinese and foreigners. To solve these disputes, a practical demand for legal professionals was on the rise. As these demands accumulated, judicial reform and a modern legal profession became inevitable.

---

<sup>12</sup> Quoted in 杨鸿烈, *中国法律发达史* [YANG HONGLIE, HISTORY OF CHINA'S LEGAL DEVELOPMENT] 872 (1930).

<sup>13</sup> See Chüzō Ichiko, *Political and Institutional Reform, 1901-1911*, in 11 THE CAMBRIDGE HISTORY OF CHINA 375, 413 (John K. Fairbank & Kwang-Ching Liu eds., 1978).

<sup>14</sup> A most successful example is Soochow University Law School, established by American missionaries in 1915. See Alison W. Conner, *Training China's Early Modern Lawyers: Soochow University Law School*, 8 COLUM. J. ASIAN L. 1 (1994).

The legal system continued to develop until Japan invaded China in the mid-1930s. During China's war with Japan, there was no law in Chinese society. In 1945, when World War II ended, civil war broke out in China. While civil war ended in 1949 with the victory of Mao Zedong and the Chinese Communist Party, social turmoil continued through the first three decades of the People's Republic of China. According to Marxism, law represents bourgeois interests and should be discarded. With the rise of Marxism in China, political discourse replaced legal discourse. In practice, law lost its autonomy and became the handmaiden of politics. As legal instrumentalism climaxed, it degenerated into legal anarchy. During the Cultural Revolution, law was completely eliminated from China and replaced by a precarious balance between policy considerations and the capricious will of rulers. This state of anarchy lasted as long as ten years. It not only brought unprecedented economic and humanitarian disaster, but also greatly undermined the legitimacy of CCP rule.

As a reflection of the historical lesson of the Cultural Revolution and in an effort to restructure the legitimacy of the rule of the CCP, socialist democracy and rule of law were proposed in late 1970s. The past twenty years have seen changes in the quality of legal education in China. The number of law schools has jumped from five in 1978 to more than 300 today. In 1978 there were only 600 law students in China. Today, Peking University Law School has more than 2000 students. The total number of law students (excluding law postgraduates) in 1998 reached 85,000, with an additional 29,000 students admitted that same year.<sup>15</sup> The progress in legal education is shown not only by the growth in the number of students, but also by the diversity of law degrees awarded. The majority of law students are undergraduate students, but in some research-oriented universities students at the Masters and Ph.D. levels outnumber undergraduates. Law has now become one of the most popular majors in China and is finding greater appeal among more qualified students.

The development of legal education has also improved the quality of the legal profession. Twenty years ago, judges had little legal education and could not be trusted with complex legal matters.<sup>16</sup>

---

<sup>15</sup> These numbers are drawn from data from the Center of Education Information, Ministry of Education and Department for Legal Education, Ministry of Justice, in 建构统一的中国法律教育模式: 法律硕士专业学位教育的改革与发展报告 [*The Establishment of Uniformed Legal Education in China: A Report on the Reform and Development of the Education Towards a Master's Degree in Law*], in 中国法律硕士专业学位教育的实践与探索 [DOCUMENTARY BOOK ON THE J.M. PROGRAM EDUCATION IN CHINA] 375 (贺卫方 & 霍宪丹编 [He Weifang & Huo Xiandan eds.], 2001).

<sup>16</sup> According to data compiled by China's court system in 1980, only 3.6% of the 58,000 personnel



However, with a growing market economy and the rising social demand for an independent judiciary, legal professionals are now better educated than their predecessors.<sup>17</sup> As one of the most important benchmarks, the Standing Committee of China's National People's Congress revised the Law on Judges and the Law on Procurators to introduce a unified national bar exam. The first unified judicial exam was held in 2002 with 300,000 examinees and a 7% pass rate. Indeed, legal education is prospering, the unified judicial exam is now established, and the demand for democracy is rising. Considering all these social elements, we can see that Chinese legal professionals are facing a historic opportunity. Can this generation see the professionalization of lawyers in China? Clearly, as a developing country in the age of globalization, China frequently faces a number of contradictions that effect the development of the legal profession. For instance, the lack of a professional legal tradition in China weakens the development of legal ethical rules essential to a healthy legal profession. Therefore, China will continue to face a hastening crisis in the process of professionalization while, at the same time, undergoing the belated nascence of a professionalized legal class.

#### IV. CHALLENGES

##### A. *System Choice*

China borrowed its method of professional legal education from Western countries. Specifically, influenced by a desire to abolish extra-territorial jurisdiction, mitigate the influence of Japan, and avoid the difficulty of transplanting common law, China has adopted the European Continental model. As the Chinese legal system followed the Continental pattern, so did its style of legal education.<sup>18</sup>

Like other countries that follow the Continental legal style, China also focuses its legal education on statutes as opposed to case law

---

surveyed within China's court system graduated from university affiliated law schools or law departments. See 汤能松等, 探索的轨迹: 中国法学教育发展史略 [TANG NENGSONG ET AL., A CONCISE HISTORY OF CHINESE LEGAL EDUCATION] 410 (1995).

<sup>17</sup> 贺卫方, 通过司法实现社会正义: 对中国法官现状的一个透视 [He Weifang, *The Realization of Social Justice Through Judicature: A Look at the Current Situation of Chinese Judges*], in 走向权利的时代: 中国公民权利发展研究 [TOWARD A TIME OF RIGHTS: A STUDY OF CIVIL RIGHTS DEVELOPMENT IN CHINA] 179, 179-250 (夏勇编 [Xia Yong ed.], 2000); STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 253 (1999).

<sup>18</sup> Since the 1940s, the diverse educational background of China's leading lawyers has caused confusion about the model of China's legal education and legal system. See Roscoe Pound, 法律教育第一次报告书 [First Report on Legal Education], in 中国法律教育之路 [ESSAYS ON LEGAL EDUCATION IN CHINA] 298 (贺卫方编 [He Weifang ed.], 1997).

precedent. Moreover, the goals of Chinese legal education, the course design, and the Chinese pedagogic method are similar to those of Continental law. After an almost thirty-year interruption (1949-1978), China's legal system again pays homage to the Continental style. Even though some articles of China's Constitution are colored by socialist ideology, China's civil law, criminal law, and procedural codes clearly reflect a Continental influence. For example, the ongoing codification of China's civil code demonstrates China's reception of Continental methods. Further, legal education has returned to the Continental pattern as well. Legal education in China differs from that in America: whereas American law schools admit only college graduates, Chinese law students attend law school directly after high school graduation. In China, the goal of legal education is to train professionals not only for legal practice, but also for enterprise, corporate work, and government service. In addition, lecture, rather than Socratic method, is the preferred teaching method in Chinese law schools.

Nevertheless, Continental methods have been influenced by Anglo-American elements. The newly amended civil and criminal procedure laws both adopt the adversary system into Chinese legal practice. The Continental system has not only lost battles on the fields of procedural law, but it has also lost influence in substantive law as well. It seems that Anglo-American law is continually making inroads in Chinese legal development. The pursuit of comprehensive codification, an important tradition of Continental law, has recently been cast into doubt in China. Professor Jiang Ping, the former president of the China University of Political Science and Law, has suggested that "China should enact a civil code with an open spirit. The effective and efficient American legal system should be introduced into the design of property rule and contract rule of the to-be-enacted civil code."<sup>19</sup> As the Chinese legal system balances between the Continental pattern and the Anglo-American pattern, legal education inevitably sways between them as well. With more and more American legal rules and doctrines penetrating the Chinese legal system, Chinese legal education has moved closer to the Anglo-American style.

Another reason for the great influence of American law on Chinese legal education is language. As the most widely used language in the world, English is the first foreign language for the majority of Chinese law students. Language is not only a tool, but also a way of thinking. As a matter of path dependency, students are more likely to read

---

<sup>19</sup> See generally 江平, 制订民法典的几点宏观思考 [JIANG PING, SEVERAL THOUGHTS ON THE ENACTMENT OF THE CIVIL CODE], available at <http://law-thinker.com/show.asp?id=1010> (last visited Apr. 6, 2006).

an original legal treatise in English than in any other foreign language. As a result, there is a tendency for Chinese law students to think like common law lawyers.

Considering these influences, the suggestion of modeling Chinese legal education on the American model is not altogether surprising.<sup>20</sup> In fact, this suggestion was turned into reality in 1995 when the Department of Legal Education under the Ministry of Justice designed a J.M. program independent of undergraduate and graduate law degrees. In the same year, this proposal was adopted and eight universities were granted the right to recruit J.M. students. The debate over this program has not ceased in the past eight years.<sup>21</sup> Lacking clear differences from other programs of formal legal education, the J.M. program has been criticized from its inception. The compromise of two legal education methods resulted in chaos to China's legal education system. The debate will not end until one method is chosen over the other.

### *B. Problems of Quantity*

The expansion of law schools and the dramatic increase in number of law students marks an unusual development for legal education in China. This phenomenon reflects an increasing social demand for law students. However, it also reflects the questionable quality of Chinese legal education. First, thanks to the weak and confusing administration of the Ministry of Education, it is very easy to establish a new law department in Chinese educational institutions without any strict requirements for faculty and basic facilities. Moreover, because China's legal profession was separated from its legal education, it exerts no substantial pressure on legal academia, thus accentuating the lacking quality of Chinese law schools. Second, the explosion in the quantity of law students has diluted the quality of legal education and justice on a per-student basis, consequently undermining China's judicial reputation. Third, the number of Chinese law students has grown to such an extent that the government has had to implement regulations to restrain the growth.<sup>22</sup>

---

<sup>20</sup> The current legal education regime seems relatively undesirable not only in China, but also in Japan and South Korea. In recent years, the introduction of the American model of legal education has been a popular topic among scholars from East Asian countries at some of the conferences in which I have participated.

<sup>21</sup> 王健, 中国的JD? 评法律专业硕士学位教育 [Wang Jian, *A J.D. Program in China? A Critique of Education Towards a Master's Degree in Law*], in 中国法律教育之路 [ESSAYS ON LEGAL EDUCATION IN CHINA] 83 (贺卫方编 [He Weifang ed.], 1997).

<sup>22</sup> See 杨荫杭, 老圃遗文辑 [YANG YINHANG, COLLECTED ESSAYS OF YANG YINHANG] 806-07 (1993).

There is no precise standard for how many lawyers a society needs. Among the G-8 nations, America has the highest percentage of lawyers, while Japan claims the lowest. Different statistical methods, divergent attitudes towards alternative dispute resolution, and diversity of legal cultures may explain the differences within the population of every country.<sup>23</sup> Nevertheless, China has far too many law students. The crisis of Chinese legal education is evident in the drastic expansion of the number of Chinese law schools. We can contrast this with Western legal history's general successes. By setting the number of lawyers, regulating their services, and capping their fees, the lawyers' guilds of the European Middle Ages played an important role in regulating the quality of legal services.<sup>24</sup> In comparison, China's current dilemma stems from two root causes: the uncontrolled explosion of Chinese legal academia and the Chinese legal profession's negligible influence on legal education.

### C. *Between Autonomy and Openness*

China's legal community must pursue two important traits. On the one hand, law must attain autonomy; on the other hand, it must keep the door open to other academic disciplines and social sciences. Autonomy means the construction of an independent conceptual system of legal knowledge. According to Tocqueville, law is a professional discipline, and therefore not easily instilled in the greater, non-lawyer population.<sup>25</sup> Law has its own historical tradition, knowledge, genealogy, and methodology. The unique interpretative power of law lies in its autonomy, and law's specialized nature distinguishes it from politics and morality. In the past twenty years, Chinese legal scholars have touched on this specialized knowledge, and Chinese translations of foreign legal treatises have been more numerous than ever. However, there are few conscious Chinese efforts towards systematic construction. Thus, the Chinese legal community must work towards legal autonomy.

Similarly, legal history shows that law has never been a self-sufficient discipline and has benefited greatly from other disciplines. Therefore, openness is essential to Chinese legal development. Social sciences and various other disciplines have played a significant role in advancing legal academics. Recently, anthropology, economics, and literary criticism have greatly enriched various fields of legal study. Further, law is intertwined not only with academic theory, but also with the world at large. Legal practice is ultimately meant to solve specific

---

<sup>23</sup> HENRY WALTER EHRLMANN, *COMPARATIVE LEGAL CULTURES* 55-79 (1976).

<sup>24</sup> See POSNER, *supra* note 6, at 39.

<sup>25</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 264 (George Lawrence trans., 1988).

disputes in our daily life. This means that the law must be open to the real world. At present, Chinese society is undergoing a historic transformation. The pursuit of market economics, the increasing demand for democratic politics, and the incremental separation of nation and society have reshaped China's social structure and methods of political control. As a modern mode of governance, law continues to gain heightened legitimacy. Given such social conditions, it is important for legal academics to respond effectively and efficiently to the challenge of a transforming society. The long-existing separation between legal academia and practice has heretofore prevented China's legal practice from instilling growth in legal theory, while the Chinese legal academic community is unable to further practical legal causes. The Chinese legal community as a whole must work towards bridging the gap between these currently distinct disciplines.

The Western experience has seen law evolve from a dependent and derivative period to an era of independence and autonomy. According to Selznick and Nonet, as repressive law turned into autonomous law, law has become an increasingly self-centered discipline because it has become too autonomous and is not able to respond to progressing social challenges.<sup>26</sup> Selznick and Nonet advocate a new legal order: responsive law. Postmodern legal theory is held in high regard by certain Chinese legal scholars. Because of its deconstructive nature, its openness to other disciplines, and its challenge to the existing social structure, it is widely popular among law students as well. Postmodern legal theory offers a distinctive perspective. However, as China is still in the process of establishing a fair and effective judicial system, postmodern legal theory is too radical a prescription for China's current legal maladies.

#### IV. PROSPECTS AND CONCLUSION

The above is a discussion of a few issues in Chinese legal education and the Chinese legal profession as a whole. I have deliberately ignored the issue of obstacles posed by China's current political system. It is, of course, a big problem. But from the standpoint of present-day circumstances, and especially from the standpoint of a legal scholar, its importance is diminishing. In fact, rule of law has become a major source of legitimacy for China's current government. The popularity of power discourse in China attests to this fact. A major part of this article has been devoted to a discussion of Chinese history

---

<sup>26</sup> See generally PHILIPPE NONET ET AL., *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* (1978).

because, if one wants to build the rule of law and establish a democratic system in China which, of all large countries has, the longest history of governance without the rule of law, time is, in addition to human effort, an important element. In his book *Bird in a Cage*,<sup>27</sup> Stanley Lubman undertook the task of attempting to understand China through Chinese law; by the same token, we must of course observe and assess trends in Chinese legal institutions through understanding and studying Chinese society. We must not overlook the fact that Chinese legal professionals have received an education in imported knowledge, and consequently apply this knowledge to create a new type of social relationship. From a long-term perspective, rule of law is the only way for China's ancient civilization to escape the historical cycle of order and chaos. More and more Chinese citizens recognize this. For this reason, legal professionals should not be pessimistic even in the face of unpredictable variables. Let me conclude with a saying praised by Confucius, even though it has a strong "rule-of-man" flavor: "Only if the right sort of people had charge of a country for a hundred years would it become really possible to stop cruelty and do away with slaughter."<sup>28</sup>

---

<sup>27</sup> See generally LUBMAN, *supra* note 17.

<sup>28</sup> THE ANALECTS OF CONFUCIUS 174 (Arthur Waley trans., 1st Vintage Books ed. 1989).