

PALACE WARS OVER PROFESSIONAL REGULATION: IN-HOUSE COUNSEL IN CHINESE STATE-OWNED ENTERPRISES

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This paper uses the case of enterprise legal advisors in Chinese state-owned enterprises (SOEs) to investigate the various ways by which the state regulates in-house counsel, an understudied topic in the scholarship on the legal profession. In China's three-decade legal reform since the 1980s, lawyers (*lüshi*) and enterprise legal advisors (i.e., in-house counsel in SOEs) have been separately licensed and regulated by different government agencies. In 2002, the Ministry of Justice initiated the "corporation lawyer" and "government lawyer" experiments, with the intention to strengthen its control over in-house legal work in enterprises and government agencies, yet both experiments encountered strong resistance and ended in failure. Based on interviews, online ethnography, and archival research, the paper demonstrates how political struggles in the state shapes professional development and inter-professional relations in the market.

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INTRODUCTION

In-house counsel is perhaps one of the least researched sectors in the scholarship on the legal profession. In the limited number of studies on this unique group of legal professionals who work in corporations rather than law firms, most attention has been given to the lawyer-client fiduciary relationship,¹ but the role of the state as a main regulator of

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1. See Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277 (1985); Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057 (1997); Hugh P. Gunz & Sally P. Gunz, *The Lawyer's Response to Organizational Professional Conflict: An Empirical Study of the Ethical Decision Making of In-House Counsel*, 39 AM. BUS. L.J. 241 (2002); Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of*

the legal profession is often ignored. This is particularly a salient problem after the recent global financial crisis, when national and local governments across the world have begun to intervene in companies and banks more rigorously. To fill in this research gap, this paper uses the case of enterprise legal advisors in Chinese state-owned enterprises (SOEs) to investigate the various ways by which the state regulates in-house counsel.

Since China initiated its economic reform in the late 1970s, its legal profession has been rebuilt from scratch and experienced a rapid development in those three decades.² By 2010, the total number of licensed Chinese lawyers had exceeded 200,000, and the total number of law firms was approximately 17,000.³ However, after thirty years of reform, licensed lawyers are still wandering outside SOEs, which constitute a substantial part of the Chinese economy.⁴ While Chinese lawyers (*lüshi*) are licensed and regulated by the Ministry of Justice (MOJ), in-house counsel in SOEs are separately licensed as “enterprise legal advisors” (*qiye falü guwen*) by the State-owned Assets Supervision and Administration Commission (SASAC), a special commission under the State Council that is responsible for managing SOEs.⁵ In 2002, the MOJ initiated the “corporation lawyer” (*gongsi lüshi*) experiment, with the intention to strengthen its control over corporate legal work, yet the reform has encountered strong resistance

Inside Counsel in Large Corporations, 34 LAW & SOC'Y REV. 457 (2000); Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479 (1989); Omari Scott Simmons & James D. Dinnage, *Innkeepers: A Unifying Theory of the In-House Counsel Role*, 41 SETON HALL L. REV. 77 (2011); David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067 (2010).

2. See Sida Liu, *Globalization as Boundary-Blurring: International and Local Law Firms in China's Corporate Law Market*, 42 LAW & SOC'Y REV. 771 (2008); Sida Liu, *Lawyers, State Officials, and Significant Others: Symbiotic Exchange in the Chinese Legal Services Market*, 206 CHINA Q. 276 (2011) [hereinafter Liu, *Lawyers*]; Ethan Michelson, *Lawyers, Political Embeddedness, and Institutional Continuity in China's Transition from Socialism*, 113 AM. J. SOC. 352 (2007).

3. *The Number of Lawyers in China Passes 200,000, Number of Firms Reaches 17,000*, NEWS.SOHU.COM (Nov. 10, 2011, 2:42 PM), <http://news.sohu.com/20111018/n322572273.shtml> (last visited January 2, 2012) (source is in Chinese).

4. Derek Scissors, Testimony before the U.S.-China Economic and Security Review Commission: The Fall and Rise of Chinese State-Owned Enterprises (Mar. 30, 2011), available at <http://www.heritage.org/research/testimony/2011/04/chinese-state-owned-enterprises-and-us-china-economic-relations>.

5. [Enterprise Legal Advisor's Regulatory Method] (promulgated by the State-Owned Assets Supervision and Administration Commission, effective 2004).

from the SASAC. While this and other “palace wars”⁶ continue inside the state, Chinese lawyers in the legal services market complain bitterly about both the competition from enterprise legal advisors and the lack of legal expertise in government agencies.

This paper explains why enterprise legal services in China have been separately licensed and regulated from lawyers who provide legal services in the market, or the so-called “social legal services” (*shehui falü fuwu*). In the following pages, I first trace the origin of the fragmented regulatory regimes for enterprise and social legal services. Then I use the “corporation lawyer” reform to closely examine the political conflict among the government agencies that regulate these two sectors, namely, the MOJ and the SASAC. As a comparison, I also briefly discuss the “government lawyer” reform to demonstrate the similar political conflict between the MOJ and the Legislative Affairs Office over government legal counsel. The analysis will demonstrate the dynamics of political conflict inside the Chinese state and the consequences of the regulatory fragmentation on the development of in-house counsel and other legal professionals in China.

The empirical data used in this paper are drawn from three main sources. First, as part of a large research project on the Chinese legal services market, the author conducted the 256 semi-structured, open-ended interviews in twelve provinces of China from 2004 to 2007, including a number of interviews with lawyers, in-house counsel, and justice bureau officials who discussed enterprise legal service and other related issues in detail. Second, to trace the history of the Chinese legal services market, the author systematically collected archival data of newspaper articles, professional journals, and government statistics from four academic libraries and the internal archives of six provincial justice bureaus. In particular, the official journals of the MOJ provide valuable historical data on the evolution of enterprise legal advisors. Finally, the author conducted a three-year online ethnography at the official Internet forum of the All-China Lawyers Association (ACLA) from 2003 to 2005. By March 2005, the forum had over 34,000 registered users from every province and more than 230 cities all over China, and these users had posted 271,925 messages on twenty-five discussion boards. Through this unique data source we can overhear, without interference from outside observers, the spontaneous exchanges

6. YVES DEZALAY & BRYAN G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* (2002).

among law practitioners about their personal experiences and opinions on the competition and regulation of the Chinese legal services market.⁷

I. THE ORIGIN OF ENTERPRISE LEGAL SERVICE IN CHINA

When China initiated its economic reform in the late 1970s, all enterprises were state-owned and affiliated with various levels of government agencies and work units.⁸ In the early 1980s, the State Economic Commission (SEC), the official agency for regulating SOEs, started to develop legal services in enterprises, with slogans such as “training internal legal talents in enterprises” and “managing the factory according to the law.”⁹ The model that the SEC adopted at the time was the Soviet model as used in the former Soviet Union and East Europe, which divided legal services into “enterprise legal service” and “social legal service.”¹⁰ Accordingly, two parallel professions (i.e., lawyers and enterprise legal advisors) were created by the MOJ and the SEC, respectively, to accommodate the demands for legal services in those two sectors.

Nevertheless, due to the shortage of legal expertise, until the mid-1980s relatively few SOEs in China were able to establish their internal legal advisory offices (*falü guwen shi*). When they needed legal services, enterprises usually sought help from lawyers working in legal advisory divisions (*falü guwen chu*) in the same city or county.¹¹ Plenty of evidence of this can be found in *Fazhi Jianshe* [*Legal System Construction*], the official journal of the MOJ at that time. For example, in Changchun, Jilin Province, the No. 1 Automobile Factory

7. The interview codes are in the form of “Interview 04103,” in which “04” is the year (i.e., 2004) in which the interview was conducted, “1” is the sub-project number, and “03” is the number of the interview under that sub-project, in that year. The ACLA forum data are coded with thread (not message) as the unit of analysis in the form of “F#123456,” in which “F” refers to the forum, and “#123456” is the number of the first message in a thread as it appears on the forum. The archival data are treated as primary data and coded in the form of “FZJS_198406,” in which “FZJS” (*Fazhi Jianshe*, or *Legal System Construction*) is the pinyin abbreviation of the Chinese title of the newspaper or professional journal, and “198406” is the year (i.e., 1984) and issue (i.e., Issue 6) of the publication.

8. Andrew Walder, *Factory and Manager in an Era of Reform*, 118 CHINA Q. 242 (1989).

9. Interview 04102, in Beijing, China (June 29, 2004) (on file with author).

10. Kathryn Hendley, Peter Murrell, & Randi Ryterman, *Agents of Change or Unchanging Agents? The Role of Lawyers within Russian Industrial Enterprises*, 26 LAW & SOC. INQUIRY 685, 687–88 (2001); Kathryn Hendley, *The Role of In-House Counsel in Post-Soviet Russia in the Wake of Privatization*, 17 INT’L J. LEGAL PROF. 5, 8–9 (2010).

11. Liu, *Lawyers*, *supra* note 2, at 281–82.

started to retain legal counsel from the municipal legal advisory division for legal consulting and contract negotiation as early as June 1981.¹² In Zunhua County, Hebei Province, a local food processing factory retained lawyers in the county legal advisory division in a case against some local cadres in July 1983.¹³ In Anyang, Henan Province, the Anyang Steel Factory also employed lawyers from the municipal legal advisory division in the contract negotiation with an Italian company in the early 1980s.¹⁴

According to the incomplete statistics of the MOJ, in 1982 only 441 Chinese enterprises retained lawyers as legal counsel, and the number sharply increased to 3,846 in 1983 and 15,349 in 1984; by 1986, more than 40,000 enterprises had already retained outside legal counsel.¹⁵ In this period, although enterprise legal advisors existed in some large SOEs, they had neither the expertise nor the work experience to replace outside legal counsel. For instance, in the No. 1 Automobile Factory case mentioned above, the factory established its in-house legal advisory office in October 1981, which was affiliated with the economic planning division of the factory and only had two staff to assist outside legal counsel in their work.¹⁶ In other words, there was no real competition between the two professional groups in their initial years. The relationship was more collaborative rather than competitive.

As the Chinese bureaucracy evolved into a “fragmented authoritarianism” in the late 1980s,¹⁷ the regulatory power of enterprise legal advisors was also fragmented into the hands of several state ministries. This was evident in the proliferation of ministry regulations regarding this profession in that period. From 1987 to 1992, the Ministry of Chemical Industry, Ministry of Aviation Industry, Ministry of Communications, Ministry of Electrical and Mechanical Services, Ministry of Railways, and Ministry of Commerce all made their

12. *Fazhi Jianshe [Legal System Construction]*, Issue 6, 1984 (on file with author).

13. *Id.*

14. *Fazhi Jianshe [Legal System Construction]*, Issue 3, 1984 (on file with author).

15. *Fazhi Jianshe [Legal System Construction]*, Issue 6, 1987 (on file with author).

16. *Fazhi Jianshe*, *supra* note 12.

17. BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA (Kenneth G. Lieberthal & David M. Lampton eds., 1992): see KENNETH LIEBERTHAL & MICHEL OKSENBERG, POLICY MAKING IN CHINA: LEADERS, STRUCTURES, AND PROCESSES 22–23 (1988).

regulations on enterprise legal advisors in their own industries.¹⁸ Officially, however, the regulatory power for this profession belonged to the State Economic Restructuring Commission (SERC), a powerful state agency that controlled the pace of China's economic reform in the late 1980s.¹⁹ The MOJ also played a role in the early years of enterprise legal advisors, but two former officials from the MOJ and the SERC gave very different accounts of the importance of the MOJ at that time. The former MOJ official stated:

The problem of enterprise legal advisors was originated in the late 1980s. It was jointly established by the SERC and the MOJ. The main objective was to make sure enterprises obeyed the law and were managed according to the law after they entered the market. It was also because the number of lawyers was not enough at that time, so enterprise legal advisors were created, jointly established by the SERC and the MOJ. The MOJ did much work at the beginning, but later on [it] was kicked out for no reason, and enterprise legal advisors became theirs. I had no idea what was going on.²⁰

The Former SERC and SETC official stated:

It was in the 1980s when enterprise legal advisors were established. From the very beginning they were regulated by the SEC and the SERC, and the MOJ did not participate much. The original goal of establishing this institution was to strengthen the internal management of enterprises. . . . After the State Economic and Trade Commission (SETC) was established in 1993, we felt that this institution of enterprise legal advisors needed some assistance from other ministries,

18. [Interim Regulation on Enterprise Legal Advisors] (promulgated by the Ministry of Chemical Industry, effective 1987); [Ministry of Aviation Industry Interim Regulation on Enterprise Legal Advisors] (promulgated by the Ministry of Aviation Industry, effective 1987); [Regulatory Method for Enterprise Legal Advisors in Communications Enterprises] (promulgated by the Ministry of Communications, effective 1990); [Regulatory Method for the Work of Enterprise Legal Advisors in Electrical and Mechanical Enterprises] (promulgated by the Ministry of Electrical and Mechanical Services, effective 1990); [Interim Regulation on Legal Affairs Work in Railway Enterprises] (promulgated by the Ministry of Railways, effective 1991); [Work Method for Commercial Enterprise Legal Advisors] (promulgated by the Ministry of Commerce, effective 1992).

19. Interview 04102, *supra* note 9; Interview 04103, in Beijing, China (June 20, 2004); Interview 04111, in Beijing, China (Aug. 23, 2004) (on file with author).

20. Interview 04103, *supra* note 19.

and it was at that time the MOJ came in. But it only did some supplementary work.²¹

It is striking from these two accounts the sharply different views that officials from the two government agencies held toward the role of the MOJ in the establishment of in-house legal advisors in SOEs. One commonality, however, is that they both confirmed that the MOJ was marginalized in the regulatory regime for this nascent profession by the SERC. This is not only because of the regulatory separation between enterprise and social legal services, but also because the MOJ itself is a weak ministry in the Chinese state. In the 1991 Notice on Further Strengthening Lawyers' Work as Enterprise Legal Advisors, the MOJ made the following statement to all lawyers:

The establishment and development of enterprises' internal legal advisory departments are the need of our country's legal reform, and its creation, existence and development has its objective conditions and necessary factors. It is very important for strengthening the enterprises' consciousness to do business according to the law and protecting the enterprises' legal rights. Lawyers should realize this point. Meanwhile, the relationship between lawyers as legal advisors for enterprises and enterprises' own legal advisors is both different and complementary. Because legal advisory department is a department affiliated with the enterprise, its work scope, social exposure, and rights of work are all limited to some extent. Therefore, enterprises' internal legal advisors could never replace the role of lawyers. The two parties should negotiate with, collaborate with, and mutually respect each other, establish good work relationship, and develop together. It is inevitable that the establishment and development of enterprises' internal legal advisory departments will replace part of lawyers' work. Therefore, all lawyers should strengthen their confidence and improve their expertise and specialized skills. This is the only way to gain trust and support from enterprises and make lawyers' legal advisory work in enterprises develop further.²²

The message from this MOJ notice is mixed. On the one hand, it emphasized the necessity of enterprise legal advisors and its division of

21. Interview 04111, *supra* note 19.

22. [Notice on Further Strengthening Lawyer's Work as Enterprise Legal Advisors] (promulgated by the Ministry of Justice, effective 1991).

labor with lawyers. On the other hand, the MOJ also indicated its political impotence in the coordination with the SERC and other ministries regarding the professional regulation of enterprise legal advisors. Accordingly, the MOJ emphasized the importance for lawyers to improve the quality of their legal advisory work and make enterprises realize the advantages of lawyers over their in-house legal advisors. In other words, as a weak government agency the MOJ considered that the competition between lawyers and enterprise legal advisors needed to be settled by the market, not politics.

Yet this call for “free-market” competition between the two professional groups soon became the MOJ’s empty wish. In 1994, the State Council authorized the newly established State Economic and Trade Commission (SETC) to regulate enterprise legal advisors.²³ Although enterprise legal advisors were also jointly regulated by the MOJ and the Ministry of Personnel, in reality the SETC was in charge of most administrative affairs, and the other two agencies had merely nominal control over the profession. In 1997, the SETC promulgated the Enterprise Legal Advisors Regulatory Method, which introduced formal licensing, examination, and registration to this rapidly developing profession.²⁴ Accordingly, the number of enterprise legal advisors in China substantially increased in the 1990s. By 2001, the total number of legal staff in SOEs was approximately 90,000, among whom more than 23,000 had the license of enterprise legal advisors.²⁵ In comparison, the total number of legal staff in law firms was 122,585 in the same year, among whom 90,257 were licensed lawyers.²⁶

II. THE “CORPORATION LAWYER” AND “GOVERNMENT LAWYER” EXPERIMENTS

In October 2002, the MOJ issued two opinions and initiated two experiments targeting in-house and government legal services, namely, the “corporation lawyer” (*gongsi lüshi*) and “government lawyer” (*gongzhi lüshi*) experiments. In an August 2003 document titled Opinion on Expanding and Regulating Lawyers’ Legal Services, the

23. [Notice on the State Economic and Trade Commission’s Take-Over of the Work of Enterprise Legal Advisors] (promulgated by the State Economic and Trade Commission, effective 1994).

24. [Enterprise Legal Advisor’s Regulatory Method] (promulgated by the State Economic and Trade Commission, effective 1997).

25. Zhang Delin, *Falü Guwen: Qiye Gaige Fazhan de “Baohushen”* [Enterprise Legal Advisors: The Patron Saint for the Reform and Development of Enterprises] (Nov. 12, 2001), <http://www.sasac.gov.cn/n1180/n1566/n11183/n11214/1803815.html>.

26. LAW Y.B. CHINA (2001).

MOJ states the objective of the experiments as to “perfect the organizational structure of the legal profession, constitute the coexistence, cooperation, and complementary development among society lawyers, government lawyers, corporation lawyers, and military lawyers.”²⁷ In effect, it is a boundary-blurring process by the MOJ to expand both the jurisdiction of the legal profession and its own regulatory power.

According to the MOJ’s original plan, both experiments would start from a few provinces and then be spread to the whole country by 2004. Meanwhile, relevant statutes on the two sub-professions would be drafted, with an article to be added to the Lawyers Law being revised at the time. The first experiment of corporation lawyers was made in Jilin Province, where nineteen enterprise legal advisors in four major SOEs obtained the corporation lawyer license certified by the MOJ on December 20, 2002.²⁸ At the same time, the first “government law firm” (*gongzhi lüshi shiwusuo*) was founded in Guangzhou on December 9, 2002.²⁹ Soon afterwards, similar experiments were conducted in various places across the country. One notable feature of these early experiments, however, is that no lawyer was recruited from outside to join the government law firm or the enterprise legal department. Instead, licenses were simply given to existing personnel inside the SOEs and government agencies.³⁰ It suggests that the MOJ’s strategy toward enterprise and government legal work had changed from encouraging licensed lawyers to enter enterprises and government agencies to actively seeking to take over the licensing authorities of the existing professional groups. In other words, the MOJ’s “palace wars” over the regulatory jurisdictions became much more aggressive than before.

The main targets of the MOJ’s reforms, however, are the powerful SETC and State Council Legislative Affairs Office. Soon after the corporation lawyer experiment was started in a few provinces, the SETC made a strong response. In January 2003, the SETC ordered its subordinate provincial and local agencies to forbid enterprise legal advisors to attend the experiments organized by local justice bureaus.³¹ Three months later, in a major reorganization of the central ministries

27. [Opinion on Expanding and Regulating Lawyer’s Legal Services] (promulgated by the Ministry of Justice, effective 2003).

28. *Zhongguo Lüshi* [Chinese Lawyers], Issue 2, 2003 (on file with author).

29. GUANGZHOU NIANJIAN [GUANGZHOU YEARBOOK] (2003), available at <http://www.guangzhou.gov.cn/yearbook/2003/2003/23/2304/226.htm> (last visited Jan. 8, 2012).

30. Interview 04105, in Beijing, China (July 1, 2004) (on file with author).

31. F#50202 (on file with author); Interview 04111, *supra* note 19.

the SETC was reorganized into the SASAC, and some of its previous tasks were taken over by other ministries.³² Accordingly, the regulation of enterprise legal advisors was inherited by the SASAC. Although the SASAC's political power was not as strong as the SETC, it nevertheless kept firm its authority over this profession. In July 2004, when I interviewed a senior SASAC official who had been involved in the regulation of enterprise legal advisors for many years, he made the following comment:

The MOJ's corporation lawyer experiment in 2002, it has stopped, I guess? Because the 1997 Enterprise Legal Advisor Regulatory Method was jointly signed by the SETC, the Ministry of Personnel, and the MOJ, and the MOJ also participated in our chief legal officer experiment in 2000. You understand what I mean by this? They understood the logic in those things, but suddenly they made up such a thing in 2002, the function and work scope of corporation lawyers are almost exactly the same as enterprise legal advisors! There was no previous sign at all. . . . Perhaps the MOJ thought now the legal services market got bigger, so all aspects should be controlled, so it put its antennae into enterprises. . . . The whole 1990s they did not make up anything. At that time the SETC was still there, and our attitude was conveyed to all SOEs, that is, the legal advisors and chief legal officers of these enterprises should not participate in the corporation lawyer experiment. Then after the SASAC was established, this issue was written clearly into the regulatory statutes on state-owned assets, that is, to strengthen the system of enterprise legal advisors. Later on we coordinated through the State Council and leaders of the State Council made an opinion, the corporation lawyer reform should stop. I do not dare to say whether or not it really has stopped, but I guess eventually it will quietly disappear.³³

It is clear from this quote that the SASAC, as well as its predecessor the SETC, had no intention to give away its regulatory power to the MOJ. In fact, the battle between the SETC and the MOJ over enterprise legal advisors goes back to the 1990s, and a former MOJ official even described it as "a ten-year war" between the two central government agencies.³⁴ From the MOJ's point of view, it is the

32. [Interim Regulation on Supervision and Management of State-Owned Assets of Enterprises] (promulgated by the State Council, effective 2003).

33. Interview 04111, *supra* note 19.

34. Interview 04102, *supra* note 9.

regulatory policies of the SASAC and its predecessors that have made the situation difficult. The former MOJ official puts it this way:

Why did the SERC and the SETC do it this way? There are two main reasons. One is the inertial way of thinking for Chinese government agencies, that is, [they] think if [they] regulate something, [they] need to set up an agency for it. The other reason is to fight for power and interest for the agency itself. How did the SETC put its antennae into enterprises, strengthen its control over enterprises, and strengthen its position in the government? This is one way to do it. It is also a way of rent-seeking and a symbol of power.³⁵

It is fascinating that the MOJ official used exactly the same metaphor as the SASAC official quoted above in describing the other agency's regulatory action (i.e., "put its antennae into enterprises"). Behind this metaphor, the MOJ official emphasizes four different reasons for the SETC's control over enterprise legal advisors; namely, organizational inertia, political strength, economic rent-seeking, and symbolic power. But what is fascinating is that those four things could also be well applied to explain the MOJ's own regulatory policies, particularly the corporation lawyer reform. Ironically, even some high officials in the MOJ were suspicious of this reform. For instance, a senior MOJ official in charge of lawyer work for many years gave the following comment when asked about corporation lawyers:

In fact, enterprise legal advisors have some natural weaknesses, because they do not have the independence of lawyers and have to do whatever the enterprises ask them to do. And they can only handle low-end service, not capable of doing complex projects. Originally there was no conflict between enterprise legal advisors and lawyers, but then the MOJ made up corporation lawyers, so it has conflicts with enterprise legal advisors. The SETC did not recognize corporation lawyers, so it was not easy to develop the work. Now it is still at the experimental stage. Besides private enterprises, the MOJ says that it is also not a problem to establish corporation lawyers in SOEs, because corporation lawyers have many advantages over enterprise legal advisors. For example, they have the rights of lawyers in court proceedings, their work years in the company can be counted into the years of law practice, and so on. But there are also

35. *Id.*

some practical problems. For example, shall corporation lawyers join lawyers associations? If so, how to charge their registration fees?³⁶

This official's doubt about corporation lawyers was shared by many lawyers working in large corporate law firms. For them, enterprise legal advisors are merely an inferior group that poses no real threat to lawyers.³⁷ Therefore, the corporation lawyer reform is both unnecessary and problematic. It is mostly a political action of the MOJ that has no real benefit to lawyers. A founding partner of one of the largest Chinese corporate law firms put it this way:

I personally do not agree with the corporation lawyer reform. . . . In comparison to government legal work, corporate legal work has far more general characteristics than unique ones. Take oil and steel industries as an example. Their production processes are totally different, but lawyers do not participate in this process. The product exchange process that lawyers participate has little uniqueness. . . . So my opinion is that there is no need for corporation lawyers, and all corporate legal work should be done by law firms. Of course, some large enterprises establish a legal department and hire one or two staff. That's fine. But like government lawyers, such legal advisors absolutely should not provide services to society. So in fact lawyers and enterprise legal advisors have a division of labor, but this division of labor is not divided by people, but by the division of legal fields. Today's China is not like twenty years ago, only a few laws, now every year there are one or two hundreds new laws and regulations coming out. Now the complexity of Chinese law could already be compared to hospitals. Physicians cannot do surgeries, and ophthalmologists cannot work in the E. N. T. department. That's the logic. Now the division of labor in legal fields is too specific, and you can't imagine in-house counsel could do every legal field well. This is the market for lawyers.³⁸

36. Interview 04103, *supra* note 19.

37. Interview 04209, in Beijing, China (Aug. 13, 2004) (on file with author); Interview 04217, in Beijing, China (Aug. 30, 2004) (on file with author); Interview 04218, in Beijing, China (Aug. 31, 2004) (on file with author); Interview 04222, in Beijing, China (Sept. 8, 2004) (on file with author).

38. Interview 04217, *supra* note 37.

Indeed, for these elite corporate law firms in Beijing, most enterprise legal advisors in SOEs do not pose any threat to their practice, and the corporation lawyer reform is almost irrelevant for them. For more ordinary lawyers and law firms across China, however, the corporation lawyer reform not only has little benefit, but also has even a potential danger, in that corporation lawyers might represent the enterprises in litigation and other projects and thus “rob the rice bowl” (*qiang fanwan*) of law firms. This view is particularly prevalent on the ACLA lawyer forum.³⁹ The following are two examples:

Miracle! This establishment [of corporation lawyers] is in fact the typical product of bureaucratism! Some officials in the MOJ really have nothing to do, so they invented “lawyers’ gowns” and “corporation lawyers.” The original “enterprise legal advisors” are pretty good, what for? From now on, the “Museum of Oriental Bureaucratism” has one more exhibit!!!⁴⁰

I don’t agree with the “corporation lawyer” reform!! How to guarantee that corporation lawyers do not practice law outside? This is a problem that could not be avoided. I’m afraid that the final result would be the unequal competition between lawyers and corporation lawyers. It is inevitable!!⁴¹

The primary reason for lawyers’ concerns on corporation lawyers is that, in reality, many enterprise legal advisors in state-owned companies or banks who hold the lawyer qualification are also affiliated with law firms as part-time or even full-time lawyers.⁴² They rarely appear in the law firm’s office but nevertheless control an important case source for the firm. A successful senior lawyer and bar association leader in Shanxi Province complains about the situation and its impact on local lawyers’ work:

Our clients are mostly private enterprises. There are many big SOEs in Shanxi, but most of those enterprises do not retain lawyers. They have internal legal staff in the enterprises, and

39. *E.g.*, F#29279 (on file with author); F#37358 (on file with author); F#105475(on file with author); F#178932 (on file with author).

40. F#37358 (on file with author).

41. *Id.*

42. Interview 06122, in Shanxi Province, China (Nov. 23, 2006) (on file with author); Interview 06125, in Shanxi Province, China (Nov. 24, 2006) (on file with author); Interview 07141, in Sichuan Province, China (Mar. 28, 2007) (on file with author).

the scale is not small. An enterprise of 10 or 20 thousand people could have 20–30 legal staff. It is called the legal department. Many of these guys have the lawyer qualification and are also affiliated with outside law firms, but in fact they just do the work within the enterprise. This is a big loss for the business of our lawyers.⁴³

The prevalence of these “amphibians” between enterprises and law firms is partly due to the fact that enterprise legal advisors are not recognized as lawyers and therefore their work experiences in SOEs do not count for years of law practice. A major benefit of the corporation lawyer reform for them is precisely to count their in-house work experiences as law practice and therefore to give them more freedom in practice—they would not need to be affiliated with law firms anymore.⁴⁴ In the view of lawyers working in law firms, however, this would make the legal services market even more disordered. As a lawyer from a small city in Shandong Province comments on the ACLA forum:

In the long run, I’m positive toward the creation of corporation lawyers. However, in the present stage it is totally unnecessary to create corporation lawyers, and it is the same mistake as the creation of legal aid lawyers. The external conditions for corporation lawyers are absent. . . The market for legal services is extremely disordered, which is obvious to all. This is particularly true of the markets in the city and county levels. . . . The condition for lawyers’ survival is already harsh. . . . The creation of corporation lawyers will add more disorder to the market for lawyers.⁴⁵

In contrast, enterprise legal advisors on the ACLA forum showed a uniformly welcome attitude toward this reform. After acquiring the license of corporation lawyer, enterprise legal advisors would be able to enjoy the rights of lawyers in litigation work. A more important reason for their supportive attitude is that many enterprise legal advisors regard themselves as the “reserve army” of lawyers, and this reform will facilitate their transition from enterprise employees to private lawyers. An enterprise legal advisor from Beijing elaborates on this issue:

43. Interview 06122, *supra* note 42.

44. Interview 07301, in Beijing, China (Jan. 23, 2007) (on file with author); Interview 07147, in Heilongjiang Province, China (Apr. 18, 2007) (on file with author).

45. F#38336 (on file with author).

I already have the lawyer qualification, but because the salary in a company is higher than the salary in a law firm, and because now I need money, I'm working in a company. But I feel very ambivalent and want to do internship [in law firms] to quickly become a lawyer. To solve this dilemma, I think corporation lawyers should be created, so the transition from in-house counsel to lawyer would become much smoother. And there would be more legal service for corporations, and the legal system would be more perfect.⁴⁶

But the benefit of the corporation lawyer reform to enterprise legal advisors is also limited. As many legal advisors in SOEs already hold both the enterprise legal advisor license and the lawyer qualification, the title of corporation lawyer is merely symbolic to them in the workplace.⁴⁷ They care more about the internal politics of their own enterprises than the regulatory policies of the government agencies. As an enterprise legal advisor working in the Beijing branch company of one of the largest SOEs in China explains:

I have both the lawyer license and the enterprise legal advisor license, because our company is one of the experimental work units for corporation lawyers. So having the lawyer license can count for years of practice. In fact, both the two licenses are useless, and neither the SASAC nor the MOJ could regulate our work. It is mainly regulated by the internal leaders of the company. The legal department in SOEs has three functions: the first is an ornament, the second is to assume liabilities for other departments, and the third is to deal with some trivial matters that no one else wants to deal with. . . . The legal department has no status in the company and cannot influence the decision-making. The struggles between different departments are very serious, and everyone wants to expand its own power, so we basically can only keep silent. In many situations we are simply cleaning up the mess for other departments.⁴⁸

It is striking from this quote that the intense political conflict between the MOJ and the SASAC had relatively little impact on the day-to-day practice of the professionals that they sought to regulate. In

46. F#37358 (on file with author).

47. Interview 04218, *supra* note 37; Interview 07302, in Beijing, China (Mar. 1, 2007) (on file with author).

48. Interview 07302, *supra* note 47.

other words, the “palace war” over professional regulation did not penetrate the workplace of in-house counsel. From enterprise legal advisors’ point of view, their relationship with lawyers is not competitive, but more cooperative and interdependent. Most large SOEs have a stable list of law firms from which they seek services. Except for rare occasions such as public listing in the stock exchange, few enterprises would invite open bidding for their projects. Instead, they prefer to use law firms that have close exchange relationships with their leaders. As the enterprise legal advisor quoted above further explains:

Actually we just serve the function of the bridge between the enterprise and lawyers. Our daily tasks are very messy, including writing legal documents, reviewing contracts, preparing documents for the company’s meetings, also including litigation. If the amount of money involved in the litigation is not large, we always use our own staff, only when the amount is higher than 100,000 [yuan] or in relatively important cases we would go outside to retain lawyers. There are only a few law firms that cooperate with us. I’m sure you haven’t heard of them, all because of connections (*guanxi*). Some know our leaders, sometimes it is the leader of the superior agency who made a phone call and said let me introduce you a law firm, you could use it if you had issues, then we used it. In fact none of these firms are very capable, some are like debt connection companies, and they even cannot get back the debt, because lawyers do not like to do things like that.⁴⁹

The relationship between these SOEs and the law firms that they retain is not a private lawyer-client fiduciary relationship, but more similar to the market-state exchange between law practitioners and state officials as discussed in my earlier work.⁵⁰ Because SOEs in China follow the logic of bureaucracy more than the logic of the market,⁵¹ when hiring outside legal counsel, they also need to obey the orders of their leaders or leaders of the superior state agencies. Consequently, lawyers who want to get business from these enterprises must form a symbiotic exchange relationship with those high-level state officials, and this process could completely bypass the enterprise’s internal legal department.

49. *Id.*

50. *See* Liu, *Lawyers*, *supra* note 2.

51. ELIOT FREIDSON, PROFESSIONALISM: THE THIRD LOGIC (2001).

Given this hierarchical structure of Chinese SOEs and the weak position of their legal departments, it is evident that the corporation lawyer reform would not generate any substantive change to the work of in-house counsel in these enterprises. Even if all enterprise legal advisors could obtain the corporation lawyer license, their structural position in the enterprise would not change much. It would merely give them more incentives to switch to law firms after gaining some work experiences as in-house counsel.

The experiment of the government lawyers followed a different path from corporation lawyers. Instead of giving practice licenses to the legal staff in various government agencies, the MOJ first asked its own justice bureaus to establish “government lawyer offices” to provide legal services to the government at the same administrative level.⁵² Most staff members in these offices were justice bureau officials who also assumed other tasks in the bureaus, such as legal aid. In a sense, it merely added another “sign” to the “one team, multiple signs” (*yitao renma, duokuai paizi*) situation of the justice bureau.⁵³ When the justice bureaus sought to expand the scope of the experiment to other government agencies, however, difficulties began to arise. A justice bureau official in Ningxia Hui Autonomous Region describes the development of government lawyers in the autonomous region as the following:

Our corporation lawyer and government lawyer experiments were started in 2004. Five agencies for government lawyers and two enterprises for corporation lawyers were included. Minister [of Justice] Zhang Fusen came here to make the inauguration, but [the experiments] ended up in failure. . . . Government lawyers have become an empty institution. We established a government lawyer office, I myself have the qualification, the regional justice bureau approved it, but it did not serve its function. Only when the bureau leaders have some issues they would consult with me, no legal service in the real sense. The staff members of the Legislative Affairs Office in the regional government are all public servants, but they cannot provide services with the identity of lawyers. Actually the government wanted to establish a legal consulting group, but it did not make it, the problem is precisely the conflicts of interest between agencies. The Legislative Affairs Offices have disagreements with us. They firmly object to

52. Interview 07506, in Guangdong Province, China (Mar. 14, 2007) (on file with author).

53. Liu, *Lawyers*, *supra* note 2, at 282.

government lawyers. Our document was already in the printing factory, but the bureau chief of the Legislative Affairs Office heard about it and talked to the government leader at the same night. Then the leader said, put the document on hold for a while, and now it has already been on hold for 3–4 years.⁵⁴

While it is remarkable that the bureau chief of the Legislative Affairs Office was able to stop the justice bureau's document on government lawyers the night it went to print, the intensity of the "palace war" is clearly shown. This unfriendly attitude of the Legislative Affairs Offices to the government lawyer reform was not unique in Ningxia or the northwest, but prevalent across the country. In Shenzhen, where the profession of lawyers is highly developed, the justice bureau encountered similar resistance from the Legislative Affairs Office of the municipal government. A justice bureau official puts it this way:

Can corporation and government lawyers be regulated? Now every agency just does its own work. The provincial [justice] bureau is in control, very subjective. Shenzhen has 20–30 government lawyers, only a few corporation lawyers, just two banks. We need to coordinate the audit bureau, tax [bureau], labor [bureau], planning [bureau], and trade and development bureau, but both the definition of its nature and its operational law are blank, just an empty title, only licenses being given. There are some technical problems in lawmaking, but also the obstacles from the Legislative Affairs Offices. From the central to the local level, there is no legal basis [for the experiment]. We tried to make a municipal statute, but the provincial bureau did not allow it, and relevant agencies did not support it. In fact, the provincial bureau made a draft, but it was not passed when being reviewed by the Legislative Affairs Office. All legislations need to go through the Legislative Affairs Office.⁵⁵

Apparently, the Legislative Affairs Office's control over government legislation gives it a major advantage in the political conflict with the justice bureau. Consequently, as a weaker government

54. Interview 06515, in Ningxia Hui Autonomous Region, China (Dec. 13, 2006) (on file with author).

55. Interview 07133, in Guangdong Province, China (Mar. 19, 2007) (on file with author).

agency, the justice bureau had to bypass the Legislative Affairs Office and seek alliances with other agencies in the state. In Guangdong Province, where the experiment was relatively successful, the provincial justice bureau was able to mobilize the personnel bureau and the finance bureau to make a document and establish a “government law firm” in Guangzhou. The firm had fifteen lawyers by 2007, all of whom were state employees on the official payroll.⁵⁶

In addition, the Guangdong Provincial Justice Bureau also created “positional government lawyers” (*gangwei gongzhi lüshi*) in various government agencies.⁵⁷ This practice is similar to the corporation lawyer reform, namely, to give lawyer licenses to legal staff in these agencies which already had the lawyer qualification. By 2006, Guangdong had over 190 positional government lawyers working in various government agencies in at least nine cities.⁵⁸ Despite the seemingly large number, the actual work these government lawyers did was still limited, as a justice bureau official in Guangzhou explains:

Now the problem is that the system is not smooth (*tizhi bu shun*). The Legislative Affairs Office thinks it is their work, overlapping functions. This is very salient in Guangdong. Government lawyers now have a special institution, representing the mayor in litigation, but the Legislative Affairs Office should also naturally represent the government in litigation. For example, if the State Council and the premier were sued, then it should be the State Council Legislative Affairs Office that handles the litigation work. When the Vice-Minister [of Justice] came here, he said this problem should be communicated with the Legislative Affairs Office, but it has not been coordinated well. The Legislative Affairs Office’s work would not be assigned to government lawyers. Only things within the work scope of a vice-secretary-general of the municipal government would be assigned to us, such as sports events, local lawmaking, project consulting, also including some things of the development and reform committee and civil litigations of administrative

56. Interview 07506, *supra* note 52.

57. *Id.*

58. [Supplementary Opinion on the Positional Experiment Work of Government Lawyers] (promulgated by the Guangdong Provincial Justice Bureau, effective 2006).

agencies. Government lawyers did a lot of work, but few at the level of the mayor, only at the level of the vice-mayor.⁵⁹

What this official describes is a fragmentation between the Legislative Affairs Office and government lawyers in the workplace—the Legislative Affairs Office firmly controls the core tasks of government legislative affairs, while the government law firm established by the justice bureau merely “cleans up the periphery” (*sao waiwei*) left by the Legislative Affairs Office and works in less important areas such as health and urban management.⁶⁰ Their space in the periphery was opened up through their connections with a vice-secretary-general in the municipal government who was sympathetic to the government lawyer experiment. Arguably, this shows again the powerlessness of the justice bureau in the political system, but it also indicates the strategy of a weak player in the political system (i.e., when facing strong institutional constraints, it uses informal connections with individual leaders to expand its jurisdictional boundary).

In fact, this strategy is also observed in the corporation lawyer experiment in other provinces. In Ningxia, for instance, one large state-owned bank decided to keep corporation lawyers only because its leader had the lawyer qualification; in another bank that originally participated in the experiment, because no senior level leader was involved, corporation lawyers disappeared in a year.⁶¹ This is to say, when the experiment could bring personal gains to the enterprise leaders, it is more likely to be facilitated. To some extent, the coordination between the justice bureaus and the enterprise or government leaders here resembles the reciprocal exchange between law practitioners and state officials,⁶² though the actors in this exchange are both inside the political system.

Unlike the serious political conflict inside the state, the government lawyer experiment generated little market response from lawyers. Most lawyers displayed an indifferent attitude toward this experiment. On the one hand, the salaries of government lawyers must follow the salary standard for state employees and are often lower than lawyers' incomes in law firms. Without economic incentives, it is difficult for government lawyer offices to compete with law firms in

59. Interview 07506, *supra* note 52.

60. *Id.*

61. Interview 06515, *supra* note 54.

62. Liu, *supra* note 2.

recruiting high-quality lawyers.⁶³ On the other hand, government legal work often requires extensive knowledge of the relevant administrative agencies and their internal procedures, which could hardly be acquired by lawyers working in private firms. It is for this reason that the founding partner in the large Beijing firm quoted above, who was opposed to corporation lawyers, nevertheless supported government lawyers:

The government lawyer experiment is understandable, because providing legal services to the government indeed has some uniqueness, many ministry regulations. For example, in administrative litigation, if I were to represent the Ministry of Construction, I could not do it, because I really don't know much about their stuff, and no experience. . . . The legal work of many ministries and commissions that closely relate to ordinary people is very specialized, and government lawyers can serve at least the following functions. First, when the government makes rules, there are people with legal background participating in lawmaking. Second, every department is specialized, so there should be lawyers familiar with those specialized issues to handle their Legislative Affairs. Third, it is helpful for the government to obey the law in their administrative work. Fourth, it has the law dissemination function and can strengthen the legal caliber of state officials.⁶⁴

Despite this senior lawyer's good wishes, the government lawyer experiment has brought little actual change to Chinese government agencies and, as the corporation lawyer experiment, largely become symbolic after more than five years of practice.

In October 2007, China's Lawyers Law was comprehensively revised and then became effective in June 2008.⁶⁵ The MOJ was in charge of the drafting process and, as planned in 2003, it proposed an article on corporation lawyers and government lawyers in several earlier drafts. However, in the final version of the Lawyer Law this article was quietly removed. According to a senior official in the MOJ's Lawyer and Notary Work Guidance Office, "the SASAC

63. Interview 07101, Zhejiang Province, China (Jan. 7, 2007) (on file with author); Interview 07123, in Guangdong Province, China (Mar. 14, 2007) (on file with author).

64. Interview 04217, *supra* note 37.

65. [Lawyers Law] (promulgated by the National People's Congress, effective 2008).

disagreed with corporation lawyers, and the State Council Legislative Affairs Office disagreed with government lawyers, so they cannot even be written into the Lawyers Law.”⁶⁶ While scattered experiments are still found in different parts of the country, the MOJ’s “palace wars” on in-house and government legal work seem to have been lost.

CONCLUSION

The regulation of in-house counsel in Chinese SOEs is an extreme but interesting case to show how political conflict in the state shapes the development of the legal profession, particularly its in-house sector. In China’s three-decade legal reform since 1979, lawyers and enterprise legal advisors have been separately licensed and regulated by two ministry-level government agencies. This separation in regulatory structure led to not only “palace wars” in the state, but also a unique relationship between law firms and SOEs in the market. While the division of labor between in-house counsel and lawyers in firms is not so different from other social contexts, enterprise legal advisors in China enjoy less autonomy and prestige in the workplace because of the bureaucratic management of the SOEs. Furthermore, the separate licensing systems make the mobility between lawyers and enterprise legal advisors more difficult in practice.

While market and bureaucracy are often conceived as two distinct and sometimes oppositional logics of organizing modern society, the analysis in this paper has shown that political struggles in the state could follow a competitive logic and shape inter-professional competition in the market. To gain the regulatory authorities over corporate and government legal work, the MOJ fought two “palace wars” with the SETC/SASAC and the State Council Legislative Affairs Office since 2002, but both ended in failure. One main reason, arguably, is the MOJ’s own weak structural position in China’s political system, but equally important is its lack of contacts with the professional groups that it seeks to regulate. In the three decades of legal reform, in-house and government legal counsel have been separated from lawyers and therefore fallen outside of the MOJ’s regulatory jurisdiction. Without a supportive constituency in the market, the MOJ’s political struggle in the state was further weakened, and the fragmented regulatory regime would probably continue in the near future.

In contrast to the rigorous state regulation of enterprise legal advisors in SOEs, in-house counsel in private and foreign-invested

66. Interview 07505, in Beijing, China (Mar. 5. 2007) (on file with author).

companies in China is almost entirely out of the state regulatory regime. Little research or public documentation can be found on this sector of the Chinese legal profession. Anecdotal evidence suggests that private companies in China are less likely to have an in-house legal department than SOEs, whereas foreign-invested companies often have a legal department or at least employ one or a few lawyers as in-house counsel. Without any licensing requirement, the mobility of lawyers between law firms and non-state-owned companies is relatively easy and convenient. In particular, after the 2008 global financial crisis, many companies have recruited experienced lawyers as their in-house counsel to reduce the costs of legal services.⁶⁷ The significant growth of the private in-house sector in the past decade makes the analysis in this paper inevitably partial and incomplete. A more comprehensive picture of in-house counsel in China awaits future research.

67. Xueyao Li & Sida Liu, *The Learning Process of Globalization: How Chinese Law Firms Survived the Financial Crisis*, FORDHAM L. REV. (forthcoming).

