

REGULATORY REGIMES FOR LAWYERS' ETHICS IN JAPAN  
AND CHINA: A COMPARATIVE STUDY

Richard W.S. Wu\*and Kay-Wah Chan\*\*

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## REGULATORY REGIMES FOR LAWYERS' ETHICS IN JAPAN AND CHINA: A COMPARATIVE STUDY

Richard W.S. Wu\* and Kay-Wah Chan\*\*

### ABSTRACT

*China and Japan are the two largest economies in Asia, and both countries are similar in their adoption of a civil law system. This article undertakes a comparative study of the regulatory frameworks for lawyers' ethics in the two countries. This article first considers the development of legal profession, particularly their rapid growth in the past decade. It then analyses and compares the regulatory regimes on lawyers' ethics in both countries, with reference to six 'professional virtues' of competence, independence, loyalty, confidentiality, responsibility and honourable conduct. It reveals that Japan adopts a model of self-regulation, while China implements a 'hybrid' mode, namely, both state and self-regulation. It also argues that China is improving in its growing recognition of such virtues as 'competence', and that it has room for improvement in such virtues as 'independence', 'confidentiality' and 'honourable conduct.'*

### I. INTRODUCTION

China and Japan are two of the largest economies in Northeast Asia. China and Japan share similar culture roots. Both countries are heavily influenced by Confucianism, which has lasting impact on their public perception of moral and ethical standards. Moreover, both countries have witnessed radical changes in their political, economic and social systems from the demise of the feudalism to today. They are now the second and third largest economies in the world, respectively.

In comparison with many Western economies such as the United States, the legal systems and legal professions in China and Japan have short histories. Unlike the United States, which implements a common law system, both China and Japan adopt a civil law system. Japan only introduced the modern legal profession in the 19th Century during the Meiji Era when it undertook radical reforms in its political, economic and legal systems. The lawyer system was modified in the post-World War II period. As a result, supervision

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and disciplinary power and authority were taken away from the government and the legal profession<sup>1</sup> gained self-regulatory rights.

In China, the legal profession did not develop until the late 1970s when the country adopted the Open Door Policy.<sup>2</sup> Lawyers in China are regulated by the state, and the Ministry of Justice is the government department responsible for their supervision. In 1986, China established the All China Lawyer Association, which marked a milestone development of self-regulation for the legal profession. At present, China practices a 'hybrid' model of regulation, namely, state-regulation supplemented by self-regulation.

In the past, there was a paucity of lawyers in Japan and China but both countries have witnessed a substantial increase in the number of lawyers in recent years. This article attempts to undertake a comparative study of the regulatory regimes for lawyers' ethics in Japan and China. The article first considers the development of the legal profession in the two countries, particularly their rapid growth in the past decade. It then analyses and compares the regulatory regimes for lawyers in both countries, with reference to the six 'professional virtues' as identified by Hazard and Dondi as the framework for comparison.<sup>3</sup> It concludes with a summary of the development of the legal profession and comparison of the regulatory regimes in Japan and China.

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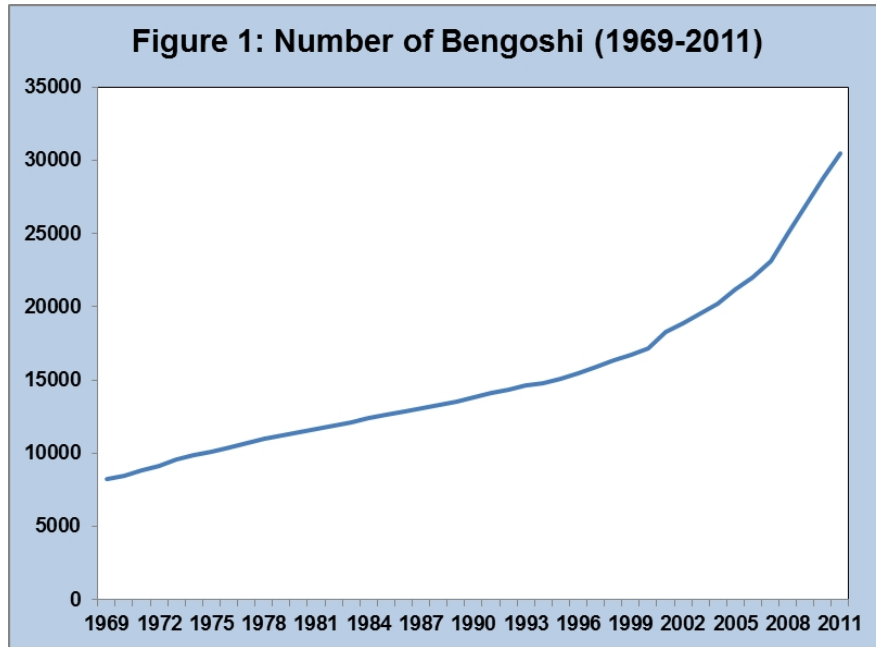
<sup>1</sup> In Japan, the legal professions (*hōsō*) comprise of lawyers, judges and prosecutors. However, in this article, the term "legal profession" is used in the common law tradition to mean lawyers/attorneys only.

<sup>2</sup> The Open Door Policy was adopted by Deng Xiaoping after he returned to power in China in the late 1970s. For an account of the Open Door Policy, see ERZA F. VOGEL, *DENG XIAOPING AND THE TRANSFORMATION OF CHINA* (2011).

<sup>3</sup> GEOFFREY C. HAZARD, JR. & ANGELO DONDI, *LEGAL ETHICS: A COMPARATIVE STUDY* (2004).

## II. DEVELOPMENT OF LEGAL PROFESSION IN JAPAN AND CHINA

### A. Japan



Much literature has pointed out that Japan has small per capita ratio of attorneys (*bengoshi*) compared to many other advanced economies such as the US, England, Germany and France.<sup>7</sup> In 1999, the Japanese government established the Justice System Reform Council (the Council) to investigate a reform of the justice administration system in Japan. The Council produced its Final Report in 2001.<sup>8</sup> One of its recommendations was a substantial increase in the number of attorneys. This reform was implemented shortly thereafter. As a result, the last decade has seen a significant increase in the profession's number (Figure 1). In 2001, there were

<sup>7</sup> See, e.g., Setsuo Miyazawa, *Law Reform, Lawyers, and Access to Justice*, in JAPANESE BUSINESS LAW 46-47 (Gerald Paul McAlinn ed., 2007); Kahei Rokumoto, *The Present State of Japanese Practicing Attorneys: On the Way to Full Professionalization?*, in LAWYERS IN SOCIETY: AN OVERVIEW 131 (Richard L. Abel & Philip S.C. Lewis eds., 1995).

<sup>8</sup> JUSTICE SYSTEM REFORM COUNCIL, RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL: FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY (2001).

18,243 attorneys in Japan.<sup>9</sup> A decade afterwards, in 2010, there were 28,789 attorneys.<sup>10</sup> This amounts to a 57.8% increase.<sup>11</sup>

### B. China

Unlike Japan, the increase in number of lawyers did not result from a reform of the justice administration system in China but through a dramatic growth of law schools. In the past three decades, the number of law schools has multiplied by 70 times (see Table One, *infra*). In addition, legal profession has become a popular career choice of college students in China during the past decade. For example, a survey commissioned by the Ministry of Justice and the All China Lawyer Association in Beijing in 2008 revealed that 22.3% of college students in Beijing ranked legal profession as their first choice in career. The same survey also revealed a high degree of job satisfaction among lawyers in Beijing, which received a rating of 65.1%. Beijing lawyers also gave high rating to their autonomy at work (77.4%) and challenging nature of their work (72.2%).<sup>12</sup> As a result of these two factors, the legal profession in China has grown at a dramatic rate in the past decade (Figure 2). In 2001, there were 66,269 lawyers in China.<sup>13</sup> In 2010, there were 185,513 lawyers, which amounted to a 280% increase.<sup>14</sup> In comparison, the percentage growth of lawyers in China is about 4.8 times that of Japan.

Table One: Change in number of law schools in China<sup>15</sup>

Year of Establishment	Number of New Law Schools	% of Higher Education Institutions	Total Number of New Law Schools
1949-1976	8	1.43%	8

<sup>9</sup> THE JAPAN FEDERATION OF BAR ASSOCIATIONS, *Bengoshi Hakusho 2011 Nenban*, in LAWYERS WHITE PAPER 2011(2011), Figure 1, available at <http://www.nichibenren.or.jp/library/en/about/data/WhitePaper2011.pdf>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

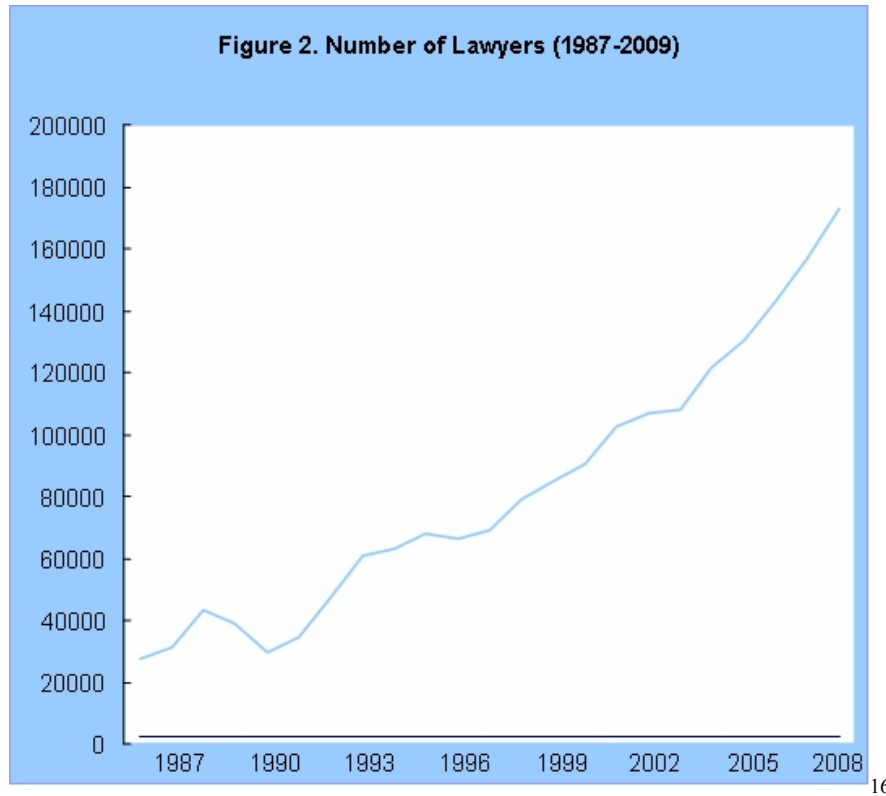
<sup>12</sup> See Beijingshi Sifaju & Beijingshi Lüshi Xiehui (北京市司法局/北京市律师协会) [MINISTRY OF JUSTICE & ALL CHINA LAWYER ASSOCIATION], Beijing Lüshi Hangye Fazhan Zhishu (Zhaiyao) (北京律师行业发展指数(摘要)) [DEVELOPMENT INDEX OF LEGAL PROFESSION IN BEIJING (EXTRACT)], available at <http://wenku.baidu.com/view/2053453c5727a5e9856a6127.html>.

<sup>13</sup> In 2001, there were 47,574 full-time lawyers and 18,695 part-time lawyers, making a total of 66,269 lawyers. See 2002 LAW Y.B. CHINA 1253 (Press of Law Yearbook of China).

<sup>14</sup> In 2010, there were 176,219 full-time lawyers and 9,294 part-time lawyers, making a total of 185,513 lawyers. See 2011 LAW Y.B. CHINA 1067 (Press of Law Yearbook of China).

<sup>15</sup> JINGWEN ZHU, CHINA LEGAL DEVELOPMENT REPORT: DATABASE AND INDEX SYSTEM 520 (2007).

1977-1989	54	9.66%	62
1990-1999	121	21.65%	183
2000-2003	206	36.85%	389
2004-2005	170	30.41%	559



As the number of lawyers has increased significantly in the past decade, regulation of the legal profession has become a common issue in both Japan and China. The following section analyses the regimes for regulating lawyers' ethics in these two countries from a comparative perspective.

<sup>16</sup> Data compiled from The Law Yearbook of China, 1988-2009 editions.

### III. REGULATORY FRAMEWORK IN JAPAN AND CHINA

In Japan, the regulatory regime on lawyers' ethics mainly comprises the Attorney Act (1949)<sup>17</sup> ('the Act'), the Articles of Association of Japan Federation of Bar Associations ('JFBA Articles')<sup>18</sup> and the Basic Rules on the Duties of Practicing Attorneys ('Basic Rules').<sup>19</sup> Article 22 of the Act requires that all attorneys abide by the JFBA Articles and Article 29 requires all attorneys to observe the rules and regulations of the Japan Federation of Bar Associations ('JFBA'), including the Basic Rules. However, the provisions in the Basic Rules are not all 'obligatory'. Paragraph 2 of Article 82 of the Basic Rules stipulates a number of articles to be "guidelines illustrating an attorney's best practices."<sup>20</sup> In other words, they are 'aspirational' only. However, as Chan points out, as a result of the broad wording of Paragraph 1 of Article 56 of the Act ("[misbehaviour] in a manner impairing his/her . . . own integrity, whether in the conduct of his/her professional activities or not"), even a violation of a 'non-obligatory' provision in the Basic Rules may be treated as an ethical violation under the Act.<sup>21</sup>

The regulatory regime in China is more 'fragmented' compared to that of Japan as seen in the Lawyers' Law (2008).<sup>22</sup> The Chinese regulatory regime is supplemented by administrative regulations issued by the Ministry of Justice, including, inter alia, Several Stipulations on Opposing Unlawful Anti-Competitive Conduct of Lawyers (1995), Stipulations on Procedures for Administrative Sanctions Against Judicial Administration Authorities (1997), Management Regulation on Lawyer Practice (2008) and Measures

<sup>17</sup> Bengoshi Hou, Law No. 205 of 1949 (Japan), available at [http://law.e-gov.go.jp/cgi-bin/idxselect.cgi?IDX\\_OPT=1&H\\_NAME=%95%d9%8c%ec%8e%6d%96%40&H\\_NAME\\_YOMI=%82%a0&H\\_NO\\_GENGO=H&H\\_NO\\_YEAR=&H\\_NO\\_TYPE=2&H\\_NO\\_NO=&H\\_FILE\\_NAME=S24HO205&H\\_RYAKU=1&H\\_CTG=1&H\\_YOMI\\_GUN=1&H\\_CTG\\_GUN=1](http://law.e-gov.go.jp/cgi-bin/idxselect.cgi?IDX_OPT=1&H_NAME=%95%d9%8c%ec%8e%6d%96%40&H_NAME_YOMI=%82%a0&H_NO_GENGO=H&H_NO_YEAR=&H_NO_TYPE=2&H_NO_NO=&H_FILE_NAME=S24HO205&H_RYAKU=1&H_CTG=1&H_YOMI_GUN=1&H_CTG_GUN=1) [hereinafter The Attorney Act].

<sup>18</sup> Nippon Bengoshi Rengokai Kaisoku [Articles of Association of Japan Federation of Bar Association Rules] (Japan), available at [http://www.nichibenren.or.jp/library/ja/jfba\\_info/rules/pdf/kaisoku/kaisoku\\_no\\_1.pdf](http://www.nichibenren.or.jp/library/ja/jfba_info/rules/pdf/kaisoku/kaisoku_no_1.pdf), translated in <http://www.nichibenren.or.jp/library/en/about/data/articles.pdf> [hereinafter JFBA Articles].

<sup>19</sup> Bengoshi Shokumu Kihon Kitei [Basic Rules on the Duties of Practicing Attorneys] (Japan), available at [http://www.nichibenren.or.jp/library/ja/jfba\\_info/rules/data/rinzisoukai\\_syokumu.pdf](http://www.nichibenren.or.jp/library/ja/jfba_info/rules/data/rinzisoukai_syokumu.pdf), translated in [http://www.nichibenren.or.jp/library/en/about/data/basic\\_rules.pdf](http://www.nichibenren.or.jp/library/en/about/data/basic_rules.pdf) [hereinafter Basic Rules].

<sup>20</sup> These are Articles 1-8, 20-22, 26, 33, 37-2, 46-48, 50, 55, 59, 61, 68, 70, 73 and 74.

<sup>21</sup> Kay-Wah Chan, *The Emergence of Large Law Firms in Japan: Impact on Legal Professional Ethics*, 11 LEGAL ETHICS, 154, 165-6 (2008).

<sup>22</sup> Zhongguo Renmin Gongheguo Lüshi Fa (中华人民共和国律师法) [The Lawyers' Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., May 15, 1996, effective Jan. 1 1997), available at [http://www.gov.cn/flfg/2007-10/28/content\\_788495.htm](http://www.gov.cn/flfg/2007-10/28/content_788495.htm) [hereinafter variously referred to as "The Lawyers' Law" and "The Law"].

for Sanctions Against Unlawful Conduct of Lawyers and Law Firms (2010) ('the Measures'). Apart from national legislation and administrative regulations, the Code on Practice Conduct of Lawyers ('the Code') (2011)<sup>23</sup> issued by the All China Lawyer Association also constitutes an integral part of the regulatory regime.

In discharging their professional duties, lawyers are guided by certain ethical norms or virtues. While these norms or virtues may vary from one country to another, Hazard and Dondi argued that six 'professional virtues' exist in every legal system: competence, independence, loyalty, confidentiality, responsibility and honourable conduct.<sup>24</sup> As discussed below, these professional virtues exist in the regulatory frameworks in Japan and China, but these two countries emphasise on different elements of the professional virtues.

#### A. Competence

As Hazard and Dondi observed, 'competence' means that lawyers need to possess knowledge of law from different sources (including local, national and international sources) and regulatory authorities.<sup>25</sup> In Japan, the virtue of 'competence' is covered in a number of provisions. Under Article 2 of the Act, a lawyer should be well-versed in laws, regulations and legal practices. The Basic Rules provide that they shall endeavour in such pursuit.<sup>26</sup> The JFBA Articles also require a lawyer to undertake legal studies and other necessary disciplines.<sup>27</sup> When there is a request from a potential client, the attorney must promptly notify the client whether the lawyer will take the case.<sup>28</sup> After taking up a case, an attorney must proceed promptly and without delays.<sup>29</sup> If necessary, the lawyer must also report to the client regarding the progress and matters that may affect the case outcome.<sup>30</sup> The lawyer must consult with the client when working on the client's case.<sup>31</sup> The Basic Rules specifically outlines attorney's duty in criminal trials. An attorney shall endeavour to provide the best defence to protect the client's rights and interests.<sup>32</sup> A lawyer should also strive to secure opportunities to consult with the client and work towards earlier

<sup>23</sup> See The Code, *infra* note 34.

<sup>24</sup> HAZARD & DONDI, *supra* note 3, at 109.

<sup>25</sup> *Id.* at 115.

<sup>26</sup> Basic Rules, art. 7.

<sup>27</sup> JFBA Articles, art. 12.

<sup>28</sup> Basic Rules, art. 34.

<sup>29</sup> *Id.* art. 35.

<sup>30</sup> *Id.* art. 36.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* art. 46.



release of the client in case of custody.<sup>33</sup> The lawyer shall properly explain and advise the client the right of silence and other rights to defence.<sup>34</sup>

Similar to the Japanese regulatory framework, the Chinese regulatory framework incorporates the virtue of 'competence.' The Lawyer's Law stipulates that lawyers shall maintain the legitimate rights and interests of their clients.<sup>35</sup> Those serving as defence counsel shall present materials and arguments to prove innocence of their clients, trivial nature of their crimes, reduction or exemption of criminal liabilities.<sup>36</sup> Lawyers should also make full use of their professional knowledge to advise their clients.<sup>37</sup> Likewise, the Code requires lawyers to adopt legal strategies that can achieve the objectives of their clients.<sup>38</sup> A lawyer should work in a timely manner but must inform the clients of any 'insurmountable' difficulties and risks.<sup>39</sup> An attorney should only furnish legal opinions based on facts and evidence provided by the client and the lawyer's legal knowledge.<sup>40</sup>

Overall, the Chinese regime is less comprehensive than the Japanese regime regarding the incorporation of the 'competence' virtue. There is no mention of the legal knowledge that lawyers need to possess, or a general duty of promptness in action. Therefore, China needs to improve its regulatory framework in the 'competence' virtue.

### B. Independence

'Independence', according to Hazard and Dondi, means that lawyers should not be directed or controlled by others.<sup>41</sup> In Japan, this virtue is incorporated in the JFBA Articles, which provide that a lawyer shall be free and not be influenced by power or material interests.<sup>42</sup> Similarly, the Basic Rules state that lawyers should be

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<sup>33</sup> *Id.* art. 47.

<sup>34</sup> Basic Rules, art. 48.

<sup>35</sup> The Lawyers' Law, art. 2.

<sup>36</sup> *Id.* art. 31.

<sup>37</sup> Falü Zhiye Hangwei Guifan (2011 Xiuding) (法律执业行为规范 (2011 修订)) [The Code on Practice Conduct of Lawyers (2011 Revision)] (promulgated by All China Lawyers Ass'n, Nov. 9, 2011, effective Mar. 20, 1994) (Lawinfochina), available at <http://lawinfochina.com/display.aspx?id=9134&lib=law&SearchKeyword=&SearchCKeyword=%C2% C9%CA%A6%D6%B4%D2%B5%D0%D0%CE%AA%B9%E6%B7%B6>, art. 35 [hereinafter The Code].

<sup>38</sup> *Id.* art. 36.

<sup>39</sup> *Id.* art. 42.

<sup>40</sup> *Id.* art. 43.

<sup>41</sup> HAZARD & DONDI, *supra* note 3, at 146.

<sup>42</sup> JFBA Articles, art. 15.

free and independent in their duties.<sup>43</sup> Lawyers should also maintain and develop their professional autonomy.<sup>44</sup> Furthermore, lawyers are forbidden from borrowing money from or lending money to the client, guaranteeing the client's debts, or requesting that the client guarantee his own debts, unless there are special circumstances.<sup>45</sup> The Act also prohibits 'non-attorneys' from providing legal services for the purpose of obtaining remuneration,<sup>46</sup> and persons from engaging in the business of obtaining the rights of others by assignment and enforcing such rights through lawsuits, mediation and conciliation.<sup>47</sup> In addition, a lawyer should not permit these 'non-attorneys' and persons to utilise their names.<sup>48</sup> Moreover, a lawyer should not share legal fees or commission for client referral with a person or corporation who/which is not an attorney or a Legal Professional Corporation ('LPC').<sup>49</sup>

In contrast, the Chinese regime reflects the 'independence' virtue in a more limited manner. For example, the Law stipulates that no organization or individual can infringe the lawful rights of lawyers, but they are subject to state supervision in their practice.<sup>50</sup> The regime is also silent on the role of the Communist Party in relation to the legal profession. However, the Law stipulates that lawyers intending to apply for practising certificates have to uphold the Constitution of the People's Republic of China,<sup>51</sup> which emphasises the leadership of the Communist Party.<sup>52</sup> In early 2012, the Ministry of Justice required all lawyers to take an oath of allegiance to the Communist Party on applying for, or renewing, their practising certificates.<sup>53</sup>

As the above comparison demonstrates, the regulatory framework confers a high degree of independence on the legal profession in Japan similar to its Western counterparts. In contrast, the Chinese regime implies that the legal profession is not independent from the

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<sup>43</sup> Basic Rules, art. 2.

<sup>44</sup> *Id.* art. 3.

<sup>45</sup> *Id.* art. 25.

<sup>46</sup> The Attorney Act, art. 72.

<sup>47</sup> *Id.* art. 73.

<sup>48</sup> *Id.* art. 27.

<sup>49</sup> *Id.* art. 12.

<sup>50</sup> The Lawyer's Law, art. 3.

<sup>51</sup> *Id.* art. 5.

<sup>52</sup> See the Preamble of the Constitution of the People's Republic of China. *Zhonghua Renmin Gongheguo Xianfa* (中华人民共和国宪法) [Constitution of the People's Republic of China] Preamble (1982).

<sup>53</sup> See Simon Rabinovitch, *China tightens grip on lawyers*, FIN. TIMES, Mar. 22, 2012, <http://www.ft.com/intl/cms/s/0/a808c9f2-735f-11e1-aab3-00144feab49a.html#axzz2lphbZuZf> ("China has ordered its lawyers to swear their allegiance to the Communist party . . .").

state and regulated by the Ministry of Justice. China has much room for improvement for the independence of its legal profession.

### C. Loyalty

As Hazard and Dondi point out, the 'loyalty' virtue means that lawyers should not be influenced by their duties to others while assisting their clients.<sup>54</sup> In Japan, this virtue is reflected in the Act, which provides guideline as to what constitutes conflict of interest. A lawyer is deemed to have conflict interest when a lawyer advises someone with adverse interests as the lawyer's client within the same case. A second example would be where a lawyer provides legal service to a third party before their client's consultation. A third example would be when the lawyer provided legal service for the same case as a public officer or as an arbitrator. Last but not least, a fourth example would be when the attorney was a member or employee of a LPC and the LPC either consults or accepts the third party, who is involved in the same case as their original client, as a client.<sup>55</sup>

In some situations, an attorney may undertake the case with the client's consent. The situations include where an attorney is to be engaged in another matter by an adverse party in an unrelated case; and secondly, where the attorney is to be engaged in another matter by a party adverse to a case undertaken by the attorney's LPC, even when the attorney was personally involved in the LPC's case.<sup>56</sup>

Moreover, if the attorney is to be engaged in a matter where the other party in that matter is the attorney's client in an unrelated case, consent from both clients must be obtained.<sup>57</sup> The Basic Rules also impose prohibition on cases in which the attorney was previously involved as a person conducting mediation, settlement conciliation or other forms of alternative dispute resolution.<sup>58</sup> In addition, a lawyer cannot take cases if there is conflict of interest between the lawyer and the client unless the client consents.<sup>59</sup> If a lawyer has more than one client in the same case and there is a potential conflict, the lawyer should advise both clients on the possibility of his withdrawal as well as potential prejudice to their interests.<sup>60</sup> If, after undertaking the case, such conflict actually emerges, the lawyer should promptly notify the client(s) and withdraw from representation or take other

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<sup>54</sup> HAZARD & DONDI, *supra* note 3, at 116.

<sup>55</sup> The Attorney Act, art. 25.

<sup>56</sup> *Id.*

<sup>57</sup> The Basic Rules, art. 28(2).

<sup>58</sup> *Id.*, art. 27(5).

<sup>59</sup> *Id.*, art. 28(3).

<sup>60</sup> *Id.*, art. 32.

appropriate steps.<sup>61</sup> For law firms with more than one lawyer, the Basic Rules state that when there is a conflict of interest, the case will be ‘imputed’ to another lawyer unless impartiality can be maintained.<sup>62</sup> A lawyer is also prohibited from receiving benefit from the other party in the same case.<sup>63</sup> Similarly, if a lawyer is a member or an employee of a LPC, he cannot accept, or cause the LPC to accept, any benefit from the other party in the same case.<sup>64</sup> To prevent acceptance of instructions in breach of the rule against conflict of interests, law firms and lawyers (*kyōdō jimusho*) should endeavor to keep records of clients, other parties and case names.

Similar to its Japanese counterpart, the Chinese framework has incorporated the ‘loyalty’ virtue. The Law stipulates that a lawyer cannot concurrently act for both parties in the same case, or accept instructions in cases involving conflict of interests.<sup>65</sup> Furthermore, the Measures provide five scenarios that deem violation of the principle regarding conflict of interest. First, a lawyer is deemed to have violated the principle of conflict of interest when he concurrently represents or provides legal services to parties having a conflict of interest with each other in the same case. Secondly, when a lawyer represents both the defendant and the victim in the same criminal case. Thirdly, if a lawyer provides legal services to parties who have conflicting interests with another corporation that currently retains the lawyer as their legal counsel. Fourthly, when a lawyer participated in a case where he had previously served as judge or procurator. Finally, if a lawyer acts in a case handled by an arbitration agency where he previously served or currently serves as an arbitrator.<sup>66</sup>

In addition, law firms are recommended to set up an ‘audit’ system for cases involving conflicting interests.<sup>67</sup> The Code also specifies eight circumstances that a lawyer should not establish or continue his professional relationship. First, a lawyer should not act for both parties in the same case, or act in a case in conflict with his personal interest or interests of his close relatives. Secondly, a lawyer should not act in a case in which his close relative is the legal representative. Thirdly, a lawyer should not take a case that he has previously handled or has adjudicated a case as administrative officer, judicial officer, procurator or arbitrator. Fourthly, lawyers

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<sup>61</sup> *Id.*, art. 42.

<sup>62</sup> *Id.*, art. 57.

<sup>63</sup> The Attorney Act, art. 26; The Basic Rules, art. 53.

<sup>64</sup> The Attorney Act, art. 30-20, paras. 1 and 2.

<sup>65</sup> The Lawyer’s Law, art. 39.

<sup>66</sup> The Measures, art. 7.

<sup>67</sup> The Code, art. 4.

from the same law firm should not represent both the defendant and the victim in the same case, unless there is only one law firm in that locality and with the consent of the client. Finally, a lawyer should not act if another lawyer in the same firm acts for both parties in dispute, or acts concurrently for all parties in a 'non-contentious' case, unless the lawyer is jointly appointed by all parties involved. A lawyer should decline to act for a client after termination of retainer, or accept instructions from the other party in the same case. Finally, a lawyer should refrain from accepting instructions or continuing to act if there is conflict interests based on his professional judgement.<sup>68</sup>

In summary, both China and Japan have developed a comprehensive regime for the 'loyalty' virtue. Both countries have provided detailed provisions covering situations of potential or actual conflicts of interests that may be encountered by their legal professions in dealing with existing and past clients. This is the area where both countries are most similar in terms of their ethical regulations for lawyers.

#### *D. Confidentiality*

By 'confidentiality', Hazard and Dondi mean that lawyers must not disclose the secrets of their clients to third parties, including other clients, third parties and government officers.<sup>69</sup> In Japan, the Act incorporates this virtue by stipulating that a lawyer has a general duty to maintain the client's confidentiality regarding all the information.<sup>70</sup> This principle is repeated in the Basic Rules, which prohibits a lawyer from not only disclosing, but also utilizing, such confidential information.<sup>71</sup> In relation to storage and disposal of case records, an attorney should exercise caution not to leak confidential information.<sup>72</sup> Such duty of confidentiality also extends to secrets of clients of other lawyers in the same firm,<sup>73</sup> and applies even after the lawyer has left the firm.<sup>74</sup> Similarly, the duty to maintain confidentiality of a lawyer in a LPC extends to secrets of clients of the LPC,<sup>75</sup> and continues after he has left the LPC.<sup>76</sup>

In a similar vein, China incorporated the 'confidentiality' principle in the Law, which stipulates that lawyers should keep

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<sup>68</sup> *Id.*, art. 50.

<sup>69</sup> HAZARD & DONDI, *supra* note 3, at 117.

<sup>70</sup> The Attorney Act, art. 23.

<sup>71</sup> The Basic Rules, art. 23.

<sup>72</sup> *Id.*, art. 18.

<sup>73</sup> *Id.*, art. 56.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*, art. 62.

<sup>76</sup> *Id.*

confidential *state* or commercial secrets that come into their knowledge, and should not disclose any private information of their clients. If, however, their clients undertake acts that threaten *state security*, public security or seriously endanger others' physical health or property safety, such criminal acts and information will be protected by the confidentiality principle.<sup>77</sup> The Code reiterates the principle of confidentiality set out in the Law.<sup>78</sup>

As the above comparison demonstrates, the Japanese regime has enshrined the 'confidentiality' virtue. In contrast, the Chinese regulation sets the exception of 'state secret.' Furthermore, there is no doctrine of legal professional privilege ('LPP') under the PRC law similar to that existing in common law countries like the United States. The absence of LPP hampers full and frank communications between lawyers and their clients in China. Thus, China can improve its ethical framework in the 'confidentiality' virtue, which also represents one key area in need of reform.<sup>79</sup>

### *E. Responsibility*

By 'responsibility', Hazard and Dondi mean that lawyers should remain truthful to courts and judges and adopt a co-operative attitude towards other lawyers.<sup>80</sup> In Japan, this virtue is reflected in the JFBA Articles, which require a lawyer to ensure proper application of law and regulations and endeavour to rectify any illegality (if discovered).<sup>81</sup> Lawyers are also guided by the Basic Rules, which outlines the proper procedure for trials and stresses the importance of fairness in trials.<sup>82</sup> Lawyers must not entice a witness to commit perjury or tender evidence that he knows to be false.<sup>83</sup> Lawyers should not negligently or for unjust purposes cause delay in legal proceedings.<sup>84</sup> Lawyers should be polite to judges, prosecutors and other lawyers.<sup>85</sup> Lawyers should not, without good reason, prevent their clients from instructing another attorney or LPC.<sup>86</sup> Lawyers should also respect, honour and trust LPC and other legal

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<sup>77</sup> The Law, art. 38.

<sup>78</sup> The Code, art. 8.

<sup>79</sup> For discussion on 'state secret' and 'legal professional privilege' in China, see Sigrid U. Jernudd, Comment, *China, State Secrets, and the Case of Xue Feng: The Implication for International Trade*, 12 CHI. J. INT'L L. 309 (2011), and Xu Xi, *A Comparative Study of Lawyers' Ethics in the US and PRC: Attorney-Client Privilege and Duty of Confidentiality*, 1 TSINGHUA CHINA L. REV. 47 (2011).

<sup>80</sup> HAZARD & DONDI, *supra* note 3, at 118.

<sup>81</sup> The JFBA Articles, art. 11.

<sup>82</sup> The Basic Rules, art. 74.

<sup>83</sup> *Id.*

<sup>84</sup> The Basic Rules, art. 76.

<sup>85</sup> The JFBA Articles, art. 13.

<sup>86</sup> The Basic Rules, art. 40.

professional colleagues.<sup>87</sup> Moreover, a lawyer should not 'entrap' another legal professional colleague in contravention of good faith.<sup>88</sup> Lawyers should not improperly intervene in a case that another legal professional colleague has undertaken.<sup>89</sup> Finally, if the other party in the same case is legally represented, a lawyer should generally refrain from negotiating directly with him without consent of his legal representative.<sup>90</sup>

Under the Basic Rules, no lawyer can guarantee the client a positive outcome.<sup>91</sup> If it is unlikely to achieve his client's goal, a lawyer cannot accept his case by pretending that there is good prospect of success.<sup>92</sup> In addition, lawyers should not instigate cases or solicit instructions for unjust purposes or by methods that lower his reputation.<sup>93</sup> These provisions regulate improper competition as well as the lawyers' honourable conduct. Similarly, the regime regulating advertisements also serve these dual purposes. Detailed provisions regulating legal service advertisements are found in the Rules Concerning the Advertisement of Attorney's Practice<sup>94</sup> of the JFBA ('the Rules'). For example, a lawyer is prohibited from putting up an advertisement that either contains a comparison with a specified lawyer or law firm, or is untrue, or may mislead or cause misunderstanding, or is exaggerated, or cause excessive expectation, or arouse excessive anxiety, or upset others, or impair attorneys' dignity or credibility.<sup>95</sup> A lawyer is also prohibited from mentioning in advertisement the success rates in litigation.<sup>96</sup> Furthermore, the Guidelines Concerning Advertisements of Attorneys, Legal Professional Corporations and Foreign Special Members<sup>97</sup> provide detailed interpretations and examples in relation to the Rules.

Similarly, the Chinese framework reflected the virtue of 'responsibility.' For example, according to the Measures, a lawyer is

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<sup>87</sup> *Id.*, art. 70.

<sup>88</sup> *Id.*, art. 71.

<sup>89</sup> *Id.*, art. 72.

<sup>90</sup> *Id.*, art. 52.

<sup>91</sup> *Id.*, art. 29 para. 2.

<sup>92</sup> *Id.*, art. 29 para. 3.

<sup>93</sup> *Id.*, art. 10.

<sup>94</sup> Bengoshi No Gyomukokoku Ni Kansuru Kitei [Rules Concerning the Advertisement of Attorney's Practice], JFBA. Rule No. 44 of 2000, [http://www.nichibenren.or.jp/library/ja/jfba\\_info/rules/pdf/kaiki/kaiki\\_no\\_44.pdf/](http://www.nichibenren.or.jp/library/ja/jfba_info/rules/pdf/kaiki/kaiki_no_44.pdf/) (Japan).

<sup>95</sup> *Id.*, art. 3.

<sup>96</sup> *Id.*, art. 4(1).

<sup>97</sup> Bengoshi Oyobi Bengoshihoujin Narabini Gayikokutokubetukaiin No Gyomukokoku Ni Kansuru Shishin [Guidelines Concerning Advertisements of Attorneys, Legal Professional Corporations and Foreign Special Members], 2012, [http://www.nichibenren.or.jp/library/ja/jfba\\_info/rules/pdf/kaiki/kaiki\\_gyomukokoku\\_shishin.pdf/](http://www.nichibenren.or.jp/library/ja/jfba_info/rules/pdf/kaiki/kaiki_gyomukokoku_shishin.pdf/) (Japan).

deemed to have acted fraudulently or provided false materials, if, he withdrew information from judicial authorities, refuse to provide evidence, or modify, conceal, destroy or forge evidence.<sup>98</sup>

Furthermore, in the following three cases, a lawyer is deemed to have provided false evidence to judicial authorities. These include administrative authorities, or arbitration agencies. Furthermore, if a lawyer assists client or others to force, conceal or destroy evidence; or help clients to make collusions, or induce witnesses to decline testimonies or commit perjuries. Lawyers also are deemed to have provided to false evidence if they prevent the other parties in the same case or their agents from lawfully obtaining evidence, or if they prevent others from providing evidence. In addition, the Code stipulates that lawyers should not submit evidence to judicial authorities that are known to be false.<sup>99</sup>

Similar to Japan, China also emphasizes mutual respect and trust between lawyers and the Code states that they should help and respect each other.<sup>100</sup> Lawyers should not use sarcastic or humiliating language with each other in the court proceedings or negotiations.<sup>101</sup> In addition, lawyers should not maliciously defame or prejudice the reputation of other lawyers in public or in mass media.<sup>102</sup> Furthermore, lawyers should not engage in improper competition,<sup>103</sup> and the Code outlines circumstances that constitute improper competition. Firstly, if a lawyer defame the reputation and goodwill of other lawyers and law firms, the conduct is deemed as an improper competition; secondly, if the lawyers compete for business by offering fees below market price or through rebates, gifts of monies, properties or other interests. Thirdly, if a lawyer deliberately provokes disputes between other clients and their lawyers, it will constitute improper competition. Fourthly, if a lawyer expressly or impliedly represents to clients that they have special relationships with judicial authorities, government authorities, social entities and their working personnel or make false promises on the outcome of legal services or litigation, it is seen as improper competition. Finally, if lawyers expressly or impliedly represent that they can attain their clients' unlawful objectives, or attain their lawful objectives through unlawful means it is deemed as improper

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<sup>98</sup> The Measures, art. 16.

<sup>99</sup> The Code, art. 63.

<sup>100</sup> *Id.*, art. 72.

<sup>101</sup> *Id.*, art. 73.

<sup>102</sup> *Id.*, art. 74.

<sup>103</sup> *Id.*, art. 77.



competition.<sup>104</sup> Moreover, lawyers cannot engage in improper competition through monopoly of business with specific authorities, departments or business sectors; or require clients to use their legal services exclusively or limiting competition from other lawyers.<sup>105</sup>

In summary, Japan and China have incorporated the 'responsibility' virtue in their regulatory frameworks with clear guidelines regarding evidence submission to authorities. Both Japan and China have developed comprehensive regimes to promote respect among lawyers. China has additional regulations regarding improper competition in its framework. However, Japan's detailed provisions on the regulation of lawyers' advertisements indirectly regulate improper competition.

#### *F. Honourable Conduct*

By 'honourable conduct', Hazard and Dondi meant that lawyers should be reputable in both their professional and personal capacities.<sup>106</sup> In Japan, this virtue is reflected in the JFBA Articles, which require attorneys to maintain integrity.<sup>107</sup> The Basic Rules also stipulate that an attorney should safeguard the independence of the justice system,<sup>108</sup> endeavour to its sound development,<sup>109</sup> respect the truth,<sup>110</sup> be faithful,<sup>111</sup> perform their professional duties honestly and fairly,<sup>112</sup> maintain credibility and probity,<sup>113</sup> and endeavour to improve their dignity.<sup>114</sup> Additionally, a lawyer should not promote fraudulent transactions, violence, other violation of laws or unlawful conduct.<sup>115</sup> Lawyers should not provide any benefits or entertainment to the other party in the same case.<sup>116</sup> Moreover, offer of such treatment to the other party is also prohibited.<sup>117</sup> Furthermore, a lawyer should not advertise or promote his service in such a way that would tarnish his dignity.<sup>118</sup> Lawyers should not accept a case if it is clearly unjust in its objective or manner of

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<sup>104</sup> *Id.*, art. 78

<sup>105</sup> *Id.*, art. 79

<sup>106</sup> HAZARD & DONDI, *supra* note 3, at 119.

<sup>107</sup> The JFBA Articles, art. 12.

<sup>108</sup> *Id.*, art. 4.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*, art. 5.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*, art. 6.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*, art. 14.

<sup>116</sup> *Id.*, art. 54.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*, art. 9, para. 2.

handling.<sup>119</sup> Lawyers also should not unjustly make use of their personal relationship with judges, prosecutors or other officials in judicial proceedings<sup>120</sup> and should not obtain any rights or benefits that are in dispute.<sup>121</sup>

As Hazard and Dondi have commented, a lawyer is obliged to provide fair treatment to his client in relation to fees.<sup>122</sup> In this regard, the JFBA Articles provide that an attorney's fees should be proper and appropriate.<sup>123</sup> The Basic Rules also stipulate that such propriety and appropriateness are measured with reference to the economic benefit, the difficulty of the case, the time and labour, and other circumstances.<sup>124</sup> Upon taking up a case, an attorney must properly explain to his client the legal fees and expenses.<sup>125</sup> Subject to exceptions like mere legal consultation, simple document drafting, matters based on a retainer/continuing contracts or presence of other reasonable grounds,<sup>126</sup> an attorney must prepare a retainer that includes details on the legal fees unless he is prevented by circumstances from such preparation.<sup>127</sup> In the latter case, the contract must be prepared upon cessation of such circumstances.<sup>128</sup> Detailed provisions concerning legal fees are found in the Rules Concerning Attorney's Fees.<sup>129</sup> For example, an attorney must establish standards for his fees and keep these standards in his office.<sup>130</sup> Such standards shall clearly specify the fee classifications, amount, computation method, payment time and any other matters necessary to calculate the legal fees.<sup>131</sup> In addition to legal fees, an attorney, upon taking up a case, must explain to his client the possible outcome and the manner that the matter will be handled.<sup>132</sup> As discussed earlier in this article, no attorney can guarantee a client with a positive outcome,<sup>133</sup> nor can he accept a case by pretending

<sup>119</sup> *Id.*, art. 31.

<sup>120</sup> *Id.*, art. 77.

<sup>121</sup> The Attorney Act, art. 28; the Basic Rules, art. 17.

<sup>122</sup> HAZARD & DONDI, *supra* note 3, at 258.

<sup>123</sup> The JFBA Articles, art. 87, para. 1.

<sup>124</sup> The Basic Rules, art. 24.

<sup>125</sup> *Id.*, art. 29, para. 1.

<sup>126</sup> *Id.*, art. 30, para. 2.

<sup>127</sup> *Id.*, art. 30, para. 1.

<sup>128</sup> *Id.*, art. 30, para. 1.

<sup>129</sup> Bengoshi No Gyoumukoukoku Ni Kansuru Kitei [Rules Concerning the Advertisement of Attorney's Practice], JFBA. Rule No. 68 of 2000, [http://www.nichibenren.or.jp/library/ja/jfba\\_info/rules/pdf/kaiki/kaiki\\_no\\_68.pdf](http://www.nichibenren.or.jp/library/ja/jfba_info/rules/pdf/kaiki/kaiki_no_68.pdf) (Japan).

<sup>130</sup> Rules Concerning Attorney's Fees, art. 3, para. 1.

<sup>131</sup> *Id.*, art. 3 para. 2.

<sup>132</sup> The Basic Rules, art. 29, para. 1.

<sup>133</sup> *Id.*, art. 29, para. 2.

that there is good prospect of success when the chance of achieving the client's goal is slim.<sup>134</sup>

Because of his work nature, it is not uncommon for an attorney to have custody of his client's money. Under such circumstances, the Basic Rules require the attorney to keep it separate from his own money and in a manner that clearly shows that such money is under custody.<sup>135</sup> A record of its status must be kept as well.<sup>136</sup> Any documents and other properties received by an attorney from his client, the other party in the same case, and any other interested parties must be kept with caution.<sup>137</sup> On completion of his retainer, an attorney shall settle the account and return any money and property in custody to his client without delay.<sup>138</sup> He must also explain to his client how he handled the case, its outcome and provide legal advice if necessary.<sup>139</sup>

On the virtue of 'honourable conduct,' China focuses on the prevention of bribery. For example, lawyers are prohibited from meeting judges, procurators, arbitrators and other related working personnel in contravention of law.<sup>140</sup> They are also restricted from bribing these four categories of people or influencing them to handle cases in contravention of law.<sup>141</sup> Moreover, lawyers shall be deemed as bribing these people in four circumstances. First, they provide gifts, money, securities, and the like at their or their close relatives' weddings, funerals and other celebrations. Secondly, they decorate their houses, reimburse their personal expenses, or pay for their travels and entertainment. Thirdly, they supply vehicles, communications devices, houses and or similar gifts. Finally, they induce other people or clients to make bribes to influence the case outcomes.<sup>142</sup>

In addition, lawyers are prohibited from accepting unlawful instructions, fees, properties or other interests from their clients.<sup>143</sup> Like their Japanese counterparts, they should not obtain interests of matters in dispute while providing legal services to their clients.<sup>144</sup> In addition, they should not accept properties or other interests from parties in the same case, or maliciously collaborate with the other or

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<sup>134</sup> *Id.*, art. 29, para. 3.

<sup>135</sup> *Id.*, art. 38.

<sup>136</sup> *Id.*, art. 38.

<sup>137</sup> *Id.*, art. 39.

<sup>138</sup> *Id.*, art. 45.

<sup>139</sup> *Id.*, art. 44.

<sup>140</sup> The Lawyer's Law, art. 40(4).

<sup>141</sup> *Id.*, art. 40(5).

<sup>142</sup> The Measures, art. 15.

<sup>143</sup> The Lawyer's Law, art. 40(1).

<sup>144</sup> *Id.*, art. 40(2).

third parties to infringe upon their clients' rights.<sup>145</sup> Additionally, those who previously served as judges or procurators may not serve as defence lawyers within two years after they vacated their offices.<sup>146</sup> Finally, law firms can enter into written agreements with clients for safe custody of their properties. These agreements should be strictly adhered to.<sup>147</sup> They should also separate clients' properties from those belonging to law firms and lawyers.<sup>148</sup>

Furthermore, there are four circumstances in which lawyers should be deemed as unlawfully accepting instructions, charging fees, accepting properties or other interests from their clients. Firstly, when they accept instructions by violating the relevant stipulations. Accepting instructions can also be done during a period during which a lawyer was ordered to suspend their legal practices. The second circumstance is when lawyers collect, use or misappropriate their legal fees or travelling expenses in contravention of the relevant legal stipulations. Thirdly, when the lawyer asks clients for fees, properties or other benefits other than fees that may be lawfully charged. Finally, when they solicit or accept fees, properties or other benefits from beneficiaries of state legal aid.<sup>149</sup>

Similarly, there are two circumstances where lawyers shall be deemed as having obtained the rights and interests of the matter in dispute while providing legal services to their clients. The first circumstance is if they seek the rights and interests of the matter in dispute by means of induction, deception, coercion or extortion. Secondly, if they advise or induce their clients to transfer, sell or lease the rights and interests of the matter in dispute to third parties for their own benefits.<sup>150</sup> Additionally, the Code stipulates that lawyers should be honest and faithful.<sup>151</sup>

Overall, Japan and China are similar in their incorporation of the virtue of 'honourable conduct' in their regulatory frameworks, but they are different in emphasis. In Japan, detailed provisions on fees and retainers have been developed. This reflects the 'maturity' of its legal profession, as fees and retainers raise issues of professional conduct in other developed jurisdictions like the United States. In contrast, China focuses on the prevention of bribery, which reflects the pervasiveness of corruption problem in its legal profession. It

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<sup>145</sup> *Id.*, art. 40(3).

<sup>146</sup> *Id.*, art. 41.

<sup>147</sup> The Code, art. 53.

<sup>148</sup> *Id.*, art. 54.

<sup>149</sup> The Measures, art. 10.

<sup>150</sup> *Id.*, art. 12.

<sup>151</sup> The Code, art. 6.

may take years before the country can develop an 'honourable' legal profession free from corruption.

#### IV. CONCLUSIONS

The past decade has witnessed the rapid growth of the legal profession in both China and Japan. While both countries have developed regulatory regimes for their lawyers, Japan adopts a model of self-regulation while its Chinese counterpart implements a 'hybrid' mode of regulation, namely, state and self-regulation. The Japanese regime has developed over a longer period of time and is dated back to the post-World War II era. In contrast, the Chinese regime has a relatively short history and emerged only in the past two decades. On a textual analysis of the two frameworks, the regulatory regime in Japan has incorporated the six 'professional virtues' of competence, independence, loyalty, confidentiality, responsibility and honourable conduct. While the Chinese regime is improving in its growing recognition of virtues such as 'competence,' it has room for improvement in such virtues as 'independence,' 'confidentiality' and 'honourable conduct.' In order to develop a modern legal profession, China should strengthen these virtues in the years to come.