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The Politics of Criminal Defense Lawyers

Politics is everywhere in the legal profession, but nowhere is it as strong and complex as in the work of criminal defense lawyers. When handling criminal cases, lawyers often find themselves in an inescapable dilemma: on the one hand, they must pursue legal proceduralism and challenge the power of state authorities in order to mount a good defense for their clients; on the other hand, they often rely on their connections with judges and law enforcement officials to solve problems and reduce difficulties in practice. The tension between those two aspects of politics, which we call “political liberalism” (Karpik 1995; Halliday and Karpik 1997) and “political embeddedness” (Michelson 2007) in this book, is often amplified in authoritarian regimes where criminal defense is not only a matter of protecting individual rights in particular cases, but also a collective struggle for political change (Halliday, Karpik, and Feeley 2007; Ginsburg and Moustafa 2008).

At first glance, the story of lawyers and criminal justice in China is an unhappy story of difficulties and danger. Criminal defense lawyers encounter great difficulties in routine tasks such as meeting suspects, collecting evidence, and accessing case files (Yu 2002; Michelson 2007; Liu and Halliday 2011). Persuading judges to adopt their defense opinions in trial is rarely successful, thanks to the internal coordination among the “iron triangle” of Chinese criminal justice, namely, the police, the procuracy, and the courts (公检法, hereinafter “PPC”) (Halliday and Liu 2007; Liang, He, and Lu 2014). Moreover, lawyers can be detained, prosecuted, or convicted under Article 306 of the 1997 PRC Criminal Law, which established the crime of lawyer’s perjury (律师伪证罪). Labeled “Big Stick 306” (306 大棒) by Chinese lawyers, this article has been frequently abused in practice by the police or the procuracy to take revenge on those defense lawyers who dare to vigorously challenge the prosecution in court (Halliday and Liu 2007). As a result of all

those difficulties and risks, many Chinese lawyers have stayed away from criminal defense for the sake of self-protection.

Nevertheless, thousands of lawyers all over China still persist in carrying out criminal defense work despite the harsh conditions for their everyday practice. This fact not only indicates a glimmer of hope for the reforms of China's criminal justice system, but also motivates several key research questions: What motivates them to do so? How do they survive in an extremely unfavorable criminal justice system? What are the various strategies that they adopt to mobilize for legal and political change? Based on more than three hundred interviews across the country and a variety of media and archival data that we collected during a decade of fieldwork in China from 2005 to 2015, this book explains these empirical questions at the key intersection between research on the legal profession, criminal justice, and political change.

Theoretically, this book draws China studies into comparative and historical socio-legal theory on lawyers in political change over the *longue durée*. Current struggles of Chinese lawyers are not unprecedented – they can be contextualized within a world history in which lawyers are episodically implicated in movements towards or away from liberal political societies, national sites where basic legal freedoms are a paramount terrain of struggle (Halliday and Karpik 1997; Halliday, Karpik, and Feeley 2007, 2012). These comparative-historical contexts offer theoretical propositions about forms of action by lawyers in China. While existing studies often point to a liberal orientation of lawyers in constituting the moderate state, civil society, and basic legal freedoms, our findings in this book suggest there is a nuanced balance in China between two distinct political orientations in lawyers' everyday practice. By closely examining the relationship between lawyers' liberal ideologies and their structural embeddedness, we seek to develop a potentially generalizable theoretical framework for understanding the individual choices and structural constraints of professional mobilization. Through this theoretical framework, our study also provides a unique lens for observing the Chinese criminal justice system from the perspective of defense lawyers.

A THEORY OF PROFESSIONAL MOBILIZATION

Political mobilization is a long standing research topic in social science, yet the vast majority of the social movement literature has focused on mass mobilization rather than the mobilization of professionals (e.g., Marwell and Oliver 1993; McAdam et al. 1996, 2001). Professions possess distinct forms of expertise and organizational structures that set them apart from

political parties, labor unions, ethnic groups, and other major actors in social and political movements. Similarly, the vast scholarly literature on criminal justice has paid more attention to punishment and mass incarceration (e.g., Garland 1990; Western 2006; Wacquant [2004] 2009; Alexander 2012) than to the legal professionals working in the criminal justice system, such as judges, prosecutors, and defense lawyers (however, see Feeley 1979). One of our theoretical tasks in this book is therefore to present an analytical framework for understanding professional mobilization, particularly the mobilization of lawyers and other legal professionals in political change.

The starting point of our theory is that not all professionals are equally interested in politics or collective action. In comparison with other high-status professions, such as doctors, scientists, or engineers, lawyers have notable advantages in political mobilization because they are often uniquely able to exercise moral authority in the name of technical competence (Halliday 1985). But even within the legal profession, some lawyers are more likely to engage in politics and collective action than others. While the majority of lawyers are routine practitioners in ordinary cases, who are either politically conservative or apathetic, a critical mass of them may become vanguards of political change at key historical junctures.

From this basic insight, an extensive body of scholarship, often labeled “political lawyering” (Karpik 2007), has emerged since the late 1980s on the nexus of lawyers and legal-political change. Comparative and historical studies of more than thirty countries in all regions of the world indicate that frequently, though not always, lawyers are heavily implicated in the question of whether the legal and political institutions of a society will protect basic legal freedoms (Halliday and Karpik 1997; Halliday, Karpik, and Feeley 2007, 2012). While the “cause lawyering” literature, a parallel body of scholarship on lawyers and politics, extends the scope of analysis to a wide range of social and political causes such as labor rights or environmental rights (Sarat and Scheingold 1998, 2001, 2005; Marshall and Hale 2014), the political lawyering literature focuses more narrowly on the critical links between lawyers and a cluster of legal and political goals that scholars in this tradition term “political liberalism” (Halliday and Karpik 1997).

First of all, vanguards of lawyers, even entire legal professions, have fought for basic legal freedoms in various kinds of illiberal political societies. Basic legal freedoms include the core civil rights (e.g., *habeas corpus*, protections from arbitrary arrest or torture, and representation by counsel) and core political rights (e.g., freedoms of speech, association, movement, and religion) of individual citizens, but not their broader economic or social rights. Basic legal freedoms “rest upon the granting of legal personality to a citizen and the

protection of all residents within a sovereign legal jurisdiction” (Halliday, Karpik, and Feeley 2007: 10). Many of these universal rights are enshrined in the covenants of the United Nations and signed by most of its members (including China), yet they have numerous forms of representation in different national contexts. Our first theoretical proposition is that, even in an authoritarian polity controlled by a single political party (e.g., China), there will be segments of the practicing bar that strive to institutionalize basic legal freedoms, although they may do so in ways that display different emphases and priorities than in other comparative and historical settings. One such setting, almost entirely neglected in earlier studies of lawyers and political liberalism, is the practice of criminal law. This book is intended to fill in this gap and provide a comprehensive account of how lawyers engage with the criminal justice system in their fight for basic legal freedoms.

Second, lawyers who strive for basic legal freedoms often insist that this is only possible if state power itself is fractured, most importantly through some independence or autonomy of the judiciary from control by the monarchy, the military, one-party leaders, or an executive branch of government, including the police – the domestic coercive arm of government itself. Professional mobilization for varieties of state moderation can be seen across East, Southeast and South Asia (Feeley and Miyazawa 2007; Ginsburg 2007; Jones 2007; Harding and Whiting 2012; Munir 2012; Rajah 2012). This leads to our second theoretical proposition: a fraction of China’s lawyers, particularly criminal defense lawyers, will hold views and strive in practice for the restraint of state power through institutional re-arrangements of the judiciary and the political system. This book investigates the conceptions of state moderation in various segments of the criminal defense bar and how lawyers imagine future political and legal systems in China might be configured to protect basic legal freedoms.

Third, while lawyers play a role in constituting the justice system of a state, and hence might be thought of as officers of the court or servants of the state, historically they have also fought to position themselves as actors in civil society (Karpik 1988). They may do so through bar associations – in authoritarian societies these can take the form of insurgent and clandestine networks or associations; they may do so by defending other civil society groups or allying with civil society organizations, and hence constituting civil society itself (Karpik 1995; Tocqueville ([1835, 1840] 2000); and they may act as spokespersons for publics (Karpik 1988), thereby giving a voice to citizens and non-state actors and potentially opening up a deliberative public sphere (Habermas [1962] 1989). This leads to our third theoretical proposition: even in illiberal political regimes, some lawyers will mobilize

either collectively in their capacities as lawyers and/or speak on behalf of civil society and publics as their spokespersons. Can such segments of lawyers be found in China, and, if so, how have they done so through formal legal settings, such as courts, or through the media? Most notably, does the emergence of the Internet and social media, despite the “Great Firewall” built by the Chinese state, open up a new terrain of struggle in Chinese lawyers’ engagement with the civil society? This book seeks to provide a provisional answer to these questions.

In sum, political liberalism, as defined in this book and earlier political lawyering studies, is not equivalent to democracy or the rule of law, nor the economic neo-liberalism epitomized by the “free market” ideology and the Washington Consensus (Dezalay and Garth 2002); instead, it centers on the most fundamental citizen and political rights that many lawyers fight for, individually or collectively, in vastly different social and political contexts. It has three principal components: basic legal freedoms, the moderate state, and civil society. The three components of political liberalism are interrelated and together they form the legal, political, and social foundations for liberal political societies that many lawyers aspire and fight for, individually or collectively. Lawyers have the capacity to check arbitrary state power, pursue legal proceduralism, and call for judicial independence. Concomitantly, they can mobilize and form alliances with the media and other sectors of civil society to protect the basic legal rights of citizens. Politically liberal lawyers practice law to pursue justice and institutional change and, in their criminal defense work, they emphasize citizen and procedural rights more than substantive justice or crime control.

Yet not all lawyers are political liberals. In many times and places lawyers are silent and withdrawn in the face of attacks and repression of basic legal freedoms. Even more, lawyers may be complicit with repressive regimes that abrogate fundamental legal rights and oppose a liberal legal political order (Dezalay and Garth 2002; Ginsburg and Moustafa 2008). In practice, the shifting and sometimes antagonistic political connections between lawyers and other legal or political actors, including judges, prosecutors, legal scholars, and state officials, often shape the dynamics of the legal process in both lawmaking and the implementation of law (Michelson 2007; Liu and Halliday 2009; Liu 2011). Even those who possess liberal values and ideologies face structural constraints in pursuing political liberalism through their work, especially in authoritarian contexts such as China. These structural constraints are most evidently manifested in lawyers’ formal or informal ties to the state through their career histories and social networks, which is termed “political embeddedness” by Michelson (2007).

Political embeddedness is a spatially bounded relational concept that emphasizes lawyers' proximity to the state as the way to get clients, facilitate their practice, and reduce difficulties in their everyday work. Politically embedded lawyers often (1) have previous work experience in the state justice system, and this leaves an imprint on their subsequent careers; and/or, (2) maintain strong institutional or personal ties with the state agencies and officials that hold power in the legal system. These lawyers have advantages in legal practice not only because they are "repeat players" (Galanter 1974) of the justice system, but also because of the symbiotic exchange of power and resources between lawyers and the state (Liu 2011, 2015). It is important to note, however, that political embeddedness has a spatial limit, that is, when lawyers practice outside of the "comfort zone" of their political connections (e.g., in another city or province), they may lose their embeddedness and face significantly more difficulties in their work.

While political liberalism is defined by lawyers' political values and choices, political embeddedness is defined by their social relations and structural constraints. These two meanings of politics constitute two dimensions for understanding lawyers' political mobilization. Accordingly, lawyers can be classified by their standing vis-à-vis those two dimensions. *Motivationally*, lawyers differ in accordance with whether or not their practice is motivated by or embodies values that are politically liberal. *Structurally*, lawyers differ as to whether they have had or currently have strong relationships with the state justice system. When we combine these two dimensions, four ideal types of lawyers emerge.

As Table 1.1 demonstrates, the quintessential politically embedded lawyers, *pragmatic brokers*, are those who are embedded in the state justice system but only use their embeddedness as brokerage to pursue economic gains rather than political ends. The quintessential politically liberal lawyers, *political activists*, are those who articulate liberal values and maintain some social distance in their careers and current practices from the state. *Progressive elites* are a mixed type. They comprise lawyers who are deeply embedded in the state

TABLE 1.1. *Four ideal types of lawyers in professional mobilization.*

	Politically liberal	Not politically liberal
Politically embedded	Progressive elites	Pragmatic brokers
Not politically embedded	Political activists	Routine practitioners

justice system but also possess highly liberal values and seek to promote political change within the state apparatus. These lawyers are often found at the top of the status hierarchy in the criminal defense bar. Finally, *routine practitioners* refer to the vast number of ordinary lawyers who are neither embedded in the state nor motivated by political liberalism, but merely practice law to meet the basic needs of survival.

By definition, progressive elites and political activists are more likely to mobilize for political liberalism than pragmatic brokers or routine practitioners. Nevertheless, these two groups of law practitioners adopt distinct strategies in their collective action. Progressive elites often advocate for an incremental approach to legal and political reforms and collaborate with the state in both lawmaking and implementation. For them, institutional changes are only possible if lawyers can protect themselves and win support from the liberal judges and officials inside the state apparatus. Political activists, in contrast, take a more radical approach and undertake bold, even heroic, lawyering in highly sensitive political cases. For them, the authoritarian regime is inherently corrupt and the only way for political change is to vehemently attack and overthrow it from the outside, even if it involves serious personal sacrifice. These two approaches may seem incompatible in theory, yet we find both simultaneously at work in the political mobilization of Chinese criminal defense lawyers.

Our last and most important theoretical proposition is that, in illiberal political societies, there is an inverse relationship between political liberalism and political embeddedness in professional mobilization. Political liberalism is a “push” factor for lawyers’ mobilization, whereas political embeddedness is a “pull” factor. Politically embedded lawyers are less likely to take radical actions against the state or devote their careers to human rights work, even if they possess liberal values. Conversely, politically liberal lawyers are more likely to actively fight against arbitrary state power or participate in the construction of civil society if they are not deeply embedded in the state apparatus. Arguably, politically conservative lawyers might also mobilize collectively (e.g., Southworth 2008), but this is rarely seen in an authoritarian context such as China, because the interests of such lawyers are often in line with the interests of the state.

CRIMINAL DEFENSE LAWYERS IN THE CHINESE LEGAL COMPLEX

In theory, the application of the analytical framework that we propose in the previous section would result in a classification system of four ideal types of

lawyer in any social context, namely, progressive elites, pragmatic brokers, political activists, and routine practitioners. For the case of Chinese criminal defense lawyers, however, the category of political activists needs to be further differentiated by location into two types: notable activists and grassroots activists. *Notable activists* refer to a small group of criminal defense lawyers concentrated in Beijing, but increasingly found nationwide, who often originate from humble professional and social backgrounds but proactively seek out politically sensitive cases and challenge arbitrary state power (Fu and Cullen 2008, 2011; Pils 2015). *Grassroots activists* refer to the ordinary lawyers all over China who possess politically liberal values and motivations but do not mobilize collectively due to unfavorable structural constraints. Instead, they only use their everyday criminal defense work to pursue substantive legal-political goals of protecting the basic legal rights of citizens through practices of proceduralism.

During our fieldwork of over a decade, we have met and interviewed all the five types of lawyers across the country, who together constitute a diverse and fascinating Chinese criminal defense bar. While their stories will be told with fine-grained data in later chapters, in this section we provide some brief sketches of the vastly different profiles of the five types of lawyers, as well as their relations to other legally trained occupations such as judges, procurators, and police officers. Arguably, these general sketches omit many nuanced variations within each type, but our goal is to present a broad picture of the landscape of lawyers and criminal justice in China in this introductory chapter and use it to guide the empirical analysis in the rest of the book.

Let us begin with routine practitioners, who account for the majority of Chinese criminal defense lawyers all over the country. Although a large number of Chinese lawyers prefer to avoid criminal cases, in order to survive in the increasingly severe competition in the legal services market (Liu 2011, 2015), many of them still have to take on criminal defense work in their practice (Michelson 2007). For these routine practitioners who are neither politically liberal nor politically embedded, criminal defense is merely another income source in addition to civil and commercial cases. They usually stay away from the risky parts of the criminal process, especially collecting evidence. Some lawyers even describe criminal defense work as “short, flat, and fast” (短平快) because they intentionally restrict their work to court arguments only and avoid any direct confrontation with procurators or judges during trial. As they are not politically embedded law practitioners, this is the safest way to handle cases, make money, and protect themselves from potential risks.

Pragmatic brokers have a different method of survival in China's criminal justice system. As many of them have previous work experience in the justice system and/or maintain a symbiotic exchange relationship with judges, procurators, and law enforcement officials (Michelson 2007; Liu 2011), they face less risk than routine practitioners in handling criminal cases. Nevertheless, pragmatic brokers use their connections for economic gains rather than political ends. Thanks to their political embeddedness, they face significantly less difficulty than routine practitioners and are often able to meet suspects, access case files, and collect evidence without much disturbance from the PPC. Furthermore, pragmatic brokers often collude with judges or procurators in the criminal process, which has earned some of them the reputation of "colluding-style lawyers" (勾兑派律师) in the Chinese legal community – a term in opposite to the "die-hard lawyers" (死磕派律师), who we will examine in detail later in the book. This instrumental orientation of criminal defense is particularly salient in their selection of case sources, which often exclude all politically sensitive or controversial cases from their practice.

Progressive elites are not scattered around the country, but concentrated in Beijing and other major cities. They are the most politically embedded Chinese criminal defense lawyers as many of them were once Party cadres who previously worked in the higher levels of the criminal justice system, such as provincial-level PPC or even the Supreme People's Court (SPC). Those who do not have previous work experience in the PPC are usually part-time lawyers who are also senior professors in elite law schools. These legal academics are politically embedded in criminal defense work because many of their students assume leadership positions in the local justice system. Paradoxically, the deep political embeddedness of progressive elites does not necessarily constrain their expression of liberal values and motivation. These elite lawyers are integral to the expansion of lawyers' procedural rights in China's criminal justice reforms and produce a large number of essays, speeches, and media interviews to reveal the plight of lawyers in criminal defense. Furthermore, most of the highest-profile corruption cases in China, such as the trials of Politburo members Bo Xilai and Zhou Yongkang, involve lawyers who are progressive elites, though these lawyers usually shy away from sensitive human rights cases because of their structural proximity to state power.

Not surprisingly, the vast majority of the most sensitive human rights cases in China are handled by notable activists, most of whom, until very recently, have residences in Beijing but take on cases throughout the country. This is a relatively small but fairly cohesive group of lawyers. With a few exceptions,

most notable activists come from humble educational and social backgrounds and started their law practice in the provinces before moving to Beijing. A substantial number of them are Christians and thus they often represent freedom-of-religion cases. Other sensitive case types that notable activists handle include freedom of speech, tortured prisoners, forced abortion, and so on, most of which are too far out of the safety zone for ordinary Chinese lawyers. Notable activists display firm commitments to the elements of political liberalism and admirable courage in their defense work, but many of them have been disbarred, “disappeared,” tortured, or suffered from other forms of state repression. They are marginalized and repressed inside China but often hailed as heroes in the international media.

Grassroots activists are perhaps the most neglected group of Chinese criminal defense lawyers. They exist at the local level widely across the country, but very little has been written on this obscure group of activist lawyers in both scholarly and popular writings. Because grassroots activists are not politically embedded and do not enjoy any international exposure (as notable activists do), their political mobilization is even riskier than the mobilization of notable activists or progressive elites. As a result, many grassroots activists choose to hide their liberal values and motivation in everyday practice and focus on legal proceduralism and rights defense in routine cases. A small number of them have gradually become “die-hard lawyers” in recent years and gained national fame, but the vast majority remain cautious and keep a low profile in their everyday struggles for political liberalism.

In sum, the Chinese criminal defense bar is differentiated into five types of lawyers according to their variations in commitment to political liberalism, political embeddedness to the state, and the locations where they regularly reside or practice: (1) routine practitioners, (2) pragmatic brokers, (3) progressive elites, (4) notable activists, and (5) grassroots activists. This typology of criminal defense lawyers will be applied and substantiated with empirical data throughout the book.

Besides the internal differentiation of the bar, Chinese criminal defense lawyers also work and live in a larger “legal complex” (Karpik and Halliday 2011) consisting of other legally trained and practicing occupations, including judges, procurators, police officers, legal scholars, and others (e.g., legal news reporters or law bloggers). Defined as “a cluster of legal actors related to each other in dynamic structures and constituted and reconstituted through a variety of processes” (Karpik and Halliday 2011: 220), the legal complex is a concept aimed at explaining the dynamics of legal mobilization across occupational boundaries. It recognizes that lawyers’ politics and collective action are always intertwined with other legally trained occupations. These