

## CRIMINAL DEFENSE IN CHINA

### *The Politics of Lawyers at Work*

*Criminal Defense in China* studies empirically the everyday work and political mobilization of defense lawyers in China. It builds upon 329 interviews across China, and other social science methods, to investigate and analyze the interweaving of politics and practice in five segments of the practicing criminal defense bar in China from 2005 to 2015. This book is the first to examine everyday criminal defense work in China as a political project. The authors engage extensive scholarship on lawyers and political liberalism across the world, from 17th-century Europe to late 20th-century Korea and Taiwan, drawing on theoretical propositions from this body of theory to examine the strategies and constraints of lawyer mobilization in China. The book brings a fresh perspective through its focus on everyday work and ordinary lawyering in an authoritarian context and raises searching questions about law and lawyers, and politics and society, in China's uncertain futures.

Sida Liu is Assistant Professor of Sociology at the University of Toronto, Faculty Fellow at the American Bar Foundation, and a Member of the Institute for Advanced Study in Princeton in 2016–2017. He received his LL.B. from Peking University Law School and his Ph.D. in sociology from the University of Chicago. He has written widely on Chinese law, sociolegal theory, and general social theory, including two books (in Chinese) on the legal profession in China.

Terence Halliday is Co-Director at the Center on Law and Globalization, Research Professor at the American Bar Foundation, Honorary Professor at Australian National University, and Adjunct Professor of Sociology, Northwestern University. He has written widely on global law-making, professions, and national law reforms across the world, including corporate bankruptcy and criminal procedure law reforms and on professional regulation in China.

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# Criminal Defense in China

THE POLITICS OF LAWYERS  
AT WORK

SIDA LIU  
TERENCE C. HALLIDAY



CAMBRIDGE  
UNIVERSITY PRESS

Cambridge University Press  
978-1-107-16241-9 — Criminal Defense in China  
Sida Liu, Terence C. Halliday  
Frontmatter  
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## CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

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[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9781107162419](http://www.cambridge.org/9781107162419)

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First published 2016

Printed in the United States of America by Sheridan Books, Inc.

*A catalogue record for this publication is available from the British Library*

*Library of Congress Cataloging-in-Publication data*

Liu, Sida, 1980– author. | Halliday, Terence C. (Terence Charles), author.

Criminal defense in China : the politics of lawyers at work / Sida Liu, Terence C. Halliday.

Cambridge [UK] : Cambridge University Press, 2016. | Series: Cambridge studies in law and society

LCCN 2016026625 | ISBN 9781107162419 (hardback)

LCSH: Criminal defense lawyers – China. | Defense (Criminal procedure) – China.

LCC KNQ4630.D43 L59 2016 | DDC 345.41/05044–dc23

LC record available at <https://lccn.loc.gov/2016026625>

ISBN 978-1-107-16241-9 Hardback

ISBN 978-1-316-61484-6 Paperback

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*Sida Liu would like to dedicate this book to his father*

*Liu Bao*

*Terence Halliday would like to dedicate this book to  
Andrew, Charles, Gabriel, Olivia, and Reid*

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## Prologue

In the autumn of 1731, the Parisian Order of Barristers went on strike. Provocations for such a dramatic protest against royal justice had been building for several years as the bar progressively articulated ideas that would require limits on royal power. The Absolute Monarchy initially counseled restraint, despite its exasperation at the Order, whose impertinence caused the Crown to describe it as “an independent little republic at the heart of state.” However, this restraint disappeared when the Monarchy was confronted with a legal brief that proclaimed the subversive doctrine that “all laws are contracts between those who govern and those who are governed.” The Council threatened disbarment of the brief’s author and thirty-nine fellow barristers unless they retracted the document. After negotiations failed to defuse the confrontation, lawyers walked out of the courts, thereby denying the Crown a central function – the dispensing of justice. Confronted with an obdurate profession, the Crown held out for three months and then effectively conceded the battle to the lawyers. The work stoppage symbolized a moment where the very foundations of royal absolutism began to be eroded; it marked the beginnings of a movement, said Voltaire, where “simple citizens triumphed, having no arms but reason” (see Bell 1994; Karpik 1998 for details of this historical episode).

In December 2009, a Chinese criminal defense lawyer named Li Zhuang was arrested in Chongqing during Politburo member Bo Xilai’s campaign against organized crime. Li was subsequently charged twice for the crime of lawyer’s perjury. Labeled “China’s trial of the century” by some observers, thousands of Chinese lawyers, legal scholars, and other legal professionals enthusiastically watched Li’s dramatic trials and mobilized to defend him both in the courtroom and in cyberspace. While Li spent eighteen months in prison for his first charge in 2009, his second charge in 2011 was dropped by the

Chongqing authorities, thanks to the vigorous defense of his counsel as well as the online uproar generated by the legal profession. The Li Zhuang case marks not only a key turning point in the fallen political career of Bo Xilai from Communist Party leader to a life in prison, but also a watershed event in the history of the Chinese legal profession. It was the first time that lawyers across China mobilized collectively to defend a fellow professional whom most of them had never met or even heard of. After this *cause célèbre*, a loosely connected group of “die-hard lawyers,” consisting of elite, activist, and grassroots members of the Chinese criminal defense bar, emerged and took on controversial cases all over the country.

In July 2015, four years after the conclusion of the Li Zhuang trial, the Chinese authorities launched a large-scale crackdown against die-hard lawyers, with more than two hundred lawyers detained, disappeared, or brought in for questioning. Among the first detained lawyers was a woman named Wang Yu, who had been involved in cases of disability discrimination, religious freedom, land rights, and illegal restriction of personal freedom by government and law enforcement officials. Wang was taken from her home in the early morning on July 9 (and later accused of being part of a “criminal gang” and charged with subverting state power in January 2016). On the same day, 101 lawyers all over China signed a petition requesting to know her whereabouts and urging that “torture and abuse of power must not be tolerated.” Since many of these 101 lawyers were also taken away by the police in the next a few days, more petitions were signed by bar associations and human rights organizations in Hong Kong, Taiwan, England, Germany, Australia, and, finally, the United States. As this book goes to press, the fate of some detained lawyers remains unknown.

These three instances of lawyers’ mobilization could not seem more different. Separated by continents, centuries, and circumstances, they seem at first glance to belong to different spheres of history, politics, and law. We will argue, however, that these episodes belong to a common theoretical problem regarding lawyers and politics, despite many variations on the theme (e.g., Karpik 1995: 92–116).

Illiberal political societies come with varieties of labels – absolute monarchies, military dictatorships, authoritarian or totalitarian politics, Big Man regimes, or dual states. Yet they share key features in common – little or no restraint on arbitrary executive power, most especially as it is exercised through military, police, and security apparatuses; law that is distorted and circumscribed and ultimately ineffectual in its protections of individuals and organizations offensive to the ruling power; little space for voices to speak freely about their rulers, their qualities of life, or their circumstances in times and

places and organizations of their own choosing; severely constricted notions of rights-bearing citizens beyond those granted or withdrawn by the rulers themselves; and precariousness of property ownership, among others.

Yet the ubiquity of illiberal political societies, as they appear to invent themselves time and again at one historical moment or in another geographical location, cannot hide or suppress another powerful impulse deep within those societies. Over the last four hundred years and across the world, individual and collective action by lawyers, and often a wider range of legally trained occupations such as judges or legal academics, to transform illiberal politics into an open and liberal political society can repeatedly be observed. In this new political society, institutions and practices are both transformed and maintained such that the structures of society press insistently, even if unevenly and episodically, towards basic legal freedoms, vibrant civil societies, and moderate states.

There are many exceptions to this deep impulse; many reversals, many betrayals and retreats, many false starts and inept actions; but very often, in every type of illiberal political society that has been observed in decades of scholarly inquiries, lawyers have fought for basic legal freedoms. Their fight is often carried on in the name of the law but it is a fight, nonetheless, ultimately for political change. Among these activist professionals can be observed complex social structures of motivation and ideology, organization and collective action, historical trajectories and local dramas, sacrifice and vision, defeat and victory.

In these historical and comparative contexts of transformation, this book grapples with two broad questions, both far beyond its ability to answer definitively: Where are China's legal and political reforms going? And how do lawyers fight for basic legal freedoms in illiberal political societies?

#### WHERE ARE CHINA'S LEGAL AND POLITICAL REFORMS GOING?

Where goes China? This is arguably one of the great questions of the twenty-first century. There are "straight line" prognostications that China will get increasingly richer and more powerful, that it will become a superpower on the global stage. There are developmentalist predictions that are, in effect, new forms of the old modernization theory that as China grows progressively more prosperous it will also become ostensibly more democratic. There are warnings that China's fragilities may lead to domestic instability and international conflict. There are doomsday accounts that a desperate Chinese Communist Party (CCP) is losing its control of the population and that the

CCP itself is trapped in serious problems of corruption and organizational inertia. Optimists expect the rule of law to triumph in China, while pessimists believe that rule *by* law already overshadows economic reforms.

The correctness of any of these short- or longer-term projections lies beyond the determinations of any observers, scholarly or otherwise. China's future, especially in the legal-political turn since the ascendancy of Xi Jinping, remains acutely indeterminate and quite possibly becomes more so by the day. On the one hand, the CCP presented the most systematic proposal of legal reform in its history in the Fourth Plenum of its 18th Party Congress in October 2014. On the other hand, law's emancipatory potential seems eviscerated as openness in the political space is progressively closed and the nascent civil society is under constant harassment and attack from the state. At best, scholars like us can peer intently inside China with the historical and comparative awareness that many other illiberal and seemingly unassailable rulers have been confronted with a vanguard of lawyers, judges, and others, so much so that transitions sometimes have led to a very different sort of political society.

Our focus in this book, therefore, is on a particular *actor* and a particular *institution* that will be integral to China's future. The actor is manifest in many guises – barefoot lawyers on the margins of hardscrabble rural areas; headline-grabbing bar association leaders who are Party members while also champions of high-profile white-collar detainees; ordinary grassroots lawyers eking out a modest existence yet assured in themselves that their everyday practices are building, brick by brick, a rule-governed criminal justice system; law professors who believe and teach that historical precedents about legal proceduralism and arrangements of power have salience for China; human rights lawyers who defend desperate persons in every corner of China in the most politically sensitive cases; and constitutionalists who envision a society in which every citizen has a political voice and every person is guaranteed rights and duties inscribed in law.

These actors are not simply individual lawyers floating like professional flotsam on a sea of social and political turbulence. They connect with one another: some through local relational networks; some as law school classmates who never lose touch; some through temporary solidarity in a high-profile trial. Some self-identify as “human rights defenders” or “die-hard lawyers.” Others seek informal and formal means of forging a professional community. And yet others reach fellow lawyers and publics through Internet forums, blogs, and, most recently, Weibo and WeChat.

Our focus spotlights a particular institution – criminal procedure law and the struggles around it in everyday criminal justice, most notably through

lawyers' defense work. We shall show that for both theoretical and prudential reasons, the research site of criminal procedure law and practice puts a social scientist's fingers on a very sensitive pulse in China's social and political life. Criminal defense invokes laws and procedures that directly confront state power and potentially hold it at bay. It offers a case of law practice that has little glory and often less reward, yet it is also a grassroots place where great struggles for the future of a political society occur in microcosm. Although invisible to most ordinary persons, everyday criminal defense practice reveals both the limitations and distortions of formal law, such as China's 1979, 1996, or 2012 Criminal Procedure Law, and yet also law's underlying potential for individual freedom and collective action. The contradictions of Chinese law and politics become openly displayed in remote and notable places of criminal defense work.

In this particular institution, other legal occupations also come into conjunction or conflict with defense lawyers. Lawyers confront the police as they seek to meet with clients or collect evidence or point to instances of confession by torture. Lawyers face off against procurators who have supervisory powers over the judicial process and even the capacity to incarcerate lawyers under China's Criminal Law. Lawyers appear before increasingly professionalized judges, although they well know that out of sight there is an adjudication committee consisting of court leaders and, more troublingly, a Party Political-Legal Committee often chaired by the police chief that will determine the outcomes of important and difficult cases. Law professors play a significant role, too, sometimes as architects of criminal procedure reforms, and not infrequently as part-time lawyers or opinion-leaders in particularly controversial trials. Insofar as the police, the procuracy, and the court have historically constituted an "iron triangle" in China, their confrontations with lawyers and changing ethos and relations with each other also signal where China is headed. Towards a political society where law matters as a semi-autonomous force for freedom and restraint? Or towards a political society where law primarily is an instrument of power, a more respectable and less bloody means of repression?

The question of "Where are China's legal and political reforms going?" therefore may be answered by learning whether there are impulses among China's criminal defense lawyers that transform everyday work into a different kind of politics, and whether there are signs or prospects for collective action that might intimate a future China that has attributes in common with transformations in other times and places. This brings us to the second question.

## HOW DO LAWYERS FIGHT FOR BASIC LEGAL FREEDOMS?

In an enormous diversity of times and places, lawyers and other legally trained occupations have fought against illiberal political regimes. What is particularly challenging and consequential are the scholarly findings that the fight is not inevitable, it does not involve all lawyers, it occurs despite deep conflicts within the legal profession, and very often lawyers are handmaidens of power to preserve an illiberal status quo (Karpik 2007). Efforts at mobilization are met with skepticism, counter-mobilization, or repression. Activist lawyers are abducted, imprisoned, tortured, and, on occasion, assassinated or executed. Within and beyond the legal profession, there are powerful forces that will inhibit the impetus towards the establishment of basic legal freedoms.

This book seeks to advance understandings of how and when lawyers mobilize by juxtaposing what we observe in China with other patterns of lawyer activism in other regions of the world. At the very least we seek to discover what forms and degrees of political mobilization are already occurring in China and whether these resonate with practices elsewhere or rather manifest distinctively Chinese characteristics.

Consider lawyer activism in other national contexts. In seventeenth-century Britain, the Crown complained bitterly that lawyers were like an “independent little republic” in their expectations of time-honored autonomy for the bar from control by the king. Likewise, in the France of the *Ancien Régime*, seventeenth- and eighteenth-century Paris advocates insisted that there should be limits on the king’s power and that the strictures of censorship over political speech could not silence advocates in their oral presentations of *judiciaires mémoires* (court memorandums) (Bell 1994; Karpik 1995; Burrage 1997).

Consider also the marches of lawyers in Pakistan in support of a chief justice summarily dismissed by the president in 2007. Or the formation of an activist group of lawyers under military rule in South Korea who emerged as a vanguard of liberal politics. Or efforts by Kenya’s lawyers in the 1980s to resist President Moi’s one-party repressive rule, or the Zambia’s Law Society’s leadership of a national campaign to forestall a president intent on extending his rule beyond constitutional limits. Think too of the role of the Brazilian Bar Association which united with the Roman Catholic Church against torture, brutality, and killings under a military dictatorship in the 1970s (Falcao 1988; Ghias 2012; Gould 2012; Munir 2012).

From another angle, consider Sudan’s bloody descent into despotism when its liberal lawyers were crushed. Or Lee Kuan Yew’s campaign to silence the Law Society of Singapore when it dared critique the government’s retreat from

rule of law. Or the cutting off of overseas support for lawyers and other liberal groups by Egyptian President Mubarak, who was intent on preserving his illiberal one-party rule (Massoud 2012; Moustafa 2012; Rajah 2012).

In struggles for political futures, therefore, history reveals many occasions when the agents of transformation include lawyers, often beginning with very few voices and being subjected to harsh crackdowns, yet persisting until their impetus combines with facilitating circumstances and precipitating events to produce a transformed legal and political order. In other places, such as contemporary Singapore or Sri Lanka or Russia, that is a history unrealized.

This book therefore not only investigates the political struggles of Chinese lawyers, but also resonances of other times and places beyond contemporary China. Are lawyers, any lawyers, acting inside this highly authoritarian state in ways that point to liberal political futures? If so, how are they mobilizing? In ways seen elsewhere or uniquely? And what are they mobilizing *for*? In their work and in their political action, what instruments of authoritarianism do they confront? And how do they adapt or surmount a harsh criminal justice system and a repressive state apparatus? These questions will be pondered and answered with empirical data that point to far-reaching pragmatic and theoretical implications.

## Acknowledgments

Even in the digital age, when human interactions are increasingly threatened by electronic devices and quantitative indicators, no good academic work could be completed without the help and support of friends, colleagues, and critics. The long journey for this book began from a brief meeting of the two authors at the American Bar Foundation (ABF) in 2004, having been kindly introduced by Andrew Abbott, our colleague and friend at the University of Chicago. Since then, we have become semi-permanent residents of the fifth-floor conference room of the ABF, with a gorgeous view of Lake Michigan, for more than a decade. The ABF provided us not only with excellent institutional and funding support, but also the best intellectual community that any socio-legal researcher could hope for. In the decade-long process of research and writing, we have benefitted enormously from our ABF colleagues for their enthusiastic, constructive, and insightful comments and critiques on our project as it evolved over time. For sustained support and encouragement we thank particularly ABF Directors Robert Nelson and Ajay Mehrotra and the ABF Board of Directors and Fellows. We are also very grateful to Amy Schlueter for her exemplary administrative support. It has been a privilege to be part of this outstanding scholarly community.

A major grant from the National Science Foundation (SES-0850432) covered much of our research and travel costs for this project. We gratefully acknowledge permissions to reprint parts of articles and chapters previously published by Hart Publishing (Terence C. Halliday and Sida Liu. 2007. “Birth of a Liberal Moment? Looking through a One-Way Mirror at Lawyers’ Defense of Criminal Defendants in China.” Pp. 65–108 in *The Legal Complex and Struggles for Political Liberalism*, edited by Terence C. Halliday, Lucien Karpik, and Malcolm M. Feeley), Wiley (Sida Liu and Terence C. Halliday. 2009. “Recursivity in Legal Change: Lawyers and



Reforms of China's Criminal Procedural Law." *Law & Social Inquiry* 34: 911–950; Sida Liu and Terence C. Halliday. 2011. "Political Liberalism and Political Embeddedness: Understanding Politics in the Work of Chinese Criminal Defense Lawyers." *Law & Society Review* 45:831–865), and Cambridge University Press (Sida Liu, Lily Liang, and Terence C. Halliday. 2014. "The Trial of Li Zhuang: Chinese Lawyers' Collective Action Against Populism." *Asian Journal of Law and Society* 1:79–97). Various pieces of the book were presented at universities and research institutions in both China and the United States, including China University of Political Science and Law, Council on Foreign Relations, Georgetown University, Harvard University, Northwestern University, Shanghai Jiao Tong University, Sichuan University, Stanford University, Yale University, University of California–Berkeley, University of California–Los Angeles, University of Chicago, University of Hong Kong, University of Michigan, University of Pennsylvania, University of Pittsburgh, University of Wisconsin–Madison, as well as the annual meetings of the Law & Society Association and American Sociological Association. We have benefitted from many discussions and coverage from the media, including the BBC, the *Guardian*, the *New York Times*, and the *Wall Street Journal*, partly owing to the Chinese government's harsh treatment of criminal defense lawyers in recent years. We are grateful for the comments and feedback from all of these academic and popular audiences of our work.

Many colleagues have been dedicated readers and friendly critics of our writings and speeches, especially Jerry Cohen, Cheng Jinhua, Laurie Edelman, Howie Erlanger, Malcolm Feeley, Fu Hualing, Mary Gallagher, John Givens, He Xin, He Yongjun, Kathie Hendley, Lucien Karpik, Heinz Klug, Lan Rongjie, Maggie Lewis, Li Xueyao, Lin Xifen, Stanley Lubman, Lynn Mather, Sally Engle Merry, Ethan Michelson, Carl Minzner, John Ohnesorge, Eva Pils, Gay Seidman, Rachel Stern, Alex Wang, Wang Qinghua, Erik Olin Wright, Wu Hongqi, Xu Shenjian, and Zuo Weimin, to all of whom we owe great debts. We were fortunate to work with a number of outstanding co-authors and research assistants since 2005, including Lily Liang, Cheng-Tong Lir Wang, Connor Steelberg, and twenty law students in China, as well as our Chinese translators, whose names must remain anonymous for their protection given the political sensitivity of our topic. We also thank Jerry Cohen, Frank Upham, Ira Belkin, and the US-Asia Law Institute at NYU School of Law for providing us many opportunities to learn from Chinese lawyers and legal academics at the final stage of completing this book. Reviewers of our book raised valuable issues for us to address. John Berger, Sarah Starkey, and Brianda Reyes at Cambridge University Press in

particular provided some nuanced but critical touches to our manuscript and made it appealing to a broader audience.

Needless to say, we are most grateful to the hundreds of lawyers and other informants in China, without whose generous help this book would not have been possible. As the book goes to print, we are constantly mindful and pray for some of our bravest lawyer interviewees who remain in custody in China for the alleged crimes of perjury, subverting state power, or “picking quarrels and causing trouble,” – a criminal charge beyond comprehension in the minds of the greatest experts on Chinese law. Their suffering and perseverance make all our challenges and difficulties of researching and writing this book pale into insignificance.

## Abbreviations

ACLA	All China Lawyers Association
BBOJ	Beijing Bureau of Justice
BLA	Beijing Lawyers Association
CCP	Chinese Communist Party
CPL	Criminal Procedure Law
MOJ	Ministry of Justice
MPS	Ministry of Public Security
MSS	Ministry of State Security
NPC	National People's Congress
PLC	Political-Legal Committee of the Chinese Communist Party
PPC	Police, Procuracy, and Court
SPC	Supreme People's Court
SPP	Supreme People's Procuracy