Legal Transplants in Chinese Criminal Law: The Dilution of Due Process Across National Boundaries

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EPIGRAMS:

“Does not Dionysius seem to have made it sufficiently clear that there can be nothing happy for the person over whom some fear always looms?”¹

-Cicero

“They (the U.S.) can level charges against dogs and a court can even convict a husband of raping his wife… We (China) don’t play with words. We have a principle called ‘based on the facts.’ You will be arrested, sentenced and executed as long as we know you killed someone.”²

- Gu Kailai

ABSTRACT

China’s turbulent history under Mao Zedong and his regime’s persecution of legal professionals make China’s rebound and commitment to law in the past forty years seem almost unimaginable. In 1996, this commitment led to the transplantation of a Western (in particular, Anglo-American) version of due process into Chinese criminal law. My research explores the viability and effectiveness of the transplanted law through its implementation in the Chinese context by using a combination of explanatory and exploratory methods. To accomplish the explanatory component, I examine the formal written Chinese criminal law, as well as the Li Zhuang court case, where this Chinese defense attorney was prosecuted while defending his client. Next, to address the exploratory component, I have conducted semi-structured, open-ended phone interviews with 6 Chinese criminal defense attorneys. This research elucidates the difficulties of implementing transplanted foreign law in China through a recursive path dependent explanation, as well as through the narratives of the primary agents of implementation of the transplanted law: Chinese criminal defense attorneys. The findings of the study lead to an argument that the transplantation of due process in China has been symbolic only.
INTRODUCTION

Researching China is challenging because China is a rapidly changing society. The modern legal profession in China is only about forty years old. China adopted its first Criminal Law in 1979, which was subsequently revised in 1996. The new Criminal Law went into effect in 1997. Since 1997, the new Law has been revised and new amendments went into effect on January 1, 2013. The focus of my study is the period from 1997 to 2012 because that is when Western (Anglo-American) legal notions of due process influenced Chinese Criminal Law for the first time. The formal written Criminal Law was transformed and designed to look more Western, but were these changes effective in practice? First, I provide a brief discussion and comparison on the rule of law and rule by law for historical context. I outline the structure of Chinese courts. Then, I delve into the transplantation itself, and the role of lawyers in transplantation. Lawyers are crucial to my project, as they are the main agents of implementation of the transplanted due process law, yet they have been prosecuted while defending their clients.

The research questions I seek to answer are:

(1) How have Western legal transplants affected the struggle over implementation of due process rights for criminal defendants in China after 1996?

(2) How do Chinese criminal defense attorneys view their own work in implementing the transplanted law?

My study is both explanatory and exploratory. I have tested the recursivity of law and path dependence theories against the transplantation backdrop and combined them.

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3 I will use “Criminal Code” and “Criminal Law” interchangeably in my thesis. I also use the years 1996 and 1997 to describe the reforms of the period because they were adopted in 1996 but went into effect in 1997. The same usage applies to the reforms of 2012-2013.
into a hybrid theory, which I call recursive path dependence. My findings about the evolution of the formal written Criminal Codes, the Li Zhuang perjury case, and the 6 qualitative interviews I conducted all support this new theory. Ultimately, I argue that the effectiveness of transplanted due process is symbolic only. Lawyers face many difficulties in trying to defend their clients, including the threat of being prosecuted for perjury themselves under Article 306 of the 1996-1997 Criminal Law. Below, I trace the difficulties lawyers face in trying to apply a foreign law to a local system. The goal of this project is to build a bridge between existing research on legal transplants and existing research on China’s criminal justice system. To my knowledge, there is no study that combines these two spheres of research as of yet.

**LITERATURE REVIEW**

I found that the literature on legal transplants and literature concerning China currently form two separate, parallel paths. Below, I explore some of the ways in which they intersect. The concepts and historical information introduced in this literature review set the stage for my research.

**Rule of Law or Rule by Law?**

It is hard to find an article about Chinese law that does not mention the rule of law. The rule of law simply means that nobody is above the law. Everybody must abide by the law, regardless of social status. Although the rule of law’s origins can be traced back to ancient times, A.V. Dicey popularized the term in 19th century Britain. Currently, there are many definitions of the rule of law by many authors and organizations. It is not clear which definition China subscribes to. Both Chinese and Western scholars are divided in the debate of whether China has achieved rule of law, is transitioning towards
rule of law, or if it even needs rule of law at all. Some scholars argue that China’s legal system resembles a rule by law model more closely; in other words, that law is used as a tool to advance the interests of the state without imposing limits on the rulers (Peerenboom 2002: 83). A brief history of China’s struggle over conceptions of rule of law and rule by law is necessary to understand the country’s current legal environment.

Confucius thought that the codification and public dissemination of laws is detrimental to society. Making laws public prevents society from being harmonious because it focuses on the lowest participation required by society’s members. This encourages people to exploit the system to their own advantage. The Legalists, who saw people as self-interested, opposed Confucianism. They advocated for the manipulation of people through a codified system of rewards and punishments. This type of legal system is characterized as rule by law. Under rule by law, the ruler is above the law, and whatever the ruler says is the law. Both the Confucius and Legalist systems of law ultimately failed and were replaced by natural law. Natural law claimed that law was grounded in a predetermined Way (Dao). The ruler’s role is simply to administer the objective Way, but the ruler could not change the law. Natural law was limited in that there was no viable method to verify whether the ruler had discovered the Way and there were no institutions overseeing the ruler’s power. During the Imperial era, China had complex dynastic codes, courts, and magistrates. The Imperial system retained both Confucian and Legalist characteristics. The dynastic codes were infused with Confucian family values. Punishments were administered according to the status of the offender and the victim, with government officials treated more favorably. Many people viewed litigation as an unpleasant, disgraceful process, and turned to the courts only as a last
resort. During this time, no limits were imposed on the ruler, and “the law was indisputably a tool to serve the interests of the state” (Peerenboom 2002: 41). Legal professionals were looked down upon. Litigation was discouraged, and China’s early lawyers faced up to three years in prison for providing legal help. Lawyers were not involved at the trial level of a case.

In the 1900s, China began to take steps to improve the legal system by adopting its first constitution in 1954. However, under the turbulent Mao Zedong era, legal reform did not take root. Chairman Mao subscribed to the view that in an ideal communist society, law is unnecessary. The first step that he took in his new government was to abolish existing laws. While a Criminal Code was drafted in 1957, it never went into effect (Chen 2002: 262). Judges, lawyers, and academics were persecuted. During the Great Leap Forward, “all legal workers in the courts were sent to the villages to till the land” (Ladany 1992: 70). During the Cultural Revolution, law plunged deeper into a state of chaos as the military gained control of the courts (Ladany 1992: 74). Criminal law during this period consisted of private tribunals set up by the Communist Party, which engaged in arbitrary torture and forced confessions (Ladany 1992: 78). This period did not reflect any commitment to rule of law.

Based on China’s history, the country’s environment is not favorable to the transplantation of a rule of law system (Peerenboom 2002: 49). Yet, China has taken active steps to adopt this type of system. After Deng Xiaoping’s Reform and Opening Up (改革开放, gaigekaifang) of 1978, China began a modernization process. “Rule of law being one of the pillars of modernity, the cry rose once more… to establish [it]” (Peerenboom 2002: 49). Law schools were reopened and efforts were made to reinstate
the legal and judicial professions. The development of the legal profession in China was rapid. By 1997, there were 170,000 lawyers. According to recent surveys, becoming a lawyer is now one of the top career choices. However, criminal defense lawyers are an exception to this trend (Cohen 2003: 232). Criminal defense attorneys are haunted by negative societal attitudes and the danger of prosecution. A lawyer who defends his or her clients fiercely faces the threat of formal arrest. A lawyer who encourages his or her clients to challenge a coerced confession at trial risks prosecution for perjury or subornation of perjury because the lawyer has challenged the prosecutor’s evidence (Whitfort 2007: 147). The multiple cases commenced against criminal defense lawyers over the past two decades provide ample evidence for this phenomenon.

Remarkably, China itself has expressed its commitment to the rule of law in several U.S. congressional hearings, and in the U.S.-China Relations Act of 2000. Certain provisions of the Act specifically address the implementation of the rule of law in China. For example, Title V, Subtitle B establishes technical assistance and rule of law programs prohibiting human rights abuses. Title III establishes a Congressional-Executive Commission on the People’s Republic of China, which is in charge of monitoring the development of the rule of law in China. There are also a lot of American organizations that have established offices in China to promote the rule of law, such as the American Bar Association and The Asia Foundation. China has made strides toward the rule of law with the purpose of enhancing predictability and certainty, limiting the state’s power, and protecting the individual. However, even though China is making steps towards stabilizing its legal system, the “historical de-emphasis of written law and the judiciary in China” (Huang 1998: 187) impedes the effort to effectively implement transplanted due
process protections for Chinese criminal defendants, especially when these defendants are Chinese criminal attorneys themselves.

**The Pluralistic Structure of the Chinese Criminal Courts**

“The implementation of law, however defined, is a complicated sociolegal process which involves many institutions and actors and a complex interrelationship between these institutions and actors” (Chen 2002: 5). The court is one of the first institutions people associate with the implementation of law. The effectiveness of the courts in the proper application and enforcement of written law affects the future of the rule of law in China (Chen 2002: 4). Chinese courts are still struggling to establish legitimacy. The Chinese Constitution states that the National People’s Congress (henceforth, the NPC) and the NPC Standing Committee are the bodies responsible for interpreting the law instead of the Chinese courts.

According to Sida Liu, the legal reforms commenced in 1979 presented a challenge for Chinese courts. “While the lower courts gain global legitimacy by appearing to conform to norms of judicial rationality, they also gain local legitimacy by violating these global norms in practice and conforming to local norms of justice through various means of conciliation, even when doing so often involves bending the rules” (Liu 2006: 76). Liu’s classifies this complex interplay between global and local norms as a “twisted process” (Liu 2006: 76), claiming that legal institutions are distilled and interpreted differently on the local level. This is a prime example of legal pluralism in China’s legal arena. Legal pluralism refers to the coexistence of multiple legal orders in the same society (Liu 2006: 78). It is a dynamic process through which state and customary law are socially constructed. Originally, this theory was confined to countries
with colonial histories, but today, virtually all countries contain legal pluralism (Merry 1992: 358). Since law is closely tied to culture, legal pluralism is useful for examining the law’s potential to reshape other social orders. Some studies have demonstrated limits on the capacity of law to change society. New law, innovations in existing law, or transplanted law do not necessarily change normative ordering at the local level (Merry 1988: 880). Legal pluralism explains the relationship between multiple, intertwined social orders, or the interplay between global and local legal norms Chinese courts aim to satisfy. It also accounts for symbolic structures within the law: sometimes, state law borrows symbols from other normative orders. In this case, Chinese courts have borrowed from Western law. State law and underlying normative orders are mutually constitutive. State law defines and structures other normative orders, and non-state normative orders either resist or accept state law.

The coexistence of Western legal institutions and local Chinese culture outline new interactions between multiple sources of law (Liu 2006: 79). China’s adoption of Western due process is an attempt to gain legitimacy as an international player. Its transplanted laws are symbolic structures of the acceptance of the principle of due process, which, as I explain below, is not perfect in practice.

Moreover, there is a lot of corruption in the Chinese courts. Over the past ten years, 58 judges from 18 provincial courts have been investigated for corruption, with 32 of those being convicted and all being punished through some form of disciplinary regulation (Li 2011: 2). Li finds that judicial corruption is “an institutional activity, resulting from the routine operation of a judicial decision-making mechanism, which provides well-structured opportunities for manipulation and exploitation by all
participants of the judicial decision-making process at each and every level of the judiciary” (Li 2011: 5). The formal role of judges in this process is loosely coupled to their daily role.

Judges are not the only responsible parties in the Chinese decision-making process. Before a decision is made, a Party-leader is consulted. The Party-leader is not a judge and does not attend the court hearings or hear the evidence. Yet, this individual provides the head-judge of the court with instructions on how the case should be adjudicated. The head-judge, in turn, passes this instruction on to “frontline judges,” or the judges who sit in court and are directly responsible for the case. The “frontline judges” are bound to follow the instruction of their superiors in the bureaucratic hierarchy.

**Legal Transplants: A Definition**

The term “legal transplant” describes the process of transferring laws and institutional structures across cultural or national borders (Gillespie 2006: 3). Legal transplants may consist of legal principles or an entire body of laws. They are adopted from abroad instead of developed locally. They may be forced upon the host country, or voluntarily adopted by it. They are not new; countries have borrowed from each other as early as the period of the Roman Empire. Legal transplants are “the most fertile source of development. Most changes in most systems are the result of borrowing” (Ewald 1995: 498). They are crucial to comparative legal studies, which have classified them in four typologies: (1) the cost-saving transplant, (2) the externally dictated transplant, (3) the entrepreneurial transplant, and (4) the legitimacy generating transplant (Miller 2003: 845). The due process transplants from the U.S. to China fit best under categories (3) and
(4). They were entrepreneurial, because China did not know what their consequences would be. Chinese lawmakers experimented, in the hope that the transplants would be successful. They are legitimacy generating because one of the reasons for their transplantation is that China wanted to become more stable in the eyes of the outside world. Although to a certain extent, the transplants were externally dictated, the effort to adopt them stemmed internally from China as well, which is why they do not completely conform to category (2).

The convergence theory of transplants suggests that less developed legal systems will evolve towards more mature legal systems (Gillespie 2006: 8). “The global diffusion of legal institutions is eroding the uniqueness of the nation-states,” leading to the convergence of national laws towards universal principles (Liu 2006: 78). The world is becoming more interconnected, thus, legal transplants are inevitable. China knew this, and decided to pursue this external path to revising its Criminal Law in 1996.

There are varying explanations for the successes and failures of transplants. Some scholars believe that legal transplants can produce divergence in legal practice. Others believe that there are different “degrees of transferability” (Gillespie 2006: 13). Because of differences in interpretation and implementation, legal transplants’ function in different societies might vary (Kanda and Milhaupt 2003: 887). Berkowitz, Pistor, and Richard claim that the only time legal transplants are effective is when they are familiar with and adaptable to the existing legal conditions of the countries they inhabit; therefore, the transplantation of Western law accelerates the development of a formal legal order, but also alters the existing legal order (Berkowitz, Pistor, and Richard 2003: 170).

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4 Universal principles are considered to be those espoused by the United Nations.
Due Process in the U.S.

Due process is the administration of equal laws according to established rules, which do not violate the fundamental principles of private right, by a competent tribunal having jurisdiction of the case and proceeding upon notice and hearing (McGehee 1906: 49). Due process is fundamental to U.S. law, appearing in both the Fifth and the Fourteenth Amendments. Under the Constitution, no one can be deprived of life, liberty, or property without due process of law. Due process of law is a protection of the individual against the “arbitrary” and “tyrannical” power of the state (McGehee 1906: 43). Arbitrary decisions by the State directed against individuals or classes do not adhere to the notion of due process, as one of its requirements is the equal application of the law to everyone (McGehee 1906: 61).

There are two types of due process: procedural and substantive. Procedural due process is concerned with whether, when taking away someone’s liberty, the government has followed the proper procedures. Substantive due process, on the other hand, examines whether the government’s deprivation of a person’s liberty is justified by a compelling reason (Chemerinsky 1999: 1501). Currently, both China and the U.S. emphasize the importance of procedural due process over substantive due process.

METHODOLOGY

My research employs a combination of explanatory and exploratory methods. I test the theories of path dependence and recursivity of law to ascertain the reasons for the transplanted laws, their effectiveness in practice, and the ways in which criminal defense attorneys perceive their legal environment and the work they do. I have used three main methods to achieve this goal. First, I analyze the formal written law and the incorporation
of the transplants in the 1996-1997 Criminal Codes. Exactly how and why were they adopted? Who was present at the convention where they were ratified? I examine which changes were lobbied for and which were actually adopted, and the reasons why.

Subsequently, I discuss the lawyer perjury cases, focusing on the Li Zhuang case and its implications in particular. I confine my research to this Article 306 case since Chinese defense attorneys consider cases prosecuted under this article as the biggest threat. Even the All China Lawyers Association has expressed concern over it (Cohen 2003: 245). On its face, Article 306 is fair and balanced. It advocates accountability of legal professionals to protect criminal defendants. However, in practice, it is used disproportionately to target criminal defense attorneys in the middle of conducting defense work. In the 5 years after the 1996-1997 criminal laws went into effect, 27 criminal defense attorneys were detained on perjury charges. There is no total estimate of these cases: some sources claim there have been as many as 500 (Bureau of Democracy, Human Rights, and Labor 2005). At the same time, the average number of criminal cases taken up by Chinese lawyers decreased from 2.64 in 1990 to 0.78 in 2000 (Liu and Halliday 2009: 932).

A lot has been written on the difficulties Chinese defense attorneys face. Human rights organizations have repeatedly reported on defense attorneys being physically attacked and threatened (Walking on Thin Ice 2008: 43). There are many extra-legal means the Chinese government and the prosecution use to impede the work of criminal defense attorneys. The “Barefoot Lawyer” Chen Guangcheng⁵ was repeatedly beaten and detained in his home. Lawyers are also informally threatened, for example by having

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⁵ Walking on Thin Ice 2008: 36.
their licenses suspended so they cannot practice law, or experiencing delayed approval of their licenses upon annual review (Walking on Thin Ice 2008: 41). However, what is interesting in court cases where defense attorneys are prosecuted is that legal agents and institutions are using the law to deter fellow legal agents. The Li Zhuang case is just one out of many lawyer prosecution cases where the “selective prosecution in retaliation for offending a prominent political figure through vigorous criminal defense work” (Cohen 2003: 245) is apparent.

There are several reasons why I analyze the Li Zhuang case, as opposed to other cases. The Li Zhuang case is the most recent and well-known case of a prosecuted attorney, meaning that there is a lot of news coverage (both print and video) available online. It is also the only case whose actual court decision (判决书, panjueshu) I was able to find. In short, using this case, as opposed to other cases, is based on convenience, not through a systematic court opinion analysis of all cases.

Finally, I have conducted 6 semi-structured, open-ended qualitative phone interviews with Chinese criminal defense attorneys. I used a snowball sample to locate them. I obtained the attorneys’ information from a contact in UC Berkeley who was willing to connect me to his colleagues.

Schutt suggests that true or false and yes or no questions should be avoided in survey research because this creates agreement bias (Schutt 2012: 238). To avoid this, I designed my interview questions to be open-ended. I specifically chose the order of the questions from more general, warm-up questions, which I predicted the attorneys would be more willing to answer and continuing to more serious questions. The last question serves as a conclusion and wrap-up of the phone interview, while also providing insights
about the future of the legal profession in China, as perceived by the legal professionals. There are several reasons why I decided to conduct phone interviews instead of e-mail or Internet surveys. First, phone interviews might seem faster to the respondents. Since the respondents are attorneys, their time is a precious asset. Second, I am wary of electronic communications with defense attorneys because of the Chinese government’s censorship of the Internet. Some of the questions I have asked may be considered sensitive and I therefore do not want to leave any electronic trail of the correspondence. For the same reason, I did not tape record my respondents’ answers. I took detailed notes during the interviews instead, and destroyed the notes after my thesis was complete. All of my respondents’ answers are anonymous so that they cannot be linked to their identities. The phone interviews were administered in Chinese. The Chinese translation of the interview protocol (see Appendix B) is equivalent to its English counterpart (see Appendix A), containing the same terms and sentence structure crucial to translated questionnaires (Schutt 2012: 253).

The Classical Theory of Path Dependence

Path dependence theory has three main components. The first is the proposition that history matters. In other words, history does not evolve in an unconditioned manner but is rather based on previous decisions, solutions, and random events. Initially, decisions are open to revision. After a certain point in time, though, decisions that have already been taken impose constraints on present and future choices. “As a result, decisions that have been taken in the past may increasingly amount to an imperative for the future course of action” (Sydow, Schreyogg, and Koch 2005: 6). The second component is the concept of increasing returns. This means that the decision-making
process is self-reinforcing: the increase of a particular variable leads to the further increase of the same variable. This leads to the final stage of path dependence, or the “lock-in” point. When a lock-in occurs, alternative decisions are no longer viable (Sydow, Schreyogg, and Koch 2005: 6). A path has emerged, and the process is less and less reversible. This process is depicted below in Figure 1.

![Figure 1: The formation of path dependence](image)

Path dependence theory explains how the enforcement of certain ingrained arrangements raises the cost of changing them over time (Prado and Trebilcock 2009: 350). It explains why institutions are self-reinforcing and why they are difficult to change. As people get more and more used to doing things in a certain way, the relative cost of exploring alternatives increases.

Potential exists for the unlocking of paths. If there is awareness that path dependence has occurred, activities and decisions that loosen it can be implemented. For example, if in the social context paths constitute self-reinforcing norms, they can be broken by changing the normative patterns, as illustrated below in Figure 2 (Sydow,

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Schreyogg, and Koch 2005: 25). Paths may also simply dissolve if they are no longer relevant.

Figure 2: The breaking of path dependence

I found a lot of literature on path dependence theory as applied to developing countries, but path dependence in China in particular was only briefly mentioned. Since “the path dependence literature provides a wealth of information on institutional change” (Prado and Trebilcock 2009: 358), it is important to use it when analyzing legal transplants. As path dependence determines the success or failure of legal transplants (Mattei 1997: 6), it is imperative to test its applicability for this project.

**Recursivity of Law**

Recursivity theory focuses on four issues of the lawmaking process. First, it pays close attention to the role of legal actors, such as lawyers, law pressers, and judges, both in the lawmaking and implementation stages. Second, it is a constitutive theory, emphasizing the meaning-making power of legal concepts. In lawmaking, the creators of new laws regularly encapsulate existing problems within transplanted laws and adapt them to the local context, thereby implementing the new laws in “amplified distorted, and creatively reinterpreted” ways (Halliday and Carruthers 2007: 1142). Third, institutions

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such as courts, administrative agencies, police authorities, and professional associations, also play an important role in recursivity theory because they shape the law by modifying it or creating their own version of it. Fourth, this theory is concerned with the law’s appearance in regulations, cases, statutes, and codes, and the way this appearance is initiated and implemented. Recursive episodes are “a significant site for the mediation of exchanges between the global and the national” (Halliday and Carruthers 2007: 1192).

Sida Liu describes the relation between law on the books and law in action as “a recursive social process” (Liu and Halliday 2009: 912). Law on the books is comprised of written rules. Law in action is the way law plays out in everyday life. Law in action cannot be understood without the law on the books (Halliday and Carruthers 2007: 1146). When applied to the Chinese legal system, some law in action scholars predict that law in action will eventually catch up to the standard expressed in law on the books. Others claim that the two are destined to remain drastically different because of the inherent problems in China’s criminal system, such as difference of enforcement on the local, province, and national levels, corruption, and judicial dependence, to name a few. They predict that the gap between law on the books and law in action will become wider in the short-term and harder to reconcile in the long-term (McConville 2011: 12-13).

The recursivity of law theorizes that legal change is not linear, but rather cycles between the law on the books and the law in action. It is a theory which aims to explain the globalization of law through (1) recursive cycles of lawmaking and law implementation at the national level, (2) iterative cycles of norm making at the global level and (3) at the crux of the national and global levels, where the national level influences the global level and the global level constrains it (Halliday and Carruthers
Recursive cycles are driven by four principles: (1) the indeterminacy of law when law is vague and inconsistent, leading to confusing interpretations, (2) contradictions within the law lead to instability as they attempt to pacify underlying conflicting ideologies, (3) diagnostic (proper framing of the problem) struggles lead to the asymmetric disbursement of power among legal actors, and (4) actor mismatch causes different actors to mobilize the law in different capacities (Halliday and Carruthers 2007: 1150; Liu and Halliday 2009: 914). They range from very simple cycles to very complex ones. The ambiguity entrenched within the law gives rise to reform. Reform through lawmaking is unstable, and therefore new cycles of attempted reforms are inescapable. Reform is usually caused by underlying problems, but actual changes precipitated through lawmaking occur because of some “triggering event” – a tragedy or a national scandal (Halliday and Carruthers 2007: 1147). Recursive cycles end when consensus is reached, underlying causes dissipate, or political attention shifts to another issue.

Below is a visual representation of recursivity theory. Law in action and law on

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Figure 3: Recursivity of Law

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8 Halliday and Carruthers 2007: 1147
the books are in a constant cycle of new revisions and new ways of implementation.

**FINDINGS**

Below I argue that based on my findings, there is a need for a hybrid theory of recursive path dependence, pointing out that recursivity theory and path dependence theory are insufficient explanations for the transplantation phenomenon in and of themselves. I prove this by first examining the written Criminal Law. Then, I go through the details of the Li Zhuang case. Afterwards, I summarize my qualitative interview results.

**Recursive Path Dependence**

Originally, I imagined that the phenomenon observed through the transplantation of due process from the U.S. to China would adhere to both the tenets of path dependence theory and recursivity theory. Prior to the 1996-1997 reforms, the Chinese legal and judicial systems were structured in a way that boxed out defense attorneys. After the reforms, this situation persisted. Defense attorneys had no forum to effectively defend their clients and faced a multitude of obstacles in attempting to do so, a major one being the threat of being prosecuted themselves. This was an institutional path dependence that was history-based and pre-conditioned to limit future reform. A lock-in point had been reached with regard to the manner defense attorneys were treated in China.

Recursivity theory applied as well. Chinese criminal law underwent periodic, recursive changes. In 1978-1979, 1996-1997, and recently in 2012-2013, Chinese criminal law underwent a set of recursive episodes. Even though the literature is mixed on whether the changes have been equivalent to progress, what remains true is that the calls for reform were answered and each time, changes were made to at least attempt to
improve the existing law and to lessen the gap between law on the books and law in action.

In other words, both theories are applicable, but neither of them explains the transplantation story fully. Thus, the need arose to consolidate those two theories into what I here call recursive path dependence. In other words, path dependence in China undergoes path-dependent recursive cycles. First, there is potential for change. This is the first stage of path dependence, and the first recursive episode. Subsequently, after the reforms to the written law have been made, a lock-in occurs. However, the gap between the law in action and law on the books gives rise to another round of recursive changes. The lock-in is removed, and there is a new recursive cycle. Under recursive path dependence, a lock-in point is much easier to unlock. Moreover, path dependence is embedded within recursivity, which accounts for the fact that even though recursive episodes occur, some laws are amended and others are not. For example, the defense attorney community opposed Article 306 and hoped for its abolishment, but this was not achieved.

1978-1979 Criminal Law

In July 1979, China received its first post-Mao Zedong Criminal Code. The law was not Western by any standard; Article 1 of the Code stated explicitly that the law conforms to Marxism-Leninism and Mao Zedong Thought (Ladany 1992: 82). At the time, implementation of the law was difficult because it was so new. China had to make the leap from having no law at all since it had been abolished to adopting a fresh legal system. In addition to its lack of familiarity, as time went on, underlying structural
challenges to the application of law surfaced, such as the corruption within the courts mentioned above.

According to recursivity theory, the 1978-1979 Criminal Law enactment in China serves as the first recursive episode. When the National People’s Congress enacted the 1979 Criminal Law, China’s recursive episode began, as “the whole legal system had to be rebuilt from scratch” (Liu and Halliday 2009: 922). Simultaneously, as per path-dependence, history mattered, as the 1979 Criminal Law was based on Soviet law. It included crimes by analogy, which were crimes that were not officially written in the formal law. People could be charged for these crimes if their behavior was similar enough to crimes that were part of the law on the books (Belkin 2000: 62). Another troubling provision of the original Criminal Law was shelter and investigation, by which the police could detain a suspect indefinitely while they figured out his or her identity (Belkin 2000: 62).

The National People’s Congress assigned the task of drafting the new law consisted of few legal scholars specializing in criminal law, as a lot of them had been banished to the rural outskirts during the Cultural Revolution. From the beginning, there was an actor mismatch between the lawmakers and those who would thereafter implement the new law. Defense attorneys were excluded from the decision-making process in criminal law from its onset. This recursive episode led to a temporary lock-in, until the lock-in was undone at the 1996-1997 recursive episode.

1996-1997 Due Process Transplants

The 1979 Criminal Code was one of the first seven major laws of post-Mao China. Even though it was a major legislation, it was short and ambiguous, and as a result
received severe criticism, particularly from Western human rights organizations (Vermeer and d’Hooghe 2002: 79). China began sending judges, and scholars to the West to study different legal systems. Chinese scholars acknowledged the flaws in the 1979 Criminal Code and started to argue for the incorporation of Western criminal procedure into Chinese law (Vermeer and d’Hooghe 2002: 80). By contrast, lawyers, the actual agents of implementation of the new criminal law, were almost entirely excluded from the discussion (Liu and Halliday 2009: 927). The motivation to reform the Code stemmed from both internal and external pressure on China to adopt the rule of law (Dobinson 2002: 19).

As per recursivity theory’s claim that “each subsequent act is substantially driven by the ineffectiveness of a previous enactment” (Halliday and Carruthers 2007: 1143), the Criminal Law and the Criminal Procedure Law of the People’s Republic of China underwent their first cycle of major revisions, and its second recursive episode, in 1996. Prolonged criticism led to the extensive revision of the Criminal Code in 1996 and 1997, when “due process” was added to the written law for the first time (Vermeer and d’Hooghe 2002: 77). The new Code adopted many Western legal ideas, such as early participation in the criminal process by defense attorneys, and elements of the adversarial (in contrast to the inquisitorial) system of justice (Vermeer and d’Hooghe 2002: 113).

However, the Chinese legal system continues to be composed of a high rate of confessions and a lack of witnesses at trial. Chinese law “appears to have a presumption in favor of restraining the liberty of anyone suspected of a crime” (Belkin 2000:12). This usually occurs through pre-trial detention, when the police have the right to decide whether to incarcerate or release the suspect. If a case is filed against the suspect, the
police can order the suspect to go to the police station for up to 12 hours of questioning. During this interrogation phase, a written statement must be prepared and signed by the suspect. It is at this stage of the process that the suspect can admit guilt and confesses to the professed crime. While forced confessions are illegal under formal law, according to Beklin’s research, “obtaining a confession [is] an important component of a criminal investigation” (Belkin 2000: 16). Even if a confession is illegally obtained, the court can still use it as evidence. After the 12 hours are over, the suspect is informed of his or her right to a legal representative. It is estimated that 90% of criminal suspects are arrested after the 12 hours of investigation (Belkin 2000: 13). After criminal prosecution is initiated, the prosecutor must examine the evidence and interrogate the suspect or his or her representative. If the prosecutor discovers that illegal methods or misconduct has occurred during the investigation, he or she can refer the behavior for criminal investigation.

During trial, both sides present their evidence. Obtaining live testimony from a witness is very difficult and not required for the criminal proceedings. Written witness statement may be read for the record even if the witness is not present and the defense has not had a chance to cross-examine the witness (Belkin 2000: 20). Article 47 of the 1996 Criminal Procedure Law states that witness testimony may be used in court only after a witness has been cross-examined in the courtroom by both parties; however, in practice, this is not the case.

At first glance, the 1996-1997 Criminal Law reforms seem progressive because they expand the role of defense attorneys. However, in practice, certain provisions of the Criminal Law are regressive and prevent lawyers from doing their work (Liu and
Halliday 2009: 927). For example, from 1997 to 2001, the police arrested 142 criminal defense lawyers, and 77 lawyers were illegally detained or beaten. While the 1996 Criminal Law gave lawyers more rights on paper, in practice, they found that they were facing even greater difficulties and personal danger for defending their clients. This has led to a diminishing number of Chinese attorneys who practice criminal law. Sida Liu’s work in an online lawyer forum shows that the persecution of lawyers is of the greatest concern to them, as the majority of messages posted on the forum centered around this topic. The threat of Articles 306 of the Criminal Law specifically “compelled [lawyers] to adopt defensive strategies to protect themselves at the expense of protecting their clients” (Liu and Halliday 2009: 932).

Lawyers are the ones who struggle with the implementation of law on a day-to-day basis. They exercise power through the control of legal meaning. According to legal transplants theory, the transplantation of law is based on the nature of the legal profession. “Lawyers (whether they act as legislators, judges, or scholars) constitute an elite law-making group within society; into their hands has been entrusted the task of interpreting, preserving, and developing the law” (Ewald 1995: 499). At times, lawyers themselves are agents of transplantation because they evoke foreign principles to lend their cases legitimacy.

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9 Article 306 states: “If, in the course of criminal procedures, any defender or agent ad litem destroys or forges evidence, assists the party concerned in destroying or forging evidence, threatens or lures witnesses to, contrary to the facts, change testimony or provide false evidence, he shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention. If the circumstances are serious, the offender shall be sentenced to fixed-term imprisonment of not less than three years and not more than seven years. Where the testimony or other evidence provided, produced or cited by a defender or an agent ad litem is substantiated but not forged intentionally, such a case shall not been deemed as a crime of forgery of evidence” (Asian Legal Information Institute).
China has a conviction rate of over 98% (Cohen 2003: 243). One of the reasons it is so high is because if a judge fails to convict a defendant, the judge must compensate him or her. A prosecutor may be required to do the same (Whitfort 2007: 150). With so many incentives to convict defendants, the prosecution of criminal defense attorneys who challenge the prosecutor’s and the court’s authority is no surprise. It is true that the cases of defense attorneys going on trial do not make up the majority of criminal cases in China. However, the fact that prosecutors are using the legal system to intimidate defense attorneys is a cause for concern.

Therefore, even though a recursive episode was taking place, certain features of the previous system remained intact, such as the de-emphasis of the opinion of defense lawyers. Instead, the power to shape the revisions was vested in high-ranking officials, police officers, and judges. There were many actor mismatch issues. There was also a struggle over diagnostic framing of the revised law. Different actors could not agree on what should be included and what should be struck down. After many debates between the various actors, only about 65% of the original draft of revisions resulted into new law (Liu and Halliday 2009: 928). The built-in compromises over the way the new law should appear also led to the inclusion of a lot of contradictions within the law, such as efficiency versus justice, combatting crime versus protecting defendants’ rights, etc.

After the reforms, a new lock-in occurred, and temporary path-dependence ensued anew. However, the inherent contradictions and compromises in the Criminal Law led to a new 2012-2013 recursive episode, as China once again attempted to lessen the gap between law in action and law on the books.
2012-2013 Criminal Procedural Law Revisions

On March 14, 2012, China’s National People’s Congress adopted more revisions to its Criminal Procedure Law. The first draft of the revised law caused fear that the law would expand the powers of the police and over 80,000 people responded to the Chinese government’s invitation for online comments. The most worrying “disappearance clause” was finally struck from the new law.

The law was expanded from 225 Articles to 290 Articles and for the first time, the language of human rights was included in the law. There were also revisions to how soon family members would be notified about a defendant’s detention. Articles 37 through 40 focus on the difficulties encountered by defense lawyers: face-to-face meetings with clients, consultation of case files, and evidence collection. The law strengthens due procedural rights for suspects and detainees. For example, they are entitled to be informed of the crime they are being held for and they have the right not to incriminate themselves. There is a specific ban on the use of torture and courts are asked not to consider illegally obtained evidence, such as coerced confessions (Andreasen and Dalton 2012).

However, the revisions have also been called “a symbolic victory” only (Andreasen and Dalton 2012). Some rights, such as the right to remain silent, were not achieved. More importantly, no changes were made to Articles 38 of the Criminal Procedure Law, nor Articles 306 and 307 of the 1996 Criminal Law despite many calls to abolish them. Defense attorneys remain subject to selective prosecution if they present evidence the prosecution disagrees with (LaFraniere 2012). The inability to strike lawyer prosecution once more signifies the semi-recursivity of path dependence. The lack of
change is path dependent because the legal institutions and actors are accustomed to a set, historical way of handling defense attorneys. Path dependence, or lack of change, has persisted even within a recursive episode. The interplay between the written law and its enforcement remains an issue, as “whether the police and prosecutors will abide by the new structures is another question entirely” (LaFraniere 2012).

The new law went into effect on January 1, 2013. Only time will tell how effective the new revisions are.

**Li Zhuang Case** (李庄案, Li Zhuang an)

The Li Zhuang case originated in Chongqing in 2007. At that time, the famous political leader Bo Xilai was appointed as the Chongqing Committee Secretary. In July, 2009, he began an intensive campaign to crackdown on organized crime in the area (Johnson 2011). The campaign was called “strike black” (打黑, da hei) and was aimed at gangs and the powerful officials who controlled them. It was reminiscent of the Cultural Revolution because of the Communist Party slogans Bo Xilai employed to promote it. Approximately 6,000 people were arrested (Huang 2012).

On November 20, 2009, Gong Gangmo became one of the individuals arrested under Bo Xilai’s campaign. He was charged with organizing a mafia-style gang, premeditated murder, and illegal gun and drug possession (Likun 2010). On November 22, 2009, Gong Gangmo’s wife called Li Zhuang, a lawyer at Beijing Kangda Law Firm, for help and he subsequently traveled from Beijing to Chongqing to defend the arrestee. When Li Zhuang first met his client, Gong Gangmo told him that the police had tortured him over the course of eight days and eight nights by having him suspended in the air and denying him food (Li Zhuang Judicial Opinion 2010). Gong had already confessed to
committing the crimes he was charged with in front of the police, but during Gong’s trial, Li Zhuang argued that the confession had been solicited through torture and was therefore illegal. Then, in 2009, Li was detained himself, on charges of fabricating evidence and witness tampering in violation of Article 306 of China’s Criminal Law. Gong had told the police that Li Zhuang was responsible for making him change his confession and that he had not actually been tortured (Yu 2012).

According to the judicial opinion of the case, Li Zhuang was determined to exonerate his client at all costs, and thereby forced Gong to say he was tortured in court (Li Zhuang Judicial Opinion 2010). By committing this act, the defense lawyer had effectively suborned perjury. On December 10, 2009, Gong Gangmo reported Li Zhuang’s behavior to the police. Li was detained two days later. He denied all charges, claiming that Gong Gangmo had told him he was tortured on his own, without ever having been coerced. During Li Zhuang’s trial, the Chongqing prosecutor provided evidence that Gong Gangmo was healthy and had no marks or bruises while he was imprisoned. Li Zhuang’s defense team mentioned that Li Zhuang had requested medical clearance to ascertain Gong’s scars during Gong’s trial, but was repeatedly denied. Although the Chongqing court agreed with the prosecutor that the police had respected Gong’s rights and routine inspection had proven that he was not harmed while in custody, there was a conflicting piece of evidence from a Chongqing forensic investigator, who concluded that Gong Gangmo’s left wrist had different pigmentation and a scar that could have been caused by a blunt object (Li Zhuang Judicial Opinion 2010). The court’s response to this evidence was vague; it simply claimed that the forensics report could not
prove that Gong was tortured, especially since Gong himself already confessed that he was not.

Li’s trial did not have witnesses. There were only witness statements read aloud for him and his defense team to hear. The witness statements came from suspected criminals under detention at the time (Eberlein 2010). His lawyers were barred from cross-examination after they requested it (Lim 2012). Li Zhuang’s defense attorneys also pointed to several Criminal Procedure Law violations that the prosecution had committed in indicting Li Zhuang. They claimed that Li Zhuang was simply doing his job in defending Gong Gangmo and had not offered him any illegal help, nor solicited him to perjure himself. The police’s own transcripts showed that Gong Gangmo was tortured, and Gong Gangmo admitted so himself first when Li Zhuang interviewed him. Gong Gang Mo’s wrist scars were still visible (Li Zhuang Judicial Opinion 2010).

The court concluded that the facts of the crime Li committed were clear and that there was ample evidence pointing towards his guilt. Li Zhuang was deemed guilty of suborning perjury and was sentenced to 2 years and 6 months. In February, 2010, Gong Gangmo was sentenced to life imprisonment, but the crime he was charged with usually receives the death penalty in China. Was Li Zhuang framed by Gong Gangmo just so that Gong Gangmo would keep his life? After Li Zhuang’s trial, Gong Gangmo told the media that he had turned on Li Zhuang to avoid the death penalty (Huang 2012).

Even though Li Zhuang had claimed he was innocent all throughout his trial, upon appeal, all of a sudden he admitted that he was guilty, claiming that he had stained the legal profession, and that he would never retract his confession (Branigan 2010). After obtaining his confession, the court reduced Li Zhuang’s sentence to 18 months for co-
operation. Upon discovering that he would still serve time, Li Zhuang grabbed a microphone and announced that the authorities had promised him freedom in exchange for his confession (Branigan 2010). Gao Zicheng, Li Zhuang’s lawyer, later affirmed Li Zhuang had told him this in front of the media.

In 2011, when Li Zhuang was nearly done serving his 18-month sentence, the Chongqing prosecutors charged him with another count of subornation of perjury for a 2008 Shanghai case. This time, the prosecutors claimed, Li Zhuang had forced Xu Lijun, his client at the time, to change her testimony. The case was abruptly dismissed 3 minutes into trial because of insufficient evidence (Prosecutors drop charges against jailed Beijing lawyer 2011). Li Zhuang was released in June 2011.

The political context of the Gong Gangmo and Li Zhuang trials was turbulent. Gong Gangmo was a high-profile defendant. Li Zhuang was trying to prove his innocence, thereby directly undermining Bo Xilai’s campaign against organized crime. The campaign itself received mixed feedback from the community. Applauded on the one hand for making the city safer, it was also deemed a gross violation of due process. He Weifang, a prominent Peking University professor said, “The Li Zhuang case is so important because it is an indicator of how far China has come to legal reform” (Johnson 2011). Many other Chinese defense attorneys questioned the viability of due process (Heyan 2012).

Bo Xilai’s anti-cime campaign was stained by accounts of brutal executions, apparent violations of law, and corruption (Disturbing Details of Ousted Leader Bo Xilai’s Brutal ‘Strike Black’ Campaign 2012). In the words of Li Zhuang himself, “The anti-mafia campaign in Chongqing wasn’t based on the rule of law… it was an anti-mafia
campaign for political purposes. It overrode the law, it ignored basic legal procedure and it even violated basic human morality” (Lim 2012). Bo Xilai fell out of favor with the Chinese Communist Party in 2012, when the former Chongqing police chief, Wang Lijun, reported that Bo Xilai’s wife, Gu Kailai, was a suspect in the murder of British businessman Neil Heywood (Chi-yuk 2013). Bo Xilai was later removed from Chongqing in March 2012, and suspended from the politburo in April 2012.

On November 2, 2012, Li Zhuang announced that he will represent Gong Gangmo at his appeal, to clear both of their names (Heyan 2012). This is a questionable decision, considering Gong Gangmo’s prior behavior, but Li Zhuang believes that he needs to continue defending his former client and advance the implementation of due process rights in China.

**Qualitative Interviews Results**

Prior to conducting my qualitative phone interviews, I found conflicting research on the role of attorneys and the ways they view themselves. According to Brown, the 1997 legal transplants have transformed the role of attorneys. Traditionally, the attorneys’ role was static, but has hence become more dynamic (Brown 1997: 24). Sida Liu’s research, on the other hand, claims that even though China’s criminal code has undergone multiple reforms, the conditions of criminal defense attorneys’ work have not been improved (Liu 2009: 912). Previous empirical research has found that criminal defense attorneys are not satisfied with their work conditions because the Criminal Law does not allow them to properly defend their clients. My goal in speaking directly to defense attorneys was to decipher the way they viewed themselves in the context of their work, to
see what challenges they face, and to parse out the challenges as either specific to the transplanted law or not.

Four of the 6 attorneys I interviewed worked for a big corporate law firm, while 2 worked for smaller firms. Criminal defendants were not common clients for either type of lawyers and most of the work they did on a daily basis did not involve criminal proceedings. In other words, these attorneys were not full-time criminal defense attorneys; rather, criminal law work was only one component of the many types of law they dealt with.

The minimum number of clients the 6 attorneys I interviewed serviced per month was 1, while the maximum was 10. Most attorneys defended 1-2 clients per month, while only one attorney defended 10 per month. Their clients were mostly city dwellers and migrant workers, as foreign clients were very rare. In all of the attorneys’ experience, the most common crime was theft and bribery. In the context of the attorneys who worked for the bigger corporate law firm, theft and bribery were considered white-collar crimes.

When asked what the biggest challenge in defending his clients was, one attorney offered an example of a case he worked on where the suspect’s father did not know that his son was in police custody until the day before the son’s trial. This was challenging for the attorney and for his client, but the Chinese authorities did not address did problem. The attorney told me that, “This is common in China.” Other challenges the same attorney mentioned were evidence collection, and having the appropriate space and environment to be able to defend a client in. He emphasized the need for such an environment, saying that it needed to be “safe” for attorneys to comfortably practice criminal law. He mentioned that this was impossible under the present Chinese political
conditions. The other attorneys listed evidence collection and access to case files as their most common challenges in practicing criminal law as well.

The interviewees’ responses to whether Article 306 lawyer perjury cases affected their own work were mixed. Two attorneys replied that they did not. I am not sure if they were being entirely truthful when they said so, because they both paused for a considerable length of time before answering in the negative. The other 4 attorneys gave me a cautious, affirmative answer. One female attorney, in particular, spoke out firmly against Article 306, stating that, “When something like that happens, when a lawyer is imprisoned in that way, it creates fear for the entire legal community... Of course, this needs to change, and Article 306 needs to be amended so that it doesn’t target us. Yes, of course it affects my work.”

All of the attorneys were optimistic about the 2012-2013 revisions to the Criminal Procedure Law. One male attorney told me that, “Since this is the Criminal Procedural Law, it will have a tangible impact on my work.” However, even though they all sounded hopeful about the new revisions, all of the interviewees confessed that they hope to migrate into another field of law in the future. Two of them are already transitioning into doing corporate and business law only. When asked why, they told me that they are no longer interested in doing criminal law, and that business law provides more opportunities, both professionally and financially.

Liu claims that lawyers do not view themselves as powerful actors in China’s criminal justice system, and rather as “hapless victims” (Liu 2009: 913). The 6 attorneys I interviewed conformed to Liu’s view. They were cautious in their answers, and, though hopeful about the future of criminal law, seemed eager to stop practicing it. When fellow
attorneys are being prosecuted around them, they do not feel safe to practice criminal
law. They say that fundamental change is needed to make the environment more open for
them, yet they themselves do not feel adequate to make the change. My interviews with
these attorneys portray the actor mismatch issues, and the exclusion of defense attorneys
from the law-making process, proposed by recursive path dependence theory.

LIMITATIONS AND FUTURE RESEARCH

The most basic limitation of this study is, of course, time. With only a year to
prepare and research, there are a lot of facets that have been left out because in-depth
discussion is impossible given the time frame. Where applicable, I have done my best to
at least include a summary of the relevant information.

Researching China in the U.S. is a very different process than researching China
in China. It is very difficult to do this research without personal connections (关系,
guanxi), and I am extremely grateful to the individual who gave me access to the Chinese
lawyers’ contact information. My only way of interviewing Chinese attorneys was over
the phone, which itself is not as ideal as interviewing them in person. Furthermore, the
sampling method I used was not randomized, but rather a snowball sample, which is not
representative of the opinions and feelings of all Chinese lawyers. Snowball sampling can
produce mixed results and may be unreliable, which is why there is a need for a bigger,
randomized sample.

I faced the greatest limitation when discussing the Article 306 lawyer perjury
cases. I would have liked to examine more cases in depth. The Chinese government has
not yet released the official number of cases where lawyers have been prosecuted under
perjury charges. Sources are conflicted as to what that number is, with ranges anywhere
from 100 to 500 cases (Bureau of Democracy, Human Rights, and Labor 2005). It is also important to note that these cases do not comprise the majority of Chinese criminal cases. They are a unique phenomenon that deserves more in-depth research. Within the period of 1997 to 2007, there were approximately 108 criminal defense attorneys prosecuted for violation of Article 306. Lawyers have been found guilty in 32 of these cases. The majority of the cases against the lawyers were dismissed (Lawyer Perjury: High Wrongful Conviction Rate). There is little information on the cases that went to trial, and even less information about the cases that were dismissed. There is therefore no way to talk about the frequency of adjudication and dismissal of these cases. This is why here I focus only on the Li Zhuang case, though I have no way of knowing if it is representative of all lawyer perjury cases.

I believe that given more time, more resources, and more connections to Chinese lawyers, judges, and government officials, future research can expand on this thesis to make the findings more generalizable and complete.

CONCLUSION

In 1978-1979, China expressed a renewed commitment to criminal law by establishing its first Criminal Codes since the pre-Mao Zedong era. The issues within these Codes became salient soon thereafter, leading to their revisions in 1996-1997. During that cycle of revisions, Western due process rhetoric was transplanted and incorporated into Chinese criminal law for the first time. Recent revisions to the Criminal Procedure Code occurred in 2012-2013.

Originally starting off by testing the recursivity and path dependence theories separately, in this thesis I have argued for their consolidation into the hybrid I call
recursive path dependence. Simply stated, the recursive cycles of lawmaking in China with regards to due process transplantation have been constrained by the country’s history and perception of criminal defense attorneys, which in turn has impacted the effectiveness of the laws. Since the 1996-1997 laws, many cases of defense attorneys prosecuted for perjury under Article 306 have surfaced. Here, I have discussed one of the greater-known cases, that of Li Zhuang, which partly demonstrates the convolution of the legal process in China. In addition to examining the formal written law and the Li Zhuang case, I have also spoken with 6 criminal defense attorneys in order to discover how they view the work they do, as the frontline agents of implementation of the legal transplants. The attorneys themselves, though optimistic about the 2012-2013 revisions, did not seem to desire a career in criminal law. They were not empowered or excited about their work, and did not feel that they could affect change in China’s criminal justice system. These results demonstrate that the recursive path dependent changes in China’s Criminal Law have been largely symbolic. There are structural issues within Chinese courts, Chinese law enforcement, and the Chinese government that need to be addressed before the written revisions in the Criminal Codes can be effectively implemented in practice.
WORKS CITED


APPENDIX A

Interview Protocol (English)

Mr. X/Mrs. X, my name is Yana Pavlova. I am a student at the University of California, Berkeley and I am writing an honors thesis on Chinese criminal law. “Tell them how you got their information and how you identified them as someone you are interested in speaking with.” I am wondering if it’s possible to take half an hour of your time to ask you some questions about your work as a criminal defense attorney? Everything you tell me will remain anonymous and confidential. Your name or personal information will not be used. Thank you.

1. Can you tell me a little bit about yourself? Why did you decide to practice criminal law? For how long have you been a practicing criminal defense attorney? Did you work anywhere else prior to becoming a criminal defense attorney?

2. How many clients would you say you serve per month?

3. What kinds of clients do you serve (ex: clients born in the city, migrant workers, foreigners)?

4. What kinds of criminal offenses would you say are most common, in your experience? Most rare?
5. Can you tell me about a particular case that you worked on that stood out to you? What was special about the case?

6. What do you find challenging about defending clients in the current legal system? Why do you think this is the case?

7. Have you heard about criminal defense attorneys being prosecuted under Article 306 of the Criminal Law (for example, the Li Zhuang case)? What is your view on these types of cases? Have they had an effect on your own work as a defense attorney?

8. Revisions to the Criminal Procedure Law are scheduled to take effect in January 2013. In your opinion, will these revisions affect the way you practice law and defend clients?

9. In the future, do you plan to practice a different type of law, other than criminal law? Why or why not?

Those were all of my questions. Thank you for taking the time to participate in my research. I will be happy to send you a copy of my thesis project once I have finished writing it. Is there anything else that you want to tell me?

Thank you. Goodbye.
APPENDIX B

采访提要 (中文)

X 先生/X 女士，您好。我叫罗雅娜。我是一名伯克利大学的研究生。我正在在写跟中国刑法有关的论文。《告诉他们您是如何得到他们的信息以及为何采访他们》我可不可以耽误您一些宝贵的时间，问一些关于您工作的事情？您的回答我都会保密的。我不会公开您的名字或个人信息。非常感谢您的帮助！

1. 您可不可以介绍一下您自己？您为什么决定要做跟刑法有关的工作？您当刑事辩护律师有多长时间了？在成为一位刑事辩护律师以前，有没有在别的地方工作？

2. 您每个月大概会有多少客户？

3. 您为什么样的客户提供服务？（例如：城市市民，农民工，外国人）？

4. 在您的工作经历中，什么样的刑事罪行是最常见的？什么样的是最少见的？

5. 在您的从业经历中最特别的案件是什么？您为什么认为是最特别的？

6. 在中国目前的刑法制度下，您面临的最大挑战是什么？您怎么面对这一挑战？您觉得为客户辩护的条件是什么？为什么？
7. 有一些中国刑事辩护律师根据“刑法”第 306 条（比如说，李庄案）被告上法庭。您听说过吗？您对这些案件有什么看法？您觉得这些案件影响了您自己的工作吗？

8. 中国的刑事诉讼法修订案将于 2013 年 1 月生效。对您来说，这些修改会不会影响您以及您为客户所提供辩护的方式？

9. 在未来，除了刑法以外，您还打算从事不同类型的法律工作吗？为什么或者为什么不呢？

那是我所有的问题。感谢您抽出时间来参加我的研究。写完了论文之后，我可以发给您看看。有没有什么要告诉我吗？

谢谢您。再见。