

Recursivity in Legal Change: Lawyers and Reforms of China's Criminal Procedure Law

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This article employs a new framework for legal change, the recursivity of law, to explain why China's criminal procedure law has cycled through numerous reforms between 1979 and 2008 without improving the conditions of lawyers' criminal defense work. The authors argue that Chinese lawyers' difficulties in criminal defense have deep roots in the recursive nature of the criminal procedure reforms. In particular, those difficulties were produced by interactions of the four mechanisms of recursivity (indeterminacy of law, contradictions, diagnostic struggles, and actor mismatch) in both lawmaking and implementation. The empirical analysis shows that these mechanisms are linked in pairs and in sequence. This logic of change offers an integrated interdisciplinary approach to the enactment and implementation of law in other times, places, and areas of law.

INTRODUCTION

Criminal procedure law provides a sensitive indicator for observing struggles surrounding advances toward or retreats from political liberalism (Halliday and Karpik 1997; Halliday, Karpik, and Feeley 2007). The reforms

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of Criminal Procedure Law (CPL) in China, which began with the 1979 CPL and continued through the 1996 CPL to the third round of statutory reforms at present, appear to signal a “great leap forward” toward a liberal criminal justice system that emphasizes the rule of law and proceduralism. Nevertheless, the ability of Chinese lawyers to defend criminal suspects and defendants remains limited in practice. They encounter difficulties in every step of the criminal process and often face daunting personal danger in daily work.

Why has China’s CPL cycled through numerous reforms between 1979 and 2008 without improving the conditions of lawyers’ criminal defense work? This puzzling development of criminal procedure law and the legal profession in contemporary China enables us to both test the salience of and elaborate a new framework for legal change, namely, the recursivity of law.

Originating from research on global commercial lawmaking (Carruthers and Halliday 1998; Halliday and Carruthers 2007, 2009), the recursivity of law is a theoretical effort to overcome the disciplinary balkanization of approaches to legal change and to rethink the relationship between law in action and law in the books as a recursive social process. In this article we not only test the value of the recursivity framework in a new research site, namely, criminal procedure law in China, but also employ CPL reforms in China to develop our sociolegal framework to legal change more generally. In particular, we seek to use the recursivity of law to understand (1) the embeddedness of domestic lawmaking in the global context from which it is frequently detached in existing theories, (2) the struggles for a redistribution of power between lawyers and other actors in the criminal justice system that occur in both lawmaking and practice, and (3) the deeper contradictions in the Chinese Party-state between modernizing the legal and political systems and maintaining coercive controls of society (Shirk 2007).

The value of criminal procedure law for sociolegal analysis can be observed through a narrow lens, namely, the ability of criminal defense lawyers to provide effective representation of detainees and defendants. In this one element of criminal procedure can be reached the theory of legal change and the constitution of power in political society, as well as the rise of professions and the elaboration of citizenship. Previous empirical research in China finds that criminal defense lawyers complain vociferously about their conditions of practice (Halliday and Liu 2007). Most notably, they maintain that the CPL does not permit them to mount adequate defenses of detainees and defendants (Lawyers Committee for Human Rights 1993; Human Rights in China 2001; Lu and Miethe 2002; Yu 2002; Sheng 2003, 2004; Fang 2005; Human Rights Watch 2008). No existing study, however, has integrated the legislative, structural, and political roots of Chinese lawyers’ plight into a coherent theoretical framework.

In this article, we focus on the issue of lawyers’ representation of criminal suspects and defendants in the lawmaking and implementation of China’s CPL since its enactment in 1979. We start from an overview of the theory of

recursivity in legal change and brief notes on data and methods. Then we proceed to the empirical analysis of the three cycles of CPL reforms and their consequences for lawyers' criminal defense work. We argue that Chinese lawyers' difficulties in criminal defense have deep roots in the recursive cycles of the CPL. In particular, they were produced by the interactions of four mechanisms of recursivity (indeterminacy of law, contradictions, diagnostic struggles, and actor mismatch) in both lawmaking and implementation. In this ongoing process of legal change, it remains to be seen whether lawyers can change the dynamics of recursivity and turn themselves from hapless victims to powerful actors in China's criminal justice system.

THE RECURSIVITY OF LAW

Over several decades, theories of legal change have become fragmented into discrete disciplinary approaches, scattered across a variety of actors and located in differing sites of action. Law and society researchers have made a central *problematique* of the gap between enactment of law and law in action, but they have effectively ceded statutory lawmaking to political scientists (Sutton 2001). By contrast, political scientists have attended in great detail and with eclectic theories to statutory lawmaking but have given much less attention to legal change that occurs beyond enactment or through courts and regulatory agencies (Streeck and Thelen 2005), although there are increasing prospects of an intersection with law and society's emphasis on implementation (Mertha 2005). Within the legal academy, and often in the social sciences, legislative histories of a particular statute frequently fail to place it in any kind of historical institutional context. And a certain decontextualization can also be observed in many studies that treat national lawmaking as if it could be detached from its global context. As a result, explanations of legal change have lost the forest for the trees.

The theoretical framework of the recursivity of law has been developed to reverse this balkanization and bring the distinctive merits of each discipline back into mutual engagement (Carruthers and Halliday 1998; Halliday and Carruthers 2007, 2009). A recursive approach to legal change does not require that we reject central concepts, orientations, or theories of the disciplines that converge on legal change. We do not seek to displace the sociology of law's advances on the contingencies of implementation, the theories of interests and institutional change in politics, or legislative histories in legal scholarship. Rather, we intend to bring them back into creative conversation, to reverse an excessive specialization that fragments a holistic theory of legal change. The recursivity framework offers precisely such a theoretical site for intellectual comity.

The recursivity of law theory maintains that legal change rarely occurs in a linear progressive manner, but more often cycles between the establishment

of formal law in the books (statutes, regulations, cases, etc.) and the implementation of law in action. In most countries, there are three main sites of lawmaking: legislatures (often multiple chambers at national and local levels), courts (always varying by jurisdiction and hierarchical level), and administrative or executive agencies (at all levels of governance from national, state or provincial, to local). The implementation of law, on the other hand, includes but is not limited to the interpretations of statutes, professional tasks of law practitioners in their workplaces, and the interactions between law practitioners/implementing agencies and lay parties at both the individual and the collective levels.

Recursive cycles of legal change are driven by four mechanisms: indeterminacy of law, contradictions, diagnostic struggles, and actor mismatch.

- (1) The *indeterminacy of law* occurs when lawmaking is vague, ambiguous, and inconsistent, or when agencies that implement the law interpret it differently or compete with one another by issuing conflicting regulations, cases, or statutes (Pistor and Xu 2003). Indeterminacy often stimulates further lawmaking to reduce confusion, increase certainty, and establish predictability.
- (2) *Contradictions* frequently are internalized in laws (Chambliss and Zatz 1993; Grattet 1993; Clemens and Cook 1999). Ideological contradictions occur when lawmakers seek simultaneously to satisfy competing ideologies in the same law without resolving the contradiction to the mutual satisfaction of the conflicting parties to lawmaking. Structural contradictions occur when various organizational segments of the state use their organizations to advance conflicting values and interests. Settlements of contradictions in lawmaking tend to be incomplete and unstable, and they provoke further rounds of lawmaking and implementation until a relatively stable settlement is reached.
- (3) Lawmaking and implementation invariably proceed through *diagnostic struggles* among actors with conflicts of interest. From studies of political agenda-setting (Kingdon 1995) to professions (Abbott 1988), there is a consistent appreciation that diagnosis, or the social framing of a problem (Janowitz 1966; Goffman 1974), is a necessary condition of a prescriptive response. In both lawmaking and implementation, actors compete with each other in order to legitimate their diagnoses through official reports, Congressional inquiries, Royal Commissions, scholarly reports, or the evaluations of private groups. Cycles of lawmaking occur as competing diagnoses are advanced by contesting parties to legal change.
- (4) *Actor mismatch* highlights the frequently ignored fact that legal change occurs in two loci: formal enactment and practical implementation. Effective legal change is unlikely to occur if there is a significant asymmetry between the class of actors who enact a law and those who implement it. In either sphere, actors may mobilize different forms of power. If, for instance, actors in practice are excluded from formal lawmaking, they frequently use their privileged position as agents of implementation to frustrate, reject, ignore, or distort the intentions of the lawmakers.

In a global context, national lawmaking increasingly involves an engagement with exogenous actors (e.g., other nation-states, epistemic communities, international organizations) and social structures (e.g., networks of professionals, transnational corporations, scholarly networks) that advance global or sectional norms, best practices, standards, and principles that are intended to constrain nation-states (Halliday and Osinsky 2006). They propagate these norms through a variety of institutional mechanisms (e.g., coercion, modeling, capacity building) (see DiMaggio and Powell 1983, 1991; Braithwaite and Drahos 2000) that inevitably lead to a kind of negotiation between and among global and local actors (Carruthers and Halliday 2006). There is a contingent relationship between actors and forms of leverage.

The CPL in China offers a valuable research site precisely because statutory law is now in the third of three major iterations of reform since 1979, with many smaller cycles of regulatory and interpretive law revisions in between. With this contemporary case of radical legal change, we seek to advance the theory of recursivity by demonstrating that its four mechanisms operate not independently but in contingent relationships. In other words, indeterminacy, contradictions, diagnostic struggles, and actor mismatch can be shown to have systematic relations with each other and be ordered into a dynamic sequence. The empirical basis of our findings in Chinese criminal procedure law thereby establishes a set of conclusions and propositions about the dynamics of legal change in other areas of law in China and elsewhere.

DATA AND METHODS

Research on lawmaking in authoritarian regimes faces peculiar difficulties. Ideally, a research design on enactment would include primary documents and interviews with key lawmakers and interest groups, while research on implementation requires data from practitioners. In regimes where secrecy continues to pervade much lawmaking, and state authorities, particularly the police, are wary of investigators, researchers must find proxies. We do so by relying on a triangulation of primary sources: (1) archival materials on the historical development of China's CPL in legislation and practice; (2) online ethnographic data from a nationwide Internet forum hosted by the official All-China Lawyers Association; and (3) in-depth interviews with lawmakers and practitioners in the criminal justice system, including lawyers, police, procurators, judges, and legal academics.

First, we collected extensive archival materials that are available from each of the primary actors in the criminal justice system. An indirect but effective way to learn about the opinions and experiences, agreements and disagreements of these actors is to analyze their exchanges with each other in their in-house organs. We systematically collected data from the journals of the police, procuracy, judiciary, and lawyers' associations from 1979 to 2005

(see Newspaper and Periodical Reference List). Articles, columns, and debates provide institutional, and sometimes individual, views of legislation and everyday practice from their respective perspectives, sometimes in engagement with each other. In addition, we reviewed media reports and scholarly writings in Chinese and English. We also collected all the formal laws (e.g., statutes, judicial and administrative interpretations, notices, regulations) and government documents on criminal procedure and lawyer representation since 1979, as well as relevant declarations, covenants, and principles of the United Nations.

Second, based on the senior author's three-year online ethnographic work, we have collected and analyzed a large number of written discussions from the official Internet forum of the All-China Lawyers Association (ACLA) (<http://www.acla.org.cn>) regarding the practice of Chinese criminal defense lawyers. The forum was established in August 2002 and has developed into a large Internet community of lawyers, law students, and other legal professionals in China. By March 2005, it had over 34,000 registered users from every province of China (including Tibet and Inner Mongolia) who had posted 271,925 messages on 25 discussion boards. Messages relating to criminal procedure law and the work of defense lawyers have been among the central topics and most heavily trafficked discussion sites since the beginning of the forum.¹ As a long-time participant and a discussion board manager, the senior author collected 60 threads of messages on criminal defense for data analysis from these online discussions.² Through this unique data source we can overhear, without contamination by outside observers, the spontaneous exchanges among lawyers about their problems in the implementation of the CPL that purport to institutionalize basic elements of political liberalism. This also enables us to contrast the "public voice" of the bar association journals with the "private voices" of its members.³

1. Other topics for each discussion board include work experiences in different legal fields, consulting services to the public, professional issues in lawyers' practice, the judicial exam, local lawyer communities, and general comments on the rule of law.

2. Among the 60 threads, there are 9 threads (77 messages) on the difficulty in meeting criminal suspects, 12 threads (118 messages) on the difficulty in collecting evidence and cross-examining witnesses at trial, 4 threads (51 messages) on the difficulty in getting access to case files, and 22 threads (382 messages) on the persecution of defense lawyers. In particular, a post of the complete notes of a 2003 National People's Congress (NPC) symposium on CPL revision on this forum has greatly facilitated our interviews and later research work.

3. Since Internet forums are closely censored in China, it is reasonable to reflect on the amount of sample bias in opinions, whether from self-censorship (i.e., certain kinds of views are simply not expressed because they might lead to sanctions) or official censorship (e.g., from the forum administrators). We can gauge official censorship because we have private access to the "recycle bin" of the forum, which contains messages that are deleted by the forum administrators. The data in the censored files and the forthrightness of opinion in the forum indicate that official censorship and even self-censorship is surprisingly restrained. A detailed content analysis using the same data source for parallel research on criminal defense practice (Halliday and Liu 2007) shows that lawyers on the forum spoke openly and forthrightly, and often very

Third, we conducted two rounds of interviews with sixty-six law professors, bar association leaders, criminal defense lawyers, judges, and procurators in five major Chinese cities in September 2005 and October 2007. Several of our interviewees played important roles in the lawmaking and implementation of the 1996 CPL and continue their involvement in the current CPL reforms. For example, all the law professors we interviewed directly participated in the 1996 and/or the current CPL revision, and we also interviewed two of the three lawyer representatives of the ACLA in the current revision. Furthermore, we interviewed senior officials at the Supreme People's Procuratorcy, as well as a senior law professor in Beijing who is closely linked to all levels of the public security agency, since it is particularly difficult to interview public security officials directly. For additional insights on conditions in practice, we interviewed local judges, procurators, and criminal defense lawyers in Beijing, Xi'an, Shanghai, Hangzhou, and Chengdu.⁴ Overall, the interviews provide both individual viewpoints of practitioners on criminal procedure reform and information on the collective ideologies of the institutions to which they belong.

Altogether, these three data sources enable us to approach both the problems and practices of legal enactment and legal implementation from complementary perspectives—from public and private sources, from institutional and individual points of view, and from domestic and international orientations.⁵

GLOBAL NORMS AND NATIONAL CONTEXTS

Cycles of domestic law reform in the contemporary world invariably are influenced in some degree by global contexts. A recursive theory of legal change must map the array of actors and the global norms that directly

critically, about almost every aspect of legal practice, the courts, the police, the concentration of political power, and the absence of rule of law or democracy.

4. For reasons widely known, it was impossible for us to get direct access to police officers. We sought to compensate for this limitation by collecting reports published by police themselves in their house publications, from opinions of their spokesmen delivered at forums (e.g., the NPC Legal Work Committee), from lawyers and judges who deal with police, and from sources close to the police.

5. In the empirical analysis, we use different codes for the citation and quotation from the three data sources. The interviews are coded in the form of "B0501," in which "B" refers to the location of the interview ("B" for Beijing, "C" for Chengdu, "H" for Hangzhou, "S" for Shanghai, "X" is for Xi'an); "05" refers to the year of the interview; and "01" refers to the number of the interview under the time and location. The archival data are coded in the form of "*Chinese Lawyers*, 2002_07," in which "*Chinese Lawyers*" is the English title of the newspaper or journal, and "2002_07" is the year (e.g., 2002) and issue (e.g., 07) of the publication. The forum data are coded in the form of "F#431895," in which "F" refers to the ACLA forum, and "#431895" refers to the number of the first message in a discussion thread as it appears on the forum.

influenced lawmakers and law implementers (Halliday and Osinsky 2006). These norms frame the domestic debate because, since the late 1970s, China's leaders and lawmakers have been obliged to position themselves between their domestic challenges of social stability and China's presentation of self to the rest of the world. As a result, criminal procedure reforms, as in many other areas of Chinese law, have become experimental sites for this large project of state-led legal transplantation, which has often produced poorly implemented legal institutions with merely symbolic value (Liu 2006, 2008).

The global norms in the area of criminal procedure have four major sources: (1) international governance bodies, such as the United Nations, which have international legitimacy as a transnational deliberative assembly and to whose norms China has officially subscribed; (2) norms of Western legal liberalism, embodied in major legal families of the common and civil law, and institutionalized in national criminal justice systems; these find their way into the Chinese society via intergovernmental exchanges, technical assistance, and foreign aid; (3) epistemic communities of scholars, lawyers, judges, and other legal professionals who attend international conferences and symposiums, who study overseas, and who belong to international professional associations; and (4) the international media, which often promote ideas of jury trial, cross-examination in courtroom drama, etc., and influence public opinion.

Since the global norms in the areas of criminal procedure were mostly derived from the Western legal traditions, they place paramount importance on the protection of civil and political rights, particularly the procedural rights of the detainees and their assistance by legal counsel. Since the Universal Declaration of Human Rights was proclaimed in 1948, these norms have been embodied and institutionalized in a series of UN declarations, covenants, and principles.⁶

By the early 1990s, especially after the United Nations adopted the Basic Principles on the Role of Lawyers in 1990, global norms on lawyer representation of criminal suspects and defendants had been institutionalized in a mature form.⁷ These institutions provide strong normative impetus for the

6. These UN documents include the International Covenant on Civil and Political Rights (1966); the International Covenant on Economic, Social, and Cultural Rights (1966); Code of Conduct for Law Enforcement Officials (1979); Convention against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment (1984); Basic Principles on the Independence of the Judiciary (1985); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988); and Basic Principles on the Role of Lawyers (1990).

7. The essence of this global standard can be articulated as the following: (1) no one shall be subjected to arbitrary arrest or detention; anyone who is deprived his liberty by arrest or detention shall be entitled to prompt trial in accordance with legal procedure; (2) a detained or imprisoned person shall be entitled to have the assistance of the legal counsel of their choice; governments shall ensure that all persons upon arrest or detention are immediately informed of their right to the legal counsel and have access to a lawyer no later than forty-eight hours from

diffusion of the global norms, because members of the United Nations, including China, have signed most of these documents.⁸ Around the same time, legal scholars in China started to look overseas for ways to advance domestic criminal procedure law (B0504). The UN covenants and principles provided them a clear model of procedural justice that has shaped the legislative ideologies of both the 1996 CPL revision and the current revision (B0515). The academic conferences that major CPL scholars organized and participated in during this period also contributed to the diffusion of the global norms within the legal academic community in China (B0504; Cui 1996). During the 1996 CPL lawmaking process, the initial drafting group, mostly composed of legal scholars, visited France, Germany, Italy, the United States, Britain, and Canada, and translated the German, Italian, and French criminal procedure codes into Chinese (Cui 1996).

In addition to academic influences, China's proliferation of law schools since the 1990s and its judicial reform—particularly the rising concerns about human rights and the quality of judges and lawyers—also brought international agencies (e.g., the American Bar Association, the Canadian Bar Association, the Ford Foundation, International Bridges to Justice) to establish training programs with Chinese courts, procuracies, bar associations, and law schools (B0511; C0703). These programs are mainly modeled after the Anglo-American legal system and, therefore, often emphasize the adversarial trial mode, the due process of law, and the protection of human rights. Together with the influence of legal scholars, they have influenced significantly the ideologies of Chinese judges, procurators, lawyers, and law students.

The global influence on China's CPL lawmaking, therefore, is realized through three major mechanisms (Braithwaite and Drahos 2000): (1) modeling, by which China conforms its CPL to the standards of the UN norms; (2) capacity building, by which international training and research programs shape the ideologies and practices of Chinese judges, lawyers, and academics; and (3) indirect coercion, by which powerful entities such as the United

the time of arrest or detention; (3) the communications and consultations between lawyers and the arrested, detained, or imprisoned persons shall be provided with adequate time and facilities and may be within sight, but not within the hearing, of law enforcement officials; (4) governments shall ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment, or improper interference, and they shall not suffer or be threatened with prosecution or other sanctions for any action taken in accordance with recognized professional duties, standards, and ethics; (5) governments shall ensure lawyers access to appropriate information, files, and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients; and, (6) lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearance before a court.

8. Note that although the Chinese government signed the International Covenant on Civil and Political Rights (ICCPR), the most important covenant for protecting citizens' political rights, in 1998 the NPC had still not ratified it after a decade.

States or the European Union frequently tackle China's human rights and procedural justice in front of the international community.

The diffusion of global norms of procedural justice has coincided with China's great transformation from a Socialist traditional society to a market-oriented modern society. Rapid social change and dislocation produced many new types of crimes and brought a huge floating population to urban areas (B0515; S0704). Crimes committed by the floating population present a major problem for the police and the procuracy, as the suspects can easily disappear if released from detention. As a result, the police and the procuracy strongly advocate longer periods of detention and arrest and resist lawyers' intervention before their investigation is complete (B0509; B0515). And to strike at the white-collar crimes that have been increasing since the 1990s, every level of the procuracy has established an anticorruption bureau, which combines the powers of investigation and prosecution and is closely linked to the party disciplinary system. All these social conditions and practices, together with significant geographical imbalance in development, the strong institutional power of the police, the supervisory power of the procuracy, and the shortage of criminal defense lawyers, constitute the "Chinese characteristics" in the criminal justice system.

A more fundamental source of Chinese characteristics comes from a long history of criminal justice that emphasizes substantive law and overlooks procedure.⁹ In the traditional Chinese criminal justice system, once a person was arrested he was considered a criminal by the public, and there were few procedural limits on periods of detention, coerced testimony, or trial. Reinforced by the Communist ideals of subordinating all procedural fetters to the goal of creating a new society, this long and deep tradition of substantive justice still significantly shapes the legal ideologies of many criminal law enforcement officers, judges, citizens, and even some lawyers (B0515; H0701; C0702).

A systematic comparison of these Chinese characteristics with the global norms identified above indicates a sharp contrast between substantive and procedural justice and between striking crimes and protecting human rights. These conflicting ideologies are carried on by different actors in the criminal justice system. To provide a manageable and coherent account of the recursive process of legal change, we focus our attention on issues related to lawyer representation in the criminal process, which has been severely

9. The legislative history of China's criminal law dates back to the Western Zhou Dynasty (ca. 1100–771 BCE) (Head and Wang 2005), but until a draft of the Great Qing Criminal Procedure Code was finished in 1910, there had never been a separate criminal procedure law in Imperial China. Even though in the Republican period (1911–1949) the CPL was promulgated twice (by the Beiyang government in 1912 and the Kuomintang government in 1935, respectively), after the People's Republic was established in 1949 all Republican laws were abolished (Cai 1999).

contested in China's implementation of its criminal procedure law and regulations (Lawyers Committee for Human Rights 1993, 1998; Lubman 1999; Yu 2002; Sheng 2003, 2004).

The struggles for criminal defense are pungently illustrated through lawyers' articulation of their grievances with two metaphors, namely, "Three Difficulties" (*san nan*) and "Big Stick 306" (306 *da bang*). The Three Difficulties refer to lawyers' difficulties in (1) meeting the criminal suspect, (2) getting access to the procuracy's case files, and (3) collecting evidence and cross-examining witnesses at trial. Big Stick 306 refers to the abusive use of Article 306 of the 1997 Criminal Law and Article 38 of the 1996 CPL by the police and procuracy, which allow prosecutors to arrest lawyers who are defending cases against them on grounds that lawyers have conspired with defendants to commit perjury or to give false testimony. Lawyers are most vulnerable when defendants change the story they tell the lawyer from the story they told the police, often as a result of police coercion (Yu 2002; Halliday and Liu 2007).

In practice, the Three Difficulties and Big Stick 306 subvert each element of proceduralism institutionalized in global norms. They are not only discussed within the lawyer community but also are frequently mentioned in domestic media reports (*Chinese Lawyers*, 1995_11, 1997_12, 2001_05; *People's Daily*, 2004_04_07; *Procuratorial Daily*, 2002_07_24; *People's Court News*, 2002_07_22). They do not exhaust the tensions between the law and practice or the inherent contradictions in the criminal procedure statutes, but they do enable us to dissect in detail one part of a conflict that lies at the heart of legal liberalism's encounter with contemporary China.

CYCLES OF CRIMINAL PROCEDURE REFORM

We turn now to analyze the recursive cycles of criminal procedure reforms from 1979 to the present. This narrative is refracted through the mechanisms for legal change in the recursivity framework—indeterminacy, contradictions, diagnostic struggles, and actor mismatch. We will demonstrate how these four mechanisms interact with one another and lead to the recursive pattern of the CPL reforms from 1979 to the present.

The 1979 CPL: Beginning of a Recursive Episode

When the People's Republic of China (PRC) was established in 1949, no formal criminal procedure code or criminal code was adopted in its first thirty years, except for a number of criminal law-related statutes issued by various judicial and administrative agencies and party organs. Driven by the principle of "leniency for confession, harshness for resistance" (*tanbai*

congkuan, *kangju congyan*), the criminal process in the early years of the PRC was characterized by long, informal, and secret interrogations and lack of defense for the criminal suspects (Cohen 1968, 48–49). The “iron triangle” of the police, procuracy, and judiciary (*gongjianfa*) often acted together in striking at crimes, and they possessed huge discretionary power in the criminal process. However, this socialist model of criminal justice was swept away during the Cultural Revolution (1966–1976), together with most other legal institutions in China, and by 1979—the year China’s first CPL was promulgated—the whole legal system had to be rebuilt from scratch.

From 1979, a recursive episode¹⁰ began for the CPL lawmaking in China, which lasts until the present day. Table 1 presents an overview of the major regulations and notices related to lawyer representation from 1979 to 2004. It is evident that lawmaking activities have become much more frequent since the 1996 CPL was put into practice. To explain the dynamics of CPL lawmaking in this recursive episode, we divide it into three major legislative cycles, namely, the 1979 CPL legislation, the 1996 CPL revision, and the current CPL revision, complemented by smaller regulatory cycles in between. In this section, we provide a brief overview of the lawmaking and implementation of the 1979 CPL as a historical background for more detailed analysis of the later cycles.

The 1979 CPL, together with the 1979 Criminal Law, was among the first major laws promulgated by the NPC after the Cultural Revolution. As our interviews and many previous studies indicate, this round of lawmaking was the direct result of a deep lesson from the social and political turmoil during the Cultural Revolution (B0515; Folsom, Minan, and Otto 1992; Lo 1995; Cai 1999; Potter 2001). In reaction to the unlimited flexibility and discretion of the administration of justice in earlier periods, during the groundbreaking Third Meeting of the Eleventh Congress of the Chinese Communist Party (CCP) in late 1978, Deng Xiaoping, Peng Zhen, and other central leaders decided to build a socialist democratic legal system that had the capacity of maintaining social order and promoting economic development (Cui 1996). As part of this effort, the 1979 CPL laid down the basic framework of an inquisitorial system of criminal justice following the civil law and Soviet law traditions that informed the PRC’s formal legal system.

The 1979 law was primarily based on an earlier draft in 1956 (Cui 1996), which drew upon both the Soviet law and some experiences from the old Communist eras before 1949 (B0504). From the CCP meeting in December 1978 to the promulgation of the law in July 1979, the whole lawmaking process lasted for merely seven months. Due to the special circumstances of its enactment, the 1979 CPL contained only 164 articles in total; many specific procedures were left to the discretion of the police, procuracy, and judiciary.

10. For a detailed discussion of the concept “recursive episode,” see Halliday (forthcoming); Halliday and Carruthers (2007, 2009).

TABLE 1.
Major Statutes Related to the Criminal Procedure Law and Lawyer Representation, 1979–2004

Date	Agency	Title	Level
July 1, 1979	NPC	Criminal Law	Law
July 7, 1979	NPC	Criminal Procedure Law	Law
Dec. 15, 1979	SPC, SPP, MPS	Joint Notice on Implementing the Case Jurisdictions Prescribed by the Criminal Procedure Law	Notice
Aug. 26, 1980	NPCSC	Interim Regulation on Lawyers	Regulation
Apr. 27, 1981	SPC, SPP, MPS, MOJ	Joint Notice on Several Specific Rules Regarding Lawyers' Participation in Litigation	Notice
Sept. 2, 1983	NPCSC	Decision on the Procedure for Prompt Adjudication of Cases Involving Criminals Who Seriously Endanger Public Security	Decision
July 26, 1986	SPC, SPP, MPS, MOJ	Several Complementary Rules Regarding Lawyers' Participation in Litigation	Regulation
Mar. 18, 1987	MPS	Police's Procedural Rules in Handling Criminal Cases	Regulation
Mar. 21, 1994	SPC	Specific Rules on the Procedure for the Trial of Criminal Cases	Interpretation
Mar. 17, 1996	NPC	Criminal Procedure Law	Law
May 15, 1996	NPCSC	Lawyers Law	Law
June 13, 1996	MPS	Notice on Issues Related to the Implementation of the Criminal Procedure Law	Notice
Sept. 9, 1996	SPP	Notice on Guaranteeing the Smooth Implementation of the Criminal Procedure Law	Notice
Dec. 10, 1996	MPS	Regulation on the Lawyer's Involvement of the Criminal Process in the Phase of Investigation	Regulation
Dec. 20, 1996	SPC	Interpretation on Several Issues in the Implementation of the Criminal Procedure Law (Interim)	Interpretation

TABLE 1.
(Continued)

Date	Agency	Title	Level
Jan. 30, 1997	SPP	People's Procuracy's Rules for Criminal Procedure (Interim)	Interpretation
Mar. 14, 1997	NPC	Criminal Law	Law
Nov. 6, 1997	ACLA	Regulation on Lawyers' Handling of Criminal Cases (Interim)	Regulation
Jan. 19, 1998	SPC, SPP, MPS, MSS, MOJ, NPCLWC	Regulation on Several Issues in the Implementation of the Criminal Procedure Law	Regulation
Jan. 23, 1998	MPS	Notice on the Strict Implementation of Issues Related to the Criminal Procedure Law and the Criminal Law	Notice
Apr. 25, 1998	MOJ	Regulation on Lawyers' Handling of Criminal Cases (Revised Draft)	Regulation
Sept. 2, 1998	SPC	Interpretation on Several Issues in the Implementation of the Criminal Procedure Law	Interpretation
Oct. 19, 1998	SPC, SPP, MPS	Notice on the Strict Implementation of the Criminal Procedure Law and the Correction of the Problem of Extended Detention	Notice
Jan. 18, 1999	SPP	People's Procuracy's Rules for Criminal Procedure	Interpretation
Apr. 25, 1999	ACLA	Regulation on Lawyers' Handling of Criminal Cases	Regulation
Nov. 12, 2003	SPC, SPP, MPS	Notice on the Practical Correction and Protection of Extended Detention	Notice
Feb. 10, 2004	SPP	Regulation on the Protection of Lawyers' Legal Practice in the Criminal Procedure	Regulation

Abbreviations:

ACLA: All-China Lawyers Association

MOJ: Ministry of Justice

MPS: Ministry of Public Security

MSS: Ministry of State Security

NPC: National People's Congress

NPCLWC: NPC Legal Work Commission

NPCSC: Standing Committee of the National People's Congress

SPC: Supreme People's Court

SPP: Supreme People's Procuracy

Although the NPC drafting committee consisted of a number of widely recognized national legal experts, few legal scholars specializing in criminal procedure participated in the 1979 CPL lawmaking because many of them were expelled to the provinces during the Cultural Revolution (B0504). The exclusion of legal scholars led to a potential mismatch between those who drafted the law and those who taught the future generations of practitioners who would implement it.

The 1979 CPL divided the criminal process into three separate phases: the police were in charge of the phase of investigation, including interrogation, detention, and pretrial; the procuracy was in charge of the phase of prosecution, including arrest approval, prosecution, and some investigation; and the court was in charge of the phase of trial (Article 3). Although the procuracy also had the procedural power of supervision over the whole process, in each phase only one of the three agencies was in control of its respective area of responsibility. In other words, the relationship among the three agencies was more sequential and coordinative rather than checking and balancing one another (Article 5). Defense lawyers obtained access to the defendants only when a case reached the trial phase, although they were given no more than seven days before trial to prepare the case (Article 110).

This unbalanced structure of criminal process made the role of criminal defense lawyers very limited in practice. The defense lawyer, as a state employee, was expected to “act on the basis of facts, take the law as the criterion, and be loyal to the interest of the socialist cause and the people” (Article 3 of the Interim Regulation on Lawyers)—he was not an agent of the defendant in a criminal proceeding but an independent party who must carry out his activities within the legal framework without fabricating evidence or distorting facts for the interest of his clients (Leng 1985, 93). During the less than seven days between appointment and trial, the defense lawyer was allowed to visit the defendant and review the case files transferred from the procuracy at the relevant court (Lawyers Committee for Human Rights 1993; Fu 1998). However, the effect of the lawyer’s defense on the case outcome was kept to the minimum—the great majority of defendants remained unrepresented by lawyers and, for those who did get legal representation, lawyers’ pleas for innocence were rarely offered (Lawyers Committee for Human Rights 1993; Fu 1998).

The limited role of defense lawyers, coupled with the huge discretionary power of the police and procuracy, made difficult the protection of the rights of defendants. In 1983, the NPC Standing Committee promulgated the so-called September 2 Decision,¹¹ which abolished the trial notification period in death penalty cases and thus stripped the defendant’s *de facto* right

11. The full title of the decision is “Decision Regarding the Procedure for the Swift Trial of Criminals Who Severely Endanger Social Security,” passed by the NPC Standing Committee on September 2, 1983.

to legal counsel—this provided the legal basis for the several “strike hard” (*yanda*) campaigns on crimes all through the 1980s and 1990s (Cui 1996, 208–15). During these campaigns, the procedures enacted in the 1979 CPL were largely replaced by the “severe and swift” (*congzhong congkuai*) principle and by unrestricted discretion of the police, procuracy, and court (Dutton 1992; H. Tanner 1999; Bakken 2005; Biddulph 2007; Trevaskes 2007). Among all the various procedural problems in the criminal process, two measures frequently used by the police and procuracy aroused the most attention of both Chinese legal scholars and foreign observers: shelter for investigation (*shourong shencha*) and exemption from prosecution (*mianyu qisu*).¹² Such procedural measures seriously violated the global norms on criminal procedure prescribed in the UN covenants and made the rights of defendants easily abused by the state agencies.

In sum, when the 1979 CPL was drafted, there was no formal legal profession in China, most legal scholars had been exiled to the provinces, and the procuracy and the judiciary were newly revived—in other words, the criminal justice system was still in an embryonic stage. After the law was put into practice, lawyers and defendants were almost completely lost in diagnostic struggles over how the law actually worked and how it should work. The “iron triangle” of the police, procuracy, and court closely cooperated with one another and tightly controlled the criminal process.

By the early 1990s, however, the NPC’s institutional power had significantly increased (O’Brien 1990; Cai 1999; M. Tanner 1999; Ngok 2002), law as a profession had been revived, lawyers’ privatization had begun, legal academics became more active participants in the lawmaking process (Ngok 2002), and both the procuracy and the judiciary had grown into large bureaucratic organizations that had the capacity to challenge the police from time to time. Externally, although the Chinese legal system still mainly followed the Continental and Soviet legal traditions, ideas and practices of Anglo-American law had already entered China through the channels mentioned earlier. All these situations implicitly called for a major redistribution of power in the criminal justice system (B0504) and led to a comprehensive revision of the CPL in 1996.

Lawmaking Process of the 1996 CPL: Indeterminacy and Contradictions

The 1996 CPL revision was a result of both ideological and structural contradictions in the criminal justice system and collective diagnostic

12. While shelter for investigation allowed the police to detain and investigate a person in the police office without any approval from the procuracy or the court, exemption from prosecution allowed the procuracy to convict a criminal suspect and withhold his punishment without court trial (B0515; Clarke and Feinerman 1995; Lubman 1999; Luo 2000; Chen 2002).

struggles during lawmaking. The legislative process started in January 1991 and ended in March 1996, five years in total. In appearance, this revision seemed a great step forward with its goals of expanding adversarial proceedings, increasing rights of defendants, and widening the role of defense lawyers (Chen 1995). Yet the reality of criminal defense practice indicates that several provisions in the legislation may, in fact, have been regressive. In this cycle of legal change, a wider range of actors with conflicting interests were involved than in the cycle of the 1979 CPL, and, accordingly, the power struggles in lawmaking became much more salient.

The preparation for the 1996 CPL revision was started from a small-scale symposium held at China University of Political Science and Law (CUPL) in January 1991, organized by the Criminal Law Office of the NPC Legal Work Commission (Cui 1996). After this symposium, legal scholars began extensively discussing many specific issues in the CPL through research papers and academic conferences. In September 1993, the NPC Legal Work Commission held a two-day symposium with the Supreme People's Court (SPC), the Supreme People's Procuracy (SPP), the Ministry of Public Security (MPS), the Ministry of State Security (MSS), the Ministry of Justice (MOJ), and several legal scholars in Beijing to discuss how to revise the CPL. Soon afterwards, the NPC Legal Work Commission appointed Professor Chen Guangzhong to lead a research group at CUPL to draft a preliminary version of the 1996 CPL (B0503; B0504; Chen 1996; Cui 1996). Based upon research on the UN covenants and the criminal procedure codes in other countries, the scholarly draft of the CPL completed in 1994 contains 329 articles, twice as many as the number of articles in the 1979 CPL (Chen and Yan 1995; Cui 1996). Academic discussions on the CPL through conferences, including with foreign experts and scholars from Taiwan (B0504; Cui 1996), continued after the scholarly draft was submitted to the NPC.

Yet legal scholars were by no means the only active players in the 1996 CPL lawmaking process. As early as 1992–1993, some NPC representatives proposed bills for the CPL revision, and the MPS, SPP, and SPC all proposed their ideas for the revision (Chen 1996). At the local level in 1993, a judge in Zhejiang Province wrote an entire book on the CPL revision and proposed a complete CPL draft with 212 articles (Wang 1993; Cui 1996). On the other hand, lawyers were almost completely excluded from the 1996 CPL revision—they could only express indirect opinions through the MOJ and a few prominent legal scholars (B0502; B0507; B0508; B0510; X0505; S0703; H0701).

In June 1995, the NPC Legal Work Commission held another five-day symposium with leaders and research staff of the MPS, SPP, SPC, and MOJ, as well as some legal scholars in Beijing, in which twenty-four major issues on the CPL revision were comprehensively debated (Chen 1996; Cui 1996). Based on all these discussions, the NPC Legal Work Commission made a revised draft CPL in October 1995 and distributed it nationwide for comments and suggestions. In January 1996, two meetings with high-ranking

officials from the SPC, SPP, MPS, MOJ, and MSS were held by the NPC Standing Committee and the Central Political-Legal Committee of the Chinese Communist Party (CCP) to coordinate the divergent opinions on several key issues in the revised draft, including shelter for investigation and exemption from prosecution (Chen 1996; Cui 1996). Finally, through a series of routine legislative procedures, the 1996 CPL was passed by the Fourth Meeting of the Eighth NPC in March 1996 and became effective on January 1, 1997.

The final version of the 1996 CPL contains 225 articles, 61 articles more than the 1979 CPL but 104 articles fewer than the scholarly version. According to the estimation of a distinguished law professor who participated in the entire 1996 lawmaking process, only about 65 percent of the content of the scholarly draft was finally incorporated into the 1996 CPL (B0504). The significant reduction of articles during the lawmaking process indicates the divergent opinions between legal scholars and other actors (especially the police, procuracy, and court) over many issues. Numerous debates and diagnostic struggles occurred in the five years of revision, among which the four most heavily debated issues were the presumption of innocence, shelter for investigation, exemption from prosecution, and the adversarial trial system (*China Legal Science*, 1994_05; Cui 1995). Both legal scholars and SPC representatives proposed adding the presumption of innocence as a general principle of the CPL, whereas SPP and MPS representatives strongly opposed it (*China Legal Science*, 1994_05). On the police's power of shelter for investigation and the procuracy's power of exemption from prosecution, there had also been severe debates between legal scholars and SPP/MOPS representatives before they were abolished.¹³ Finally, the difficult movement of trial reform toward an adversarial system resulted from opposing diagnoses of SPC and SPP representatives.¹⁴

13. For example, on exemption from prosecution, SPP representatives argued that exemption from prosecution was an inseparable part of the procuracy's prosecution function. In their view, this institution reflected the criminal policy of "distinctive treatment" (*qubie duidai*) and "integration of punishment and leniency" (*chengfa yu kuanda xiang jiehe*), and it was also in accordance with the economic principle of proceedings and made the efforts of the procuracy and the court concentrate on serious cases (*China Legal Science*, 1994_05; *Politics and Law*, 1995_01). In contrast, legal scholars argued that this was an invasion of the court's exclusive power of adjudication, and it also stripped the defendant's right to legal counsel and right of appeal (*China Legal Science*, 1994_05; Cui 1995).

14. SPC representatives argued that all public prosecution cases should have open trials, pretrial investigations should only include procedural issues, and all substantive issues should be resolved through court trials. During court proceedings, the functions of prosecution and trial should be separated, the prosecutor should undertake the burden of proof, and the judge should not produce evidence. In contrast, SPP representatives argued that the CPL should stick to the socialist trial mode with Chinese characteristics and should not copy the foreign adversarial trial mode, the court and the procuracy should cooperate to investigate on crimes, and the inspective power of the procuracy on court trials should be strengthened (*China Legal Science*, 1994_05).

As lawyers were excluded from the 1996 lawmaking process, their interests were largely represented by MOJ representatives and a few legal scholars. For example, an MOJ representative proposed that, in order to fully protect the procedural rights of criminal suspects and defendants, lawyers should be allowed to intervene in the criminal process from the phase of investigation, and they should be able to meet their clients and collect their own evidence (*China Legal Science*, 1994_05). Not surprisingly, representatives of the police strongly opposed these proposals (B0504). Although the power of the MOJ was quite weak compared to the MPS, legal scholars were able to exert their influence through the scholarly draft and later discussions.

All these debates in the lawmaking process indicate severe diagnostic struggles about how to characterize problems in practice among actors with conflicting interests. As a result, compromises were built into the final version of the 1996 CPL. In so doing, the law incorporated contradictory concepts and ideologies. A law professor who directly participated in the lawmaking process gave a clear explanation of this issue based on his “theory of balance” in criminal procedure law:

There is a central contradiction between the public policy position on political stability and protecting the rights of defendants. In every country there is a conflict between striking crimes and protecting human rights. Criminal procedure is a product of balancing the two interests. How to find the proper balance is very difficult. The legal relationship that the criminal procedure law adjusts has lots of inner conflicts and contradictions. Because of these we need to use the law to balance them, including the balance between maintaining social order and protecting human rights, between substantive law and procedural law, between justice and efficiency, between rights of defendant and of the victim. If we cannot balance these in practice it will generate many problems. Therefore, wherever in the world, the criminal procedure law builds very well entrenched tensions, conflicts, and contradictions into the law. (B0513)

Four interrelated ideological contradictions inherent in the CPL are identified here: (1) striking crimes versus protecting human rights, (2) substantive law versus procedural law, (3) efficiency versus justice, and (4) rights of the victim versus rights of the defendant. These central ideological cleavages in lawmaking led to many conflicting measures in the 1996 CPL. For example, both striking crimes and protecting rights were written in the 1996 CPL as basic principles (Articles 1 and 2); lawyers were allowed to meet the suspects in the phase of investigation, but they were not given the status of a defender (Article 96); lawyers could collect their own evidence but they needed the witness’s consent and, for testimony from the victim’s witnesses, the approval from the procuracy or the court (Article 37). All these tensions in the law reflect the broader social conflicts in China’s reform and opening up. They also

reflect the diagnostic struggles between different actors in the lawmaking process over what was wrong with the system and how it should be corrected.

Furthermore, structural contradictions in the criminal justice system were also built into the 1996 CPL. The structural position of the procuracy is a good case in point. The procuracy has two basic functions, namely, to prosecute cases and to supervise the work of the police and the court. However, as the police, procuracy, and court each control one phase of the criminal process (investigation, prosecution, and trial), the procuracy's supervision of the police and the court cannot be a substantive supervision; therefore the 1996 CPL gives a procedural power only to the procuracy, that is, when a decision of the police (e.g., case filing) or the court (e.g., court procedure) is not in accordance with the law, the procuracy can issue a "correcting opinion" (*jiuzheng yijian*), to which the police or the court must respond (Articles 87 and 169). However, if the police or the court decides to stick to their original decision, there is no sanction that the procuracy can exercise (B0509; X0505; X0508; F#431895).

These ideological and structural contradictions produced ambiguities and inconsistencies in the 1996 CPL. Many of our interviewees, particularly lawyers and scholars, expressed the view that the 1996 revision was made "in a hurry" (B0503; B0504; B0507; B0508; B0511). By this they did not mean that the lawmaking period was too short, but that many important issues were not clarified in the law. For example, now the defense lawyer can intervene in the criminal process from the investigation phase, much earlier than under the 1979 CPL, but the 1996 CPL does not provide enough complementary measures or sanctions to guarantee the lawyer's procedural rights. The supervisory power of the procuracy discussed above is another example.

All these indeterminacies of law quickly generated conflicting regulations and interpretations by the implementing agencies. Since the 1996 CPL was promulgated, in less than a year the SPC, SPP, and MPS all made their own interpretative regulations and notices on how to implement the new CPL in practice (see Table 1). Numerous rules and notices at the provincial and municipal levels were also found during this period. A notable feature of these early interpretations is that they are often in conflict with the 1996 CPL or contradict one another over many issues, particularly issues related to lawyers' criminal defense work.¹⁵ As a law professor commented,

Our current CPL has 225 articles. This is too few for a large country like China. It is not satisfactory. In the implementation the police, procuracy

15. For instance, a September 1996 notice of the SPP emphasizes the importance of sticking to the "heavy and fast" and "heavy and strict" principles of "strike hard" campaigns in the implementation of the new CPL; a December 1996 regulation of the MPS sets the time and place of the lawyer's meeting with suspects and allows the police to be present during the meeting; the three interim CPL interpretations by the SPC, SPP, and MPS made during December 1996–January 1997 provide contradictory prescriptions on a variety of issues.

and court have made all kinds of interpretations for implementation. Altogether there are approximately 1,440 articles from interpretations. In China the procuracy and the court could be considered judicial agencies. But the MPS is an administrative agency and it is inappropriate for it to put together an interpretation like the court. All three contradict each other and each has its own rule and all try to check and constrain the power of other agencies. Also there are situations where the interpretations may directly violate the law. So the result of this in practice is that all the agencies when they deal with a case they use their own interpretations and this reduces the efficiency of the process. (B0511)

To solve the conflicts among the interpretations and guarantee the smooth implementation of the 1996 CPL, the NPC Legal Work Commission organized the SPC, SPP, MPS, MSS, and MOJ and made a Joint Regulation in January 1998. The Joint Regulation emphasizes that, unless the case involves state secrets, the lawyer's meeting with criminal suspects needs no approval from the investigating agency and should be arranged within forty-eight hours (Article 11), and the scope of "state secrets" should be restricted to the content of the case (Article 9). Both the SPC and SPP adjusted their interpretations in accordance to this Joint Regulation,¹⁶ but the MPS Regulation remained intact—the police could still set the time and place for the lawyer's meeting and be present at the meeting if necessary (Articles 11 and 12). Meanwhile, the MOJ and ACLA also promulgated their regulations to protect lawyers' rights in criminal cases, but these regulations have no binding effect on the behavior of the police or the judicial agencies. Conflicts of interpretations persisted in practice, and they made the work of defense lawyers extremely difficult.

Implementing the 1996 Criminal Procedure Law: Diagnostic Struggles

When the 1996 CPL was initially passed by the NPC, many of the new prescriptions in the law were highly acclaimed by criminal defense lawyers (*Beijing Lawyers*, 1996_03) and overseas observers. By contrast, the police and the procuracy expressed concerns about the law's restriction on their power and discretion (B0501; B0509; *People's Procuratorial Monthly*, 1997_08;

16. According to the vice director of the SPP research office (*People's Procuratorial Monthly*, 1999_04), the main conflict between the procuracy and the police is on the implementation of coercive measures, the main conflict between the procuracy and the MOJ is on the lawyer's intervention in the phase of investigation, and the main conflict between the procuracy and the court is on the transfer of case files. The revision of the SPP Rules took the SPC and MPS interpretations as references to reduce contradictions, and the revised Rules were also reported to the NPC Legal Work Committee many times before it was finalized.

Policing Studies, 1998_01), while many legal scholars registered disappointment as the stipulations in the law on several key issues were still far behind “international standards” (*China Legal Science*, 1996_03). However, soon after the law was put into practice, procurators and police officers were much relieved because they discovered that, in practice, they could still control the criminal process almost the same as before (B0501; B0515; C0708), whereas lawyers found that they were facing even greater difficulties and personal danger.

According to the official statistics of the ACLA, in the five years after the 1996 CPL became effective (1997–2001), 142 criminal defense lawyers were arrested by the police and procuracy, among which 77 lawyers were illegally detained or even beaten, and 27 cases were directly concerned with perjury (ACLA 2002; Fang 2005).¹⁷ Those numbers have continued to grow in recent years. These lawyer persecution cases, though relatively few in number, have had a powerful signaling and chilling effect on the entire Chinese legal profession. More and more Chinese lawyers, particularly those working in economically developed areas, are staying away from criminal defense work¹⁸ (Yu 2002; Sheng 2003, 2004). In their public discussions on the ACLA forum, lawyers also expressed serious concerns about the various problems in criminal defense (see Halliday and Liu 2007 for details). Together, the Three Difficulties and the threat of Big Stick 306 heavily restrained lawyers from mounting an active defense, and indeed compelled them to adopt defensive strategies to protect themselves at the expense of protecting their clients.

These unintended consequences are the result of both the conflicting interpretations of the CPL and the struggles among different actors to have their respective definitions accepted. That is to say, in their everyday work, actors involved in implementation of the law diagnose its problems in very different ways. Take lawyers’ difficulty in meeting suspects. The 1996 CPL and the 1998 Joint Regulation prescribe that the lawyer’s meeting should be arranged within forty-eight hours, and they do not need the approval of the police, but the 1996 MPS Regulation prescribes that the time and place for the lawyer’s meeting should be decided by the police, and the police can choose to be present during the meeting. These conflicts in the law led to serious conflicts between lawyers and police officers: lawyers believe that their

17. Some famous cases include Li Kuisheng, a Henan lawyer, who was detained for twenty-six months before the innocence verdict; Huang Yabin, a Fujian lawyer, who was similarly wrongly detained for more than a year; Wang Yibing, a Yunnan lawyer, who decided to become a monk after being wrongly detained and tortured for two years (*Chinese Lawyers*, 2002_07). Even nationally renowned lawyers from Beijing were prosecuted and sentenced. For example, Zhang Jianzhong, one of the “Ten Best Lawyers” in China in the late 1990s, who defended high-ranking corrupt officials, such as Cheng Kejie and Li Jizhou, was charged with the crime of perjury in 2002 and spent two years in prison. For detailed reports on more Article 306 cases, see Wang (2001, 2003).

18. In 2000, for example, all 5,495 Beijing lawyers only handled around 4,300 criminal cases, with an average of .78 cases per lawyer (*Chinese Lawyers*, 2002_07).

meeting applications do not need approval and that the meeting should be arranged within forty-eight hours, whereas the police insist on their power in approving meetings and being present during the meeting.

In their workplaces, the police have various strategies in rejecting the lawyer's meeting or setting obstacles during the meeting. Although the 1998 Joint Regulation restricted the meaning of "state secret," police officers still often broadly interpret the scope of "state secret" to reject the lawyer's meeting application (B0510; B0515). A law professor who trained a large number of police officers explained this and other techniques that the police use to reject or postpone the lawyer's meeting:

When the lawyer wants to meet the suspect they have all kinds of reasons to reject you: first, "now the suspect is in the investigation phase and the investigation itself is a state secret, so you cannot interfere"; second, they will postpone the meeting with all kinds of methods, for example, the lawyer comes and the police officer says, "I have to report to the superior but my superior is out of town," so two days later the lawyer is back and [the police officer says,] "I have to report to the division chief and he is in a meeting now." This is a very prevalent phenomenon. So the consequence is that it is extremely difficult for the lawyer to meet. (B0515)

Even if a meeting is arranged (often long exceeding the forty-eight hours requirement of the 1998 Joint Regulation), the police officer is almost always present, and the officer sometimes intimidates the criminal suspect not to reveal information to the lawyer. Some lawyers ironically describe this as "not the lawyer's meeting with the criminal suspect, but the police officer's investigation with the assistance of the lawyer" (F#618182). Some detention centers also have informal rules for the lawyer's meeting; for instance, the meeting should not exceed half an hour (B0508). A renowned female defense lawyer in Beijing recounted as follows:

Earlier last year I went to meet a suspect in Suzhou and the procuracy led me to meet the suspect and after five minutes they wanted to take him away. I shouted for more time and they gave me another five minutes. Then I procrastinated for another two minutes. I got 12 minutes altogether. This was only a few days after the SPP Regulation on Lawyers was passed. So the SPP think they did an excellent thing for lawyers—they want us to say good things about it and held a symposium with a lot of media there. So I told this case at the meeting and it was reported on the *Legal Daily* the next day. They were pretty upset about it. (B0510)

This quote not only shows the severe difficulties in the lawyer's meeting (even for a famous Beijing lawyer), but also lawyers' strategies for fighting back. It is only one of many cases in which lawyers turn to the media as

potential allies in their bid to fix in the minds of public audiences their particular diagnosis of wrongs in the criminal justice system. In fact, almost all leading criminal defense lawyers in China use the media to expose their difficulties and problems in practice (H0701; S0703), and even less well-known lawyers without access to official newspapers and TV stations are able to post messages on Internet forums, particularly the lawyer forum on the ACLA Web site, to reveal problems, exchange opinions, and promote collective ideologies (Halliday and Liu 2007).

Besides the media, some lawyers rely on legal scholars—their natural allies, most of whom firmly believe in legal proceduralism—to promote changes (B0508; C0709; C0710). Many law professors discuss lawyers' problems in their articles and speeches, and sometimes these are even published in the police and procuracy's newspapers and journals, including the *People's Police News*, the *Procuratorial Daily*, and the *People's Procuratorial Monthly*. Furthermore, some defense lawyers with previous work experience in the police, procuracy, or court are also able to use their connections to reduce the difficulties in practice (B0508; B0516; X0505; C0708; H0703; Michelson 2007). Therefore, although in their direct confrontations with the state judicial agencies lawyers are almost completely powerless, they can find means to mobilize resources to indirectly change the power equilibrium in the implementation of the CPL.

Similarly, diagnostic struggles over what is the new distribution of power in the criminal process are prevalent within the “iron triangle” of the police, procuracy, and court. The 1996 CPL restricted the power of the police and the procuracy by abolishing some discretionary measures (e.g., shelter for investigation, exemption from prosecution) and partially changed the trial mode from the inquisitorial system to the adversarial system. However, in implementation the police and the procuracy quickly developed a series of countermeasures to rebalance the power structure in the criminal process. A former vice chief procurator in a local procuracy in Beijing in the late 1990s described the experience of procurators after 1996:

Immediately after the 1996 revision a lot of procurators were nervous. Then they found that the new provisions were not practical. For example, after 1996, the procuracy only transferred the major case files to the court but not all of them, so procuracies could make a restrictive interpretation of this regulation to keep evidence that is advantageous to the defendant away from the lawyer who doesn't get access before the proceedings. . . . Also, the 1996 CPL stipulated that the procurators needed to Xerox the case files and transfer them to the court. But in some areas the procuracies are very poor and they could not afford to make photocopies, so it is not practical. (B0501)

This example clearly shows that the procuracy diagnoses its standing in practice quite differently from the court and defense lawyers during the

implementation of the 1996 CPL. The prescription in the 1996 CPL on transferring the procuracy's evidence is ambiguous; that is, after the case is prosecuted, the procuracy should transfer the photocopies of "major evidence" in the case files to the court (Article 150). This indeterminacy in the law generated conflicting diagnoses in implementation—judges and lawyers want to see as much evidence as possible in the case files, whereas procurators prefer to separate out important evidence until the court proceeding, to give the defense lawyer a sudden attack. The result is that the procuracy would transfer only the evidence adverse to the defendant and would keep all the evidence advantageous to the defendant out of the case files (B0510; B0512; H0702; S0703). This diagnostic struggle between the procuracy and the court is the underlying reason for lawyers' difficulty in examining case files.

Conflicting diagnoses are also found in tensions between the police/procuracy and the court over the exclusion of illegal evidence. As confession by torture is still prevalent in the investigation phase, the prosecutor's evidence is often obtained through illegal means. If the defender finds evidence of confession by torture and argues for the exclusion of illegal evidence in the court proceeding, the judge faces a dilemma—if the defender's argument is adopted and the case is dismissed, then the procuracy's work record would be damaged and the defendant could request state compensation from the police and the procuracy; if the argument is rejected and the defendant appeals to the higher-level court and the verdict is reversed, the trial record of the court would be stained. A judge at a basic-level court in Xi'an explained what would usually happen in this situation:

If the defense lawyer can show confession by torture, what is the result? The rule of evidence in China is not comprehensive. In practice when this occurs we will request the procuracy to investigate in three days. If it is confirmed and illegal evidence is involved, you cannot really declare the person innocent but we request the procuracy to withdraw the case and "digest" it in the system. The police, the procuracy and the court are not independent from one another. They have equal positions under the guidance of the Party, so we will try to avoid state compensation. (X0503)

This phenomenon of withdrawing wrong prosecutions to avoid state compensation is not unique in this court and is prevalent all over the country (B0510; B0514; X0504; H0701). It indicates bargaining between the court and the police/procuracy to reduce the mutual risks to the minimum. Apparently, the victims of this informal rule in judicial decision making are lawyers and defendants—it becomes extremely difficult for lawyers to get innocence verdicts for their defendants (B0507; B0510; B0514), and the acquittal rates in criminal cases in China remain less than 1 percent (Michelson 2003, 100).

Yet the police, procuracy, and court do not always reach consensus after bargaining over controversial issues in the criminal process. The procuracy's supervisory power over the police and the court, as a procedural rather than a substantive power prescribed in the 1996 CPL, has generated conflicts and struggles in the work of the three agencies. The irony of this struggle is that each agency diagnoses its own situation, so as to require remedies in its favor. Each considers its power to be too weak, calling for restrictions on the power of the other agencies. Compare the following three paragraphs from our interviews concerning the procuracy's supervisory power:

The power of the procuracy was strengthened. . . . For example, if the police arrest someone and then release him, in the past no one could control this, but now they need to get approval from the procuracy . . . if you should file a case and did not, the procuracy will supervise. (First-rank police supervisor and law professor, B0515)

If the procuracy prosecutes a case and we think it should be 15 years and the judge says three years and we think it is wrong, we can do nothing about it. So in the procuracy if we find something is wrong with a case, if the court wants to listen it does, otherwise not. And also with police, if we need some evidence from them and we send them a letter, they look at it and agree they will, if disagree they won't listen to us. The most important thing is to restrict the power of the court. (Procurator at a high-level procuracy, X0505)

The supervisory power of the procuracy is getting bigger and bigger. Now the supervision of the procuracy is not only for criminal issues, it can make objections in criminal cases and now also civil and administrative cases. It has supervisory power over the court and more power over the police than before. For example, for the supervision over the police, the procuracy has an office in the detention center and has supervisory power from the arrest through the trial phase. . . . If the court wants a police officer to come and discuss a case, nothing happens; but if the procuracy asks the police officer, they run faster than rabbits. (Judge at a basic-level court, X0503)

The sharp contrast among the three quotes suggests that police officers, procurators, and judges hold divergent diagnoses on the supervisory power of the procuracy, and these conflicting diagnoses are strengthened in their day-to-day workplace interactions. Similar to lawyers' problems in meetings, the transfer of procuracy's case files, and the exclusion of illegal evidence, the diagnostic struggles among the three agencies in implementation are shaped by indeterminacies in the statutes and interpretations.

Given the fact that defense lawyers face tremendous difficulties in the criminal process, it is not surprising that the basic procedural rights of

criminal suspects and defendants were also poorly protected. According to the statistics collected by Chen Xingliang, a distinguished criminal law professor at Peking University, over 70 percent of all criminal cases in China were tried without lawyer representation (*Chinese Lawyers*, 2002_07). Extended detention and confession by torture still widely exist in spite of the frequent notices made by the SPP and MPS to control the problem (see Table 1). The acquittal rates in criminal cases remain insignificant, and the lawyer's presence in criminal proceedings has almost no effect on case outcome (Lu and Miethe 2002).

From Post-1996 Implementation to Current Lawmaking: Actor Mismatch

While the implementation of the 1996 CPL and its subsequent interpretations display many regressive and contradictory elements, on the international front China has taken significant formal steps to conform with global norms on the protection of citizen rights. In 1997 and 1998, China signed the UN International Covenant on Economic, Social, and Cultural Rights (ICESC) and the International Covenant on Civil and Political Rights (ICCPR), respectively. In particular, as a major global standard for protecting human rights and restricting government power, the ICCPR strongly infuses criminal procedure law reforms in national contexts. In the process of ratifying the ICCPR, the Tenth NPC (2003–2008) put another round of CPL revision into its five-year legislation agenda, which initiated the third legislative cycle of China's CPL reform.

This move from implementation to a next phase of lawmaking is a crucial step for the recursive process of legal change. It exemplifies struggles among actors over what needs correcting in practice and, indeed, reveals conflicts over which actors will be heard in the drafting of new law. In fact, a disconnection has always existed in the legislative history of the CPL in China between those implementing the law and those writing it. In 1979, most actors in the criminal justice system were still in their embryonic stage; in the 1996 revision, all actors but lawyers who participated in the implementation of the 1979 CPL played their roles in lawmaking, but the initial drafting was completed by legal scholars who had little experience with implementation; in the present revision, lawyers finally appeared in the lawmaking process, and the NPC Legal Work Commission is controlling this round of CPL revision much more closely (B0503; B0504; B0511; C0703; S0702). Although symposiums with legal scholars and representatives from the judiciary and the state agencies were still held, the NPC did not appoint any outside legal scholar or other CPL expert to draft the law.

Among all actors in the criminal justice system, lawyers have encountered the most serious problems in the implementation of the CPL and have

the strongest incentives to change the status quo. However, through both the two legislative cycles of the CPL (1979 and 1996), lawyers' input in the lawmaking process was almost negligible; in 1979 the legal profession had not yet been revived, and in 1996 lawyers could only express their opinions through the MOJ and legal scholars. After 1996, the intensification of Three Difficulties and Big Stick 306 made Chinese criminal defense lawyers realize that participation in lawmaking is crucial for their practice, and some leading Beijing lawyers began actively seeking opportunities to directly represent the profession in the NPC symposiums and other discussions in the current revision (B0507; B0514).

Diagnostic perceptions about deficiencies in practice are experienced individually, but for effective impact on lawmaking they must be aggregated. This collective action problem means that lawyers themselves must come to a diagnostic consensus and then a prescriptive solution. The aggregation of lawyers' diagnoses over their problems in practice has been more recently achieved through their professional associations. In the last several years, much of the regulatory power on the legal professions (e.g., collecting membership fees, disciplinary measures, training, etc.) has been transferred or delegated from the justice bureaus to the lawyers' associations, and many special committees, including the Criminal Law Committee, have been established in the ACLA and many urban lawyers' associations (B0507; B0508; S0701). Accordingly, leading criminal defense lawyers are now able to use their professional associations to mobilize lawyers from all over the country to participate in the current lawmaking process. In the past several years, all major provincial lawyers' associations held conferences on the CPL revision and proposed suggestions to the ACLA Criminal Law Committee (B0508; B0510), and the ACLA made a partial CPL draft on issues related to lawyer representation based on all these suggestions and its own meetings with prominent defense lawyers in Beijing and some legal scholars (B0507). Furthermore, perhaps for the first time, three lawyer representatives from the ACLA Criminal Law Committee appeared in an NPC symposium on the CPL revision in 2003 (F#431895). The director of the ACLA Criminal Law Committee, also a nationally renowned criminal defense lawyer, stated as follows to the NPC Symposium:

Let me say something about the obstacles in my business. . . . Regarding investigations, first of all we must make it certain what the lawyer's role is. I propose that the lawyer is the defender of the criminal suspect since the very beginning of his authorization. The defense is an integrated process from the beginning to the end, and it is not only embodied in the court proceedings. The second problem is that the witness can reject the lawyers' investigation. It must be made clear whether the witness can reject the lawyers' investigation. Thirdly, the lawyers cannot carry on the investigation in the phase of investigation. In practice, the public

security officers made the investigation first and, in almost in all cases, the lawyers did their investigation after the police. Fourthly, there is a restriction on the lawyers' investigation to the victims that it must be approved by the court or the procuracy. I think this restriction must be deleted. . . . The remedy measures for the violations on the right of defense are too weak. Now all parties are used to going to their superiors, but this is not a legal procedure. They should not go to the superior in their own agencies, but need an organization to solve this problem, need a procedure. Meanwhile, we should consider the legal consequences after the lawyers' rights are violated. If these issues could not be clearly specified, the problem of protecting lawyers' rights would not be fundamentally solved. (F#431895)

This strong call for restricting the power of the police and expanding lawyers' rights is a reflection of the diagnostic struggles between the two in practice. In the meantime, the lawyer-spokesman also proposes to reduce indeterminacy in the law by specifying the consequences for procedural violations and abolishing the opaque and murky internal supervision process within the police, procuracy, and court. Similarly, the vice director of the ACLA Criminal Law Committee stated to the symposium:

The construction of the legal system of China in the early 1980s was relatively good, and now it has lagged behind compared to the situation then. We have two issues to consider for this revision: (1) what is the status of the lawyer in the investigation phase? The revision this time cannot continue with such a bizarre conception; (2) Article 36 of the CPL about the responsibility of the defender is actually on substantive defense, not procedural defense. The defense is not simply that the lawyers bring forward materials and opinions—a large part of it is the defense for procedural issues. Therefore, in order to penetrate into the procedures of investigation and so on, the lawyers must participate in some procedures, for example, appraisals, interrogations, identifications, etc. That is defense. Does China really need the system of defense or just pretending to need it, or half of both? My impression is that the answer is the last. The design of a system cannot be ambivalent, so we need to make up our minds. (F#431895)

The propositions of this lawyer are even more radical than his colleague's, because he not only calls for the defender status of lawyers in the investigation phase but also for the participation of defense lawyers in the police investigation itself. And he trenchantly points out that the role of defense lawyers in the actual criminal process is merely half substantive and half symbolic, a weakness stemming from the structural contradictions in the criminal justice system. Such radical proposals by lawyers are likely to generate new diagnostic struggles in the lawmaking process. For instance, on the

procuracy's supervisory power, lawyers and procurators presented completely opposite judgments about the state of affairs in practice. Compare the following two excerpts:

The supervisory power of the procuracy made by Lenin is actually the distrust of the trial power of the court. But it is not the truth anymore under the present conditions. The combination of the power of supervision and the power of prosecution would easily cause confusion in role orientation. (ACLA representative, F#431895)

The principle of supervision by the procuracy is a run-through principle that should be maintained. This is determined by China's social situation. In China we do not carry out the principle of separation of the three powers. Under the current structure of the state system, we need a supervisory agency of the law. The procuracy's supervisory power embodies the idea of the check and balance of power. . . . The real problem in China nowadays is not that the procuracy's supervision is too powerful, but it is too weak. The supervisory power of the procuracy is not the main reason for the obstacles on judicial justice. (Supreme People's Procuracy official, F#431895)

The message from the procurator's speech is very clear: the supervisory power of the procuracy should be further strengthened in the new CPL; the procurator could never be equal to the lawyer-defender. Although lawyers and some legal scholars (e.g., B0511) strongly resist this point of view, it is unlikely that the procuracy's supervisory power, as a power prescribed by the Constitutional Law, will be abolished in the current revision (B0505). A few scholars even pointed out at the symposium that the only way to change the procuracy's supervisory power and the relationship among the three agencies is through constitutional reform (F#431895).

Lawyers' impact on other issues is similarly weak. For example, lawyer representatives strongly call for giving the defense lawyer the status of defender as early as the phase of investigation, but the power of the police, who resist this unwelcome intrusion of lawyers in their investigation, is as influential in lawmaking as in implementation. Said an eminent law professor, "The power of the police in China is the biggest in the world" (B0501). Similarly, an experienced Xi'an lawyer worries that the efforts of leading Beijing lawyers will be made in vain, as the former minister of public security has become a key member of the CCP Politburo, whose composition is heavily weighted toward powerful figures with responsibility for social control (X0505). Therefore, even if lawyers' proposals are seriously considered by the NPC, when the dispute reaches the ultimate authorities at the top of the party, the decision is likely to favor the police and social control rather than lawyers and the protection of basic legal rights. In other words, even if there were to be a balancing of actor influence in CPL lawmaking, it would remain

largely symbolic. After all, the interests of public security agencies command the heights of political power in China (Shirk 2007).

Practice also affects differences in statutory recommendations by lawyers and legal scholars. The proposals of most legal scholars in the symposium were much less radical than lawyers' proposals. Because the 1996 CPL left out many articles in their initial draft and generated conflicting interpretations, scholars' focus in the current revision is principally upon reducing indeterminacies and contradictions by adding more articles and specifying the CPL more precisely (F#431895). This difference in lawmaking emphasis between lawyers and scholars stems in substantial part from the fact that legal scholars do not participate in the implementation of the law and therefore do not observe the same problems in practice or come to the same conclusions about its deficiencies as lawyers do.

Yet legal scholars themselves do not share a diagnostic consensus and therefore an opinion on how much the current revision should change the 1996 CPL. As many of them have assumed adjunct positions in the court, procuracy, or public security agencies in recent years, their diagnoses sometimes also reflect the interests of these agencies. A law professor in Shanghai, for example, declared that the procedure law annual meeting had become a battleground for the three agencies to win scholarly support (S0702). Whereas some scholars made radical proposals, such as abolishing the procuracy's supervisory power or purging socialist ideological language out of the law (F#431895; B0511), others argued that the CPL reform should keep a steady pace to maintain the authority and stability of the law. A senior law professor who played a crucial role in the 1996 revision stated in 2005:

The term of the current NPC has three years remaining so the law will need to be revised within three years. But for many issues people do not have the same understanding yet. For example, do we make a big, medium or small change? If a big change, we will make a very comprehensive revision. If a medium change, only a portion of it. If a small change, we will only revise some articles. So friends from different places hold different opinions. I think that now the situation is not mature. If we make a big change it will be an incomprehensive law. So after 5–8 years it may need another round of revision. I do not want this situation to happen. Because the law needs to be stable—you cannot make it in the morning and change it in the evening. So my argument is that we should make a comprehensive revision when the time is right. But for some articles where the problem is really serious, we can change several articles using the method of amendment. (B0515)

His phrase, "the situation is not mature," reminds us of many "Chinese characteristics" discussed above. In other words, these unfavorable conditions have kept China's law reform from quickly converging with global norms and have contributed to the recursive process of CPL lawmaking. China's

lawmakers and scholars find themselves constantly caught between domestic exigencies and international pressures. Accordingly, some legal academics adapted by changing their strategy. For instance, a research group at Renmin University, led by Chen Weidong and supported by an aid program of the American Bar Association, has created a “Model Criminal Procedure Code” that claims to have incorporated the most “advanced” experiences of CPL legislation in other countries (B0505; B0511). This tactic has deliberately created a “model” that is far in excess of what is enactable in contemporary China, but it is intended to pull the NPC drafting committee further toward international practices and global standards than it might otherwise be inclined to do.

While the current CPL revision is still going through fierce diagnostic struggles among various actors in the criminal justice system, on another front lawyers and scholars have made some significant achievements. When the Lawyers Law was revised in 2007, several articles were added to protect lawyers’ procedural rights in criminal defense, which are beyond the scope of the 1996 CPL.¹⁹ In August 2008, the NPC Legal Work Commission made an official reply regarding the potential conflicts of law and gave the new Lawyers Law priority over the 1996 CPL. According to a law professor who attended the internal discussion of the NPC on this reply, the final decision was made under the direct guidance of a member of the CCP Politburo, and leading criminal defense lawyers from the ACLA played a significant role in the process without even the participation of the MOJ.

It is important to note that this modest triumph for lawyers was also a result of actor mismatch and the lack of diagnostic struggles in lawmaking. Unlike the CPL revision in which the MPS, SPP, and SPC are all vital players, the revision of the Lawyers Law was mainly undertaken by the MOJ, so lawyers were able to insert their opinions into the draft more easily than in the CPL revision. Yet the recent NPC reply indicates that the general direction of the current CPL revision may be in favor of lawyers rather than the police or the procuracy, though the lawmaking process has exceeded its original time frame. It remains to be seen how much progress can be made after the inevitable legislative compromises and the subsequent workplace struggles in the years to come.

DISCUSSION: PROPERTIES OF RECURSIVE LEGAL CHANGE

The empirical analysis of two full cycles of CPL reforms and a third cycle currently under way has been structured not only temporally but in terms of

19. For example, Article 33 stipulates that lawyers’ meetings with criminal suspects and defendants should not be monitored by the police, Article 34 expands lawyers’ access to case files to “all relevant files” of the case, and Article 37 exempts lawyers’ speeches and opinions during the court proceeding from being investigated by the procuracy.

particular mechanisms that appear dominant in various phases of the reforms. When we closely inspect the relationships among the mechanisms that drive cycles of law reform, we discover that these relationships form pairs, and possibly a sequence. These links between the four mechanisms are not equally significant at every phase of lawmaking or law-implementing cycles of the CPL reforms. We find that an affinity exists between processes and stages of legal change. This allows us to transcend the typical variable-based causal thinking in social science research and move the theory of recursivity “from causes to events” (Abbott 2001, 183). These processes can be expressed as four conclusions.

First, *ideological and structural contradictions produced ambiguities and inconsistencies in the law*. In the lawmaking of the 1996 CPL, for example, two major contradictory ideologies behind the law, striking crimes and protecting human rights, were both written into the CPL as basic principles, thereby internalizing in the law a basic inconsistency. To balance the two ideologies, lawyers were allowed to intervene in the phase of investigation, but they did not have the status of the defender, an ambiguous situation that led to much confusion over their role in criminal defense. In the meantime, the structural contradictions among the police, procuracy, and court led to procedural but not substantive supervisory power of the procuracy over the other two agencies, which further compounded ambiguity and inconsistency in the law.

Second, *the indeterminacy of law leads to conflicting interpretations and individual diagnostic struggles in practice, which mutually influence each other*. The conflict between the police and lawyers regarding meeting suspects is a good case in point for how ambiguities in the 1996 CPL produce conflicting definitions of the situation in practice. Over time, the conflicting interpretations were revised and adjusted to reflect the diagnoses of different actors on the issues in implementation and, in turn, they also shaped the dynamics of diagnostic struggles between individual law practitioners. For instance, the 1998 Joint Regulation by the six state agencies was a direct result of conflicting interpretations of what was happening in practice among lawyers, police officers, procurators, and judges, all of whom were following the differing interpretations of their own agencies.

Third, *individual diagnoses in practice are differentially aggregated into collective diagnoses for subsequent rounds of lawmaking, and this may be accompanied by actor mismatch between practice and lawmaking*. For example, the problems lawyers experienced with the Three Difficulties were collected by the ACLA representatives and presented at the NPC symposia during the current CPL revision. Similarly, at these symposia, representatives of the procuracy strongly advocated for the expansion of its supervision from a procedural to a substantive power. A notable feature of this transition from implementation to another round of lawmaking is actor mismatch. Lawyers extensively participated in the implementation of the CPL, but their

collective voices in lawmaking are still heavily muted. In comparison, legal scholars did not participate in implementation but had their voices heard in lawmaking as major advocates for reforms that conform to global norms.

Fourth, *collective diagnostic struggles in lawmaking process can strengthen existing contradictions and produce new indeterminacy of law*. We do not yet have evidence on how the NPC symposia in the current lawmaking process will influence the new CPL, which may not be completed until 2010 or later, but we have provided numerous examples of this during the 1996 lawmaking. The limited role of lawyers in the phase of investigation in the 1996 CPL, for instance, is not only a reflection of the contradictions in the criminal justice system but also the result of severe diagnostic struggles between the MPS and legal scholars/MOJ in the lawmaking process.

CONCLUSION

In spite of some persisting criticisms from observers of China's criminal justice system, it is clear that a vast distance has been traversed since 1979. China's legal rhetoric and many practices are qualitatively different from those that existed at any time between 1949 and the first PRC CPL. The convergence has been strongest at the level of norms: the 1996 CPL was hailed as a breakthrough in China's conformity with UN norms by commentators inside the country and overseas. But this evaluation rested on a primitive understanding of formal law—that it resided only or principally in statutes, and in an ante-sociolegal concept of law, that law on the books was a reasonable indication of law in action. Similarly, an overemphasis on lawyers' difficulties and problems in practice masks their deep social, structural, and political roots, some of which may be traced back to the dynamics of lawmaking that long antedates struggles in the workplace. In short, only by conceiving of lawmaking and practice as intimately connected and mutually contingent processes can we fully explain the procedural reform of China's criminal justice system since the late 1970s and its consequences for lawyers' criminal defense work.

We have argued that China's reforms of criminal procedure law have followed a recursive trajectory. The entire episode of reforms began in 1979 and has gone through two statutory lawmaking cycles, with a third in process. Within the statutory cycles have been cycles of administrative and judicial lawmaking, most particularly in the wake of the 1996 CPL. We have proposed that these cycles are driven by the interactions of four mechanisms—indeterminacy, contradictions, diagnostic struggles, and actor mismatch. The empirical analysis shows that these mechanisms are linked in pairs and in sequence, and together they drive continuing cycles of formal lawmaking and everyday practice.

It is clear that China's domestic agenda is constrained considerably, mostly intellectually, by exogenous influences, most notably by the normative power of the UN covenants, conventions, and principles. Weak internal actors—academics, lawyers—appeal to these global norms in order to counteract powerful domestic agencies—police, procuracy, and court—for whom those norms would diminish their longstanding power. The adoption of these UN norms also serves an important symbolic function of displaying China's progress to the outside world. In terms of the theory of legal change, however, it should be noted that these global influences are more persuasive than coercive, based more on integration into the global community than on compulsion or negotiation, although moral suasion is not to be minimized.

The cycles of criminal law reform in China are framed by a changing domestic ideological balancing of imponderables faced by any society's criminal law system. Yet they involve distinctively Chinese attributes insofar as they respond to particular social and economic exigencies across thirty years of rapid social and economic change. They also reflect the struggles of the Chinese Communist Party to define the structure of power inside the state (Yang 2004). By focusing on criminal procedure law and, more precisely, lawyers' capacity to provide an effective representation of criminal defendants, we have a particular indicator of China's move toward political liberalism. This indicator relates both to the degree of moderation of the state—by indications of courts' willingness and ability to restrain arbitrary executive power—and to the basic legal freedoms contained in first-generation civil rights, namely, due process and procedural rights (Halliday, Karpik, and Feeley 2007). To accomplish either a moderate state or basic legal freedoms, however, requires a limiting of authoritarian power and a reconstitution of the structure of the state. Since this would constitute a fundamental reorientation of Chinese politics and law, it is not surprising that the struggle continues with no clear direction in sight. Awareness of the structural configurations of power that underlie criminal procedure law in China helps avoid naïve notions that more precise formal law, more training of lawyers and judges, or more refinement of purely legal institutions will suffice to produce a criminal procedure law consistent with global norms without reconstruction of the state.

Finally, we have proposed that the recursivity framework has the potential to bridge divides between existing disciplinary approaches to legal change. A central objective of this article is to bring the divergent approaches of sociology of law, political science, and legal scholarship back into mutual engagement to provide a holistic theory of legal change. We have shown that the recursivity of law offers such a theoretical framework for explaining why legal change continues in one cycle after another, in China as elsewhere, in criminal law as well as commercial law. Awareness of that contingency is intended to aid scholars and practitioners alike to greet ostensible legal

change with a disposition of caution about the limits of formal law and an empirical metric for appraising implementation.

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