

RULES AND REBELS: DISCOURSE, DOMESTIC POLITICS,
AND THE DIFFUSION OF LAW

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RULES AND REBELS: DISCOURSE, DOMESTIC POLITICS,
AND THE DIFFUSION OF LAW

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This dissertation examines the role of discourse and domestic structure in the diffusion of norms and the conditions under which the policy recommendations of transnational advocates transplant to the domestic law of a target state. In particular, it examines contemporary episodes of transnational pressure that either succeeded or failed to bring a country's legal commitments more closely in line with the constitutive and regulative norms of international society.

This research challenges mainstream international relations literature on the subject, which relies on either a rationalist logic of norm diffusion or the constructivist logic of norm localization. In addition, this work expands beyond sociological institutionalist literature that leaves largely unexamined the agency of domestic actors in the promotion and resistance of normative change. Instead, I explore the communicative interactions among transnational actors, domestic reformers, and domestic reactionaries (so-called "legal nationalist rebels") to show that normative change is determined not only by coercion or emulation, but also by the discursive practices of these actors.

Through a study of legal development in a civil law state—China—and common law state—South Africa—this dissertation demonstrates that transnational discourse can both create and block channels for the diffusion of ideas about best practices, legitimacy, and perceptions of policy problems. More specifically, it

addresses the problematic conflation between discourse and norms by incorporating insights from communication theory and social psychology research. By speaking interchangeably of “grafting onto a norm” and “appealing to resonant discourses,” norm localization theorists often ignore the observation that the more strongly held a belief or deeply engrained a practice, the less an actor can articulate his or her reasons for holding that belief or engaging in that practice. It follows that entrenched beliefs and practices are especially vulnerable to discursive challenge, whereas contested practices are more likely to have already generated an active discourse that can be readily employed in their defense. The vulnerability of deeply entrenched norms thus suggests that transnational advocates and their domestic counterparts may not be as bound by “local values,” as some scholars have suggested, and are instead capable of affecting legal rules previously thought too entrenched for reform.

BIOGRAPHICAL SKETCH

Benjamin Turner Brake was born in the United Kingdom to an American mother, Dianne, and an English father, Terence. Ben, his parents, and his two big brothers—Sam and Morgan—then moved to the United States and settled in Princeton, New Jersey. As a student at Vassar College, where he received a B.A. in Political Science in 2000, Ben studied advanced Chinese, earning the Man-Sheng Chen Scholarly Award for Chinese Studies. Ben then returned to the United Kingdom to earn an M.S.c. in Asian Politics with highest honors at the School of Oriental and African Studies. After graduation, Ben worked until 2004 as a research associate at the Council on Foreign Relations in New York City. Later that same year, he began graduate school in the Government Department of Cornell University. In 2007 Ben received an M.A. in Government and enrolled in the J.D. program at Cornell Law School. In 2008, Ben married his beloved Government Department classmate, Julie Ajinkya. In 2010, Ben graduated *cum laude* from Cornell Law School and received a Ph.D. in Government. Following his Ph.D., Ben and Julie moved to Washington, D.C. where Ben joined the U.S. Department of State.

For my Julie.

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There is something to be said for seeking a joint JD/PhD; that something is the terrific cast of scholars one meets along the way. By far, my most consequential meeting occurred during my second year. It was then, when I was sure I didn't have the stamina for both degrees, that I met my wife, Julie. The joy of being near her, as well as her articulate advocacy for the merits of graduate study, swiftly did away with any doubts I had about staying in either program. Her patience with my work and her incredible intellect, moreover, ensured that I excelled in both. Any understanding of either law or political science that I have been able to attain is due only to her incredible ability to listen to my poor explanation of a concept and to repeat it back to me in far sharper form. If she weren't there for that, far more errors and poor ideas would appear on the pages that follow.

It was also not until my second year that I met Peter Katzenstein, without whom my joint degree would not have been possible, let alone pleasant. Already familiar with his outstanding scholarship and of his reputation as an invaluable advisor, I signed up as a teaching assistant for his Introduction to International Relations with the hope of learning the basics of a discipline that was still eluding me. That beginner class, and his terrific instruction, was enough to sustain me through five more years of advanced study. His openness to different ideas and careful consideration of each served as a model for my graduate work in both law and political science. My subsequent experiences of researching and writing with Peter have been enough to sustain me for a lifetime of academic work. His bold thinking and prolific production continue to push me beyond expectations I've set for myself. Finally, his generous praise and support greatly eased the rigors of pursuing a joint JD/PhD. At times, one of my greatest motivations to continue was a desire to satisfy

his insatiable curiosity in matters of the law.

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It was not until later that I met Andrew Mertha. Andy's keen eye for how political actors actually act, and for how political scientists can best study them, was essential to elevating this quality of this work. His enviable knowledge and challenging criticisms forced many changes through many drafts. These challenges, though, turned many of the project's weakest points into its strongest. As I move to become a participant-observer in the American bureaucratic system, I hope I learn to understand the U.S. bureaucracy half as well as Andy understands its Chinese counterpart.

My time in law school has been equally full of inspiring professors and formative experiences. In addition to the invaluable support of Deans Stewart Schwab and Anne Lukingbeal, my interest in and commitment to the law was stoked by great public interest lawyers like Andrea Mooney and legal scholars like Theodore Eisenberg and Mitchel Lasser. Prof. Lasser offered terrific contributions to the project in his Comparative Law Colloquium. Indeed, any theory I've been able to construct owes as much to him and his class as it does to international relations theory.

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Finally, my greatest debt is to my family. I owe my pursuit of a PhD, let alone its completion, to my wonderful parents and my beloved brothers. Each, through their kind words, made me believe that I truly could do anything; each, through their deeds, showed me what hard work, in the company of love, could accomplish. These lessons have only been reinforced by the addition of Raj, Milind, and Monica Ajinkya to my family. Their gracious welcome and generosity have more than doubled the amount of love and joy in my life. I am so proud of all that my ever-expanding family has achieved and it has been a thrill to try and keep up.

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CHAPTER 1

INTRODUCTION: DISCOURSE, DOMESTIC POLITICS AND THE DIFFUSION OF FOREIGN LAW

I. *Introduction*

Transnational legal advocates have played a significant part in redefining the role of the state in international relations (IR) theory.¹ These legal entrepreneurs have influenced not only how states trade with one another,² but also how they fight.³ The rise of these actors—and their ability to affect domestic political reform—presents an important analytical domain not encompassed by the ontological foundations of standard IR theory or even the ontological foundation of the modern state system itself.⁴ States in the contemporary international system are no longer challenged only on the battlefield or in the international marketplace, but also in the conferences and

¹ “Transnational” is understood here as Robert Keohane and Joseph Nye described: “regular interactions across national boundaries when at least one actor is a non-state agent...” See Robert O. Keohane & Joseph S. Nye, Jr., “Transnational Relations and World Politics,” in Keohane and Nye, eds., *Transnational Relations and World Politics* (Harvard University Press, Cambridge, MA: 1971), at xii-xvi. A legal advocate is understood to mean any policy entrepreneur that employs litigation or lobbying of legal actors for the purposes of policy reform.

² See, e.g., Audie Klotz, *Norms in International Relations: The Struggle Against Apartheid* (Cornell University Press: 1995); Robert O’Brien, et al., *Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements* (Cambridge University Press: 2000).

³ See, e.g., Peter Katzenstein, ed., *The Culture of National Security: Norms and Identity in World Politics* (Columbia University Press: 1996); Matthew Evangelista, *Unarmed Forces: The Transnational Movement to End the Cold War* (Cornell University Press: 1999); Richard M. Price, “Reversing the Gun Sights: Transnational Civil Society Targets Land Mines,” 52 *International Organization* 613 (2003); Martha Finnemore, *National Interests in International Society* (Cornell University Press: 1996).

⁴ See Smith, 2004. This is not to suggest a decline in the role of the state itself. Some scholars suggest that transnational actors have been able to operate successfully only with state permission (Huntington, 1973, at 343) and only in relation to the domestic political structure of the states (Evangelista, 1999; Risse-Kappen, 1995).

courtrooms wherein members of a transnational legal epistemic community teach states new norms and best practices.⁵

The international exchange of law and the perceived convergence of national legal norms brought about by these new actors is a subject of intense controversy in many countries. Serving as a powerful political force intertwined with a state's social structure, a national legal system is often considered part of what constitutes a state's national identity.⁶ Domestic actors thus frequently mobilize to combat foreign interpretations of law or proposals for legal reform that appear of foreign origin.⁷ In contemporary international politics, domestic discomfort with the importation of foreign law can persist even as domestic actors, in the course of dramatically expanded international trade and mobility, are increasingly familiar with the merits of certain foreign law.⁸ Indeed, contemporary efforts to exclude foreign legal norms parallel similar episodes of domestic resistance to foreign legal encroachment seen in previous historical periods,⁹ including Irish concern about the import of English law

⁵ See, e.g., E. Haas, 1991; M. Barnett & P. Haas, 1992; Adler, 1998.

⁶ See Laura Nader, *The Anthropological Study of Law*, 67 AMERICAN ANTHROPOLOGIST 3, 10 (1965).

⁷ See ANTHONY D. SMITH, NATIONAL IDENTITY: ETHNONATIONALISM IN COMPARATIVE PERSPECTIVE 13–14 (1993).

⁸ See, e.g., Andrea Hamann & Hélène Ruiz Fabri, *Transnational Networks and Constitutionalism*, 6 INT'L J. CONST. L. 481, 498 (2008) (describing the process of “constitutional cross-fertilization,” where foreign approaches are imported and resisted).

⁹ The controversy surrounding the citation of foreign law in U.S. constitutional interpretation provides one contemporary example, appearing most recently in the confirmation hearings of Justices John Roberts and Samuel Alito, during which both maintained that the practice should be proscribed. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. On the Judiciary, 109th Cong.* (2005); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. On the Judiciary, 109th Cong.* (2006). The opposition of Justices Alito and Roberts is supported by Congressional efforts to pass legislation explicitly forbidding the use of foreign law in constitutional decisions of the Supreme Court. See, e.g., American Justice for American Citizens Act, H.R. 1658, 109th Cong. § 3 (2005); Constitution Restoration Act of 2005, H.R.

and continental opposition to the spread of Teutonic law.¹⁰

Given the sensitive relationship political communities have with their legal system, it is argued by some that the only way for advocates to affect change in those systems is through grafting a candidate norm onto a preexisting discourse from the body politic. In this approach, advocates are limited to what Chinese legal scholar Zhu Suli has described as the “native resources” of the political community.¹¹ Reflected in the local discourse, these resources are said to be the resonant norms through which domestic and transnational advocates can successfully import foreign law.¹² The theory outlined below explores this dynamic between domestic discourse and domestic resistance to the adoption of foreign legal rules. More specifically, it addresses the problematic conflation between discourse and norms by incorporating insights from communication theory and social psychology research. By speaking interchangeably of “grafting onto a local norm” and “appealing to a resonant discourse,”¹³ the literature on diffusion ignores the observation that the more strongly held a belief or deeply engrained a practice, the less an actor can articulate his or her reasons for holding that belief or engaging in that practice. It follows that such

1070, 109th Cong. §201 (2005); S. Res. 92, 109th Cong. (2005); H.R. Res. 97, 109th Cong. (2005); American Justice for American Citizens Act, H.R. 4118, 108th Cong. (2004); Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. (2004); H. Res. 568, 108th Cong. (2004); H. Res. 468, 108th Cong. (2003).

¹⁰ See Adam M. Smith, *Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence*, 24 BERKELEY J. INT’L L. 218, 220 (2006).

¹¹ 朱苏力 [Zhu Suli], 送法下乡:中国基层司法制度研究 [*Sending Law to the Countryside: Research on China’s Basic-Level Judicial System*] (China University of Political Science and Law: 2000).

¹² Jeffrey Checkel, “Norms, Institutions and National Identity in Contemporary Europe,” 43 *International Studies Quarterly* 83 (1999), at 99.

¹³ See, e.g., Richard Price and Nina Tannenwald, *Norms and Deterrence: The Nuclear and Chemical Weapons Taboos*, in Peter J. Katzenstein ed., *THE CULTURE OF NATIONAL SECURITY* (1996), at 114-52; Richard Price, *Reversing the Gun Sights: Transnational Civil Society Targets Landmines*, 52 *INTERNATIONAL ORGANIZATION* 613 (1998).

entrenched beliefs and practices are especially vulnerable to discursive challenge, whereas contested practices are more likely to have already generated an active discourse that can be readily employed in their defense. The vulnerability of deeply entrenched norms thus suggests that transnational advocates and their domestic counterparts may not be as bound by “local values” as some scholars have suggested and are instead capable of affecting legal rules otherwise thought too entrenched for successful reform.

Through a study of contemporary legal reform and the incorporation of insights from comparative legal studies, which too often go underutilized by both comparative political scientists and international relations theorists, the research below attempts to contribute to the growing body of IR literature by examining the circumstances under which foreign advocacy succeeds or fails to bring a target state’s legal practices in line with the constitutive and regulative norms of the dominant international society.¹⁴ To better understand the dynamics of norm diffusion, this study attempts to answer two main questions: 1.) To what extent does domestic discourse concerning a norm determine the pace and content of reform?; and 2.) To what extent does the structure of a state’s legal system affect the vulnerability of that state to international and transnational legal advocacy campaigns?

This consideration of domestic discursive and structural conditions, though underexamined in IR scholarship, is central to understanding successful norm

¹⁴ See, e.g., Amitav Acharya, *How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism*, 28 INTERNATIONAL ORGANIZATION 239 (2004); Pitman B. Potter, *Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices*, 2 WASH. U. GLOBAL STUD. L. REV. 119 (2003); Jeffrey W. Legro, *Which Norms Matter? Revisiting the "Failure" of Internationalism*, 51 INTERNATIONAL ORGANIZATION 31 (1997).

diffusion and persuasion.¹⁵ The basic insight of the model described below is that while local advocacy networks are activated by increased international and transnational pressure from the outside, so too are extant domestic opposition groups eager to deploy discursive challenges to such reforms. This insight helps explain why, after the application of foreign pressure for reform, a norm with a history as a contested practice or “point of concern”¹⁶ in a society—e.g. capital punishment—proves resistant to foreign pressure, but a novel or deeply entrenched practice about which little domestic discourse exists—e.g. plea bargaining—may undergo rapid and significant change.

In addition, the model addresses (in Chapter 2) the intervening variable of domestic structure. More specifically, the model examines how domestic structure, in the form of a state’s legal system, further affects the openness of a state to foreign pressure, the persuasive strategy foreign advocates must employ and, in the case of a successful advocacy campaign, the ultimate pace of legal reform. With distinctive configurations of power and prestige, legal systems (i.e. common law or civil law) can be distinguished by the location of key legal decision makers (i.e. in courtrooms, law schools, or national legislatures). These differences directly affect the means by which foreign legal advocates are able to achieve desired legal reforms. In centralized, statute-based civil law states, transnational diffusion can occur quickly, and generally requires the successful persuasion of a small number of influential academics and

¹⁵ For the terms “norm diffusion” and “persuasion,” this paper understands both as being an activity or process through which an actor is induced to make a change in belief, attitude, or behavior.

¹⁶ Rather than perceive of culture as a society’s received and/or shared values legitimating social practices, this work instead proceeds, as David Laitin and Aaron Wildavsky suggest, with culture conceived of as delineating the “points of concern” of a society. They argue that a general focus on “points of concern” rather than an attempt to identify shared values provides a richer appreciation of why political action may differ across cultures. See David Laitin & Aaron Wildavsky, *Political Culture and Political Preferences*, 82 AMERICAN POLITICAL SCIENCE REVIEW 589, 590 (1988).

legislative drafters. In decentralized, precedent-based common law systems, which lack the unifying institutional structures of civil law, transnational diffusion often occurs more slowly, requiring the successful persuasion not of a handful of scholars or legislators, but rather judges dispersed throughout the legal system. Through an examination of these two variables—discursive context and legal system—this study thus aims to improve our understanding of the domestic factors involved in determining whether international and transnational actors will succeed in their attempts to affect legal reform in the international system. In so doing, it offers insights into how those actors can, through the appropriate discursive framing of their advocacy, as well as the targeting of the right domestic actors, avoid undermining the positive efforts of local reformers.

While there exist many competing explanations of diffusion, this research does not seek to advance another unified theory purporting to explain *all* episodes of legal diffusion. It proceeds with the more modest goal of identifying various scope conditions that indicate which of the many theoretical approaches to diffusion should be applied. I readily concede that under certain conditions of force, self-interest, shame, and scarcity, foreign legal practices have successfully diffused.¹⁷ However, as is shown below, foreign advocates for reform do not necessarily succeed when those conditions are present. Instead, successful diffusion can even occur—counter-intuitively—in the absence of such conditions. Moreover, the variability with which foreign norms diffuse reveals a discursive element that political scientists and comparative legal scholars should consider.

¹⁷ See Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 843-67 (2003) (usefully specifying a typology of legal transplant theories: cost-saving, externally dictated, entrepreneurial, and legitimacy-generating).

II. *Legal Rules and Local Resistance*

To successfully diffuse into a new legal domain, a legal norm or practice must overcome significant discursive and structural obstacles.¹⁸ Certain laws serve as a mutually constitutive component of the legal culture of a society, and so the relative success of any transplant operation often depends on the characteristics of the transplanted law itself and whether the foreign law can coexist with extant legal norms in the recipient body politic.¹⁹ As Montesquieu suggested in his *De L'esprit des Lois*, laws often serve as an expression of national spirit.²⁰ The divergent cognitive orientations of different legal systems, and not just the laws themselves, thus distinguish jurisdictions and reinforce in jurists what Hans-Georg Gadamer has described as a distinct “pre-understanding” of law.²¹

In addition to varied constitutive understandings of law, any successful transplantation between different legal systems must also consider the translation of

¹⁸ Usefully illustrating the controversial nature of citations to foreign law, activists in both the United States and the People’s Republic of China have proposed formal prohibitions on references to foreign law. *Compare Setting a Precedent*, BEIJING REVIEW (Jan. 4, 2007) (citing suggestions from China’s then top legislator, Wu Bangguo) *with* American Justice for American Citizens Act, H.R. 1658, 109th Cong. § 3 (2005); Constitution Restoration Act of 2005, H.R. 1070, 109th Cong. §201 (2005); S. Res. 92, 109th Cong. (2005); H.R. Res. 97, 109th Cong. (2005); American Justice for American Citizens Act, H.R. 4118, 108th Cong. (2004); Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. (2004); H. Res. 568, 108th Cong. (2004); H. Res. 468, 108th Cong. (2003).

¹⁹ See MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE, at 134 (noting that a successful graft requires a series of people who take one set of ideas and reframe them in different terms for another group and translate grievances and alternative understandings); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INTERNATIONAL ORGANIZATION 887 (2005) (identifying the ability of transnational advocacy networks to mobilize on behalf of foreign norms and enforcement measures); MARTIN CHANOCK, THE MAKING OF SOUTH AFRICAN LEGAL CULTURE 23 (2007).

²⁰ C.S. MONTESQUIEU, L’ESPRIT DES LOIS (1748).

²¹ See Pierre Legrand, “Against a European Civil Code,” 60 MOD. L. REV. 44, 45 (1997).

concepts into different legal languages.²² In this way, successful legal transplants require a legal actor serving as equal parts linguist, legal scholar, and hermeneut. Any direct reference to a law that neither resembles the known legal practices of a foreign legal system or does not effectively translate into the domestic legal discourse is thus controversial because, as Pierre Bourdieu explains, to genuinely experience the “force of law,” individuals must first accept the reasoning and judicial precedent upon which the law is based, as well as the institutions within which those laws are embedded.²³ It follows that foreign laws are difficult to import because of the unique *habitus* of every political community, which he defines as the “habitual, patterned ways of understanding, judging, and acting.”²⁴

For these reasons, some comparative law scholars distinguish between “mechanical transplants,” which transplant relatively easily into a variety of body politics, and “organic transplants”²⁵ or “legal irritants,”²⁶ which require greater attention to local conditions and the nature of the proposed legal reform. Indeed, some legal anthropologists question whether a foreign law has any useful application outside its theoretical birthplace.²⁷ For Clifford Geertz, domestic laws are tight “webs of

²² Maximo Langer, “From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure,” 45 *Harvard Int. Law Journal* 1, 10 (2004). See also Damaska 1997, 839-40.

²³ Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Judicial Field*, 28 *HASTINGS L.J.* 805, 807 (1986).

²⁴ *Id.* at 811.

²⁵ See Otto Kahn-Freund, *On the Uses and Misuses of Comparative Law*, 37 *MOD. L. REV.* 1, 12-13 (1974); William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 *AM. J. COMP. L.* 489, 495 n.7 (1995); John Gillespie, *Towards a Discursive Analysis of Legal Transfers into Developing East Asia*, 40 *N.Y.U. J. INT’L L. & POL.* 657, 664 (2008).

²⁶ See Gunther Teubner, “Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences,” 61 *MOD. L. REV.* 11, 17 (1998) (noting that even though the production of law is increasingly detached from national culture, many laws are still difficult to transplant because they are tightly coupled with the specific political power structure of the society in which they develop).

²⁷ See generally CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN*

signification” in which individuals enclose themselves.²⁸ Domestic law, he describes, is not merely an instrumental means of social mechanics, but a form of cultural hermeneutics, a semantics of social action, whereby individuals in a community determine who they are and distinguish whom they are among.²⁹ Other legal anthropologists similarly maintain that law is local custom lifted from daily life to be “reinstitutionalized within the legal institution,”³⁰ a product of its unique historical experience.³¹ Law, it follows, is a purely local knowledge and remains so, despite the competing pressures of increasing international transactions or transnational advocacy.³²

INTERPRETIVE ANTHROPOLOGY (1983). Many colonial powers, for instance, were aware of the difficulty of imposing law and so did so incrementally. *See, e.g.*, *Campbell v. Hall*, 98 Eng. Rep. 1045, 1047 (K.B. 1774) (“[T]he laws of a conquered country continue in force, until they are altered....”).

²⁸ GEERTZ at 182.

²⁹ *Id.* Successful transplants, Geertz argued, are extraordinarily rare. Islamic law, he noted, proved a rare successful homogenizing force in the fourteenth century, whereas most legal systems, like Indic law, failed to retain their meaning once transplanted into foreign jurisdictions. *See id.* at 229.

³⁰ Paul Bohannan, *The Differing Realms of the Law*, 67 AMERICAN ANTHROPOLOGIST 33, 36 (1965).

³¹ Pierre Legrand, “Comparative Legal Studies Commitment to Theory,” 58 MOD. L. REV. 262 (1995).

³² The fundamental weakness of the challenge posed by Geertz and others, however, is that defining *local* law is just as difficult as the project of identifying the causes of transnational legal influences. For example, the valuable scholarship of Laura Nader, Edward Said, Francis Snyder, and others, describes the perverting role many missionaries, both colonial and neocolonial, played in the fabrication of “indigenous” and “customary” local law. Much of what was treated by colonial jurists as extant local legal norms was in fact the synthetic product of a two-level game involving the converging interests of colonial officials and local elites. *See generally* LAURA NADER, HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEC VILLAGE (1991); *see also* CHANOCK (2007); Sally Falk Moore, *Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949–1999*, 7 JOURNAL OF THE ROYAL ANTHROPOLOGICAL INSTITUTE 95 (2001); Langer (2004) (arguing that legal systems are structures of interpretation and meaning internalized by legal actors through legal education, training, and repeated interactions rendering them predisposed to understand procedure and the various roles the actors play within it in a particular way). *See also* GEERTZ, at 182.

Despite the skepticism of Geertz and other legal anthropologists, this project proceeds with the understanding that the mere adoption of a foreign law is a political event worthy of study, regardless of whether a transplant ultimately survives, mutates, or fails.³³ As such, this dissertation does not address the gulf between law on the books and law in practice. The project outlined here examines an antecedent event in the transnational policy cycle—i.e. the initial process by which a foreign law or norm is codified in the statutory law of a target state. While much great work on the interaction between codified law and society exists,³⁴ such political phenomena lie outside the scope of this work, which focuses instead on the event that has been subject to considerable scrutiny in international relations literature—the agenda-setting or “norm emergence” phase of normative diffusion.³⁵ In so doing, this study examines whether certain legal reforms advocated for by international and transnational actors are transplanted strategically by policymakers in target states, or whether variation in such transplants suggests that nonmaterial factors such as

³³ Of course, there is much valuable work on the question of whether efforts to transform national laws and legal systems can ever succeed. *See, e.g.*, John Henry Merryman, *The French Deviation*, 44 AM. J. COMP. L. 109, 119 (1996) (noting that “In each case the attempt to detach a national legal system from the European *jus commune* and move it in an independent direction by following persuasive theoretical principles appears to have ended with a return to the mainstream).

³⁴ *See, e.g.*, Andrew Mertha, *The Politics of Piracy: Intellectual Property in Contemporary China* (Cornell University Press, Ithaca, NY: 2005); Robert O. Keohane, Peter M. Haas, & Marc A. Levy, “The Effectiveness of International Environmental Institutions,” in Peter M. Haas, Robert O. Keohane, and Marc A. Levy, eds., *Institutions for the Earth: Sources of Effective International Environmental Protection* (MIT Press: 1993); David G. Victor, Kal Raustiala, & Eugene Skolnikoff, eds., *The Implementation and Effectiveness of International Environmental Commitments* (MIT Press: 1998); Wolfgang Streeck & Kathleen Thelen, “Advanced Political Economies,” in Wolfgang Streeck & Kathleen Thelen, eds., *Beyond Continuity: Institutional Change in Advanced Political Economies*, (Cambridge University Press, New York: 2005); Teubner (1998); Damaska (1997); *The Institutions of Private Law* (Karl Renner and O. Kahn-Freund, eds.) (London: 1949).

³⁵ *See* Risse (2002) (noting that “agenda-setting does not equal norm creation”), at 268; Keck & Sikkink (2005).

constitutive discourse might also play a role in the selection of foreign law. The plausibility of the latter stems from the fact that that states have accepted a selection of the proposed legal reforms—e.g. adversarial procedures—but rejected less costly and easily circumvented rules—e.g. the exclusion of evidence unlawfully obtained. Put simply, this study attempts to answer the question of why a state adopts certain procedural reforms but reject others, even when that state at the implementation stage could circumvent both. The question of how those transplants ultimately operate in the receiving polity, while essential to understanding the comparative legal development of that state, stands apart from the simpler—and arguably less interesting—task of identifying patterns in interstate and transnational relationships.³⁶

Studies of the observed convergence or harmonization of legal systems, from the fields of both law and political science, generally provide a limited sense of what causal factors determine the degree to which those systems come to resemble one another.³⁷ Legal scholars such as Rudolf Schlesinger and political scientists such as Hedley Bull usefully performed a form of “legal cartography” to map the so-called “common core” of legal systems, but this static picture of commonalities provided little insight into how those systems became more or less alike over time.³⁸ Frequent claims by constructivist political scientists such as Martha Finnemore that “states are

³⁶ See K.J. Holsti, “Retreat from Utopia: International Relations Theory: 1945-1970,” 4 CAN. J. POLI. SCI. 165, 167 (1971).

³⁷ See, e.g., YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES 5 (2002) (expressing frustration with the limited explanatory power of extant theories); Yves Dezalay & Bryant G. Garth, *Legitimizing the New Legal Orthodoxy*, in GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY 306, 312-13 (Yves Dezalay & Bryant G. Garth eds., 2002).

³⁸ See, e.g., FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS (Rudolf B. Schlesinger ed., 1968); HEDLEY BULL, THE ANARCHICAL SOCIETY 4 (1977). See also Mauro Bussani & Ugo Mattei, *The Common Core Approach to European Private Law*, 3 COLUM. J. EUR. L. 339, 339 (1996).

embedded in dense networks of transnational and international social relations that shape their perceptions of the world and their role in that world” similarly leave unexplained the process by which a state’s interests are shaped and why variation occurs.³⁹ The observation of Edith Brown Weiss, an international law scholar, that there is a growing tendency in the international system to recognize the rights of “future generations” in national constitutions, treaties, and other instruments of formal law,⁴⁰ while instructive, similarly cannot explain the growth nor why it is that while the past constitutions of only twenty-one countries referenced the rights of “future generations,” forty-eight now do.⁴¹ The following section presents a theory explaining the variation.

III. A Two-Tailed Theory of Norm Diffusion

There currently exist at least three distinct logics to explain the legal and regulatory reforms states implement in order to bring their policies in line with the constitutive and regulative norms of other states—realism, liberalism, and constructivism. The theoretical framework that guides the theory outlined below integrates the communicative action theory of constructivism with the transnational and domestic politics research programs of international relations theory. In the general-equilibrium model proposed here, an exogenous rise in pressure for legal

³⁹ FINNEMORE (1996), at 2 (arguing that “states are *socialized* to want certain things by the international society in which they and the people in them live.” (emphasis in original)).

⁴⁰ Edith Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 AM. J. INT’L L. 198 (1990); EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS (1988) (identifying an emerging consensus in the common and civil law traditions, in Islamic law, in African customary law, and in Asian nontheistic traditions).

⁴¹ Compiled by author from *Ocean Law: Constitutions of the Countries of the World Database*, available at www.oceanlaw.net. It is worth noting also that while only 61 past constitutions refer to the environment, 140 now do.

reform led by international and transnational advocates can result in increased lobbying by both domestic reform advocates *and* opponents—a group Gao Hongjun, a professor and vice dean of Qinghua University School of Law, has called in the context of legal reform in the People’s Republic of China “legal nationalist rebels” (“法律民族主义的反叛”).⁴² Much as in two-level games, in which domestic and international actors are incorporated into a single strategic framework, the degree to which a state is able to adopt certain foreign legal reforms is affected by the presence or absence of motivated domestic constituencies, as well as by the content of those foreign legal reforms.⁴³ In addition to considering these actors, the model below also adopts a discourse- and structure-centered approach, asking how a state’s discursive and institutional environment affects the importability of foreign law. In so doing, the model attempts to identify which reforms and which discursive contexts are most viable for diffusion. Put in Robert Putnam’s terms, it aims to identify the discursive “win-set” shared by state and non-state actors.

International and transnational advocates consist of members of both formal organizations (from international organizations to development agencies) and informal networks, defined as “forms of organization characterized by voluntary, reciprocal, and horizontal patterns of communication.”⁴⁴ The domestic opponents of these advocates, as John Merryman observed in his discussion of notable differences emerging between legal systems, serve as a powerful “particularizing force,” “opposing uniformity, standardization, and the loss of those characteristics by which

⁴² Hongjun Gao, “法律移植与法律文化: 译者前言,” in *ADAPTING LEGAL CULTURES* (H. Gao trans.; Johannes Feest & David Nelken eds., 2006).

⁴³ See Robert Putnam, “Diplomacy and Domestic Politics: The Logic of Two-Level Games,” 42 *Int’l Org.* 427 (1988).

⁴⁴ Margaret Keck & Kathryn Sikkink, *Activists Beyond Borders: Transnational Advocacy Networks in International Politics* (Cornell University Press, Ithaca, NY: 1998), at 8.

people define themselves and establish their unique identities.”⁴⁵ It follows that international and transnational legal advocates must overcome not only the preexisting normative landscape and institutional barriers to entry such as the relative strength of the political system,⁴⁶ but also the domestic legal parochialism of these so-called legal nationalist rebels.⁴⁷ The contest between this local resistance and domestic advocates for reform can determine which reforms are invited in and which are blocked. As Jason Frank similarly observes, amidst early American legal advocates one of the most consequential struggles of the revolutionary era was the persistent contest over what and who constituted the will of the people. Some, such as Thomas Paine, saw themselves as “citizens of the world” advocating transnational revolutionary thought. In tension with these visionaries, however, were ardent nationalists who proclaimed the reforms advocated by Paine and others were in fact the products of foreign conspirators “who had no part of the people, as nationally defined.”⁴⁸

The mobilization of non-state domestic actors resistant to proposed legal reforms is not surprising, but its role is overlooked in the relevant literature on contemporary norm diffusion.⁴⁹ In Margaret Keck and Kathryn Sikkink’s so-called “boomerang” model of norm diffusion, reform is best achieved when domestic supporters of reform circumvent their domestic government and associate with foreign

⁴⁵ John Henry Merryman, “On the Convergence (and Divergence) of the Civil Law and the Common Law,” 17 *STAN. J. INT’L L.* 357, 372(1981).

⁴⁶ MATTHEW EVANGELISTA, *UNARMED FORCES: THE TRANSNATIONAL MOVEMENT TO END THE COLD WAR* (1999).

⁴⁷ Extant theories of diffusion suffer from a tendency to collapse the normative orientations of states targeted for reform, thus missing a dynamic essential understanding successful norm diffusion.

⁴⁸ Jason Frank, *Constituent Moments: Enacting the People in Postrevolutionary America* (Duke University Press: 2010), at 133, 177.

⁴⁹ These scholars argue that domestic actors such as nongovernmental organizations and trade unions, in cooperation with transnational organizations and networks, exploit international movements to generate pressures for compliance or reform on state decision makers. *See, e.g.,* KLOTZ (1995).

allies to bring pressure against their host government from the outside.⁵⁰ In this network model of diffusion, nongovernmental organizations (NGOs) in state A cooperate with an NGO in state B (or an international NGO) to advocate for reform in state B.⁵¹

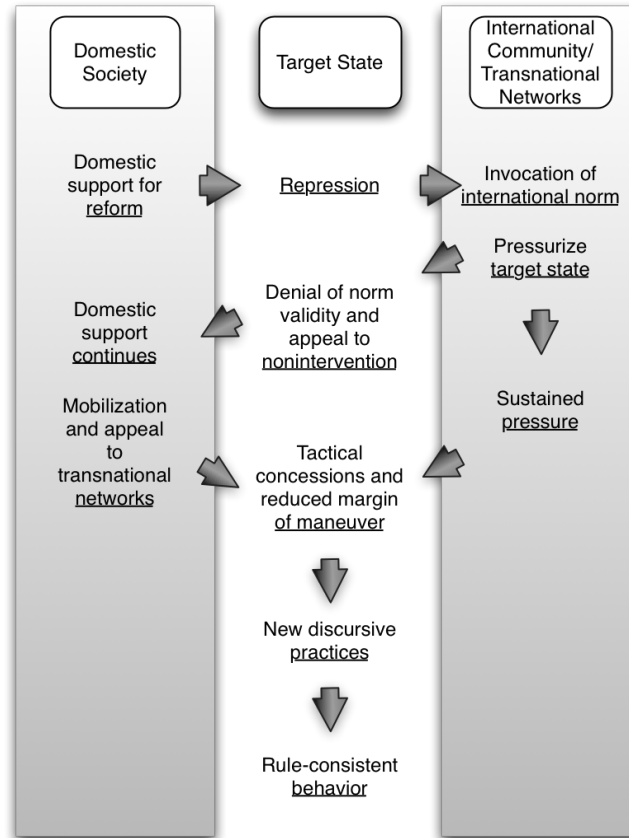


Figure 1.1. *Risse and Sikkink’s “Spiral Model” of Diffusion*

As sketched in Figure 1.1, Thomas Risse, Stephen Ropp, and Kathryn Sikkink’s similar five-phase “spiral” model of the diffusion of issue-specific norms considers several such “boomerang” throws between domestic supporters of reform and foreign allies. Like Keck and Sikkink’s model, however, it too focuses on the relationship among the transnational human rights community, the domestic

⁵⁰ See Keck & Sikkink (1998).

⁵¹ See Keck & Sikkink, at 12-13.

supporters of the norm, and the target state government, thereby excluding potentially decisive players in non-state domestic opposition.⁵²

The “boomerang” and “spiral” explanations, which depict a constrained target state ensnared between activists from domestic society and the international community, exclude from the analysis a crucial player in the two-level game—domestic non-state opponents to legal reform.⁵³ All that is required for success, these models suggest, is domestic non-state support for reform and sustained international and transnational pressure. Matthew Evangelista offers an analogous model of transnational diffusion in which transnational allies of domestic political actors provide the necessary ideas and information to aid key domestic supporters in their efforts to influence the state.⁵⁴ Other prominent studies of diffusion similarly leave under-examined the internal domestic dynamics of reform, often giving only cursory attention to or neglecting outright the local nonstate agents that can effectively translate or impede structural effects of international norms.⁵⁵ As Peter Spiro observes, these models, while innovative and insightful, are all marked by the traditional emphasis of political science research—state action—and thus overlook important non-state actors.⁵⁶ These nonstate actors and their tools of resistance are worthy of

⁵² See Thomas Risse & Kathryn Sikkink, *Introduction*, in *POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 1, 20 (Thomas Risse, Stephen Ropp, & Kathryn Sikkink eds., 1999).

⁵³ For a similar critique of the failure of diffusion literature in international relations to examine domestic conditions, see Jeffrey T. Checkel, *Why Comply?: Social Learning and European Identity Change*, 55 *INTERNATIONAL ORGANIZATION* 553, 557 (2001).

⁵⁴ See Evangelista (1999), at 19.

⁵⁵ See, e.g., TIMOTHY J. SINCLAIR, *THE NEW MASTERS OF CAPITAL: AMERICAN BOND CREDIT RATING AGENCIES AND THE POLITICS OF CREDITWORTHINESS* (2005); Nina Tannenwald, *The Nuclear Taboo: The United States and the Normative Basis of Nuclear Non-Use*, 53 *INTERNATIONAL ORGANIZATION* 433 (1999); ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* (1999); Finnemore & Sikkink, *International Norms and Political Change*, at 887 (1998); FINNEMORE (1996).

⁵⁶ See Peter Spiro, “Nonstate Actors in Global Politics,” 92 *American Journal of International Law* 808, 810 (1998).

study, scholars such as Putnam and Leonard Shoppa note, because they can impair a state's ability to adopt certain reforms, as well as affect the abilities of foreign actors to effectively market those same reforms in the target state.⁵⁷

The two-tailed theory of diffusion presented here begins with the more empirically sound expectation that foreign and international advocacy activates not only the supportive domestic reformers identified by Risse and Sikkink, but also less-supportive—if not outright resistant—non-state legal nationalists. The ability of these opponents to block the adoption of foreign law depends in part on their ability to tap into an extant oppositional discourse. Thus, I hypothesize that the greatest degree of normative change may be achieved not when foreign advocates promote a norm, as Schoppa suggests, by synergistically appending the norm onto an agenda already being considered by a domestic interest group or via a campaign of norm localization (in the Chinese context: “本土化”) in which those advocates attempt graft the foreign norm onto a comparable domestic discourse, but rather when such discourse is most minimal.⁵⁸ Put another way, if a legal practice or norm has not become a “point of concern” or discursive issue within a society, members of that group may be more open to reform even where the proposed reform implicates an entrenched social practice.⁵⁹ If, by contrast, a normative discourse already exists, it is more likely that there is also an opposing vocabulary, ready to be exploited by domestic opponents or manipulated to fit their framing. A normative landscape already populated with supporters and opponents equipped with such an established domestic discourse concerning an issue poses a greater challenge to foreign advocates. It follows that

⁵⁷ See Putnam (1988); LEONARD SCHOPPA, *BARGAINING WITH JAPAN: WHAT AMERICAN PRESSURE CAN AND CANNOT DO* (1997).

⁵⁸ See P.G. ZIMBARDO & M. R LEIPPE, *THE PSYCHOLOGY OF ATTITUDE CHANGE AND SOCIAL INFLUENCE* 192 (1991).

⁵⁹ See Paul T. Wangerin, *A Multidisciplinary Analysis of the Structure of Persuasive Arguments*, 16 HARV. J.L. & PUB. POL'Y 195, 200 (1993).

foreign advocates can successfully introduce viable legal reforms into target states by introducing novel legal reforms or novel legal challenges to entrenched legal practices that lie outside the contemporary discourse.

Paul Wangerin, surveying the field of cognitive psychology observed a similar phenomenon with respect to the role of discourse: “Researchers now largely agree that audiences that have ‘high involvement’ with the issue being argued tend to be persuaded to different degrees, and in different ways than people who have ‘low involvement’ with the issue.”⁶⁰ This relationship fits with the empirical findings of various psychological experiments that similarly find that the susceptibility of an actor to persuasion relates to the actor’s degree of cognitive involvement with the issue and that actors have the least cognitive involvement with novel and ingrained practices.⁶¹ In this way, “cultural cognition,” as Paul DiMaggio dubbed it, is central to whether actors will be motivated to resist a proposed reform.⁶² It follows that the less an actor is challenged about or made aware of a justification for a particular legal practice, the less equipped that actor is to raise an effective defense of that practice. Salient practices, by contrast, are already affixed with a vocabulary from which that actor can draw in support or opposition. To provide one example from the American legal context, Dan Kahan et al. noted in the realm of commitment laws that individuals often resist legal reforms that are too novel to have a clear liberal-conservative valence so long as they nonetheless trigger extant discursive cues that are readily accessible.⁶³

It should be noted that this explanation does not assume that legal reform

⁶⁰ See Wangerin, (1993), at 200.

⁶¹ Blair T. Johnson & Alice H. Eagly, *Effects of Involvement on Persuasion: A Meta-Analysis*, 106 PSYCHOL. BULL. 290, 290 (1989).

⁶² See Paul DiMaggio, “Culture and Cognition,” 23 *Annual Review of Sociology* 263-87 (1997).

⁶³ See Dan M. Kahan, et al., “Cultural Cognition and Public Policy: The Case of Outpatient Commitment Laws,” 34 *Law & Human Behavior* 118-40 (2010).

advocates necessarily accept the candidate foreign norm in its entirety. Nor does it assume that those advocates do not intend to manipulate the adopted norm to their advantage, once codified. Rather, the model simply suggests that those foreign legal advocates will experience greater success in promoting foreign legal norms when a candidate norm does not evoke extant vocabularies that can be employed by state and non-state opponents resistant to that reform. That is, if a reform can be successfully framed outside of an existing domestic discourse or debate, it will likely prove more successful in diffusing into a new legal market.

Bourdieu, who, as described above, is skeptical of the ability of foreign actors to influence the legal development of a state, instructively analogizes the field of legal development to a game involving various state and non-state actors, each vying to appropriate the “right to determine the law.”⁶⁴ In this game, state and non-state legal actors interact according to the constitutive “rules of the game”⁶⁵ because both are members of a shared legal “*habitus*.”⁶⁶ As in a tennis game, Bourdieu explains, the net and the lines of the court establish the parameters within which this discursive struggle occurs.⁶⁷ What Bourdieu’s analysis overlooks, however, is that such a game is often disrupted by the introduction of new technology by outside actors.⁶⁸ It follows that the constitutive “rules of the game” are not always equipped to settle disputes concerning

⁶⁴ See Bourdieu (1987); P. Bourdieu & L. Wacquant, *An Invitation to Reflexive Sociology* (University of Chicago Press: 1992).

⁶⁵ See Bourdieu & Wacquant (1992), at 98.

⁶⁶ See R. Terdiman, “Translator’s Introduction: The Force of Law—Toward a Sociology of the Juridical Field,” 38 *Hastings Law Journal* 805-13 (1987).

⁶⁷ See Bourdieu & Wacquant, at 98.

⁶⁸ Tennis itself is a “game” in which technological innovations by exogenous commercial actors often generate controversy and uncertainty, resulting in both commercial successes and failures. See Hann Earl Kimm & Johannes M. Pennings, Innovation and Strategic Renewal in Mature Markets: A Study of the Tennis Racket Industry, 20 *Organization Science* 368-83 (2009) (observing that whether new norms and practices are adopted by the target community depends in large part on how marketers introduce technologies that implicate a celebrated tradition of the game).

a novel or innovative challenge advocated by an outside actor. As Jeffrey Checkel similarly explained, “Argumentative persuasion is more likely to be effective when the persuadee is in a novel and uncertain environment...and thus cognitively motivated to analyze new information.”⁶⁹ Foreign legal advocates, it follows, need not in all cases reconstruct—“localize”—candidate legal norms to ensure they fit with the normative priors of the target state. Rather, a state targeted for legal reform is more likely to make significant issue-specific changes when the preexisting discourse about the norm is most minimal and thus offers little for foreign legal advocates to help graft or localize the proposed reform. Put simply, the more limited the domestic discourse related to a particular law, the more success legal reformers will have in overcoming any cleavages with state opposition or reluctant non-state legal nationalists, even if the proposed reform runs counter to an entrenched local practice or shared understanding.

The hypothesis that foreign campaigns to change state behavior can succeed without a process of norm localization or organic transplantation stems from the observation that when actors are uncertain of their interests or have no extant cognitive scripts to follow, the more open they may be to persuasion and discursive challenges.⁷⁰ Such periods resemble what Mark Blyth referred to as Knightian uncertainty—situations in which actors are unsure of their interests.⁷¹ Figure 1.2, supplies a useful heuristic to illustrate this relationship between discourse and diffusion in which less domestic discourse is associated with a greater likelihood of diffusion.

⁶⁹ Checkel (2003), at 562-3, 573 (citing as an example the openness of Ukrainian actors during early dealings with the Council of Europe). The theory proposed here differs from Checkel in that he hypothesizes that persuasion is more likely where there are fewer ingrained beliefs. The theory here, by contrast, suggests such deeply ingrained beliefs, which required less “involvement” from the belief-holder, are more open to persuasion. *See* Checkel, at 563.

⁷⁰ *See* ZIMBARDO & LEIPPE (1991), at 192; Johnson & Eagly, (1989).

⁷¹ *See* MARK BLYTH, GREAT TRANSFORMATIONS: ECONOMIC IDEAS AND INSTITUTIONAL CHANGE IN THE TWENTIETH CENTURY (2002).

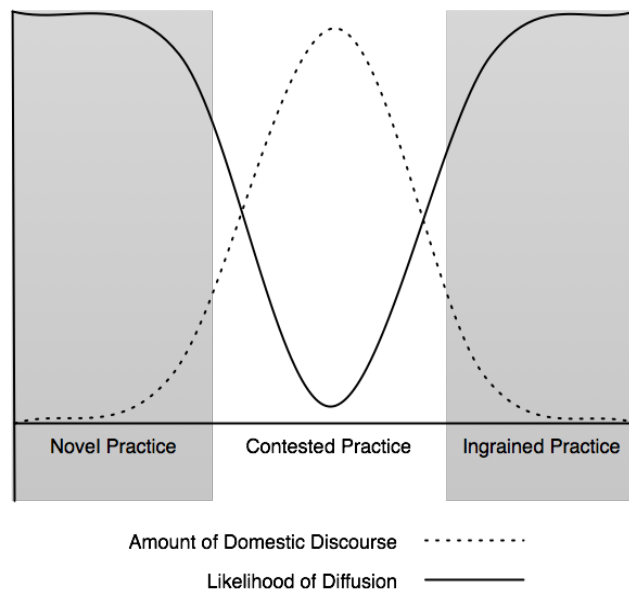


Figure 1.2. *Two-Tailed Relationship between Diffusion and Domestic Discourse*

Philip Zimbardo and Michael Leippe, in a review of psychological studies regarding persuasion, observed a process similar to this two-tailed pattern of diffusion in challenges of so-called “cultural truisms.” They note:

In some situations, lack of knowledge base makes the individual especially susceptible to a persuasive attack on beliefs that are subscribed to universally, so much so that they are never attacked. They are called *cultural truisms*.... Persuasive messages aimed at debunking these cultural truisms are likely to be quite effective because people simply have a weak defense. Their cognitive structure, the fortress in which the belief exists, has such low walls and inept weapons that the attacking message cannot be effectively argued against.⁷²

⁷² ZIMBARDO & LIEPPE (1991), at 230 (citing W.J. McGuire & D. Papageorgis, *The Relative Efficacy of Various Types of Prior Belief-Defense in Producing Immunity Against Persuasion*, 62 JOURNAL OF ABNORMAL AND SOCIAL PSYCHOLOGY, 327 (1961)).

Cultural truisms, as originally dubbed by social psychologist William McGuire, leave their holders with inadequate knowledge or reasoning to defend the practices when attacked.⁷³ It follows that cultural truisms such as a “presumption of guilt,” when challenged by legal advocates, are more easily challenged because domestic opponents had not yet raised an effective discursive defense of such an allocation of the burden of proof. When a pre-existing cognitive script or discourse of an actor is activated, by contrast, the ability of advocates to persuade that actor is far more limited.⁷⁴ Indeed, the greatest resistance to influence and persuasion occurs among people who have “well-articulated” attitudes about the candidate norm.⁷⁵ The operative difference, Zimbardo and Leippe observe, is that “if you know how you feel *and why*, forces outside you have less impact in changing beliefs and emotions.”⁷⁶ Actors with ready access to language that can be deployed to defend their normative commitments, it follows, are less open to persuasion, even if their understanding for ‘why’ they feel as they do is insincere or incompatible with the original justification of the practice. In this way, unquestioned orthodoxy that lies outside an actor’s “cognitive boundaries” can readily change not only, as John Odell observes, when faced with a dramatic contradictory experience, but similarly in the face of a forceful ideational challenge of an unarticulated belief.⁷⁷

Communication theorists offer a useful biological metaphor to illustrate the process of diffusion captured by the two-tailed theory of diffusion—Inoculation Theory. This approach posits that a resistance to persuasion is similar to the

⁷³ McGuire & D. Papageorgis (1961), at 327.

⁷⁴ See Peter A. Hall & Rosemary C.R. Taylor, *Political Science and the Three New Institutionalisms*, 44 *POLITICAL STUDIES* 936 (1996).

⁷⁵ See Zimbardo & Lieppe (1991), at 151.

⁷⁶ *Id.* at 151 (emphasis added).

⁷⁷ John S. Odell, *From London to Bretton Woods: Sources of Change in Bargaining Strategies and Outcomes*, 8 *JOURNAL OF PUBLIC POLICY* 287 (1988), at 308.

inoculation of a body to a virus through weak doses of the virus itself. If healthy, the body produces antibodies to fight the virus, leaving it better prepared to ward off future attacks.⁷⁸ Applied to discursive scenarios, actors presented with or challenged by novel ideas, cultural truisms and entrenched beliefs all “have had little motivation or practice in developing supporting arguments to bolster [them] or in preparing refutations for the unsuspected counterarguments.”⁷⁹ It follows that actors with beliefs that are rarely challenged domestically are more open to the persuasive efforts of international and transnational legal advocates than are actors that have had to defend those beliefs domestically. An extension of this biological metaphor to political communities yields instructive insights. An inoculated body politic is one that has already developed a discourse in support or opposition to a particular belief or practice through a prior domestic challenge to the practice. It follows that the introduction of foreign advocates, acting like an infection trying to overwhelm a body, can thus be combated by the inoculant—i.e. the preexisting discourse. If, however, the practice or belief was left unchallenged prior to the arrival of infectious foreign agents, the body politic is less prepared to resist the ideas germinated by the outsiders.

IV. *Legal Diffusion in Contemporary Politics (and Political Science)*

The *study* of legal convergence is, like the *practice* of legal convergence, a point of controversy. Analyses of the spread of legal norms, while a decades-old industry, have not yet reached a consensus. From Karl Deutch’s early observation that increasing cross-border transactions were leading to shared identities, to more contemporary studies of trends toward a convergence of national civil procedures by scholars such as Joachim Zekoll, K.D. Kerameus, Christopher Hodges, and Jürgen

⁷⁸ See JAMES BRIAN STIFF & PAUL A. MONGEAU, PERSUASIVE COMMUNICATION (2003); ELLIOT ARONSON, THE SOCIAL ANIMAL (9th ed. 2004).

⁷⁹ See McGuire & Papageorgis (1961), at 327.

Schwarze, many legal observers report a growing community of similarly governed states.⁸⁰ This convergence is said to be especially acute in the domain of commercial law. Susan Strange, for example, notes that, “the authority of the governments of all states, large and small, strong and weak, has been weakened as a result of technological and financial change and of the accelerated integration of national economies into one single global market economy.”⁸¹ Outside of commercial convergence, sociological institutionalists such as John Meyer similarly see the emergence of a more encompassing “world culture,” in which certain institutions and the norms they embody can be found in widely dispersed parts of the world, irrespective of local need or suitability.⁸² J.A. Jolowicz, by contrast, notes that while many countries have joined the trend of important procedural reforms, they have done so “without benefit of serious comparative study, which has led to further divergence between them.”⁸³

⁸⁰ See Joachim Zekoll, *Comparative Civil Procedure*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann & Reinhard Zimmermann eds., 2006); K.D. Kerameus, *Political Integration and Procedural Unification in the European Union*, 45 AM. J. COMP. L. 919 (1997); Christopher Hodges, *Europeanization of Civil Justice: Trends and Issues*, 26 CIVIL JUSTICE QUARTERLY 96 (2007); and Jürgen Schwarze, *The Convergence of the Administrative Laws of the E.U. Member States*, in Francis Snyder ed., THE EUROPEANIZATION OF LAW (2000), at 163.

⁸¹ See SUSAN STRANGE, THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY (Cambridge University Press: 1996).

⁸² See J.W. Meyer, J. Boli, et al., “World Society and the Nation-State,” 103 AMERICAN JOURNAL OF SOCIOLOGY 144 (1997); J.W. Meyer, “Review Essay: Kings and People,” AMERICAN JOURNAL OF SOCIOLOGY; Martha Finnemore, “Norms, Culture, and World Politics,” 50 INTERNATIONAL ORGANIZATION 325 (1996). See also ALICE H. AMSDEN, THE RISE OF THE “REST”: CHALLENGES TO THE WEST FROM LATE-INDUSTRIALIZING ECONOMIES, (Oxford University Press, 2003); CHARLES SABEL AND MICHAEL J. PIORE, THE SECOND INDUSTRIAL DIVIDE, (Basic Books, 1984), at 14.

⁸³ See J.A. Jolowicz, *Civil Procedure and the Common and Civil Law*, in LAW AND LEGAL CULTURE IN COMPARATIVE PERSPECTIVE (Guenther Doeker-Mach and Klaus A. Ziegart eds., 2004). See also MIRJAN R. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS (1991) (observing a widening gap between American and other jurisdictions’ procedural practices).

Despite disagreements about the extent and direction of reform, there has been an observable trafficking in various areas of law.⁸⁴ Indeed, “most changes in most [legal] systems are the result of borrowing,”⁸⁵ leaving domestic criminal, civil, and administrative legal systems all a mixture of disparate foreign and local elements.⁸⁶ Laws within a single system now derive from various sources and are thoroughly intertwined. For this reason, many comparative scholars have shifted away from an emphasis on the categories essential to legal pluralism and adopted instead, as the communication theorists discussed above have done, a biological metaphor—the “legal transplant.”⁸⁷ This term usefully evokes the complex requirements in the recipient body politic and donor country for a viable diffusion of law and better reflects the dialectic, mutually constitutive relations between the extant local law and the transplanted law.

Although challenging to study, international legal transplants of substantive and procedural law, and the discourses that surround them, are essential to any understanding of contemporary legal development. Domestic legal advocates of human rights, endeavoring to transplant foreign laws in whole or in part, increasingly negotiate from within a web of global and local legal norms and construct legal arguments rooted in an emerging transnational discourse of human rights.⁸⁸ Moreover,

⁸⁴ See e.g. Nathan Cortez, *International Health Care Convergence: The Benefits and Borders of Market-Oriented Standardization*, 26 WIS. INT’L L.J. 646 (2008); Robert Chesney, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008); Joseph Farrell, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. J.L. & TECH 85 (2003).

⁸⁵ See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMMON LAW* (1974), at 94.

⁸⁶ See Daniel Visser, “Cultural Forces in the Making of Mixed Legal Systems,” 78 TUL. L. REV. 41, 47 (2003).

⁸⁷ Watson (1974).

⁸⁸ See MERRY (2006), at 134 (identifying a process of legal translation, whereby a local movement—e.g. labor, women, or environmental rights—draws upon legal

expanding global commerce and the civil claims that arise from it render already permeable domestic legal systems even more sensitive to and affected by foreign law and legal theory in areas of law far removed from matters of human rights.⁸⁹ As the judicial decisions of even the U.S. Supreme Court demonstrate, all national legal institutions, even those of the most materially powerful state, are porous and, to varying degrees, shaped by transnational and international legal norms.⁹⁰ The following subsection discusses several popular alternative explanations of transnational diffusion of law and legal scholarship derived from international relations and comparative law literatures.

V. Power & Proximity: Alternative Explanations of Legal Diffusion

To strengthen confidence in the theory of diffusion proposed above, this study will also explore common alternative explanations of legal and norm diffusion. Scholars have proposed several explanations for why a state welcomes or resists the introduction of foreign law.⁹¹ These explanations range from external coercion, internal power and efficiency concerns, international legitimacy, and norm localization. The theoretical efforts of these observers, however, have lacked

knowledge and reasoning from extant transnational organizations and translates it to fit the local context).

⁸⁹ See Saul Levmore, *Transfusing Tort Law*, in *ISSUES IN COMPENSATORY JUSTICE: THE BHOPAL ACCIDENT* 48 (R.S. Khare ed. 1987) (noting how the extensive transnational litigation that followed the massive industrial disaster in Bhopal, India, led to the diffusion of several aspects of American tort law).

⁹⁰ See, e.g., *Atkins v. Virginia*, 536 U.S. 304 (2002) (citing European jurisprudence in support of holding that the execution of mentally retarded defendants constitutes cruel and unusual punishment); *Lawrence v. Texas*, 539 U.S. 558 (2003) (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981) (applying the European Court of Human Rights' invalidation of laws barring homosexual sodomy in E.U. member states in support of holding that the Bowers court mistakenly claimed there was a long tradition of condemning homosexual relations)).

⁹¹ See, e.g., Miller (2003).

systematic empirical analysis. In order to fill this gap, the following section specifies a set of testable hypotheses derived from the most common scholarly arguments purported to explain the transnational diffusion of law and legal scholarship.

a. Power

A common explanation of diffusion proposed by many scholars of IR applies the logic of consequence to explain patterns of legal diffusion. These scholars maintain that the legal rules and obligations to which states commit themselves are a manifestation of the distribution of power in either the international system or the domestic structure of a state.⁹² For the power-focused IR scholars, transnational relations reflect merely the interests of the most powerful states.⁹³ Accordingly, economic and military aid serves as a means through which the hegemonic power in the international system induces cooperation and coerces particular political reforms from subordinate states.⁹⁴ As Robert Gilpin explains, “In order to maintain its dominant position, a state must expend resources on military forces, the financing of allies, foreign aid, and the costs associated with maintaining the international economy.”⁹⁵ To appease the dominant power and secure this stream of aid, it follows, subordinate states in the international system make legal reforms consonant with those of the hegemonic power.⁹⁶

⁹² See, e.g., John J. Mearsheimer, *False Promise of International Institutions*, 19 INTERNATIONAL SECURITY 5 (1995); Jeffrey A. Frieden and Ronald Rogowski, “The Impact of the International Economy on National Policies: An Analytical Overview,” in Helen V. Milner and Robert O. Keohane, eds., *Internationalization and Domestic Politics*, (Cambridge University Press, 1996).

⁹³ See Robert Gilpin, “The Politics of Transnational Economic Relations,” in Robert O. Keohane & Joseph S. Nye, Jr., eds., *Transnational Relations and World Politics* (Harvard University Press: 1971); Stephen D. Krasner, “Minority Rights and the Westphalian Model,” Stanford: Department of Political Science (1995).

⁹⁴ Robert Gilpin, *U.S. Power and the Multinational Corporation* 104 (1975).

⁹⁵ See Robert Gilpin, *War and Change* 156-57 (1983).

⁹⁶ As the subsequent chapters demonstrate, it is important not to overstate the ability of great powers to impose laws abroad. The largest prior effort to export the principles and practices of U.S. law occurred in the well-funded Law and Development

According to such power-based models of diffusion, significant legal reform is often imposed or coerced from above, with or without the support of the receiving national government or judiciary.⁹⁷ Extreme examples include the extension of Roman law during the expansion of the Roman Empire and the legal reconstruction efforts of various colonial or military occupations.⁹⁸ Similar instances of imposed foreign law occur more subtly, such as through mechanisms of soft power.⁹⁹ Edward Said, for example, noted that actors often implicitly valorize one legal form over another, reflecting important material imbalances of power.¹⁰⁰ Once the “primitive” society developed a court system to resemble that of the valorized Western power, the West

movement of the 1960s and 1970s. This effort met considerable resistance in the target states. Indeed, its key protagonists conceded its failure as early as 1974. However, many realist explanations of legal convergence nonetheless mischaracterize the degree to which powerful states have the power to determine the outcome of legal reform. *See, e.g.*, JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* 8 (1980) (observing the failures of the “legal missionaries” of the United States Law and Development movement who lobbied for legal reform abroad in the 1960s); David Trubeck & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development*, 1974 WIS. L. REV. 1062 (1974) (noting the failure of the first campaigns of the Law and Development movement).

⁹⁷ This has in recent years been especially true in the area of trade and finance, as powerful states and institutions condition loans on the achievement of certain legal reforms. *See* deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, at 277; Beth Simmons, “The International Politics of Harmonization: The Case of Capital Market Regulation,” 55 *INTERNATIONAL ORGANIZATION* (2003).

⁹⁸ On “imposed law,” *see* THE IMPOSITION OF LAW xiii (Burman and Harrell-Bond eds., 1979). They note that imposed law, a concept they admit is difficult to operationalize, is that law which “does not reflect the values and norms of the majority of the population or of that segment which will be subject to it.”

⁹⁹ *See generally* JOSEPH NYE, *BOUND TO LEAD: THE CHANGING NATURE OF AMERICAN POWER* (1990); Donald J. Kochan, *The Soft Power and Persuasion of Translations in the War on Terror: Words and Wisdom in the Transformation of Legal Systems*, 110 W. VA. L. REV. 545 (2008)

¹⁰⁰ *See* EDWARD SAID, *CULTURE AND IMPERIALISM* 286 (1994). *See also* Watson, *Aspects of Reception of Law*, at 346, 350-51.

simply moved on to another form of law—e.g. alternative dispute resolutions.¹⁰¹

If not directly imposed by force, these scholars maintain, domestic legal reform that seeks to mimic the dominant form in international society is nonetheless concluded to be the product of a coerced appeasement strategy or an attempt to increase the bargaining power of a state. In such instances, domestic leaders facing a risk of imperial acquisition engage in counter-hegemonic legal activism in order to fend off foreign encroachment.¹⁰² As demonstrated by the self-strengthening reforms employed by both China and Japan when faced by encroaching Western powers, states are said to use domestic legal innovations in order to represent themselves as meeting the requirements of sovereign states in the international community.¹⁰³ More recently, realist scholars have observed that national courts have invoked international and foreign law “not because they defer to other communities’ values and interests but because they wish to protect or even reclaim the domestic political space that is increasingly restricted by the economic forces of globalization and the delegation of authority to international institutions.”¹⁰⁴ In this two-level game, the resistance of the national court to the national government policy results in greater bargaining power in the international system for the state as a whole.¹⁰⁵ Finally, power-focused scholars maintain that states use judicial language that other courts understand—even to the point of quoting directly from the judicial opinions and laws of other states—in order

¹⁰¹ Laura Nader, “Hegemonic Processes in Law: Colonial to Contemporary,” in L. Nader (ed.), *The Life of the Law: Anthropological Projects* (University of California Press: 2002).

¹⁰² See Miller (2003), at 845-56.

¹⁰³ See Merry (2006), at 585 (examining the appeasement strategy of Hawaiian leaders attempting to stave off a colonial takeover); BOAVENTURA DE SOUSA SANTOS & CESAR A. RODRIGUEZ-GARAVITO, *LAW AND GLOBALIZATION FROM BELOW: TOWARDS COSMOPOLITAN LEGALITY* (2005).

¹⁰⁴ Benvenisti (2008), at 244.

¹⁰⁵ See Putnam, (1988), at 427.

to signal a willingness to cooperate in certain aspects of their international relations.¹⁰⁶

It is necessary to examine power-based explanations of transnational legal diffusion in this study because many transnational legal advocates are quite dependent on the power of states. For example, contemporary episodes of power-based diffusion are best exemplified by the well-financed Law and Development campaigns supported by the U.S. Government.¹⁰⁷ These efforts, as Ugo Mattei describes, serve as a powerful coercive vehicle for the spread of American law.¹⁰⁸ The current boom in well-funded Rule of Law campaigns, dubbed by some the “Third Moment” of the Law and Development movement, follows two previous eras of transnational legal campaigns.¹⁰⁹ The first being the Law and Developmental State period of the 1950s and 1960s, centered around the U.S.-supported export of U.S. legal theory and whole legal structures.¹¹⁰ The second, which followed in the 1980s and 1990s, described as the Law and the Neoliberal Market period, advocated that states should forgo efforts to create a “first-class judiciary or an extensive system of civil liberties” in favor of rigid rules devoted to protecting contract and property rights.¹¹¹ Finally, in the Third Moment, the emerging paradigm maintains that the judiciary is linked to poverty reduction, therefore placing legal reform at the center of the global development

¹⁰⁶ See, e.g., Benvenuti, at p. 251 (noting that such signals can be seen in recent national jurisprudence related to judicial review of counterterrorism measures, environmental policies, and the status of asylum seekers in destination countries in various countries, including Canada, France, Germany, Hong Kong, India, Israel, and New Zealand).

¹⁰⁷ See, e.g., CAROTHERS, AIDING DEMOCRACY ABROAD; Hendrix (2002).

¹⁰⁸ See, e.g. Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383, 383 (2003).

¹⁰⁹ See generally Trubeck & Santos (2006).

¹¹⁰ See Leah Larson-Rabin, *Happenstance and Memory: A Legacy of Law and Development Scholarship and Policy in Legal Education*, 25 WISC. INT’L L.J. 209, 217 (2007).

¹¹¹ Richard A. Posner, “Creating a Legal Framework for Economic Development,” 13 WORLD BANK RES. OBSERVER 1,9 (1998).

agenda.¹¹²

The on-going Third Moment in Law and Development is supported materially by powerful state mechanisms, even when such efforts occur in the shadow of the state.¹¹³ Firstly, support for Rule of Law programs comes in the form of aid or assistance to countries engaged in legal reform. In 2008, G7 countries committed more than eight billion dollars (US) to government and civil society programs in recipient states.¹¹⁴ Much of the U.S. portion of this aid is drawn primarily from the United States Agency for International Development, but also the United States Department of State.¹¹⁵ Formal Rule of Law programs include: U.S.-supported exchange of legal opinion leaders; public grants and tax credits for the work of private corporations, foundations, and nongovernmental organizations that campaign for or are dedicated to legal reform abroad; and financial support through international financial institutions (e.g. World Bank and International Monetary Fund), funding of which is conditional on certain structural legal reforms.¹¹⁶

¹¹² See Trubeck & Santos (2006). This movement intends to capture the post-Washington Consensus shift articulated by Amartya Sen's work in which he argued that multiple aspects of development, including law, should be pursued in tandem. On the failure of the Law and Development movement to serve its stated purpose, see Trubeck & Galanter (1974) (concluding that any such broad commitment to a particular legal system fatally ignored empirical realities of local contexts and domestic power structures that affect the success or failure of legal reforms).

¹¹³ See deLisle (1999), at 185.

¹¹⁴ See OECD International Aid Statistics, available at: http://www.oecd.org/document/16/0,3343,en_2649_34447_42396496_1_1_1_1,00.html.

¹¹⁵ See Hiram E. Chodosh, *Reforming Judicial Reform Inspired by U.S. Models*, 52 DEPAUL L. REV. 351, 368 (2002).

¹¹⁶ See *id.* Despite the observation that the Third Moment, at its core, reflects an effort to move away from U.S.-centric legal development, the lawyers on the staffs of these multilateral developmental institutions, my research suggests, are overwhelmingly socialized in the American legal experience. Of the forty-nine lawyers participating in World Bank's legal associate program, for example, 98% have an advanced degree related to law from a U.S. institution, even though only one of the associates is an American citizen (a dual citizen from Peru). Moreover, only one of the forty-nine

In the shadow of these overtly state-led efforts, the United States also stands as a powerful source of foreign legal practices in the contemporary commercial legal marketplace.¹¹⁷ Armed with wealthy law schools that train approximately two thousand foreign students each year,¹¹⁸ hundreds of law offices in foreign capitals performing complex and lengthy litigation,¹¹⁹ American-trained of lawyers at multilateral institutions such as the World Bank, as well as the long arm of American-style discovery procedures and certain U.S. laws,¹²⁰ the United States presents a

studied outside of the Anglo-American tradition (four of the five that were educated outside the U.S. were educated in either the UK or Canada).

¹¹⁷ The so-called Americanization of law has occurred even in the most derided aspects of U.S. practice—e.g. the excesses of “U.S.-style discovery and distended briefs.” Elana Helmer, for instance, observes the corrosion in arbitral practices. Although modern international commercial arbitration was born in continental Europe, the practice experienced strong American influence in the 1970s when the first teams of U.S. lawyers arrived to represent their clients in extensive petroleum arbitrations. They brought with them, she notes, “the familiar [American] procedural techniques, court standards of minimum contacts between the arbitrators and the parties...and other practices foreign to international commercial arbitration.” See Elana V. Helmer, *International Commercial Arbitration: ‘Americanized,’ ‘Civilized,’ or ‘Harmonized,’* 19 OHIO ST. J. ON DISP. RES. 35, 46 (2003). See also THE RECEPTION AND TRANSMISSION OF CIVIL PROCEDURAL LAW IN THE GLOBAL SOCIETY 227 (Masahisa Deguchi & Marcel Storme eds., 2008) (noting the influence in Brazil of Federal Rule of Civil Procedure 23, which provides for class actions); Chodosh (2002); Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the ‘Rule of Law,’* 101 MICH. L. REV. 2275, 2276; deLisle (1999); Hendrix (2003) (chronicling USAID efforts in Bolivia, Colombia, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, in addition to broader regional programs).

¹¹⁸ See American Bar Association, Legal Education Statistics, <http://www.abanet.org/legaled/statistics/stats.html>.

¹¹⁹ Each of the top fifty U.S. law firms has established an average of approximately eight foreign law offices. Data compiled by author according to Vault rankings. See VAULT GUIDE TO THE TOP 100 LAW FIRMS (2008).

¹²⁰ Antitrust law, for example, is one area in which foreign jurisdictions are regularly confronted with U.S. law. Current U.S. Supreme Court jurisprudence allows the Department of Justice, in many circumstances, to exercise authority under the Sherman Act and for U.S. courts to recognize jurisdiction over U.S. unfair competition claims related to activities outside the borders of the United States so long as the anticompetitive activity has direct and reasonably foreseeable effects on U.S. commerce or consumers. See *Timberlane Lumber Co. v. Bank of America Nat’l Trust*

“complex, varied, and fragmented”¹²¹ array of powerful actors in the international system and a formidable alternative legal civilization.

According to scholars applying the logic of consequence at the international level, an increase in financial assistance from a state should therefore be associated with an increase in the frequency of positive references to the law and legal scholarship of that state.¹²² Such influence, moreover, is assumed to occur irrespective of whether the assistance is supplied with or without conditions.¹²³ Under the logic of consequence, each of the various types of foreign economic assistance, which includes both conditional and unconditional aid, as well as aid that flows either directly to the state or to citizens,¹²⁴ achieve similar outcomes in the international system by increasing the economic dominance of one power over a state at the expense of

& Savings Ass’n, 549 F.2d 597 (9th Cir. 1976); *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993). Other laws that affect directly or indirectly the conduct of foreign actors include securities fraud enforcement actions pursued by the Securities and Exchange Commission and claims brought under the Foreign Corrupt Practices Act, which can require of foreign government actors certain conduct when dealing with U.S. businesses. See deLisle, (1999), at 209.

¹²¹ deLisle (1999), at 200.

¹²² Data for the annual economic assistance to China for the countries selected for analysis was compiled from the following sources: U.S.—United States Agency for International Development, U.S. OVERSEAS LOANS AND GRANTS, OBLIGATIONS AND LOAN AUTHORIZATIONS (2008) [commonly known as the “Greenbook”], available at: <http://gbk.eads.usaidallnet.gov/>; U.K.—*OECD.StatExtracts*, available at: http://stats.oecd.org/Index.aspx?DatasetCode=ODA_DONOR; France—*OECD.StatExtracts*, available at: *id.*; Germany—*OECD.StatExtracts*, available at: *id.* Data for the annual economic assistance to China from United Nations programs was compiled from expenditure data of the United Nations Development Programme reported in the *United Nations Yearbook, 1978-1997*. The *Yearbook* did not include data for several years (1985, 1986, 1987, & 1995), and so approximations for those years were calculated using linear interpolation.

¹²³ See, e.g., Raymond Vernon, “Foreign Aid: “A Proposal” Reexamined,” 9 *WORLD POLITICS* 579, 581 (1957).

¹²⁴ See, e.g., Kevin M. Morrison, *Natural Resources, Aid, and Democratization: A Best-Case Scenario*, 131 *PUBLIC CHOICE* 365 (2007); Jakob Svensson, *When is Foreign Aid Policy Credible? Aid Dependence and Conditionality*, 61 *J. OF DEV. ECON.* 61 (2000).

another. From this perspective, China's unconditional aid to and considerable foreign-direct investment in African states by state-owned enterprises administered by central government ministries and agencies has met with deep skepticism among realists.¹²⁵ In short, such aid furthers national interests and increases the influence of one state over another, whether or not such assistance is conditional or unconditional.¹²⁶ As shown in the analyses below, however, state power is neither a necessary nor sufficient condition for the success of inter- or transnational advocacy campaigns.

A related explanation of policy reform derived from the logic of consequence posits that the laws adopted by a state reflect the preferences and interests of the more powerful interest groups within a state.¹²⁷ By this logic, legal systems are said to import favorable rules that favor certain domestic interests, and are often designed to grant privileges to such powerful groups.¹²⁸ As such, the structure and rules of a legal system reflect the domestic power structures within which these are formed rather than some domestic jurisprudential philosophy.¹²⁹ The interests of these domestic actors reflect the characteristics of their institutional setting.¹³⁰ It follows that the normative discourse of legal entrepreneurs does not affect political or economic outcomes beyond serving as a mobilizing tool by which bureaucratic agencies and interest

¹²⁵ Peter Brooks & Hyeshin Ji, "China's Influence in Africa: Implications for the United States," Background, No. 1916, *Heritage Foundation* (Feb. 22, 2006); "China's Outward Foreign Direct Investment," 6 *OECD Investment News* (March 2008), at 2.

¹²⁶ See Hans J. Morgenthau, "A Political Theory of Foreign Aid," 56 *AMERICAN POLITICAL SCIENCE REVIEW* 301 (1962); GUY ARNOLD, *AID AND THE THIRD WORLD: THE NORTH SOUTH DIVIDE* (1985).

¹²⁷ Frieden & Rogowski (1996), at 42.

¹²⁸ See J. STARR AND J. COLLIER, *HISTORY AND POWER IN THE STUDY OF LAW* (1989). See also Said Amir Arjomand, *Civil Society and the Rule of Law in the Constitutional Politics of Iran under Khatami*, 67 *SOCIAL RESEARCH* 283 (2000) (examining the creation of an Islamic theocracy in Iran).

¹²⁹ See Merry (2003).

¹³⁰ See Helen V. Milner, *Interests, Institutions, and Information: Domestic Politics and International Relations* (Princeton University Press: 1997), at 15 fn.4.

groups position themselves against one another.¹³¹ In this way, the ideas advocated by foreign actors matter not by dint of their persuasive force, but rather in their ability to serve as focal points that crystallize areas of common interest shared by different interest groups.¹³² Reforms of a state's legal system or regulatory framework, even when conducted under the intense scrutiny of the international community, thus reflect the demands made by powerful domestic groups or agencies that expect to be aided or disadvantaged by the proposed reforms.¹³³ Any selection of a foreign law is thus the rational response to a particular domestic interest.¹³⁴ In the context contemporary globalization,¹³⁵ such domestic-interest explanations vary depending on the domestic interest at stake. Some scholars posit that the growing demand for international transactions motivates states to adopt uniform legal systems to reduce the cost of interstate transactions for its most powerful constituents.¹³⁶ Others, by contrast, observe that if the preferences of the most powerful interest groups are hostile to such transactions, legal differences *qua* barriers to transnational legal diffusion will arise.¹³⁷

¹³¹ See Gary S. Becker, *The Economic Approach to Human Behavior*, (University of Chicago Press, 1976), p. 110.

¹³² See JUDITH GOLDSTEIN & ROBERT O. KEOHANE EDS., *IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE* (1993).

¹³³ See Olson (1984). For a similar explanation in the context of economic policy, see, e.g., Michael J. Hiscox, (2004); McKeown, (1983).

¹³⁴ See Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335, 335 (1996).

¹³⁵ See, e.g., Richard B. Cappalli & Claudio Consolo, "Class Actions for Continental Europe? A Preliminary Inquiry," 6 TEMP. INT'L & COMP. L.J. 217, 218 (1992).

¹³⁶ In the post-Washington Consensus era of international developmental assistance, there has been a notable growth in such explanations, with a focus on market failures and regulatory efficiencies and the export of "better" law. As such, lawyers have assumed an important place in development agencies and multilateral development banks in both high-level decision-making and consulting positions. See Jeremy Perelman, *Book Review: Beyond Common Knowledge*, 47 HARV. INT'L L.J. 531 (2006). See also *DOING BUSINESS 2007: HOW TO REFORM* (World Bank eds., 2006).

¹³⁷ See Geoffrey Garrett & Peter Lange, "Internationalization, Institutions, and Political Change," in *INTERNATIONALIZATION AND DOMESTIC POLITICS* (R.O. Keohane & Helen Milner eds., 1996).

Put another way, a state is said to be more likely to adopt a proposed legal reform if the law serves the interests of its most powerful domestic constituents.

A related domestic politics approach to understanding legal reform in the international system posits that legal reforms ratified by state-level actors must be considered separately from any consideration of implementation because agents have different interests from their principals.¹³⁸ In this way, a central government ratifies legal reforms and negotiates with a keen eye to the future implementation (or lack thereof) of those laws. The adoption of certain reforms thus does not reflect the success of transnational advocates. Rather, such concessions are often made when a negotiating state believes neither that the less desirable provisions will be implemented locally nor that certain retaliatory threats will ever materialize.¹³⁹ As Daniel Berkowitz and others note, many countries borrow law with no intention of implementing the new rules, but instead in an “attempt to signal to foreign investors from different countries that they comply with their domestic legal standards.”¹⁴⁰ It follows that procedural rules or legal reforms that comply with emerging international norms are often adopted by target states that possess no intent to implement the laws fully or in good faith.

b. Proximity

As discussed above, the dominant theory of diffusion—norm localization—maintains that a foreign legal practice will transfer only in the presence of a proximate

¹³⁸ See Andrew Mertha & Robert Pahre, “Patently Misleading: Partial Implementation and Bargaining Leverage in Sino-American Negotiations on Intellectual Property Rights, 59 INT’L ORG. 695 (2005).

¹³⁹ See John S. Odell, *International Threats and Internal Politics: Brazil, the European Community, and the United States, 1985-1987*, in Peter Evans, Harold Karan Jacobson, and Robert D. Putnam eds., *DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS* (1993), at 243.

¹⁴⁰ See Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, “The Transplant Effect,” 51 *American Journal of Comparative Law* 163-90 (2003).

local norm upon which foreign advocates can indigenize the candidate reform.¹⁴¹ This hypothesis, also dubbed “resonance,” maintains that the more a candidate reform promoted by transnational coalitions resonates with local actors or is compatible with a pre-existing local norm, the more policy influence those transnational coalitions are likely to have.¹⁴² As Richard Price describes it, the most powerful finding in the study of norms is that efforts to diffuse norms “are more likely to be successful to the extent they can be grafted on to previously accepted norms.”¹⁴³ Jeffrey Checkel notes similarly that norms diffuse most readily when there is a “cultural match,” which he describes as situations in which “the prescriptions embodied in an international norm are convergent with domestic norms, as reflected in the discourse.”¹⁴⁴ The underlying assumption in this literature is that historical institutions and traditional routines render actors in the state targeted for legal reform less likely to submit to exogenous pressure for reform or update their beliefs. Thus, contrary to inoculation theory, which finds entrenched practices more open to discursive challenge, norm localization theory maintains the more widely shared a belief and the more active the discourse, the less malleable the political attitudes of those who hold it. Accordingly, foreign legal advocates must first search for and then graft the candidate legal reform onto what Amitav Acharya and Barry Buzan describe as a proximate “indigenous consciousness” already present in the target state.¹⁴⁵ By such logic, a state is expected to be more likely to adopt a proposed law in the presence of an active domestic discourse related

¹⁴¹ KLOTZ (1995); Legro (1997); Potter (2003); Acharya (2004).

¹⁴² See Risse (2002); see also Andrew Cortell & James W. Davis, Jr., *Understanding the Domestic Impact of International Norms: A Research Agenda*, 2 INTERNATIONAL STUDIES REVIEW 65 (2000); Checkel (1997).

¹⁴³ Richard Price, *Transnational Civil Society and Advocacy in World Politics*, 55 WORLD POLITICS 579 (2003), at 584.

¹⁴⁴ Checkel (1998).

¹⁴⁵ See Amitav Acharya & Barry Buzan, *Conclusion: On the Possibility of a non-Western IR Theory in Asia*, 7 INT’L RELATIONS OF THE ASIA-PACIFIC 427, 435 (2007); see also Acharya (2004); Merry (2006) Finnemore & Sikkink (1998).

to the proposed law.

A related explanation of legal transplants emphasizes the role of legal family in the occurrence of importing field-tested laws and procedures from foreign jurisdictions.¹⁴⁶ Under this approach, the normative proximity and perceived efficiency of a rule, not state power, are believed to drive patterns of legal diffusion. The closer states' legal systems are in terms of structure and constitutive rules, the more likely those states are to look to each other for legal innovations. Countries with legal systems born from civil law origins, for example, are believed more likely and able to accept and adopt the laws and legal theories of another civil law system than are states with a common law or mixed legal system.¹⁴⁷ As Peter Gourevitch and James Shinn observe, such explanations leave legal systems "trapped in their founding moment."¹⁴⁸ The likelihood of importing like from like is said to occur in part because the legal culture of the sending state better approximates the extant normative landscape of the receiving state.¹⁴⁹ In addition, the laws selected for import satisfy efficiency concerns because they have been field tested amidst institutional conditions similar to the receiving country. Accordingly, laws are said to transfer more readily and frequently when a receiving legal system is derived from the same legal family as that of the sending country. As such, the legal family from which a country imports its legal system is said to explain much of the variation among states.

While the formulation of the legal family logic forces us to specify a measure of "legal family," it should be noted that any typology of legal families has proved

¹⁴⁶ See Miller (2003), at 845-56.

¹⁴⁷ Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008); Damaska (1997).

¹⁴⁸ See PETER GOUREVTICH & JAMES SHINN, *POLITICAL POWER & CORPORATE CONTROL* (2005).

¹⁴⁹ See J. Du Plessis, "Comparative Law and the Study of Mixed Legal Systems," in *OXFORD HANDBOOK OF COMPARATIVE LAW* (2006); V. PALMER, *MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY* (2001).

epistemologically unsatisfactory. René David, for example, identified five legal families—Western, Socialist, Islamic, Hindu, and Chinese. He subsequently recast these molds into three: Romanistic-German, Common Law, and Socialist (plus a residual category of “Other systems”).¹⁵⁰ The problem of categorization—and thus much empirical work using such categories as a variable—stems from the fact that no unadulterated legal system exists, as all are alloys composed of various legal traditions. As Konrad Zweigert and Hein Kötz instructed, “we need more help with the difficult question whether a system is affiliated to one parent or to another, especially as legal systems have been known to adopt new parents.”¹⁵¹

Despite the problems associated with legal family categorization, this study will test whether a relationship does indeed exist between the type of legal system and the manner in which legal entrepreneurs—scholars, legislators, vocal private citizens—within that system cite foreign law and legal scholarship. A variable for legal family is included in the analysis not only because the legal family explanation is widely supported in the empirical legal transplant literature,¹⁵² but also because such a variable will serve to expand upon the limited empirical literature on the subject.¹⁵³ Hypothesis 2A restates the prediction that legal family determines the source of legal influence.

A final claim in the literature concerning legal diffusion asserts that courts interpreting relatively young constitutions are more likely to look abroad for

¹⁵⁰ See KONRAD ZWIEGERT AND HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 44 (1977).

¹⁵¹ Id., at 28.

¹⁵² See, e.g., Aron Balas, Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer, *The Divergence of Legal Procedures*, (NBER Working Paper No. 13809, Feb. 2008); C. Lawson, *The Family Affinities of Common-law and Civil-law Legal Systems*, 85 HASTINGS INT’L L.J. (1982); and Merryman (1981).

¹⁵³ The prevalent empirical analysis examines only the frequency of legal transplants among states, overlooking the related issue of legal citation in the courts of receiving countries examined here.

interpretive assistance than are countries with mature constitutions and well-developed constitutional jurisprudence.¹⁵⁴ The creation of judicial precedent is a time-consuming process, and so newer courts interpreting younger constitutions often rely on foreign case law dealing with similar constitutional provisions. Accordingly, these scholars hypothesize that the justices of a court facing a particular constitutional question in a country with a relatively old constitution are far less likely to look abroad for legal reasoning than are justices interpreting a younger constitutional document.

Supporters of the constitutional-maturity hypothesis cite supporting evidence in the experiences of such countries as Canada, South Africa, and New Zealand, each of which underwent significant constitutional reform in the recent past and in turn looked abroad for legal solutions to new problems. South African Justice Arthur Chaskalson, for example, noted that “[c]omparative ‘bill of rights’ jurisprudence will no doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law on which we draw.”¹⁵⁵ Canadian Justice Claire L’Heureux-Dube similarly observed that the unresolved questions created by the then-new Canadian Charter of 1982 presented an “ideal opportunity to look south and learn from the experience of the United States.”¹⁵⁶ It follows from this understanding of legal development that as a country’s constitution ages, the likelihood of a court of that country to cite foreign law or legal scholarship declines.

¹⁵⁴ See C.L. Ostberg, Matthew E. Wetstein, & Craig R. Ducat, *Attitudes, Precedents and Cultural Change: Explaining the Citation of Foreign Precedents by the Supreme Court of Canada*, 34 CAN. J. P. SCI. 377 (2001); Christopher Manfred, *The Use of United States Decisions*, 23 CAN. J. P. SCI. 499 (1990); Smith (2006), at 242; Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2570, 2585 n.82 (2004); cf. Eliezez Rivlin, *Thoughts on Referral to Foreign Law, Global Chain-Novel, and Novelty*, 21 FLA. INT’L L.J. 7 (2009).

¹⁵⁵ See SHADRACK GUTTO, EQUALITY AND NON-DISCRIMINATION IN SOUTH AFRICA: THE POLITICAL ECONOMY OF LAW AND LAW MAKING 278 (2001).

¹⁵⁶ *The Queen v. Elshaw*, [1991] 3 S.C.R. 24, 57 (Can.).

VI. *Conclusion*

This dissertation introduces a new, two-tailed theory of norm diffusion and tests the alternative power- and identity-based explanations drawn from the literatures of international relations and comparative legal studies. It will be shown that power-based explanations cannot explain those cases in which certain concessions and legal reforms made by the outlier state exceed the demands of the dominant state or vary depending on policy context.¹⁵⁷ In many instances, states will acquire new interests or abandon long-held beliefs in the absence of or in opposition to clear material incentives to behave otherwise. In addition, the model will help explain why states adopt certain procedural rules that ostensibly reduce their coercive power but resist others. The model described above also helps identify and anticipate those instances in order to improve our understanding of the circumstances under which foreign advocacy for legal reform succeeds. In so doing, this study aspires to explain what role the international community can play in affecting domestic reform in target states. More importantly, it aims to better our understanding of how policy entrepreneurs can avoid undermining the positive efforts of local advocates.

The process by which legal advocates successfully revise the constitutive or cognitive commitments of high court justices, legal scholars, and legislators raises difficult methodological challenges.¹⁵⁸ More specifically, the study of global trafficking in legal norms presented in the Chapters that follow requires a strategy of

¹⁵⁷ Rationalist realist theory would predict, for example, that when foreign powers possess the material capacity to eliminate the *status quo ante* and posit some threat point, a target state would in turn be expected to make concessions that met a compromised equilibrium somewhere in between. *See, e.g.*, L. GRUBER, *RULING THE WORLD* (2000).

¹⁵⁸ *See* Rawi Abdelal, Yoshiko M. Herrera, Alastair Iain Johnston, and Rose McDermott, "Identity as a Variable," 4 *PERSPECTIVES ON POLITICS* 695 (2006), at 696.

methodological eclecticism that includes a content analysis of political texts. Legal norms by which groups organize political behavior, consist of two dimensions—content and contestation. Content includes the more entrenched elements of national identity, including constitutive norms, shared social purposes, relational comparisons, and extant worldviews. Contestation, by contrast, consists of salient points of disagreement within a group, or what is described in this Chapter as “points of concern.”¹⁵⁹ To understand the diffusion of new constitutive legal norms, it follows that one must study political language because, as Abdelal et al. note, “much of identity discourse is the working out of the meaning of a particular collective identity through the contestation of its members.”¹⁶⁰ Content analysis of legal scholarship and judicial opinions thus provides the analytical tools necessary to understand this contestation.¹⁶¹

To perform such a study, several factors must be considered. Firstly, one must consider what political language merits analysis. In Chapter 2, I introduce the salient structural and constitutive differences between the two major legal systems—civil law and common law. As I explain, the structure of a country’s legal system acts as an important intervening variable affecting the process by which legal advocates facilitate the transnational diffusion of law. Put simply, it claims that a key difference in the process of diffusion in civil and common law systems lies in the location and character of legal decision makers. In civil law systems, for example, the key actors are legislators and scholars. As such, any content analysis of legal discourse and diffusion to such systems is best directed at the scholarly writings of legal observers and

¹⁵⁹ Abdelal at 696. Abdelal et al. cite as a useful example of the unsteady relationship between content and contestation the controversy triggered by the claims made by Samuel Huntington in *Who Are We? The Challenges to America’s National Identity* (2004).

¹⁶⁰ Abdelal et al., at 700.

¹⁶¹ *Id.*

legislative drafters. In common law systems, by contrast, the key actors are primarily judges. It follows that the legal opinions authored by such actors (or their clerks) provide the best window into the discursive context and processes of legal diffusion.

In the subsequent chapters, I employ both manual discourse analysis as well as computer-aided content analysis of legal texts from two countries (a civil law country and a common law country) that have in recent years undergone considerable legal reform—China and South Africa. Such an analysis reveals important insights into the discursive context within which legal reform occurs—i.e. the content and contestation. In Chapters 3 and 4, an analysis of legal articles written by Chinese legal scholars and practitioners published during China’s legal development in the reform era reveals that the attitudes of legal observers to proposed legal reforms varied in large part due to the preexisting discursive environments. As illustrated in Chapter 4, a selective content analysis of these articles—which in total number as many as 3,231 articles published in 320 journals from 29 of China’s 31 provinces, municipalities, and autonomous regions—indicates that pro-reform attitudes bore no relationship to efforts to ‘localize’ the proposed reforms or to the influences of aid flows. In Chapters 5 and 6, a similar content analysis of hundreds of judicial opinions authored by South African judges reveals a comparable finding. In addition, an analysis of opinions scribed by justices from South Africa’s highest court reveals that successful reforms did not diffuse via processes of localization but rather via a process of transnational socialization. Put simply, the greatest degree of reform came not from those justices most able to embed proposed reforms within extant national discourse but rather via those justices who made the most explicit overtures to international norms and foreign law. Finally, Chapter 7 concludes with a summary of the two-tailed model of diffusion and a discussion of possible future research that can further the understanding of the role of discourse in the process of legal diffusion presented here.

CHAPTER 2

WEAK STATES, STRONG COURTS: STATE STRENGTH AND MECHANISMS OF DIFFUSION IN COMMON AND CIVIL LAW COUNTRIES

I. *Introduction*

Sources of legal innovation can come from within a jurisdiction, such as when the voting public demands the regulation of a new industry, or from without, such as when a legislature or court imports the law or legal reasoning of another jurisdiction.¹⁶² Due to the federal structure of the United States, political scientists from the American politics subfield have enjoyed an embarrassment of riches when it comes to examining these two directions of policy diffusion across a wide range of legal issues, including such disparate legal topics as same-sex marriage, smoking bans, the death penalty, and fluoridation.¹⁶³ The phenomenon of diffusion in the international system, however, is far less understood by scholars of international relations.

To address this shortcoming, this Chapter considers how the structure of a country's legal system acts as an important intervening variable affecting the process by which legal advocates facilitate the transnational diffusion of law. More

¹⁶² See Charles R. Shipan & Craig Volden, "The Mechanisms of Policy Diffusion," 52 *AMERICAN JOURNAL OF POLITICAL SCIENCE* 840 (2008).

¹⁶³ See, e.g., Donald Haider-Markel, "Policy Diffusion as a Geographical Expansion of the Scope of Political Conflict: Same-Sex Marriage Bans in the 1990s," 1 *STATE POLITICS AND POLICY QUARTERLY* 5 (2001); Steven J. Balla, "Interstate Professional Associations and the Diffusion of Policy Innovations," 29 *AMERICAN POLITICS RESEARCH* 221 (2001); Michael Mintrom, "The State-Local Nexus in Policy Innovation Diffusion: The Case of School Choice," 27 *PUBLIUS: THE JOURNAL OF FEDERALISM* 41 (1997); Frances Stokes Berry & William D. Berry, "State Lottery Adoptions as Policy Innovations: An Event History Analysis," 82 *AMERICAN POLITICAL SCIENCE REVIEW* 395 (1990).

specifically, it claims that a key difference in the process of diffusion in civil and common law systems lies in the location of legal decision makers. In centralized, statute-based civil law states, transnational diffusion can occur quickly, and often requires the successful persuasion of a small number of influential academics and legislative drafters. In France, for example, the legal system is led by an elite corps of legal scholars and a small handful of *magistrat*.¹⁶⁴ To transplant a particular legal practice to such a system, one must first persuade this elite corps of the practice’s merits. In decentralized, precedent-based common law systems, which lack the unifying institutional structures of civil law, transnational diffusion often occurs more slowly, requiring the successful persuasion not of a handful of scholars or legislators, but rather judges dispersed throughout the legal system. In the South African system, for example, there is no automatic right of appeal, and so in addition to any lengthy litigation there is also the process of filing for “leave to appeal” and possibly a need to petition that decision—often an eighteen-month procedure—before elevating to a higher court for review.¹⁶⁵ This lengthy process is then repeated in order to reach the Constitutional Court. Table 2.1 illustrates the varied outcomes that can result from variation on the independent and intervening variables of interest.

Table 2.1. *Variation in Variables and Anticipated Legal Reform*

DOMESTIC DISCOURSE	<i>Active discourse</i>		<i>Inactive discourse</i>	
LEGAL SYSTEM	<i>Common Law</i>	<i>Civil Law</i>	<i>Common Law</i>	<i>Civil Law</i>
PACE OF REFORM	<i>Slowest</i>	←————→		<i>Fastest</i>

¹⁶⁴ See Lasser, at 18.

¹⁶⁵ 8/26/2010.

As described in Chapter 1, an independent variable affecting the influence of international and transnational legal advocates on domestic legal reform is the domestic discursive environment surrounding a certain policy. But this does not tell the whole story. While discourse can affect the relative success of an advocacy campaign, domestic structure can affect the relative pace and process by which that success is achieved. Put another way, the process by which any attempt to transplant a legal norm ultimately succeeds depends also “on the domestic structures of the polity to be affected,” as well as the ability of advocates to gain access to the domestic actors necessary for the creation of a winning coalition.¹⁶⁶ Indeed, few transnational actors are, as some have described them, “sovereignty-free actors”¹⁶⁷ because variation in either national-level variable—discourse or domestic structure—will determine the relative success and strategy of any transnational movement.¹⁶⁸ As illustrated in table 2.1, different legal structures can affect how quickly the influence of a successful transnational legal advocacy campaign penetrates the target legal system. Candidate legal norms, which may be adopted by target states due to either strategic or ideational concerns, can often travel more quickly into civil law states than into their common law counterparts. Given their different concentrations of power and prestige, advocacy campaigns directed at civil law jurisdictions can target a centralized legal elite that

¹⁶⁶ See Thomas Risse, “Transnational Actors and World Politics,” in Walter Carlsnaes, Thomas Risse, & Beth Simmons, eds., *Handbook of International Relations* (Sage, London, UK: 2002), at 257.

¹⁶⁷ See James N. Rosenau, *Turbulence in World Politics: A Theory of Change and Continuity* (Princeton University Press: 1990), at 11.

¹⁶⁸ “Transnational movement” is understood here to mean “regular interactions across national boundaries when at least one actor is a nonstate agent or does not operate on behalf of a national government or an intergovernmental organization.” See Thomas Risse-Kappen, “Bringing Transnational Relations Back In: Non-state Actors, Domestic Structures, and International Institutions,” in Thomas Risse-Kappen, ed., *Bringing Transnational Relations Back In* (Cambridge University Press: 1995).

includes a handful of legislators, legal drafters, and scholars. In common law systems, by contrast, diffusion often entails the *longue durée*, whereby judges and litigants introduce new rights through the slow, accretive process that includes finding the right plaintiff, protracted trials, overruling precedent, and ultimately appellate litigation. Any reform of a right or obligation in common law develops gradually as a case works its way up the appellate system and subsequent judges scrutinize its judicial reasoning. This temporal difference to legal reform is nicely captured in Albert Dicey's famous remark that while civil law statutes reflect the public opinion of yesterday, common law "reflects the opinion of the day before yesterday."¹⁶⁹ Outside of constitutional rights, moreover, common-law courts are generally less able to affect matters of statutory law.

In this way, domestic structure does not interact with the role played by discourse in the process of legal reform. It does, however, by standing between transnational advocates and the domestic actors with sufficient power and prestige to reform law, affect "target vulnerability."¹⁷⁰ The structure of a state's legal system, (i.e. common law or civil law) and the location of key legal decision makers in that system (i.e. in courtrooms, universities, or national legislatures), directly affects the means by which foreign legal advocates achieve desired legal reforms and the likely pace with which such reforms are implemented. The pace of legal reform is not necessarily of consequence for those interested in the diffusion of substantive legal rights protections because in some instances, as mentioned above, legal reforms diffuse through the international system due merely to the strategic rather than ideational considerations of the targeted states, and so may experience poor implementation after ratification. In this way, legalization and legal reform can, as Miles Kahler noted in the context of

¹⁶⁹ See Albert Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (London, UK: 1905), at 369.

¹⁷⁰ Risse (2002), at 273.

Asia-Pacific communities, be “primarily a means to other ends.”¹⁷¹ This strategic adoption of law, Stephen Krasner likewise observes, is best described as “organized hypocrisy,” wherein actors “say[] one thing but do another, endorsing a logic of appropriateness while acting in ways consistent with a logic of consequence.”¹⁷² As such, in some instances states “make greater concessions knowing that they will not be implemented.”¹⁷³

While this project does not examine the implementation of laws subsequent to their adoption, it is important to note that the strategic adoption of laws can nonetheless serve to ensnare reluctant states in a transnational discursive spiral that can transform imported ideas into constitutive rights through socialization processes of argumentation, dialogue, and persuasion.¹⁷⁴ As Beth Simmons recently observed in the case of international treaties, such legal commitments provide domestic advocates with the political, legal, and social resources that assist them in holding a government to its promise. That is, “[t]hey involve changes that give relatively weak political actors important tangible and intangible resources that raise the political costs governments pay for foot-dragging or noncompliance.”¹⁷⁵ It follows that even when policymakers strategically import a candidate legal reform with no intention or expectation that the law will be enforced domestically, the discursive context can matter in at least two points in time: firstly, the absence of a salient extant domestic discourse can leave targeted policymakers ill-equipped to raise a compelling defense against a candidate transnational norm; and secondly, domestic advocates can then in

¹⁷¹ See Miles Kahler, *Legalization as Strategy: The Asia-Pacific Case*, 54 INTERNATIONAL ORGANIZATION 549 (2000), at 564.

¹⁷² See Stephen D. Krasner, *Organized Hypocrisy in Nineteenth-Century East Asia*, 1 INTERNATIONAL RELATIONS OF THE ASIA-PACIFIC 173 (2001), at 176.

¹⁷³ See Mertha & Pahre (2005), at 696.

¹⁷⁴ See Risse & Sikkink (1999), at 11.

¹⁷⁵ See BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009), at 15.

turn employ the imported discourses that underlie that candidate norm as a weapon against a reluctant state, leaving strategically minded policymakers ensnared by the very transnational discourses they tacitly endorsed by importing the foreign law. In this way, the mechanism for the expansion of norms such as decolonization was, as Neta Crawford describes, “a combination of the effective work of moral entrepreneurs and of the logical extension of arguments” used in their advocacy.¹⁷⁶

In a similar way, the adoption in the PRC of certain labor mediation and arbitration procedures long advocated by domestic and transnational labor rights proponents, and the reshaped expectations of citizens they bring about, has resulted in an explosion in the number of labor disputes.¹⁷⁷ After the adoption of the first Labor Law in 1995, labor disputes increased annually by 29.6% as growing numbers of Chinese workers learned of their legal rights and sought to realize them through legal channels.¹⁷⁸ As transnational labor advocate Aaron Halegua noted more recently, “[p]ublicity regarding the [2007] Labor Contract Law had a tremendous impact on raising worker consciousness.... Even if migrant workers still do not know the specific details of each of their legal rights, far more came to realize that they have rights and there are laws protecting them.”¹⁷⁹ This growing awareness among workers, while a positive outcome for a regime interested in improving labor conditions throughout the

¹⁷⁶ See Neta C. Crawford, *Decolonization as an International Norm: The Evolution of Practices, Arguments, and Beliefs*, in Laura Reed and Carl Kaysen eds., *EMERGING NORMS OF JUSTIFIED INTERVENTION* (1983), at 56.

¹⁷⁷ See Mary E. Gallagher, ‘*Use the Law as Your Weapon!*’ *Institutional Change and Legal Mobilization in China*, in Neil J. Diamant, Stanley B. Lubman, and Kevin O’Brien eds., *ENGAGING THE LAW IN CHINA: STATE, SOCIETY, AND POSSIBILITIES FOR JUSTICE* (2005), at 76.

¹⁷⁸ See Ken Wang, *A Changing Arena of Industrial Relations in China: What is Happening after 1978*, 30 *EMPLOYEE RELATIONS* 190 (2008), at 195.

¹⁷⁹ See Edward Wong, “As China Aids Labor, Unrest is Still Rising,” *NEW YORK TIMES*, June 21, 2010, at A1. See also Mary Gallagher, “Use the Law as your Weapon!,” in *Engaging the Law in China: State, Society, and Possibilities for Justice* (Neil Diamant, Stanley Lubman, and Kevin O’Brien eds., 2005).

country, may nonetheless serve to undermine the interests of a regime more concerned by Solidarność-like labor mobilization.

Considered together, as they are in the following chapters, the interaction between domestic discourse and domestic structure improves our understanding of norm diffusion and answers the call for further research on how domestic structure affects transnational relations in the presence of nonstructural influences.¹⁸⁰ The following section outlines this structural distinction as an important intervening variable and identifies the ways in which variation in the type of legal system determines the processes through which transnational legal advocacy succeeds.

II. *Common Law v. Civil Law: Differences in Kind, Not Degree*

Most modern legal systems can be categorized as either common law or civil law.¹⁸¹ A century ago, civil and common law systems were deemed to be two incompatible systems fated to forever divide the world between them.¹⁸² In broad terms, this division of the world's jurisdictions has persisted over time despite repeated forecasts of a complete harmonization of laws. In the modern area of globalization, for example, many comparative legal scholars and observers of comparative political economy anticipated a gradual convergence of national laws.¹⁸³

¹⁸⁰ See, e.g., Thomas Risse-Kappen, "States and Transnational Relations: What Have We Learned?," in Thomas Risse-Kappen, ed., *BRINGING TRANSNATIONAL RELATIONS BACK IN* (1995); Matthew Evangelista, "The Paradox of State Strength: Transnational Relations, Domestic Structures, and Security Policy in Russia and the Soviet Union," 49 *INTERNATIONAL ORGANIZATION* 1, 36 (1998); Helen Milner, "International Theories of Cooperation among Nations: Strengths and Weaknesses," 44 *WORLD POLITICS* 466 (1992).

¹⁸¹ Within the civil law family, a legal system can be categorized further as deriving from the French, German, or Scandinavian tradition.

¹⁸² See, e.g., Peter J. Hamilton, "The Civil and the Common Law," 36 *HARV. L. REV.* 180 (1922).

¹⁸³ See, e.g., Peter A. Hall and David W. Soskice, "An Introduction to Varieties of Capitalism," in Peter A. Hall and David W. Soskice, eds., *Varieties of Capitalism: Institutional Foundations of Comparative Advantage*, (Oxford University Press, 2001)

Drawing on the logic of Ronald Coase and his articulation of the hierarchical firm as an entity endogenous to the free market organized to reduce transaction costs, these scholars hypothesized that the increased sensitivity and openness of markets worldwide would motivate states to reorganize according to a new, uniform logic of transaction-cost reduction.¹⁸⁴ Any persistent variations among state laws would be a function of either a catching-up process or a failure in those states' economic policy management.¹⁸⁵

The anticipated flattening of national law by the forces of globalization, however, has not occurred, despite global pressures. As Peter Hall and David Soskice observed in their study of the varieties of capitalism, there still exist at least two families of market structures: liberal market economies (LMEs) and coordinated market economies (CMEs). Firms in either type of economy operate strategically within the state's legal regimes.¹⁸⁶ In any jurisdiction, therefore, firms gravitate not toward some global logic of industrial organization but instead operate according to a local mode of coordination for which there is domestic institutional support. As with LMEs and CMEs, civil and common law systems have likewise largely survived

(discussing the expectation of rational choice theorists that a common market shall develop to reduce transaction costs), at 55; Rene David, "The International Unification of Private Law," 2 in *International Encyclopedia of Comparative Law* (1971); David Trubek, "Toward a Social Theory of Law: An Essay on the Study of Law and Development," 82 *YALE L.J.* 1 (1972); L. COLLINS, *EUROPEAN COMMUNITY LAW IN THE UNITED KINGDOM* (1976); Grementieri & Golden, "The United Kingdom and the European Court of Justice: An Encounter Between Common and Civil Law Traditions," 21 *AM. J. COMP. L.* 664 (1973)

¹⁸⁴ Peer Hull Kristensen & Jonathan Zeitlin, *Local Players in a Global Games: The Strategic Constitution of A Multinational Corporation*, (Oxford University Press, 2004), at 8.

¹⁸⁵ ROBERT GILPIN, *GLOBAL POLITICAL ECONOMY* (2003), at 184.

¹⁸⁶ Hall & Soskice, at 6. On the relationship between the "varieties of capitalism" literature and comparative law, see Gunther Teubner, "Legal Irritants: Good Faith in British Law or Unifying Law Ends Up in New Divergences," 61 *MOD. L. REV.* 11, 24 (1998).

globalizing pressures to converge and their institutional differences remain considerable. These differences, in turn, mean that different mechanisms of diffusion may apply in each system. Moreover, transnational legal advocates, like firms operating in an LME or CME, must expend their resources in a manner tailored to maximize domestic institutional support in each legal family. The following subsections outline the need for different advocacy strategies raised by differences in civil and common legal systems.¹⁸⁷

a. Historical Institutionalism and the Origins of Common and Civil Law Systems

Scholars of transnational and comparative politics have long observed in various policy contexts that “a country’s domestic structure influences its degree of openness to ideas promoted by transnational actors as well as the degree to which those ideas are implemented as policy.”¹⁸⁸ For example, a decentralized, fragmented state offers multiple points of access for policy entrepreneurs to advocate their innovative ideas. Such states experience difficulty implementing the new policies as the new ideas percolate slowly to the top, but should they reach the summit of power the policies generally achieve broad and lasting support. By contrast, policymakers in a centralized, hierarchical, and bureaucratized state may be resistant to new ideas at

¹⁸⁷ For further discussion of the differences between civil and common law systems, see: Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983); R. David and J. Brierley, *Major Legal Systems in the World Today*, 3d ed. (Stevens, 1985); P. Atiyah and R. Summers, *Form and Substance in Anglo-American Law* (Clarendon Press, 1987); M. Eisenberg, *The Nature of the Common Law* (Harvard University Press, 1988); David S. Clark, “The Idea of the Civil Law Tradition,” in *Comparative and Private International Law*, (1990); Konrad Zweigert & Hein Kotz, *An Introduction to Comparative Law* (Oxford University Press, 1998); Catherine Valcke, “Comparative Law as Comparative Jurisprudence—The Comparability of Legal Systems,” 52 AM. J. COMP. L. 713 (2004); H. Patrick Glenn, *On Common Laws* (Oxford University Press, 2005).

¹⁸⁸ Evangelista (1998); see also Zbigniew Brzezinski & Samuel P. Huntington, *Political Power: USA/USSR* (New York, 1963).

first, but they are able to implement relevant policies effectively and quickly, once they choose to adopt them.¹⁸⁹ This distinction proves especially salient in the case of centralized, hierarchical single-party countries like China.¹⁹⁰ Centralized states that are otherwise impervious to foreign legal influences are nonetheless—once the legal norms advocated by inter- and transnational entrepreneurs persuade top decision makers—quick to adopt new reforms.¹⁹¹ Decentralized states, by contrast, may be exposed to many foreign influences at various levels of authority, but consolidated national reform may prove more difficult to achieve than in more centralized regimes.

This distinction made in the transnational politics subfield between strong, hierarchically arranged political systems and weaker, more horizontally arranged systems parallels a similar distinction that can be made between common and civil law legal families. These two families of legal systems differ in important ways, including the distribution of power within them and the constitutive rules apportioning responsibilities among legal actors.¹⁹² While it must be recognized that there are also important differences among the members of each legal family,¹⁹³ each family is

¹⁸⁹ Evangelista (1999), at 19.

¹⁹⁰ Evangelista (1999); Evangelista (1998); Nina P. Halpern, “Policy Communities in a Leninist State: The Case of the Chinese Economic Policy Communities,” 2 GOVERNANCE 23 (1989); Mark A. Baskin, “The Evolution of Policy Communities in Socialist Yugoslavia: The Case of Work Migration Abroad,” 2 GOVERNANCE 67 (1989).

¹⁹¹ On different state structures and the corresponding differences in state strength, see, e.g., Kathryn Sikkink, *Ideas and Institutions: Developmentalism in Brazil and Argentina* (Cornell University Press: 1991); Margaret Weir & Theda Skocpol, “State Structures and the Possibilities for ‘Keynesian’ Responses to the Great Depression in Sweden, Britain, and the United States,” in Peter B. Evans, Dietrich Rueschmeyer, and Theda Skocpol, eds., *Bringing the State Back In* (Cambridge University Press: 1985); Peter A. Hall, “Policy Innovation and the Structure of the State: The Politics-Administration Nexus in France and Britain,” ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 466 (March 1983).

¹⁹² John Henry Merryman, “On the Convergence (and Divergence) of the Civil Law and the Common Law,” 17 STAN. J. INT’L L. 357, 358 (1981).

¹⁹³ In matters such as judicial review of legislation, for example, Germany, a civil law country is more similar to the United States than it is to France, a fellow civil law

nonetheless distinguished by certain shared, long-standing characteristics—derived and reinforced by historical practice—that make the typology useful for understanding differences in the mechanisms and in the effects of transnational legal diffusion.¹⁹⁴

b. *Legislative Primacy and the Origins of the Civil Law*

Civil law systems trace their origins the Roman *jus civile*. This set of rules, which was ultimately compiled in the *Corpus Juris Civilis* by leading jurists and legal scholars under Emperor Justinian, stood as a single, codified body of law promulgated by the state with the intent of regulating all relationships among individuals.¹⁹⁵ The force of these comprehensive codified statutes thus came at the expense of an independent judicial power, as expressed in Justinian’s instruction to judges: *non exemplis sed legibus iudicandum est* (Do not judge by examples but by the law).¹⁹⁶ As such, in civil law systems the ultimate—and sometimes the only—source of law is legislation.

The elevation of statutory law over judge-made law traces in part to a fear of encroachment by the judicial branch on the tasks of the legislature.¹⁹⁷ The true expression of the *vox populi*, civil law defenders maintain, is announced not by

country. The relative weakness of judicial review in France, moreover, more closely resembles the hostility to review in the United Kingdom, a common law state. *See* Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (1989). It must be noted that even France recently introduced reforms to strengthen its structure of constitutional review. In 2008, President Sarkozy introduced a constitutional reform based on the research of a *comité des sages*. The most revolutionary provision in the bill, Article 61-1, introduces for the first time in France *a posteriori* constitutional review. The reform was derived from the influential the work of Czech jurist Hans Kelsen, whose own work was distilled from his appreciation for the American constitutional system. *See* Stephen Gardbaum, “The Myth and the Reality of American Constitutional Exceptionalism,” 107 MICH. L. REV. 391 (2008).

¹⁹⁴ *See* Zweigert & Kötz (1998).

¹⁹⁵ *See generally* David & Brierley (1985), at 347-49; John Dawson, *The Oracles of the Law* (1986), at 100-24; Alan Watson, *The Making of Civil Law* (1981).

¹⁹⁶ Ewald, at 1974.

¹⁹⁷ Ewald, at 1972.

unaccountable judges but by the elected representatives of citizens—the legislature.¹⁹⁸ The Roman Law tradition has been most faithfully preserved in France’s Jacobian constitutional tradition, which emphasizes the dominance of legislative authority. This emphasis is likely due to the long-standing influence of Jean-Jacques Rousseau, who maintained that the supreme law should not come from courts but rather from the manifestation of the social compact—the legislative organ—and expressed through legal abstractions.¹⁹⁹ Indeed, until as recently as 2008, France’s Constitutional Council only reviewed legislation prior to its passage, and was unable to invalidate laws already in force.

Civil law judges thus function primarily as bureaucratic agents of the legislative and the executive branches. In addition, civil law judges are not bound to follow prior judicial decisions. Instead, they are tasked with justifying their decision under the authority of statutory law.²⁰⁰ Judges in lower courts are thus free, at least in principle, to ignore interpretations of law announced by a higher court or even by the same court.²⁰¹ Nor are judges required to publish detailed accounts of their reasoning. As Rudolf Schlesinger observed prior to the most recent constitutional reforms in France, “French judicial decisions, and especially the decisions of the Cour de Cassation, are reported in such a way that the reader of the reports is not reliably

¹⁹⁸ Ewald, at 1972-73.

¹⁹⁹ It should be noted that recent reforms empower the French Constitutional Council to rule on the constitutionality of laws passed by the legislature. Article 61-1 reads: “When, in the course of a controversy before a judicial court, it is claimed that a statutory disposition infringes over the rights and liberties that the Constitution safeguards, the Constitutional Council may be requested to judge on the issue by referral of the Conseil d’Etat or of the Cour de Cassation, which shall decide in a timely manner.”

²⁰⁰ Joseph Dainow, “The Civil Law and Common Law: Some Points of Comparison,” 15 AM. J. COMP. L. 428 (1967).

²⁰¹ See Ewald, at 1969.

informed either of the facts of the case or of the reasoning of the Court.”²⁰² Instead, all that need be reported is the statutory source that underlies the court’s decision.

c. Judicial Independence and the Origins of the Common Law

In sharp contrast to the courts of civil law systems, common law courts evolved outside the *jus civile* of Roman law and amidst far greater independence from sovereign and legislative authority.²⁰³ Indeed, a policy or foreign legal doctrine, if invoked by a common law court of a state, could become the law of that state, even over the protests of the legislature.²⁰⁴ This diffuse system of power-sharing emerged from the historical development of the law in both England and the United States.²⁰⁵ During the formative period of law in England, relatively independent fiefdoms operated in the absence of a strong, centralized legislature. To fill this power vacuum and institute order, common law courts emerged in feudal localities across England, operating locally and without knowledge of the laws applied elsewhere. When the king ultimately sought to consolidate central authority, these local judicial organs chafed against the encroachment on their power. The sovereign succeeded in creating a uniform system of rules and norms common throughout the kingdom, but each subsequent statute passed by parliament was viewed by judges as an intrusion upon the authority of the courts. Any ambiguous legislation, therefore, was construed especially narrowly so as to minimize the parliamentary encroachment on judicial power. For this reason, Anglo-Saxons have been described as “instinctively hostile to

²⁰² See Rudolf Schlesinger, 1 *Formation of Contracts: A Study of the Common Core of Legal Systems* 54 (1968).

²⁰³ See J.M. Kelly, *A Short History of Western Legal Theory* (Oxford University Press: 1992), at 180.

²⁰⁴ See R.C. van Caenegem, *Judges, Legislators, and Professors: Chapters in European Legal History* (1987).

²⁰⁵ See Pierre Legrand, “Against a European Code,” 60 *MOD. L. REV.* 44, 58 (1997).

codification”²⁰⁶ and distrust of the government is said to be their “mother’s milk.”²⁰⁷ Europe’s Justinian Code, which announced that the will of the Prince holds the force of law [*quod principi placuit legis habet vigorem*], was thus especially unattractive to English jurists.²⁰⁸

Extending the power of common law courts still further, the king also oversaw the development of a system known as “equity,” which was intended to mete out remedies in egregious cases and deal with novel legal scenarios. In Britain, this system evolved into the Court of Chancery, a powerful supplement to codified law that, through judicial decisions and judge-made rules, developed a large body of case law independent from parliamentary dictates.²⁰⁹ Once transplanted to the U.S. colonies, the decentralized structure of the common law and the power of its courts were strengthened still further by the introduction of federalism, which created many more competing and overlapping bodies of judicial law—what Louis Brandeis dubbed the “laboratories of democracy”²¹⁰—to compete with and balance against legislative and executive authority.

III. *Different Systems, Different Actors*

The different histories of civil and common law systems, and the distinct roles and rules institutionalized in each, suggest inter- and transnational legal advocates hoping to successfully transplant a proposed reform to a target state must tailor their

²⁰⁶ See Thomas Mackay Cooper, “The Common and the Civil Law—A Scot’s View,” 63 HARV. L. REV. 468, 471-72 (1950).

²⁰⁷ See Craig Bradley, “The Convergence of the Continental and the Common Law Model of Criminal Procedure,” 7 CRIM. L.F. 471, 472 (1996).

²⁰⁸ See Peter J. Hamilton, “The Civil Law and the Common Law,” 36 HARV. L. REV. 180, 181 (1922) (quoting Digest, I, 4, bk. 1, § 1, which declares that the word of the emperor is the equivalent of a constitution).

²⁰⁹ Dainow, at 421-23.

²¹⁰ See *New State Ice Co. v. Lieberman*, 285 U.S. 262, 311 (Brandeis, J., dissenting).

campaign according to whether the target state is a civil law or common law jurisdiction. In addition to the different historical origins of each system discussed above, the roles played by key domestic actors in each system illustrate further the important distinction between the centralized, hierarchical structure of civil law systems and the diffuse, decentralized character of common law states. In short, the difference lies in the shared power of judges to make law in common law states and the exclusive power of legislators to do the same in civil law states.

Given the elevation of statutory law over judicial interpretation in civil law jurisdictions, the most valued expositors of the legal code are not judges but rather legal scholars in the form of published treatises and commentaries.²¹¹ Legal scholars can be so influential in the formation of doctrine in civil law countries that such systems have been varyingly dubbed “professors’ law”²¹² and “university law”²¹³ by some observers. Often based in capital cities near the legislature or serving as consulting experts with the legal drafting offices of the legislative body, these esteemed scholars educate legislators and jurists on how a certain body of law operates and advocate for how it may be improved by future amendments.

In the French civil law system, for example, the primary source consulted by attorneys to understand developments in the law are not the judicial opinions themselves but case notes written by legal scholars to accompany those opinions in commercially published volumes. These notes stand as quasi-official documents, printed in the most prominent legal collections on the same page as the judicial opinions themselves and offering a thorough explanation and critique of each case.²¹⁴

²¹¹ Cappalli, at 96.

²¹² See, e.g., Cooper (1950).

²¹³ See, e.g., A.W.B. Simpson, “The Survival of the Common Law System” in *Legal Theory and Legal History: Essays on the Common Law* (Hambleton Press, London: 1987), at 394.

²¹⁴ See Lasser, at 10.

Indeed, civil law scholars and legal drafters are generally uninterested in the routine work of courts and judges. Civil law judges operate through a practiced deductive methodology, organizing their judicial decisions according to syllogisms derived from abstract rules stipulated in the state's legal code.²¹⁵ While these judges are undoubtedly influenced by extrastatutory ideas and norms, the official judicial record produced in a civil law court is in most cases closely linked to the statutory text.²¹⁶

In common law countries, by contrast, the most influential legal entrepreneurs are more likely to be the judges themselves than scholars. The most authoritative texts are likewise less likely to be scholarly treatises than they are the judicial precedents given the force of mandatory law under the common law principle of *stare decisis*,²¹⁷ which is itself a judge-made rule.²¹⁸ Richard Cappalli, explaining the common law method, notes that legal norms in common law countries develop by means of precedents through an “inter-temporal and inter-jurisdictional collaboration among the judges who decide cases and write justifying opinions.”²¹⁹ These justifying opinions, Lon Fuller describes, differ from their civil law counterparts in that they offer articulate elaborations of the law, often discussing its origins, purpose, and reasoning.²²⁰ In this way, “the judge functions not as one who seeks to conform his will to an external [codified] order, but as one whose will itself creates the order to

²¹⁵ Cappalli, at 90.

²¹⁶ Lasser, at 3 (noting that the French notion of the “sources of law” restricts law-making power to the legislature).

²¹⁷ There are two ways in which *stare decisis* gives judicial opinions the force of law. Firstly, *stare decisis* requires that a court follow its own settled precedent. Secondly, it requires that a court adhere to the interpretations of law promulgated by higher courts within the same jurisdiction.

²¹⁸ Richard B. Cappalli, “At the Point of Decision: The Common Law’s Advantage Over the Civil Law,” 12 TEMP. INT’L & COMP. L. J. 87, 89 (1998); Richard D. Cappalli, *The American Common Law Method* (1997).

²¹⁹ Cappalli, at 92.

²²⁰ Lon L. Fuller, “Reason and Fiat in Case Law,” 59 HARV. L. REV. 376 (1946) (noting that “If the common law had not attained the perfection of reason, it could be understood only as an unremitting quest for that perfection.”).

which men must conform.”²²¹ [*sic*] In lieu of legal scholarship, these judicial opinions of esteemed judges from courtrooms throughout the country are considered the most authoritative and valued source of legal commentary. Even in those cases in which a judicial opinion is not binding on their sister courts, they nonetheless stand as persuasive authority.

Instead of lengthy treatises, which in civil law systems serve as authoritative explanations of how articles of a particular code operate and interact with one another, an influential unofficial source of legal scholarship in common law countries is modeled on the so-called Restatements of the Law published by the American Law Institute.²²² These volumes are not lengthy expository texts, but rather are primarily a distillation of legal rules divined from judicial opinions. In them, an editorial staff of legal scholars and judges survey judicial opinions of fifty states to divine and restate the most “common” laws of the country and then compile those laws into a code-like body of rules. While in form they resemble “what a French lawyer sees as the permanent basis of a Code,”²²³ they mainly serve the aesthetic purpose of clarity, distilling the universe of judicial opinions down to more a manageable text. Restatements also differ from the treatises common to civil law systems in so far as the credibility of treatises depends greatly on the authority of the scholarly author and the arguments he or she advances. Restatements, by contrast, speak of rules already

²²¹ *Id.* at 379.

²²² *See, e.g.*, Leong Wai Kum, “Restatement of the Law of Guardianship and Custody in Singapore, 1999 SINGAPORE JOURNAL OF LEGAL STUDIES 432 (1999); Sandra McCullough, “Law Reform in Tasmania,” 11 UNIVERSITY OF TASMANIA LAW REVIEW 232 (1992); Paul M. Perell, “A Survey of the Case Law about the Cause of Action for Unjust Enrichment,” 29 ADVOCATES’ QUARTERLY 458 (2005) (Canada); J.W. Teolis, “Legal Opinions in International Financial Transactions,” 13 INTERNATIONAL BUSINESS LAWYER 360 (1985) (Australia).

²²³ *See* Samuel Williston, *The Restatement of Contracts*, 18 A.B.A.J. 775, 776 (1932), quoted in James Gordley, “European Codes and American Restatements: Some Difficulties,” 81 COLUM. L. REV. 140 (1981).

established by courts in the form of judicial decisions. In this way, judges, not scholars, remain the final authority on the law.²²⁴

To say scholars in common-law systems may not be as central to patterns of diffusion as their counterparts in civil-law systems is not to say their influence in the international system is not immense. One particularly influential role of common-law scholars in the global legal community, and one that has triggered considerable controversy, has been as advocates in a transnational effort to introduce common-law reforms to civil law states. This effort advocates bolstering the role of the judiciary in civil law systems.²²⁵ In the post-Washington Consensus era of international developmental assistance, there has been a notable shift in discourse away from a focus on market growth toward a focus on market failures and regulation. As such, lawyers have assumed an important place in development agencies and multilateral development banks in both high-level decision-making and consulting positions.²²⁶ These lawyers, though situated in a wide variety of institutions and hailing from a large number of countries, are still overwhelmingly influenced by the Anglo-American Law and Economics movement, which largely favors common law. As expressed in the guidance documents of USAID, the UN's own Basic Principles on the Independence of the Judiciary reflect a similar commitment to this common-law theoretical approach.²²⁷

²²⁴ See Gordley (1981), *passim*.

²²⁵ See Steven E. Hendrix, "USAID Promoting Democracy and the Rule of Law in Latin America and the Caribbean," 9 SOUTHWEST JOURNAL OF LAW AND TRADE IN THE AMERICAS (2002-2003), at 277 (chronicling USAID efforts in Bolivia, Colombia, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, in addition to broader regional programs); Hiram E. Chodosh, "Reforming Judicial Reform Inspired by U.S. Models," 52 DEPAUL L. REVIEW, (2002), at 351.

²²⁶ Jeremy Perelman, "Book Review: Beyond Common Knowledge," 47 HARV. INT'L L.J. (2006), at 531.

²²⁷ Phillips, (2007).

The different institutional environments within which legal drafters operate further illustrate the importance of different actors in civil and common law systems. The U.S. Congressional and Senate support agencies tasked with assisting their respective legislative body in the drafting of new laws, for example, do so primarily in the shadow of the courts.²²⁸ Every element of every proposed law is scrutinized by a staff attorney for its constitutionality in anticipation of how a judge will interpret the text. These nonpartisan staffers rarely have any expertise in the policy area covered by the law and so are unlikely to suggest to legislators new policies or legal solutions to address a particular social ill.²²⁹ Instead, their role is to prepare laws for judicial interpretation in the courts.

In civil law systems, by contrast, the policy portfolios of legislative and executive support agencies are divided among policy experts according to policy domain—e.g. criminal law, commercial law, and family law—and initial drafts are then compiled by *ad hoc* committees of experts. The eventual scrutiny of the law by a judge is less central a concern to its drafters.²³⁰ When a law ultimately does endure judicial scrutiny, a civil law judge gives primary importance to the legislative history of the law and the intent of legislators.²³¹ As Merryman and Rogelio Pérez-Perdomo describe, in a pure civil law system, the “authoritative interpretation by the lawmaker [is] the only permissible kind of interpretation.”²³²

For a common law judge, the legislative record and intent are just two of many

²²⁸ Interview, July 24, 2009.

²²⁹ Interview, June 1, 2009.

²³⁰ See, e.g., WILLIAM DALE, *LEGISLATIVE DRAFTING: A NEW APPROACH* (1977); see also Fu Jian, “China’s Legislative Affairs Commission,” *Hong Kong Lawyer* (April, 1994), at 39.

²³¹ See Jean-Louis Baudouin, “Mixed Jurisdictions: A Model for the XXIst Century?,” 63 *LA. L. REV.* 983, 985 (2003).

²³² See John Henry Merryman & Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (3d ed. 2007), at 39. See also Lasser (2003).

possible interpretive, extrastatutory sources to which he or she may turn. Much to the consternation of originalists such as U.S. Supreme Court Justice Antonin Scalia,²³³ the common law judge possesses additional tools that are unfamiliar to many civilian jurist, including various schools of interpretation ranging from literalism, pragmatism, developmentalism, to structuralism, as well as history and tradition theory, consensualism, natural law, John Hart Ely's theory of representation-reinforcement, and Richard Dworkin's moral theory of constitutional interpretation.²³⁴ Scalia, though not prone to look abroad for legal solutions, would prefer judicial authority be constrained in a manner resembling civil law systems, in which the power of judges is circumscribed by a judicial formalism in which precedent is less essential than the text of the law, as written by the legislature.²³⁵

Reflecting the distinct apportionments of power among civil and common law actors, Joseph Dainow notes, "the great names of the civil law are the names of professors who wrote the treatises and created the doctrine, e.g. Bartolus, Domat, Pothier, Savigny, Ihering, Planiol, Capitant, Laurent and Depage. By contrast, the heroes of the common law are the outstanding judges who contributed most to its development, like Coke, Hardwicke, Mansfield, Marshall, Story, Holmes and Brandeis."²³⁶ With judges the most important legal authority in common law systems, it is no surprise that the author most frequently cited in American law journals in 2009 was Richard Posner, a U.S. Court of Appeals judge on the Seventh Circuit situated in

²³³ See Antonin Scalia, "Common-Law Courts in a Civil-Law System," Tanner Lectures on Human Values (1997).

²³⁴ See, e.g., Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (3d ed. 2006).

²³⁵ See Miguel Schor, "The Strange Cases of Marbury and Lochner in the Constitutional Imagination," 87 TEX. L. REV. 1463, 1491 (2009).

²³⁶ Dainow, at 429.

Illinois, far from the national capital.²³⁷ Nor is it surprising that the co-authors of the most frequently cited law review article—“The Right to Privacy”—were not legal scholars, but a judge and a lawyer—Justice Louis Brandeis and Samuel Warren.²³⁸

The free exchange of rationales and ideas among common law judges is particularly pronounced when a common law court is faced with a novel, unprecedented case or controversy. In such circumstances, lawyers trained in the common law are generally given the task of analogizing the material facts of the case at hand with related cases faced by past courts, including courts lying outside their jurisdiction. In civil law states, by contrast, the express purpose of the statutory code is to specify the universe of legal rights and obligations at a high level of generality in order to anticipate every factual scenario. These codes, which generally consist of thousands of articles, require considerable effort to develop and so are intended to survive decades without much alteration, especially from judges.

IV. *Different Systems, Different Identities*

To fully understand the implications of whether a state possesses a civil or common law legal system, one must examine more than just the structural characteristics of those systems. Indeed, as scholars such as Peter Katzenstein and others observed in their studies of the varieties of capitalism, there is also an important domestic ideational setting in which actors are embedded.²³⁹ Domestic structures,

²³⁷ Judge Posner was cited 12,586 times, over 1,000 more citations than the next most-cited author, Cass Sunstein, and more citations than the third and fourth most-cited authors combined. This citation analysis was conducted via a search of more than 1,200 legal periodicals, available at: www.heinonline.com.

²³⁸ This citation analysis was conducted via a search of more than 1,200 legal periodicals, available at: www.heinonline.com.

²³⁹ See Peter J. Katzenstein, *Small States in World Markets: Industrial Policy in Europe*, (Ithaca, NY: Cornell University Press, 1985), at 192; see also Paul Doremus, William W. Keller, Louis W. Pauly, and Simon Reich, *The Myth of the Global Corporation* (Princeton University Press, 1999), at 154, fn. 19.

these scholars argue, are not limited to the economic and legal institutions of a state, but extend further to include the state's dominant national ideologies, defined as "the collective understandings that channel the way individuals in particular societies relate to one another."²⁴⁰ Key to the development of the U.S. corporation, for example, was a norm that valued decentralization and "the avoidance of concentrations of power, financial or otherwise."²⁴¹ Germany's norm of "patient capital," by contrast, emphasized stability and a deep sense of mutual trust engendered by valuing the "reciprocal and enduring relationships" between firms.²⁴² The two systems do not represent different stages of development, but rather different solutions constituted by distinct sociological histories.²⁴³

Similarly, a nation's legal system entails more than the statutes, cases, or legal institutions created by the state.²⁴⁴ It is also "a style of thought,"²⁴⁵ "a web of beliefs, ideals, choices, desires, interests, justifications, principles, techniques, reasons, and assumptions."²⁴⁶ As one scholar observed:

A civilian system differs from a common law system as much as rationalism differs from empiricism or deduction from induction. The civilian naturally reasons from principles to instances, the common

²⁴⁰ Doremus, et al., at 16.

²⁴¹ *Id.*, at 30.

²⁴² *Id.*, at 34.

²⁴³ See Günter Frankenberg, "Critical Comparisons: Re-thinking Comparative Law," 26 HARV. INT'L L.J. 411, 424 (1985) (noting that "Defining law as an additive to and not as a constitutive element of social reality confirms the domination of the text over social experience and makes it difficult if not impossible to analyze legal ideologies and the rituals pervading social life.").

²⁴⁴ See Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences," 61 MOD. L. REV. 11 (1998).

²⁴⁵ See William Ewald, "Comparative Jurisprudence (I): What Was it Like to Try a Rat?," 143 U. PA. L. REV. 1989, 1947 (1994). See also Catherine Valcke, "Comparative Law as Comparative Jurisprudence—The Comparability of Legal Systems," 52 AM. J. COMP. L. 713 (2004).

²⁴⁶ Ewald, at 1948.

lawyer from instances to principles. The civilian puts his faith in syllogisms, the common lawyer in precedents; the first silently asking himself as each new problem arises, “What should we do this time?” and the second asking along in the same situation, “What did we do last time?” The civilian thinks in terms of rights and duties, the common lawyer in terms of remedies....The instinct of the civilian is to systematize. The working rule of the common lawyer is *solvitur ambulando*. [sic]

It follows, as Rodolfo Sacco suggests, that to understand a system of law it is necessary to examine the “legal formants” of the system—i.e. the constitutive elements present in a society that inform each actor’s understanding of the “law on the books.”²⁴⁷ As such, to understand the important differences between common and civil law systems one must compare not only the respective rules of each system, but also their legal cultures.²⁴⁸

Modern reminders of the salient ideational differences between civil and common law countries—and of the risks generated by a failure to fully consider them—date back at least to the Law and Development movement of the 1960's (see Chapter 1). This movement has been described and critiqued by both scholars and its own participants, including David M. Trubek, Marc Galanter, James Gardner, and John Henry Merryman.²⁴⁹ Their efforts to export law, these authors note, were

²⁴⁷ See Rodolfo Sacco, “Legal Formants: A Dynamic Approach to Comparative Law (pt. 1),” 39 AM. J. COMP. L. (1991).

²⁴⁸ See Merryman (1981), at 383.

²⁴⁹ See John Henry Merryman, “Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement,” 25 AM. J. COMP. L. 457 (1977); David M. Trubek & Marc Galanter, “Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States,” 1974 WISC. L. REV. 1062 (1974); JAMES GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA (1980) (writing from the perspective of a Ford Foundation official).

carelessly crafted around the export of U.S. common law legal theory to states that were civilian in origin. Few actors in this failed effort had any training in comparative or international law, and this inexperience was evident in the effort's ineffectiveness.²⁵⁰

William Ewald's interpretive "legal thought" approach to differentiating legal systems provides useful insights into how common and civil law identities differ.²⁵¹ From this approach, he maintains that in a common law system the meaning of a law can only be arrived at through the close examination of the judicial opinions cited in support of a court's holding and the study of those opinions' justifications, reasoning, and aspirations. In a civil law system, by comparison, lawyers are schooled in deductive methods, with law supplied by abstract rules stated in statutory codes. The legal education and cognitive formation of common and civil law attorneys thus differ. In common law systems, students study judicial opinions and practice inductive reasoning, while in civil law systems students apply deductive reasoning to codes and scholarly treatises. Legal studies in civil law countries, then, are classified as a social science, whereas the approach in common law systems more closely resembles social engineering through which the law is seen as a flexible tool for lawyers and judges to address social ills.²⁵²

Indeed, as observed by Pierre Legrand, who stands out among even the most vocal scholars claiming a distinct *mentalité* distinguishes civil and common law systems, "there is both a civil-law and a common-law way of thinking about the

²⁵⁰ Leah Larson-Rabin, "Happenstance and Memory: A Legacy of Law and Development Scholarship and Policy in Legal Education," 25 *Wisc. Int. Law J.* (2007).

²⁵¹ Ewald (1995), at 1987.

²⁵² See John Henry Merryman, "Legal Education There and Here: A Comparison," 27 *STAN. L. REV.* 859, 870 (1974). See also Philip M. Genty, "Overcoming Cultural Blindness in International Clinical Collaboration: The Divide Between Civil and Common Law Cultures and Its Implications for Clinical Education," 15 *CLINICAL L. REV.* 131 (2008).

law.... Moreover, such difference is irreducible so that it is not possible for a civilian to think like a common-law lawyer (or for a common-law lawyer to think like a civilian).”²⁵³ Divergent cognitive orientations and a distinct “pre-understanding,”²⁵⁴ and not just the laws themselves, thus distinguish civil and common law systems. In this hermeneutic tradition, Mary Ann Glendon similarly notes that the main differences between and among civil and common law traditions lie not in the positive legal structures but “more in the area of mental processes, in styles of argumentation, and in the organization and methodology of law.”²⁵⁵ Maximo Langer likewise maintains that the differences between the civil and common legal systems lie in their normative “structures of interpretation and meaning,” which are largely socialized through legal education and, subsequently, repeated interactions with the legal community and the court.²⁵⁶

These normative differences between civil and common law manifest themselves in practical terms and can affect the likelihood that a proposed legal transplant will occur. The public interest practice of “cause lawyering,” for example, is achieved through the common-law (if not “uniquely American”²⁵⁷) device of class

²⁵³ Pierre Legrand, *Fragments on Law-as-Culture* (Deventer, The Netherlands: W.E.J. Tjeenk Willink, 1999), at 64.

²⁵⁴ See Pierre Legrand, “Against a European Civil Code,” 60 MOD. L. REV. 44, 45 (1997).

²⁵⁵ M. Glendon, M. Gordon, and C. Osakwe, *Comparative Legal Traditions* (West Publishing: 1994), at 51.

²⁵⁶ Maximo Langer (2004).

²⁵⁷ Recent experience shows that the American model can survive transplantation. As recently as the 1992, scholars proclaimed that no comparable procedures existed elsewhere. One exception was Brazil, which introduced procedural reforms allowing for class actions after being introduced to the concept by Italian scholars in the 1970s. Soon after Brazil’s experiment, a “flirtation” with the procedure began in other corners of the world. Various procedural reforms have come to serve similar functions. For example, the so-called “associational action” adopted in many European civil law systems is one such procedure, even though officials in those states outright reject the adoption of U.S.-style litigation. See Antonio Gidi, “Class Actions in Brazil—A Model for Civil Law Countries,” 51 AM. J. COMP. L. 311, 402 (2003) (calling class

actions.²⁵⁸ In a class action, class representatives, serving as “private attorneys-general,” sue on behalf of all those individuals similarly situated—i.e. all those similarly harmed by the defendant—and the court’s final judgment binds all members of the class irrespective of their participation in the suit or their awareness that the suit was brought, so long as they had fair notice and did not request exclusion from the class. U.S. Federal Rule of Civil Procedure 23, which governs this type of suit in U.S. federal courts, allows for claims to be brought by class members no matter how large the class and no matter how small the value of each individual class member’s claim, so long as it satisfies the federal jurisdiction amount required.²⁵⁹

Some civil law scholars attest that the class action suit, which until recently was unique to U.S. civil procedure, is normatively incompatible with civil law systems.²⁶⁰ This incompatibility, it is argued, stems from the ideational premise in civil law systems that law is to be applied through logical, abstract legal principles and concepts rather than common-law ends-based devices. As Richard B. Cappalli explains, “[t]he study of law in continental Europe is quite unlike [the common law’s] pragmatic, ‘problem solving’ focus; it is dominated by dogmatics, i.e., a focus on legal abstractions and the inter-relationship of juridical concepts.”²⁶¹ A fundamental legal abstraction of civil law systems, and one of the greatest obstacles to the adoption of class action litigation, is the principle of the “subjective right” (*droit subjectif*,

actions a major trend of universal dimensions); Richard B. Cappalli & Claudio Consolo, “Class Actions for Continental Europe? A Preliminary Inquiry,” 6 TEMP. INT’L & COMP. L.J. 217, 218 (1992); Samuel P. Baumgartner, “Class Actions and Group Litigation in Switzerland,” 27 NW. J. INT’L & BUS. 301, 309 (2007).

²⁵⁸ A class action is a legal tool in which a court authorizes a single litigant or a small group of litigants to represent the interests of a larger group. See BLACK’S LAW DICTIONARY (8th ed. 2008).

²⁵⁹ As early as 1940, the U.S. Supreme Court affirmed these suits as satisfying the requisites of due process so long as the procedures employed adequately protected the interests of absentee class members. See *Hansbury v. Lee*, 311 U.S. 32 (1940).

²⁶⁰ Gidi (2003).

²⁶¹ Cappalli & Consolo (1992), at 263.

subjektives Recht, diritto soggettivo, derecho subjetivo) held by individuals.²⁶² The common law practice of class action, it is argued, thus runs fundamentally counter to deeply rooted ideational precepts of the Kantian liberal-individualist tradition, in which the representation and pursuit of group rights cannot coexist with the traditional individual right model.

Despite Gadamer's caution that there may be incommensurability between the worldviews of two different systems, this does not lead necessarily to the impossibility of nonparochial understandings or exchange.²⁶³ As the next section shows, socialization and persuasion can occur in both common and civil law jurisdictions, thus enabling legal norms to travel both within and between these two ontologically opposed legal families. What has been lacking, however, is a systematic way of conceptualizing legal diffusion that takes into account the normative foundations of legal families and the different actors that populate each.

V. *Legal Families and Mechanisms of Legal Diffusion*

As Roscoe Pound observed, the history of any system of law "is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside of the law."²⁶⁴ This legal syncretism evident in all legal systems reveals a need to look beyond diffusion within a single legal family to understand the dynamics of legal diffusion. A common error among attempts by comparative and international legal scholars to understand the borrowing of law across national boundaries, however, has been a failure to consider the institutional and sociological differences between civil and common law countries. As will be shown

²⁶² Gidi (2003), at 312.

²⁶³ See GEORGIA WARNKE, *GADAMER: HERMENEUTICS, TRADITION, AND REASON* (Stanford University Press: 1987), at 171.

²⁶⁴ Quoted in WATSON (1974), at 22.

below, many of the most accepted studies of legal diffusion suffer from a bias toward evidence gathered exclusively from either common law or civil law jurisdictions to support their theory of diffusion. The obvious implication of this failure to consider the role of legal family in any theory of legal diffusion is that the mechanisms by which laws are said to spread may be limited by certain structural conditions specific to each type of legal system. This oversight renders the proposed explanations of diffusion and legal syncretism underspecified and in need of further study. The following section outlines these explanations and proposes a way forward that aims to incorporate and improve upon the merits of each.

a. “Judicial Globalization” and the Common Law

Anne-Marie Slaughter stands out among the few contemporary IR scholars attempting to understand the observable diffusion of constitutional and human rights law across national boundaries. The sharing of public constitutional jurisprudence that she observes is a relatively modern phenomenon in the history of legal diffusion, which until recently tended to include only private law.²⁶⁵ She identifies as many as three typologies and five categories of what she calls “judicial globalization.”²⁶⁶ In her important work, she also identifies several causes of legal diffusion.²⁶⁷ These include: the internationalization of domestic transactions (and the resultant litigation); accessible electronic databases of foreign law; structural factors such as international instruments that mandate transjudicial communication (e.g. Article 177 of the Treaty of Rome, which provides for the referral of national cases to the supranational body); and the judicial comity that exists among the growing number of liberal democracies

²⁶⁵ See WATSON (1974), at 8.

²⁶⁶ See, e.g., Anne-Marie Slaughter, “Judicial Globalization,” 40 VA. J. INT’L L. 1103 (2000); Anne-Marie Slaughter, “A Typology of Transjudicial Communication,” 29 U. RICH. L. REV. 99 (1994).

²⁶⁷ See Slaughter (1994), at 129-32.

after the “third wave” of democratization.²⁶⁸

What Slaughter’s analysis ignores, however, is that her evidence in the global trafficking of law among civil law countries relies almost exclusively among members of the European Union, which is arguably a *sui generis* case of regional legal integration.²⁶⁹ Even among these civil law countries of the E.U., Slaughter moderates her overall constructivist socialization theory of diffusion and cites the more rationalist conclusion that those national courts importing the rules and reasoning of European Court of Justice decisions may have been doing so at the behest of their respective governments in order to facilitate the efficient harmonization of commercial law in the European Community.²⁷⁰

Slaughter’s other evidence suffers from similar selection bias. Outside of the trafficking in law among members of the European Union, Slaughter’s claim that there is an emerging global judicial community identifies only one case of a civil law state—Argentina—looking abroad to solve a pressing legal question, and in that case the Supreme Court of Argentina did not look far for inspiration, reversing a lower court ruling by relying on an advisory opinion of the Inter-American Human Rights Court, of which it is a member state.²⁷¹ Similarly, Slaughter offers no examples from civil law states to support her claim that a global community of human rights law is

²⁶⁸ See Slaughter (1994), at 129-32.

²⁶⁹ Joseph Weiler, for instance, observed that the structure of the E.U. legal infrastructure encourages “judicial empowerment” whereby lower national courts find that they can elevate themselves with respect to higher national courts by cooperating with the ECJ. See Joseph H.H. Weiler, “The Transformation of Europe,” 100 *YALE L.J.* 2403, 2426 (1990).

²⁷⁰ See, e.g., Geoffrey Garrett, *International Cooperation and Institutional Choice: The European Community’s Internal Market*, 46 *INTERNATIONAL ORGANIZATION* 533 (1992); Geoffrey Garrett & Barry R. Weingast, “Ideas, Interests and Institutions: Constructing the European Community’s Internal Market,” in *Ideas & Foreign Policy: Beliefs, Institutions, and Policy Change* (Judith Goldstein & Robert Keohane, eds., 1993).

²⁷¹ *Ekmekdjian v. Sofovich*, [1992-III] J.A. 199.

emerging outside the European Union through the trafficking of decisions promulgated by the European Court of Human Rights.²⁷²

In Slaughter's own explanation of the so-called "judicial comity" among states, she does not cite a single civil law state as a practitioner of this pattern of mutual judicial respect. While the reason for the omission may stem from the relative ease of examining case law—which is unique to common law systems and almost always written in English—to trace the international passage of laws, the global judicial community that is depicted nonetheless appears populated with judges from only common law courts such as South Africa, Zimbabwe, the United Kingdom, Jamaica, Israel, the United States, Canada, New Zealand, and Australia.

This common-law-centric evidence of legal diffusion is not unique to Slaughter's work. Outside the field of IR, comparative legal scholars raising evidence to support the similar claim that there is an emerging "global dialogue among courts" offer case studies equally biased toward the common law, even where they claim explicitly that the trend has "spread rapidly to other parts of the world, including civil law countries."²⁷³ The repeated observation that states in the international system are developing a "common law of human rights" overlooks the fact that the evidence marshaled in support of the claim relies overwhelmingly on common law jurisdictions.²⁷⁴ Comparative and international legal scholars such as Glendon, Louis

²⁷² See Slaughter (2000) (citing as examples the South African Supreme Court, the Supreme Court of Zimbabwe, and the Constitutional Court of Jamaica).

²⁷³ Arun Thiruvengadam, for example, makes this claim while offering evidence from only common law courts. See Arun Thiruvengadam, "The Global Dialogue Among Courts: Social Rights Jurisprudence of the Supreme Court of India from a Comparative Perspective," in C. Raj Kumar & K. Chockalingam, *Human Rights, Justice, and Constitutional Empowerment* (Oxford University Press, New York, NY: 2007).

²⁷⁴ See, e.g., Adam M. Smith, "Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence: The Indian Case," 24 *BERKELEY J. INT'L L.* 218 (2006); Sarah K. Harding, "Comparative Reasoning and Judicial Review," 28 *YALE J. INT'L L.* 409 (2003) (describing the sharing of judicial precedents between the United States

Henkin, and Anthony Lester have all contributed equally biased evidence in support of similar claims.²⁷⁵

The theme that emerges upon closer inspection of this evidence suggests that common law judges are the only type of actor looking abroad for innovative solutions to legal questions. It follows that the global community of law that these scholars identify either does not exist or that its constitutive elements deserve closer scrutiny. Upon such scrutiny, it is apparent that the explanation of the phenomenon of legal diffusion touted by Slaughter and others biases their conclusions about the mechanisms by which legal diffusion can occur in the international system. Slaughter, for example, highlights the learning and persuasion that occurs in judicial exchanges such as the Organization of Supreme Courts of the Americas.²⁷⁶ While such meetings are undoubtedly effective ways of facilitating cross-border exchanges, the effect of these seminars is limited by the make-up and abilities of the participants. As discussed above, civil law judges, no matter how persuaded they may be by the transnational

and Canada); Claire L'Heureux-Dube, "Human Rights: A Worldwide Dialogue," in B.N. Kirpal et al. eds, *Supreme but not Infallible* (2000) (noting the borrowing of law among India, Canada, and South Africa); Michael J. Kirby, "The Supreme Court of India and Australian Law," in B.N. Kirpal et al. eds, *Supreme but not Infallible* (2000) (noting a cross-border exchange of law between courts in Australia and India); Christopher McCrudden, "A Common Law of Human Rights: Transnational Judicial Conversation on Constitutional Rights," 20 OXFORD J. LEG. STUD. 499 (2000) (describing the spread of constitutional doctrines among commonwealth jurisdictions); Raju Ramachandran, "The Supreme Court and the Basic Structure Doctrine," in B.N. Kirpal et al. eds, *Supreme but not Infallible* (2000) (observing the sharing of legal doctrine among courts in Bangladesh, Pakistan, and Nepal); Sujit Choudhry, "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation," 74 IND. L.J. 819 (1999) (observing the presence of Canadian constitutional precedent in South Africa); Pradyumna K. Tripathi, "Foreign Precedents and Constitutional Law," 57 COLUM. L. REV. 319 (1957) (noting the spread of U.S. legal precedents in Australia, Canada, India, and Israel).

²⁷⁵ Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991); Louis Henkin, *Constitutionalism and Rights* (1990); Anthony Lester, "The Overseas Trade in the American Bill of Rights," 88 COLUM. L. REV. 537 (1988).

²⁷⁶ Slaughter (2000), at 1120.

epistemic community of scholars attending such an event,²⁷⁷ are structurally constrained agents of the legislature and executive and are limited in the degree to which they can import new norms into their courtroom. Common law judges, by contrast, are better positioned to import what is learned of foreign jurisprudence at such events, even that law which is learned from their civil law counterparts. One South African Constitutional Court justice, for example, noted his ongoing research regarding novel Colombian approaches to socio-economic rights. Colombia's unique approach become known to him during preparations for just such a global judicial conference and is likely to appear in a South African judgment soon.²⁷⁸ To better understand how the inter- and transnational judicial community affects the legal norms of target states, one must look for evidence beyond case law and international gatherings of judges, both of which rely too heavily on the experiences of common law states. Instead, the study of the global judicial community must extend to other state and non-state actors such as legislators and legal scholars.

b. Socialization of Lawyers and the Civil Law

Outside the world of international relations theory, comparative legal scholars have given considerable thought to the phenomenon of legal and norm diffusion for decades. Nonetheless, and in direct contrast to Slaughter's work, much of the scholarship in this field has tended to focus on transplants between and among civil law countries. This emphasis on civil law systems among comparative legal scholars likely stems from the field being "dominated by [continental] European legal

²⁷⁷ An epistemic community is understood here to mean a group of actors with "recognized expertise and competence" with an "authoritative claim to policy-relevant knowledge" in a particular policy domain. *See* Peter Haas, "Epistemic Communities and International Policy Coordination," 46 *INTERNATIONAL ORGANIZATION* 1 (1992); Emanuel Adler, "The Emergence of Cooperation: National Epistemic Communities and the International Evolution of the Idea of Nuclear Arms Control," 46 *INTERNATIONAL ORGANIZATION* 101 (1992).

²⁷⁸ Interview, 8/18/2010.

theory,”²⁷⁹ in part because of the relative lack of interest in comparative legal studies in the United States (and to a lesser extent the United Kingdom).²⁸⁰ Moreover, what little interest has developed in the United States and the United Kingdom did so in part because of the intellectual traditions of America’s leading comparative law scholars, most of whom came from civil law countries after fleeing persecution in Europe before and during World War II. The contribution of these refugee scholars to the development of an Anglo-American school of comparative law, although tremendous, was diluted by the relegation of these scholars to less prestigious universities.²⁸¹

Given the evidentiary bias toward civil law systems in much of the work of comparative law, these scholars identify mechanisms of diffusion that differ from those looking mainly at diffusion among common law systems. In this civil-law focused work, the mechanism of diffusion is not the socialization of judges, but rather the socialization of legal scholars and the relative autonomy of the legal profession.²⁸² For example, civil law scholars *qua* “legal brokers” played a central role in the diffusion of the German and French Codes, both of which, with a few exceptions, transplanted to other states through a voluntary process of adoption.²⁸³ This stands in

²⁷⁹ See John Henry Merryman, “Comparative Law and Scientific Explanation,” in John N. Hazard & Wencelas J. Wagner (ed.), *Law in the United States of American in Social and Technological Revolution* 89 (1974).

²⁸⁰ See Pierre Legrand, “John Henry Merryman and Comparative Legal Studies: A Dialogue,” 47 AM. J. COMP. L. 3, 8 (questioning whether a comparatist born and bred in the United States could ever play a central role in comparative legal studies).

²⁸¹ Rudolf Schlesinger, a refugee scholar himself, famously—and ironically—remarked in his tribute to Carl Fulda that we must all acknowledge the gift of Adolph Hitler to the rule of law that he so defiled. Other influential refugee scholars from civil law states included Hans Kelsen, Friedrich Kessler, David Daube, and Erns Freund. See Ugo Mattei, “Why the Wind Changed: Intellectual Leadership in Western Law,” 42 AM. J. COMP. L. 195, 200 (1994).

²⁸² See Alan Watson, “Aspects of Reception of Law,” 44 A. J. COMP. L. 335 (1996); Alan Watson, *The Evolution of Law* (Johns Hopkins University Press, Baltimore, MD: 1985); Alan Watson, *Legal Transplants: An Approach to Common Law* (1974).

²⁸³ See Mattei (1994), at 201.

stark contrast to the historical spread of the common law, which was transplanted primarily through colonial imposition.²⁸⁴

According to the seminal work of legal comparativist Alan Watson, the diffusion of law is relatively simple task, even when the transplanted rules derive from a very different jurisdiction. This ease is said to be due to the nature of the legal profession. Scholars in the legal profession, he explains, operate largely autonomously from society due to their highly specialized vocation. This professional autonomy, along with their preference developed during their professional training for appealing to established legal authority, leads legal scholars to look abroad for innovative solutions rather than appeal to domestic norms or other societal authorities.²⁸⁵

This legal borrowing, it follows, occurs without necessarily conforming to the national social, political, or economic factors of the receiving state.²⁸⁶ Instead, Watson explains, the main facilitator of foreign legal rules is the access and exposure of legal elites to the laws and doctrines of other jurisdictions. For this reason alone Emperor Justinian's civil code spread so readily throughout the world, whereas the common law, the rules of which diffuse slowly through countless judicial opinions, spread initially through force.

Watson's evidence in support of his theory in which the socialization of legal scholars enables them to play the role of legal brokers, however, suggests this mechanism may be largely confined to the civil law world.²⁸⁷ One of his theory-

²⁸⁴ On this pattern of diffusion, Zweigert and Kötz frankly note that "though the English system has a certain antiquarian charm about it, it is so extremely complex and difficult to understand that no one else would dream of adopting it." See Zweigert & Kötz (1998), at 37.

²⁸⁵ See WATSON (1974), at 112.

²⁸⁶ See Alan Watson, *The Making of the Civil Law* (Harvard University Press: 1981), at 38.

²⁸⁷ Rodolfo Sacco's influential work on legal formants similarly relied primarily on evidence of legal diffusion from among civil law countries and between civil law and socialist states (which share several key institutional characteristics).

generating cases, for example, focuses on the radical legal transformation that occurred in Turkey in the early twentieth century. Turkish legal intellectuals, he describes, served as necessary “culture carriers” importing a new civilian legal system from the land of their legal training, Switzerland.²⁸⁸ Swiss law, he maintains, was chosen not because it fit Turkey’s sociopolitical or economic circumstances or because Turkish judges went looking for legal innovations in the judicial opinions of foreign justices, but rather because it is what legal scholars were socialized to know.²⁸⁹ Figure 2.1 sketches the distinct authority structures of the two major legal families and depicts the key targets of a successful transnational advocacy campaign. As depicted, the key domestic facilitators of diffusion are located in the courtrooms of a common law state, whereas those same actors are concentrated at the apex of a civil law system.

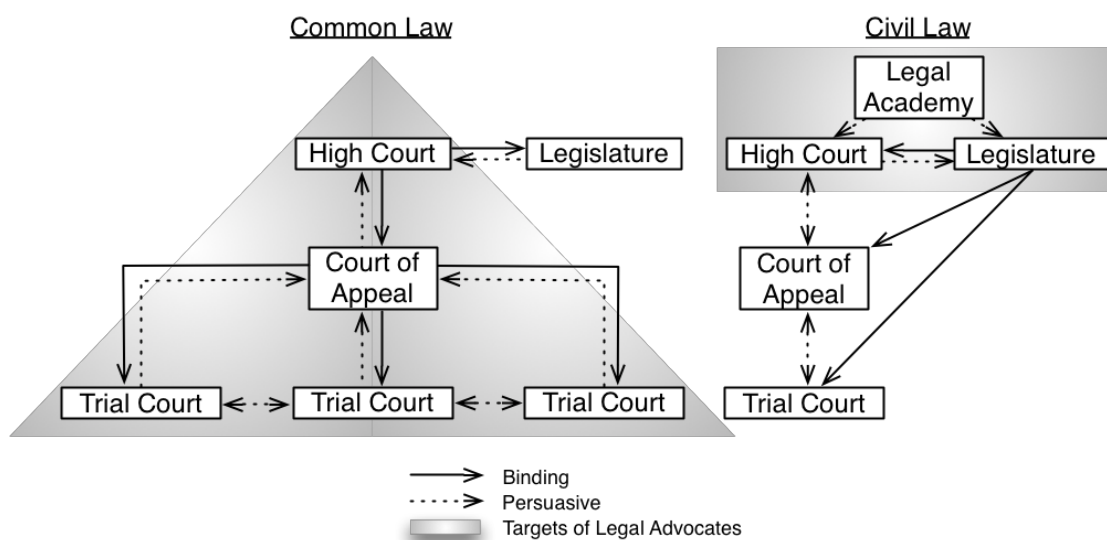


Figure 2.1. Targets of Legal Diffusion in Civil and Common Law

²⁸⁸ See WATSON (1974), at 115.

²⁸⁹ Watson’s analysis thus blurs the line between the similar, but conceptually distinct, mechanisms of policy diffusion based on learning and imitation.

To say there has been a parochial focus on evidence from either—but not both—civil or common law in studies of legal diffusion is not to say there has been no work on inter-family legal transplants by comparative legal scholars. Several classic works of comparative law from Herman Oliphant, Roscoe Pound, and others note the influence of civil law on early American and English legal development. William Blackstone, for example, England’s most influential judge and legal scholar, absorbed insights from civilian codes through his study of the Swiss jurist Dionysius Gothofredus.²⁹⁰ U.S. rules governing conflicts of laws, which determine what jurisdiction’s law will apply to adjudicate a conflict and which directly implicate issues of national sovereignty as well as other fundamental rights (the infamous *Dred Scott* decision, Watson notes, was a conflicts case),²⁹¹ were likewise influenced by civil law scholars.²⁹² More recently, Peter Gourevitch and James Shinn note that rules of shareholder protection have transplanted between the two legal families.²⁹³ As Ugo Mattei notes, however, “it is one thing to detect some particular influence at a peculiar historical moment and quite another to reflect on transplants as a phenomenon linking two families of law.”²⁹⁴ The following subsection attempts to conduct such a reflection.

c. A Hybridized Approach

The discussion above presents competing theories of which actors stand as the most critical actors in the legal diffusion process. The apparent evidentiary bias in previous studies of legal diffusion in the international system suggests a need to specify the differences between legal families and to reexamine the phenomenon of legal diffusion with the understanding that the legal system of the receiving state may

²⁹⁰ See WATSON (1974), at 109.

²⁹¹ See *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

²⁹² See WATSON (1974), at 109.

²⁹³ See Gourevitch & Shinn (2005), at 85.

²⁹⁴ See Mattei (1994).

determine which mechanism of diffusion will be successful. Table 2.2 lists these important differences between processes of diffusion in civil law and common law systems. As they suggest, the legal system of a state serves as a significant intervening variable that leads to variation in at least three key respects.

Table 2.2. Processes of Legal Diffusion in Civil and Common Law

	<i>Common Law</i>	<i>Civil Law</i>
<i>Judicial Structure</i>	Decentralized	Centralized
<i>Domestic Entrepreneurs</i>	Lawyers, Judges, NGOs	Legislators, NGOs, Executive Officials
<i>Policy Networks</i>	Decentralized	Centralized
<i>Tools of Persuasion</i>	Case law	Codes, Treatises
<i>Pace of Policy Implementation</i>	Gradual	Rapid

Firstly, it suggests that the important differences in the concentrations of legal power generally found in common and civil law states empower different groups as the most influential domestic entrepreneurs of legal reform. While figure 2.1 above does not capture the complete picture of how political institutions bind one another (for example, legislatures do bind courts within the realm of constitutionally valid law), it nonetheless captures certain theoretically important differences in the concentrations of legal power and the process by which actors can introduce new legal norms to new jurisdictions. As depicted, the structural elements of each legal family distribute the power to innovate differently, with legal entrepreneurs in a common law

state located in courtrooms around the country and their civil law counterparts located in universities and legislatures at the apex of the state hierarchy. The legal academy exerts far more influence within the civil law system. Indeed, as Mitchel Lasser observed in the French civil law context, “it would be quite difficult to overestimate the centrality of academic *doctrine*” in civil law systems.²⁹⁵

Although civil law legislators, and their advisors in the legal academy and legislative drafting bodies, are, by comparison, more empowered to dictate the terms and limits of the law than are their common law equivalents, judges within a common law system are more able to introduce foreign ideas or cite to persuasive authorities from outside their jurisdiction than their civil law counterparts. This phenomenon tracks well even with the observations of some common law scholars that would prefer to eliminate the influence of foreign legal norms on their judicial branch. Steven Calabresi, conservative co-founder of the Federalist Society, derides the “Europhil[ic]” “elite” of U.S. federal courts who too often look to foreign law when deciding American cases.²⁹⁶ This infiltration of foreign law into judicial opinions relating to difficult constitutional questions, he concedes, permeates the practice of U.S. judges, tracing all the way back to the Marshall Court era of the early 19th century.²⁹⁷ Further confirming the notion that this diffusion of law occurs through the socialization of judges, and not the legislature or public as a whole, he notes that “the elite lawyerly culture of the Supreme Court conflicts with the mass culture of most Americans as expressed over four hundred years.”²⁹⁸

²⁹⁵ See Lasser, at 9.

²⁹⁶ See Steven G. Calabresi, “A Shining City on a Hill: American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law,” 86 BOSTON UNIV. L. REV. 1335 (2006).

²⁹⁷ Calabresi finds at least 43 Supreme Court cases since 1804 that relied at least in part on the authority of foreign decisions.

²⁹⁸ See Calabresi (2006), at 1338.

Secondly, as important as the structural power relationships of a legal system can be, it is also important not to ignore the mutually constitutive relationship between structure and actor identity. By endogenizing identities and interests in this way, one can see that the ways in which legal actors are persuaded relates to their experiences with the legal system. Legal institutions, via the micro-level interactions that occur when an actor interacts with a court, are generative of that actor's identity or legal *mentalité*. As Maximo Langer describes, this *mentalité* is “acquired by the internalization of the procedural structures of interpretation and meaning, through a number of [domestic] socialization processes (i.e., law schools, judiciary school, prosecutor's office and law firm training, interaction with the courts, etc.).”²⁹⁹ As a result of this iterative socialization, actors are disposed to think of the constitutive rules of procedure and practice of law in a particular way, and this disposition remains relatively durable even as ideas about the regulative substance of law are more malleable.

From this perspective, actors' interests and ways of reasoning are “social constructs” constituted, not merely constrained, by the actors' sociopolitical environment.³⁰⁰ Moreover, the relationship between actors and institutions within which they are embedded is mutually constitutive. The constitutive rules of a system play a role not only in shaping the types of educations lawyers within those systems receive, but also in shaping their reasoning and discursive styles. These styles are developed and reinforced among repeat players in the legal system—e.g. lawyers, judges, scholars, legislators. It follows that the *mentalité* that develops within a legal

²⁹⁹ See Langer (2004), at 12.

³⁰⁰ See Paul DiMaggio, “Culture and Economy,” in Neil J. Smelser and Richard Swedberg, eds., *The Handbook of Economic Sociology*, at 28; Eric Helleiner, “Conclusion: The Meaning and Contemporary Significance of Economic Nationalism,” in Eric Helleiner and Andreas Pickel, eds., *Economic Nationalism in a Globalizing World*, (Cornell University Press, Ithaca, NY: 2004), at 231.

system and its corresponding approach to understanding law determines which types of legal materials are the most conducive for persuasion. For civil law actors, suggested reforms are more attractive and digestible when they employ the syllogistic reasoning to which they are accustomed. For common law actors, who are trained through the study of precedent, analogistic reasoning proves more persuasive. These distinct cognitive habits suggest that proposed legal reform will be more successful in a civil law state if it is presented in the form of an annotated draft of a code provision or clear bright-line rules, whereas in common law countries the most compelling advocates of reform present the material in the direct argumentative form seen in legal briefs and judicial opinions of common law courtrooms.

VI. *Conclusion*

This Chapter introduced legal family as an intervening variable essential to understanding processes of legal diffusion. As discussed above, the differences between civil and common law systems in terms of structure, the placement of key legal entrepreneurs, and the constitutive identities of those entrepreneurs, can affect the success of otherwise similar transnational advocacy campaigns. In the chapters that follow, the implications of legal family will be considered and controlled for in conjunction with the two-tailed theory of norm diffusion discussed in Chapter 1. The examination of the process by which legal reform occurs in China and South Africa, as illustrated in the chapters that follow, illustrates that the effects of a state's discursive environment are mediated through that state's legal system. This intervening variable can serve to either mediate or amplify the difficulties faced by a transnational legal advocate attempting to persuade a winning coalition.

CHAPTER 3

THE LONG ARM OF THE LAW REACHES CHINA: TRANSNATIONAL LEGAL DIFFUSION INTO CIVIL LAW SYSTEMS

“[T]he truth seems to be, that there are in every case very great obstacles to the transferring of the Criminal Law of any one nation to another. Because in any country, the frame and character of this part of its laws, has always a much closer dependence on the peculiar circumstances of the people, than the details of its customs and regulations in most of the affairs of civil life.”

—David Hume³⁰¹

I. *Two-Tailed Theory of Legal Diffusion*

In the above quote, David Hume touches upon a common understanding of the formidable domestic obstacles that hinder the adoption of foreign law. His pessimism, though, overlooks the considerable degree to which foreign laws have successfully diffused into new jurisdictions, even his native Scotland.³⁰² Indeed, transnational legal advocates have influenced policy outcomes in significant ways,³⁰³ even affecting matters as consequential as weapons proliferation.³⁰⁴ This Chapter aims to contribute to the growing literature concerning the phenomenon of diffusion through an examination of how transnational actors have redefined conceptions of criminal justice

³⁰¹ DAVID HUME, COMMENTARIES ON THE LAW OF SCOTLAND RESPECTING CRIMES (4th ed., 1844), at 15.

³⁰² See ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1974), at 105.

³⁰³ See, e.g., MARGARET KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS (1998).

³⁰⁴ See, e.g., D. P. Eyre & M. C. Suchman, “Status, Norms, and the Proliferation of Conventional Weapons: An Institutional Theory Approach,” in THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS, P. J. Katzenstein, ed. (1996), at 79-113.

in the PRC. Chapter 4 then undertakes a content analysis to explore more rigorously the process of legal diffusion by examining the effect of discourse and legal structure in the export of criminal procedure norms to the People's Republic of China (PRC).

There are many theoretical and empirical reasons to expect, as Hume did, that inter- or transnational efforts to reform Chinese criminal procedure would fail. Reasons to doubt foreign influence over Chinese leaders parallel similar skepticism about the ability of transnational advocates during the Cold War. As Matthew Evangelista noted in the Soviet setting, "In a political system dominated by a strong party-state apparatus...societal forces, including transnational actors, should exert little influence on policy."³⁰⁵ In addition, the policy of interest examined here—criminal procedure law—and its direct implications on the ability of the central government to exert control over its citizens, lies in, or at least near, the category of "high politics,"³⁰⁶ and are thus relatively immune to the influence of transnational advocates. These rules governing the rights of accused criminals, unlike commercial regulations, lie close to issues related to national security, leaving many scholars to expect foreign actors to be ineffective advocates for change.³⁰⁷ For example, as Beth Simmons noted in the context of state compliance with international treaties, procedural rights afforded to criminal defendants in treaties such as the International Covenant on Civil and Political Rights have broad implications for the coercive

³⁰⁵ See MATTHEW EVANGELISTA, *UNARMED FORCES: THE TRANSNATIONAL MOVEMENT TO END THE COLD WAR* (1999), at 17.

³⁰⁶ See ROBERT O. KEOHANE AND JOSEPH S. NYE, JR., EDS., *TRANSNATIONAL RELATIONS AND WORLD POLITICS* (Harvard University Press: 1972).

³⁰⁷ On this dichotomy and the different expectations of transnational influence depending on the category of law implicated, see Peter B. Evans, "Building an Integrative Approach to International and Domestic Politics: Reflections and Projections," in *DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS*, Peter B. Evans, Harold K. Jacobson, and Robert D. Putnam, eds. (University of California Press, Berkeley, CA: 1993), at 418.

abilities of a political regime. As such, governments are much more likely to avoid international commitments that might “endanger their grip on power or the ‘stability’ of the broader polity.”³⁰⁸

Despite such strong theoretical arguments against the expectation of inter- and transnational influence, diffusion of foreign criminal procedure law into the PRC is, according to participants in the drafting process, a common occurrence. As described below, this diffusion has occurred in large part because China’s national project of legal development increasingly involves multiple exogenous advocates—foreign states, nongovernmental organizations, and an epistemic community of transnational legal advocates—each vying to persuade officials in Beijing to import certain global legal norms and best practices.³⁰⁹ In the absence among many Chinese legal actors of much familiarity with or training in comparative law,³¹⁰ which is acquired only if a student selects to study it,³¹¹ these foreign advocates lend a powerful voice to the campaign to transform the perceived interests of state legislators. Under pressure from these foreign actors, as Audie Klotz conceded, “no state conforms to international norms in all aspects of its domestic or foreign policies.”³¹² Nonetheless, many global and foreign norms do overcome domestic obstacles and successfully change the interests and identities of state actors.³¹³

³⁰⁸ See SIMMONS (2009), at 15.

³⁰⁹ See Sida Liu & Terence C. Halliday, “Recursivity in Legal Change: Lawyers and Reforms of China’s Criminal Procedure Law,” 34 *LAW & SOCIAL INQUIRY* 911, 915 (2009).

³¹⁰ Interview, 9/5/2010.

³¹¹ Interview, 9/7/2010.

³¹² AUDIE KLOTZ, *NORMS IN INTERNATIONAL RELATIONS: THE STRUGGLE AGAINST APARTHEID* (Ithaca, NY, Cornell University Press: 1995), at 14.

³¹³ See Klotz, at 152; see also ALICE H. AMSDEN, *THE RISE OF THE “REST”:* CHALLENGES TO THE WEST FROM LATE-INDUSTRIALIZING ECONOMIES (Oxford University Press, 2003). Amsden describes a pattern of policy adoption across different that suggests an emergence of a “world culture.”

The model outlined below attempts to contribute to the understanding of norm diffusion in political science by examining the conditions under which foreign advocacy succeeds or fails to bring a target state's legal commitments in line with the constitutive and regulative norms of the dominant international society.³¹⁴ As described in Chapter 1, the basic insight of the model is that while increased international and transnational pressure for reform activates local advocacy networks, so too does it activate extant domestic opposition groups resistant to such reform, the voices of which have been underexamined in similar studies of China's adoption of global legal norms by scholars such as Rosemary Foot and Ann Kent. Foot concedes early on in her important study of China's participation in the international human rights regime that, "the domestic arena is not covered in this study in anything like the level of detail that it deserves."³¹⁵ Instead, Foot focuses much of her attention on the role of transnational nongovernmental organizations, foreign governments, U.N. human rights institutions, and the important role of these actors in reshaping China's concern for human rights. Significantly, though, she concedes that various domestic actors in China have appealed to international legal norms to advocate for reform domestically and that they have been "empowered not only by the Beijing government's decision to participate in the international human rights regime, but also by its recognition of the value of building a domestic 'rule of law.'"³¹⁶ Kent similarly focuses her analysis of compliance and cooperation with international legal regimes

³¹⁴ See, e.g., Amitav Acharya, "How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism," 28 *INTERNATIONAL ORGANIZATION* 239 (2004); Pitman B. Potter, "Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices," 2 *WASH. U. GLOBAL STUD. L. REV.* 119 (2003); Jeffrey W. Legro, "Which Norms Matter? Revisiting the 'Failure' of Internationalism," 51 *INTERNATIONAL ORGANIZATION* 31 (1997).

³¹⁵ See ROSEMARY FOOT, *RIGHTS BEYOND BORDERS: THE GLOBAL COMMUNITY AND THE STRUGGLE OVER HUMAN RIGHTS IN CHINA* (2000), at 5.

³¹⁶ *Id.*

on, as she describes them, the “pressures from without.”³¹⁷ She thus marshals evidence of how the multilateral system, through international organizations, has succeeded in socializing new or outlying members such as China. In so doing, she speaks broadly of a Chinese “legal culture,”³¹⁸ but does not unpack that concept to discover the importance of the contested aspects of that culture.

The study undertaken here, by closely examining the texts of Chinese legal scholars, will disaggregate the notion of a Chinese legal culture and help explain why, after the application of outside pressure for reform, a norm with a history as a contested practice or “point of concern”³¹⁹ in a society can prove resistant to foreign pressure, but a novel or deeply engrained practice about which little domestic discourse exists may elicit little debate and undergo rapid, significant change. As several participants in Chinese legal reform described, officials are on many occasions most persuadable when they have no preexisting discourse from which to draw. As one participant described, “they want their eyes opened”³²⁰ to new legal devices, especially “when they have nothing to draw from domestically.”³²¹ As such, the model suggests a different form of communicative action at work than that proposed by norm

³¹⁷ See ANN KENT, *BEYOND COMPLIANCE: CHINA, INTERNATIONAL ORGANIZATIONS, AND GLOBAL SECURITY* (2000), at 4.

³¹⁸ *Id.* at 33, 62.

³¹⁹ Rather than perceive of culture as a society’s received and/or shared values legitimating social practices, this work instead proceeds, as David Laitin and Aaron Wildavsky suggest, with culture conceived of as delineating the “points of concern” of a society. They argue that a general focus on “points of concern” rather than an attempt to identify shared values provides a richer appreciation of why political action may differ across cultures. See David Laitin & Aaron Wildavsky, “Political Culture and Political Preferences,” 82 *AMERICAN POLITICAL SCIENCE REVIEW* 589, 590 (1988).

³²⁰ Interview, 9/13/2010.

³²¹ Interview, 9/15/2010.

localization theory.³²² In its discursive approach, the model also helps explain why, as Foot notes, “the Chinese government does not appear fully to have accepted the prescriptive status of international rights norms.”³²³ Furthermore, it adds a useful domestic perspective on elite opinion toward global practices to help explain why, as Kent observed, China “has interpreted the norms and rules of the regime[s] narrowly, failed to commit itself to voluntary and extended controls that accord with the spirit of its obligations, and failed to participate in some voluntary agreements.”³²⁴ Finally, by examining the variation among criminal procedural reforms adopted by China in the 1997 Criminal Procedure Law, it attempts to supplement the insights provided by Beth Simmons on the ability of the international community to affect criminal procedure reform in target states. As she explains, such influence is weakened in states with stable political institutions.³²⁵ The evidence provided below suggests such influence is limited further by the presence of a stable political discourse.

The hypothesis that foreign campaigns to change state behavior can succeed without a process of norm localization stems from the observation that when actors have no pre-established cognitive scripts to follow, the more open they are to persuasion and the discursive challenges of policy entrepreneurs who, as Andrew Mertha described in the context of hydropower policy in the PRC, can offer “a fresh, alternative perspective on the issue in question.”³²⁶ This hypothesis, I propose, explains the relative successes and failures of transnational legal advocates in affecting

³²² On communicative action, see Thomas Risse & Kathryn Sikkink, “Introduction,” *in* POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 1, 20 (Thomas Risse, Stephen Ropp, & Kathryn Sikkink eds., 1999).

³²³ See FOOT (2000), at 25.

³²⁴ See ANN KENT, BEYOND COMPLIANCE: CHINA, INTERNATIONAL ORGANIZATIONS, AND GLOBAL SECURITY (2007), at 223.

³²⁵ Simmons (2009), at 15.

³²⁶ Andrew Mertha, *Fragmented Authoritarianism 2.0: Political Pluralization in the Chinese Political Process*, 200 THE CHINA QUARTERLY 995 (2009), at 998.

the final draft of China’s 1997 Criminal Procedure Law (1997 CPL). These sweeping procedural reforms had the ambitious goal of “chang[ing] the ingrained patterns of behavior by law enforcement officials.”³²⁷ Significant changes in the law included provisions related to arrest, defendant rights during the investigation process, means of prosecution, and the trial itself. Nevertheless, as hypothesized, less policy change occurred with respect to those provisions about which considerable domestic discourse already existed, namely investigatory powers and responsibilities related to detention, admissibility of evidence, right to an appeal, and the review of death sentences. The greatest changes brought about by the 1997 CPL reform were instead concentrated around those reforms that targeted novel or entrenched policies, as measured by the degree to which those policies lacked a preexisting discourse among Chinese legal actors. It follows that the new law put into place a criminal procedure system more protective of certain defendant rights about which little domestic discourse existed in the PRC, including the presumption of innocence, plea-bargaining, the right to counsel, and adversarial trials. (See table 3.1)

Table 3.1. *Variation in 1997 Criminal Procedure Reform*

SUCCESSFUL TRANSPLANTS	FAILED TRANSPLANTS
<i>Presumption of Innocence</i>	<i>Exclusionary Rule</i>
<i>Adversarial Process</i>	<i>Right to Appeal</i>
<i>Right to Counsel</i>	<i>Death Penalty</i>
<i>Plea Bargaining</i>	<i>Detention</i>

In this Chapter and the next, I survey the political landscape surrounding the proposed 1997 CPL through a content analysis of political and legal periodicals

³²⁷ Jonathan Hecht, *OPENING TO REFORM?* (1996), at i.

published between 1978 and 1997. As will be shown, this examination lends support to the two-tailed model of norm diffusion proposed in Chapter 1. In addition, the process by which transnational advocates targeted scholars to set or helped shape the agenda for Chinese reformers confirms the importance of legal family as an important intervening variable through which transnational legal advocates socialize their domestic counterparts.

II. *Alternative Explanations of Legal Diffusion: Power & Proximity*

Scholars have proposed several explanations for why countries welcome or resist the introduction of foreign law.³²⁸ The theoretical efforts of these observers, however, have lacked systematic empirical analysis. In order to fill this gap and to preface my two-tailed model of norm diffusion, the following section specifies a set of hypotheses derived from the most common scholarly arguments purported to explain the transnational diffusion of law and legal scholarship.

a. Power

As discussed in Chapter 1, a dominant explanation of diffusion in IR maintains that the legal rules and obligations to which states commit themselves are a manifestation of the distribution of power in either the international system or the domestic structure of a state.³²⁹ Under this view, states adopt the best practices of the

³²⁸ See, e.g., Jonathan Miller, “A Typology of Legal Transplants: Using Sociology, Legal History, and Argentine Examples to Explain the Transplant Process,” 51 AM. J. COMP. L. 839 (2003).

³²⁹ See, e.g., John J. Mearsheimer, “False Promise of International Institutions,” 19 INTERNATIONAL SECURITY 5 (1995); Jeffrey A. Frieden and Ronald Rogowski, “The Impact of the International Economy on National Policies: An Analytical Overview,” in INTERNATIONALIZATION AND DOMESTIC POLITICS, Helen V. Milner and Robert O. Keohane, eds. (Cambridge University Press, 1996).

international system when the structure of power is sufficiently coercive.³³⁰ Those rationalist scholars advocating the former maintain that China uses legal reform as a signaling mechanism to the hegemonic power in the international system. Hypothesis 1 restates this expectation. Accordingly, an increase in military and economic aid should be associated with an increase in the frequency of references to foreign law and legal scholarship.

Rationalist explanations that look to domestic distributions of influence, by contrast, attribute China's political reforms to the distribution of power among various domestic interest groups. According to this view, "internal—as opposed to solely external—treat to government rule" determine what policies a state adopts.³³¹ Early work on the diffusion of Western legal norms and practices to late-Qing and Republic periods offered just such an interest-group explanation of legal development in China.³³² This rationalist, interest-group approach is less applicable to the development of law contemporary in contemporary China, as Chinese Communist Party (CCP) control over the criminal justice system remains pervasive.³³³ Nonetheless, an interest group explanation is worth investigating here because with the growing range and complexity of legal matters regulated by law, the CCP is increasingly joined by an expanding pool of actors and institutions participating in the development of law in the

³³⁰ See Harold Hongju Koh, "The 1998 Frankel Lecture: Bringing International Law Home," 35 HOUS. L. REV. 623 (1998), at 634; Chris Brown, *Understanding International Relations* (1997), at 97.

³³¹ Michael Barnett & Jack Levy, "Domestic Sources of Alliances and Alignments: The Case of Egypt, 1926-1973," 45 INTERNATIONAL ORGANIZATION 369 (1991).

³³² See MARY RANKIN, *CHINESE REVOLUTIONARIES: RADICAL INTELLECTUALS IN SHANGHAI AND CHEKIANG, 1902-1911* (1971), at 227-28. By her account, each group was motivated by one of three main agendas: nationalism, individualism, and modernization.

³³³ Potter (1999); Lubman (1999).

PRC.³³⁴ As a result, a degree of “institutional pluralism” has emerged, possessing a multitude of institutional interests and preferences spread out among various persons and groups.³³⁵ As Sarah Biddulph writes, “as reform progresses, there is increasing evidence to suggest that the Party elites no longer exercise complete domination over legal production and that a distinctly legal discourse is growing.”³³⁶ Moreover, given that the 1997 CPL reforms were intended to specify more clearly the jurisdictional boundaries among the police, the court, the procuratorate, and defense counsel, the increasing salience of these competing interests warrant an analysis of whether institutional preferences correlate with the tenor of legal commentary published in China’s various institutional journals. The codification of such an institutional framework in China, despite largely serving as a gloss over CCP control, creates some space within the Party for competing positions to develop.³³⁷ Over the course of time, Randall Peerenboom observes:

[P]olitical organs can be expected to resist reforms that strengthen the judiciary at their expense. The procuracy and people’s congresses are likely to oppose any attempt to limit their right to supervise the judiciary. The State Council will object to proposals that give the courts the right to

³³⁴ See, e.g., Minxin Pei, “‘Creeping Democratization’ in China,” 6 JOURNAL OF DEMOCRACY 65 (1995); SARAH BIDDULPH, LEGAL REFORM AND ADMINISTRATIVE DETENTION POWERS IN CHINA (2007), at 26; RANDALL P. PEERENBOOM, CHINA MODERNIZES: THREAT TO THE WEST OR MODEL FOR THE REST? (2007); Chao Xi, “In Search of an Effective Monitoring Board Model: Board Reforms and the Political Economy of Corporate Law in China,” 22 CONN. J. INT’L L. 1 (2006-07).

³³⁵ See Gu Xin, “Plural Institutionalism and the Emergence of Intellectual Public Spaces in Contemporary China: Four Relation Patterns and Four Organizational Forms,” 7 J. OF CONTEMP. CHINA 271 (1998).

³³⁶ See Biddulph (2007).

³³⁷ On the creation of such spaces, see, e.g., Andrew G. Walder, “The Quiet Revolution from Within: Economic Reform as a Source of Political Decline,” in THE WANING OF THE COMMUNIST STATE: ECONOMIC ORIGINS OF POLITICAL DECLINE IN CHINA AND HUNGARY 1 (Andrew G. Walder ed., 1995).

strike down administrative regulations. The Ministry of Public security will fight efforts to do away with reeducation through labor or to impose further restrictions on administrative penalties.³³⁸

In this way, Graham Allison's organizational and bureaucratic politics models offer possible insights into examining how the process of legal reform may be an "intra-national political outcome."³³⁹

In the case presented below, the various groups potentially vying to affect criminal procedure law include the relevant public security and judicial ministries, legislative and executive organs, and unofficial publications. It follows that we should expect the pages of legal scholarship discussing the proposed legal reforms to contain a pattern of variation in authors' policy positions toward certain proposed reforms that reflects the interests of the author or of the institution issuing the publication. Most especially, we should expect authors with an institutional interest in limiting defendants' rights to oppose the codification of norms such as the presumption of innocence and the right to counsel.

A related domestic politics explanation of legal reform in China posits that legal reforms ratified by state-level actors must be considered separately from any consideration of implementation because agents have different interests from their principals.³⁴⁰ In this way, Beijing ratifies legal reforms with a keen eye to the future implementation (or lack thereof) of those laws. The adoption of certain reforms thus does not necessarily reflect the success of transnational advocates. Rather, any such concessions are made with the knowledge that less desirable provisions will never be

³³⁸ See RANDALL P. PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002), at 330.

³³⁹ See Allison (1969), at 708.

³⁴⁰ See Andrew Mertha & Robert Pahre, "Patently Misleading: Partial Implementation and Bargaining Leverage in Sino-American Negotiations on Intellectual Property Rights, 59 INT'L ORG. 695 (2005).

implemented. Officials in Beijing, for example, tasked with drafting international trade policy, proved adept at shaping the negotiating agenda with their U.S. counterparts via the indirect threat of local governments refusing to implement certain provisions or retaliating against the foreign interests.³⁴¹

b. Proximity

As discussed in Chapter 1, the dominant theory of diffusion—norm localization—maintains that a foreign legal practice will transplant only in the presence of a proximate local norm upon which foreign advocates can graft the candidate reform.³⁴² Such an understanding of legal diffusion to China traces back to the first introduction of Western procedural and substantive notions of human rights. As Marina Svensson notes, many scholars suggest that the export of certain concepts of human rights in the nineteenth and early twentieth centuries often relied upon the presence of an extant Confucian political discourse.³⁴³ These scholars maintain that Western notions of “heaven-endowed rights”—i.e. natural rights—were grafted onto Confucian conceptions of the nature of man, and that it thus was a case of a “Confucianization of human rights.”³⁴⁴ Some observers even describe the imperialist treaty port system as an institution born from the attempt of encroaching Western powers to graft an existing norm of international law onto the existing Chinese

³⁴¹ See Andrew Mertha, *Putting Your Mouth Where Your Money Is: How U.S. Companies' Fear of Chinese Retaliation Influences U.S. Trade Policy*, in Ka Zeng ed. CHINA'S FOREIGN TRADE POLICY: THE NEW CONSTITUENCIES (2007).

³⁴² KLOTZ (1995); Legro (1997); Potter (2003); Acharya (2004).

³⁴³ See MARINA SVENSSON, *DEBATING HUMAN RIGHTS IN CHINA: A CONCEPTUAL AND POLITICAL HISTORY* (Rowman & Littlefield Publishers, Inc.: 2002).

³⁴⁴ *Id.* citing Bob Tadashi Wakabayashi, *Kato Hiroyuki and Confucian Natural Rights, 1861-1870*, 44 HARVARD JOURNAL OF ASIATIC STUDIES 469 (1984); and John Allen Tucker, *Confucian and Human Rights in Meiji Japan*, paper presented at the East-West Center Conference on Confucianism and Human Rights, Honolulu, Hawaii (1996).

normative practice of “barbarian management.”³⁴⁵ In the contemporary setting, scholars likewise maintain that this model of diffusion explains such reforms as China’s adoption of American-style clinical legal education as well as other judicial practices.³⁴⁶ As Melanie Manion similarly describes in the context of internal CCP policy reform, a “peaceful coercion” of policy—i.e. the nonviolent altering of political behavior—is often most successful through a strategy of normative “association,” the process by which change is achieved by “appealing to old norms to build new ones.”³⁴⁷ In similar contemporary accounts, China is portrayed as importing those foreign practices that already complement extant Chinese norms, and so is said to be modernizing “on its own terms”³⁴⁸ or, as many have dubbed it, with “Chinese style”³⁴⁹ or “Chinese characteristics.”³⁵⁰ As such, we should also expect Chinese legal observers

³⁴⁵ See JOHN KING FAIRBANK, *CHINA: A NEW HISTORY* (1992), at 198; Kevin Herrick, “The Merger of Two Systems: Chinese Adoption and Western Adaptation in the Formation of Modern International Law,” 33 *GEORGIA J. OF INT’L & COMP. L.* 685-703 (2005) (observing that Western advocates of the treaty port system successfully took advantage of China’s traditional approach of dealing with barbarians that failed to appreciate the traditional tributary system).

³⁴⁶ See Pamela N. Phan, “Clinical Legal Education in China: In Pursuit of a Culture of Law and a Mission of Social Justice,” 8 *YALE HUMAN RIGHTS AND DEVELOPMENT JOURNAL* 117 (2005); Sida Liu, “Beyond Global Convergence: Conflicts of Legitimacy in a Chinese Lower Court,” 31 *LAW & SOCIAL INQUIRY* 75 (2006).

³⁴⁷ MELANIE MANION, *RETIREMENT OF REVOLUTIONARIES IN CHINA: PUBLIC POLICIES, SOCIAL NORMS, PRIVATE INTERESTS* (1993), at 33.

³⁴⁸ See Liang Zhiping, “Tradition and Change: Law and Order in a Pluralist Landscape,” 11 *CULTURAL DYNAMICS* 215 (1999), at 215.

³⁴⁹ Nicholas Calcina Howson, “Can the West Learn from the Rest?—The Chinese Legal Order’s Hybrid Modernity,” 32 *HASTINGS INT’L & COMP. L. REV.* 815, 827 (2009); Zhang Lihong, “The Latest Developments in the Codification of Chinese Civil Law,” 83 *TUL. L. REV.* 999, 1038 (2009); Anne S. Y. Cheung, “The Business of Governance: China’s Legislation on Content Regulation in Cyberspace,” 38 *N.Y.U. J. INT’L L. & POL.* 1, 18 (2006).

³⁵⁰ Hu Bin & Wang Zonglai, “China’s Reform and Opening-Up and International Law,” 9 *CHINESE J. INT’L LAW* 193 (2010); Lin Li-Wen, “Corporate Social Responsibility in China: Window Dressing or Structural Change,” 28 *BERKELEY J. INT’L L.* 64 (2010); Mo Jihong, “The Constitutional Law of the People’s Republic of China and Its Development,” 23 *COLUM. J. ASIAN L.* 137 (2009).

to view those legal reforms identified as foreign in origin less favorably.

A final explanation of legal transplants emphasizes the role of legal family in the occurrence of importing field-tested laws and procedures from foreign jurisdictions.³⁵¹ Many scholars maintain that the distinction between common and civil legal systems serves as a useful tool to determine which laws a country is likely to adopt and enforce.³⁵² By such accounts, the world consists of two major bodies of law.³⁵³ Accordingly, many argue that Chinese legal scholars and advocates are more likely to voice support for civil law systems than for common law systems. Scholars maintain that this intra-family diffusion explains China's initial adoption of Japanese, German, and Soviet-styled continental legal rules under the Guomindang and the early CCP leadership.³⁵⁴ China's recent adoption of certain common law criminal and civil procedures suggests this hypothesis requires more rigorous testing.

III. *Criminal Procedure Reform in the PRC*

Before selecting specific cases of legal diffusion for this study, it is necessary

³⁵¹ See Miller, "A Typology of Legal Transplants," at 845-56.

³⁵² See, e.g., Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, "Corporate Ownership Around the World," 54 JOURNAL OF FINANCE 471 (1999).

³⁵³ It should be noted that there are subtypes, e.g. French, Scandinavian, and German civil law. These intra-category differences are salient with respect to certain aspects of commercial law not at issue here. For example, Scandinavian and German civil laws are said to support higher shareholder protection than the French system. See PETER GOUREVITCH & JAMES SHINN, POLITICAL POWER AND CORPORATE CONTROL: THE NEW GLOBAL POLITICS OF CORPORATE GOVERNANCE (2005), at 84.

³⁵⁴ The Soviet system is considered "a variant of, but firmly within, the civil law family." See William E. Butler, Russian Law (1999), at 333. See also Dan Fenno Henderson, "Japanese Influences on Communist Chinese Legal Language," in CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES 158 (Jerome Cohen ed., 1970); Wang Yaxin, "The Various Roots of Civil Litigation in China and the Influence of Foreign Law in the Global Era," in THE RECEPTION AND TRANSMISSION OF CIVIL PROCEDURAL LAW IN THE GLOBAL SOCIETY, Masahisa Deguchi & Marcel Storme, eds. (2008), at 149-69; Peerenboom (2002), at 43.

to first address the issue of what type of law lends itself to such a study. Firstly, it is worth distinguishing two principle types of law—procedural and substantive.

Procedural law refers to “the rules that prescribe the steps for having a right or duty judicially enforced.” Substantive law, by contrast, refers to that law which creates, defines, and regulates rights and duties.³⁵⁵

The legal reforms examined below fall under the category of procedural law. Many comparative legal scholars maintain that the procedural rules by which actors raise substantive rights claims, and not the substantive rights themselves, are the most basic features that distinguish legal cultures.³⁵⁶ This stems in part from the fact that procedural systems arguably precede substantive law. As Konrad Zweigert and Hein Kötz explain, the Roman civil law and medieval common law traditions were each dominated by a distinctive “procedural thinking.”³⁵⁷ In both systems of law, the rules of substantive law emerged later.³⁵⁸ In addition, while there is considerable overlap in the substantive law of both systems, civil and common law systems are distinctly different in terms of procedural matters such that they constitute distinct ideational structures.³⁵⁹ It follows that procedural rather than substantive law is more appropriate for the purposes of comparative study because legal procedure is the purest—perhaps “defining”³⁶⁰—expression of a legal tradition. Indeed, differences between legal

³⁵⁵ See BLACK’S LAW DICTIONARY (8th ed. 2008).

³⁵⁶ See MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 6 (1986).

³⁵⁷ KONRAD ZWIEGERT AND HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 193 (1998).

³⁵⁸ See *id.*

³⁵⁹ See JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 60 (2d ed. 1985).

³⁶⁰ See Aron Balas, Rafael La Porta, Florencio Lopez-de-Silanes, & Andrei Shleifer, *The Divergence of Legal Procedures*, (Nat’l Bureau of Econ. Research, Working Paper No. 13809, 2008).

systems are “most visible in the area of procedure.”³⁶¹ While many of the substantive rights held by citizens in both civil and common law states may be identical, the legal means by which citizens seek to realize those rights vary greatly between the two systems. As John Henry Merryman observed, the substantive rules of different countries often appear alike, but they become operative under such strikingly different procedural rules that contrary results in otherwise similar cases frequently occur.³⁶² It follows that procedural norms are likewise analytically prior to substantive law because substantive rules cannot be understood outside of the procedural context in which they are applied. For example, the right to be free from tortious injury or improper deprivation of property may be similar in France and the United States, but there is considerable difference in the manner by which an individual can remedy such a loss.³⁶³ Henry Hart and Albert Sacks note further that “[t]hese institutionalized procedures and the constitutive arrangements governing them are obviously more fundamental than the substantive arrangements in the structure of society...since they are at once the source of the substantive arrangements and the indispensable means of making them work effectively.”³⁶⁴ Finally, the greater the variation between states in the realm of procedural law, and the smaller size of procedural codes compared to substantive codes, allows for more precise observations of change over time.

³⁶¹ Helmer, “International Commercial Arbitration: ‘Americanized,’ ‘Civilized,’ or ‘Harmonized,’” at 37.

³⁶² See John Henry Merryman, “The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America,” in *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA* 4 (John Merryman, David S. Clark, & John O. Haley eds., 1994). For example, the right to be free from tortious injury or improper deprivation of property may be similar in France and the United States, but there is considerable difference in the manner by which an individual can remedy such a loss. See Balas et al., *The Divergence of Legal Procedures*.

³⁶³ See Balas et al., *The Divergence of Legal Procedures*.

³⁶⁴ See HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1994).

a. Criminal Procedure Law in Chinese History

For this study, I selected eight proposed reforms of China's criminal procedure law for three reasons: large within-case variance in terms of independent and dependent variables; the divergence of predictions made by competing theories; and simply for the intrinsic importance of Chinese legal reform.³⁶⁵ As such, the areas of criminal procedure law selected for this study differ in the degree to which an active domestic discourse preceded international or transnational pressure for reform and the degree to which advocates for reform succeeded in expanding defendant rights.

China is governed by three basic codes of procedural law—the Law of Criminal Procedure (promulgated in 1979 and amended in 1997), the Law of Civil Procedure (first announced in 1982 and enacted in 1991), and the Law of Administrative Litigation (enacted in 1989). The 1997 Criminal Procedure Law serves here as the principal locus of analysis for several reasons. Firstly, criminal procedure stands as a “hard case.”³⁶⁶ The successful passage of certain reforms that serve to protect the rights of the defendant at the expense of the government's coercive power challenges many rational choice explanations of legal reform for at least three reasons: 1.) China had during the Tiananmen Square protests experienced tumultuous political unrest that highlighted the regime's preference for public order over due process; 2.) the instability associated with China's ongoing economic liberalization generated increasing public support for so-called “Strike Hard” campaigns in which officials subordinated certain procedural rights to the interests of swift adjudication of criminal

³⁶⁵ See GARY KING, ROBERT KEOHANE, & SIDNEY VERBA, *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* 108-9, 129-32, 137-38, 140-49 (1994).

³⁶⁶ On “hard cases” in social science research, see generally STEPHEN VAN EVERA, *GUIDE TO METHODOLOGY FOR STUDENTS OF POLITICAL SCIENCE* (1996) (noting that “hard cases” are those where the prior probability of a theory being a correct explanation is low).

defendants; and 3.) budget constraints at all levels of government increased the perceived need to reduce the costs of criminal trials and, therefore, reduce the application of defendant rights that delay the criminal justice system.³⁶⁷

Secondly, the 1997 CPL lends itself to analysis because the transnational or foreign provenance of any particular reform relating to criminal procedure is relatively easy to identify amidst China's longstanding domestic tradition of criminal procedure. Scholars of China have successfully traced codified criminal law as far back as the Western Zhou period (1100-771 BC),³⁶⁸ possibly as far as the Shang Dynasty (1766-122 BC),³⁶⁹ and certainly as far as the Qin Dynasty (221-206 BC).³⁷⁰ Moreover, prior to the first adoption of a codified code of criminal procedure in 1910, China's criminal procedure law enjoyed relative continuity since at least the Tang Dynasty (618-906 BC).³⁷¹ This stable system of law, William Jones notes, "seems to have developed completely independently from the West and to have received no influence from Western law."³⁷² China's norms related to criminal procedure are thus few in number and easy to identify. The following sections briefly describe this extensive history of

³⁶⁷ See SARAH BIDDULPH, *LEGAL REFORM AND ADMINISTRATIVE DETENTION POWERS IN CHINA* (Cambridge University Press: 2007), at 48 (noting that "In the area of criminal justice...the path of reform is arguably more complicated and contains more inconsistent trends than legal reform in the economic sphere.").

³⁶⁸ See JOHN HEAD & YANPING WANG, *LAW CODES IN DYNASTIC CHINA: A SYNOPSIS OF CHINESE LEGAL HISTORY IN THE THIRTY CENTURIES FROM ZHOU TO QING* (Carolina Academic Press, Durham, NC: 2005).

³⁶⁹ See H.G. Creel, "Legal Institutions and Procedures During the Chou Dynasty," in *ESSAYS ON CHINA'S LEGAL TRADITION*, Jerome Cohen, R.R. Edwards, and F.M. C. Chen eds., (Princeton University Press: 1980).

³⁷⁰ See DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* (University of Pennsylvania Press, Philadelphia, PA: 1973), at 8.

³⁷¹ See Perry Keller, "Sources of Order in Chinese Law," 42 *AM. J. COMP. L.* 711 (1994). *But see, e.g.*, Karen Turner, "Rule of Law Ideals in Early China?," 6 *JOURNAL OF CHINESE LAW* 1 (1992) (quoting Hsia Kung-Ch'uan's rhetorical question: "Throughout the two thousand years of China's imperial history, when did there ever appear a single instance of a government embodying the Rule of Law?").

³⁷² See Jones, at 2.

criminal procedure law in China and the post-Mao project of reform.

The Road to the 1997 Criminal Procedure Reform

The criminal justice system in China has a long history of stressing the importance of maintaining social order over the rigid adherence to procedural constraints.³⁷³ The notable weakness of procedural safeguards to restrain the coercive powers of the state in the dynastic era continued after the founding of the PRC, at which point the agenda of establishing a new society subordinated any procedural obstacles to that goal. As Jerome Cohen once described the earliest years of the PRC, 1949-1953, “[T]he criminal process served as a blunt instrument of terror, as the [CCP] proceeded relentlessly to crush all sources of political opposition and to rid society of apolitical but antisocial elements who plagued public order.”³⁷⁴

The subordination of an individual’s right to due process to the demands of political expediency, which persisted under Mao, stymied subsequent efforts to codify criminal procedure law in China. Moreover, whereas the Soviet Union promulgated a criminal code and criminal procedure code within the first five years following the Bolshevik revolution, the nascent PRC continued to operate without such laws.³⁷⁵ In the first thirty years of the PRC officials largely governed without the benefit of any legal codes.³⁷⁶ Not until 1954 did the National People’s Congress adopt a constitution

³⁷³ Interview, 9/13/2010; *see also* William T. de Bary, et al., *SOURCES OF CHINESE TRADITION* (1960); *BODDE & MORRIS* (1973); *THE GREAT QING CODE*, William C. Jones, trans. (Clarendon Press, Oxford: 1994).

³⁷⁴ *See* COHEN (1968), at 9.

³⁷⁵ WEI LUO, *THE AMENDED CRIMINAL PROCEDURE LAW AND THE CRIMINAL COURT RULES OF THE PEOPLE’S REPUBLIC OF CHINA WITH ENGLISH TRANSLATION, INTRODUCTION, AND ANNOTATION* (2000), at 3.

³⁷⁶ *See* 统一纲领 [Common Program of the Chinese People’s Consultative Conference] (the CCP promulgated this document in 1949 to serve as the interim basic law of the PRC) (“All laws, decrees and judicial systems of the Kuomintang reactionary government oppressing the people are abolished and laws and decrees protecting the people shall be enacted and the people’s judicial system shall be set up.”); *see also* Stanley Lubman, “Looking for Law in China,” 20 *COLUM. J. ASIAN L.*

and promulgate a handful of statutes describing the role of courts and procuratorates as well as procedural rules governing arrests and detentions.³⁷⁷

Not long after the PRC adopted its first Constitution, work began on the first criminal procedure law of the PRC.³⁷⁸ These efforts, however, which amounted to as many as twenty-two drafts of a comprehensive code of more than 200 articles and the passage by the NPC of an interim criminal code,³⁷⁹ quickly ended with the arrival the Anti-Rightist Campaign (ARC) of 1957, the target of which included many in the legal profession.³⁸⁰ The few criminal procedural regulations that did exist were limited to internal distribution only (内部) and officials never, with few exceptions, openly cited them as binding legal authority.³⁸¹ Legal drafters who resumed the work of compiling a criminal procedure code in the aftermath the ARC—the brief period in which Liu Shaoqi assumed many of the day-to-day responsibilities of governance³⁸²—had to again shelve their work during the disruption caused by the Cultural Revolution.³⁸³ This effort to develop a comprehensive system of law did not begin

1,4 (2006); Mireille Delmas-Marty, “Present-day China and the Rule of Law: Progress and Resistance,” 2 CHINESE J. INT’L L. 11 (2003).

³⁷⁷ Interview, 9/15/2010.

³⁷⁸ See LUBMAN, BIRD IN A CAGE, at 74. This push for formalization was spurred by Dong Biwu, then Chief Justice of the Supreme People’s Court.

³⁷⁹ See WEI LUO, THE 1997 CRIMINAL CODE OF THE PEOPLE’S REPUBLIC OF CHINA (1998), at 4.

³⁸⁰ See 刑事诉讼法新论 [A New Theory of Criminal Procedure Law], Zhang Zhonglin, ed. (Chinese People’s University Press, Beijing: 1993), at 52; CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA (Hong Kong: 2004), at 203; LUBMAN, BIRD IN A CAGE, at 76 (noting that lawyers’ offices that were open intermittently between 1955 and 1957 ineffective and defense lawyers were neither widely used nor trusted by judges, who associated them the class enemies they represented).

³⁸¹ See LUBMAN, BIRD IN A CAGE, at 72; Dicks, “Chinese Legal System,” at 453.

³⁸² See Luo (2000), at 4.

³⁸³ Legal development during the Cultural Revolution was derailed by campaigns such as “破公检法” [Smash the *Gong* (public security organs), *Jian* (procuratorates), and *Fa* (courts)].

again until after the death of Mao Zedong.³⁸⁴

At the Third Plenary Session of the Eleventh Central Committee of the CCP, convened in 1978, China's leadership highlighted the immediate necessity of legal development in the wake of Mao's death.³⁸⁵ The central goal of Deng Xiaoping and other surviving leaders was to rebuild the shattered legal system in order to provide the legal framework necessary for the reconstruction of the socialist economy.³⁸⁶

Deng, who experienced personally the confusion and destruction of law brought about by the Cultural Revolution, maintained that socialist democracy must be both "institutionalized and written into law." He added, "there must be laws to go by; laws must be observed and strictly enforced; and breaches of the law must be pursued."³⁸⁷ In the aftermath of the Gang of Four trial, which served as an early attempt to display to domestic and international audiences the appearance of criminal procedure,³⁸⁸ the National People's Congress set about drafting China's first Criminal Procedure Law in 1979.³⁸⁹ Chinese officials hailed these laws as an important component of China's modernization,³⁹⁰ and foreign observers noted them as part of a sweeping law reform

³⁸⁴ The formal criminal process is said to have "disappeared" during the Cultural Revolution. *See* LUBMAN, *BIRD IN A CAGE*, at 101.

³⁸⁵ *See* Communiqué of the Third Plenary Session of the Eleventh Central Committee of the Communist Party of China (adopted December 22, 1978). The legal reform agenda was described as a "legal system construction" ("法制建设").

³⁸⁶ *See* Anthony Dicks, "Chinese Legal System: Reforms in the Balance," 119 *CHINA QUARTERLY* 540, 545 (1989).

³⁸⁷ *See* Deng Xiaoping, "Emancipate the Mind, Seek Truth From Facts and Unite as One in Looking to the Future," in *SELECTED WORKS OF DENG XIAOPING, 1975-1982, Vol. 2* (Foreign Languages Press, Beijing: 1982), at 151-165.

³⁸⁸ *See* Jerome Alan Cohen, "China's Criminal Codes," 73 *J. CRIM. LAW & CRIMINOLOGY* 135, 136 (1982).

³⁸⁹ *See* 中华人民共和国刑事诉讼法 [CRIMINAL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA] (adopted July 1, 1979) [hereinafter 1979 CPL].

³⁹⁰ *See* "关于七个法草案的说明" [Explanation of the Drafts of Seven Laws], in 彭真文选 [SELECTION OF DOCUMENTS OF PENG ZHEN, 1949-1990] (People's Press, 1991).

movement.³⁹¹

The 1979 version of China's code of criminal procedure, while comprehensive with over 160 articles stipulating procedures for all stages of the justice system (from the filing of a case, investigation, prosecution, adjudication, and sentencing), was not a true product of post-Mao China. Instead, officials hastily compiled the law from the various preliminary drafts prepared in the relative international isolation of the 1950s and the relative chaos of the 1960s. As such, it is largely a product of the early, more ideological period of PRC history rather than a manifestation of China's post-Mao experimentation with opening and reform.³⁹² This discrepancy is due in large part to its being created without the presence or advice of transnational advocates. In 1978, China played host to fewer than 240,000 foreigners in total. In 1996, the year before the formal passage of the second CPL, China saw as many as 6,744,300 cross its border.³⁹³ Nor did China in the late 1970s possess the domestic legal elites necessary to study and import these foreign innovations into its civil law system. The disruptive political campaigns of the Mao period had eviscerated the legal profession, leaving China with few experts to contribute to a revised draft. Denounced as the worst kind of "stinking intellectuals," lawyers remained muzzled until Mao's death.³⁹⁴ By the time of the promulgation of the 1979 CPL, China possessed only a few thousand defense attorneys. Of the remaining legal practitioners, their principal task was to serve the state and aid the public security bureaucracy in the suppression of class

³⁹¹ See also Cohen (1982), at 135.

³⁹² See OPENING TO REFORM?: AN ANALYSIS OF CHINA'S REVISED CRIMINAL PROCEDURE LAW (Lawyers Committee for Human Rights: 1996), at 2.

³⁹³ See National Bureau of Statistics, available: <http://www.stats.gov.cn/> (last visited February 21, 2010).

³⁹⁴ See Jerome A. Cohen, "The Plight of China's Criminal Defence Lawyers," 33 HONG KONG LAW JOURNAL 231-47 (2003).

enemies.³⁹⁵

The hastily drafted 1979 CPL endured repeated amendments throughout the 1980s,³⁹⁶ most of which served to strengthen the position of the state during the investigation and adjudication of crime. As at least one Chinese scholar observed, the NPC amendments in the 1980s were part of a trend toward reducing the rights of defendants while “expanding the power of both the police and judiciary and making investigation, prosecution, and adjudication more convenient” for state actors.³⁹⁷ The following subsections describe the political, social, and legislative context within which the subsequent 1997 reforms developed. As the discussion illustrates, Chinese reformers in a number of policy domains studied many of the reforms advocated by transnational actors to strengthen defendant rights, despite considerable domestic pressures to retain certain limitations on defendant rights and ensure the continued

³⁹⁵ See LUBMAN (1999); Dicks (1989) (noting that, in classical Marxist-Leninist terms, “the state and the legal system which it supports are part of the superstructure of society, important but expendable whenever economic considerations so require.”); Pitman B. Potter, “Legal Reform in China: Institutions, Culture, and Selective Adaptation,” 29 *LAW & SOCIAL INQUIRY* 465, 480 (2004) (noting that the CCP’s concept of governance “blended law and administration together so closely that they were nearly indistinguishable.”).

³⁹⁶ Indeed, the history of China’s Criminal Procedure Law stands as another example of the incremental approach to reform suggested by the common refrain of China’s legal reformers: “Crossing a river by touching the stones.” During the long delay prior to promulgation of the 1997 CPL, Beijing introduced several other laws to address problems concerning criminal justice, each of which served as a proverbial “stone” from which China advanced toward a complete legal regime. See, e.g., *Joint Notice on Implementing the Case Jurisdictions Prescribed by the Criminal Procedure Law*, issued by the Supreme People’s Court, Supreme People’s Procuratorate, and Ministry of Public Security (April 27, 1981); *Decision on the Procedure for Prompt Adjudication of Cases Involving Criminals Who Seriously Endanger Public Security*, issued by Standing Committee of the National People’s Congress (Sept. 2, 1983); *Police’s Procedural Rules in Handling Criminal Cases*, issued by the Ministry of Public Security (March 21, 1987).

³⁹⁷ See Wang Minyuan, “刑事被告人权利研究” [Research on Criminal Defendants’ Rights], in *走向权利的时代* [TOWARD THE AGE OF RIGHTS], Xia Yong, ed. (China University of Politics and Law Press, Beijing: 1995), at 499.

dominance of the state.

The Context of the 1997 Criminal Procedure Law

1. Legal Context: Confusion and Conflicts in Law

The project of drafting the 1997 CPL occurred amidst unease about finding legal solutions to the instability caused by the economic reforms of the 1980s and 1990s, which included rising inequality, the disruptive migration of rural residents into cities to find work,³⁹⁸ and growing public support for “strike hard”(严打) campaigns against a perceived spike in crime.³⁹⁹ Anxious public security officials called for procedural rules governing the investigation and prosecution of crime that would grant them greater flexibility to address this new criminal element. Legal scholars responsible for the drafting of the 1997 law expressly noted that the PRC’s economic liberalization instigated crimes and criminals not envisioned by the drafters of the original 1979 CPL.⁴⁰⁰ As one scholar involved in the reforms put it, “sixteen years of profound changes in all areas of society has left the existing criminal procedure law, including the system for defendants, lagging behind and in need of modification” (“但是十六年来社会各领域的深刻变化,正使现行刑法的许多制度,包括辩护制

³⁹⁸ See THOMAS P. BERNSTEIN & XIAOBO LÜ, *TAXATION WITHOUT REPRESENTATION IN CONTEMPORARY CHINA*, (Cambridge University Press: 2003).

³⁹⁹ The 1997 CPL provides for various crimes new to post-Mao China, including insider trading (arts. 180-83), securities fraud (arts. 194-97), illegal transfer or resale of land-use rights (art. 228), and computer fraud (arts. 285-86). As early as 1980, many Chinese scholars called for an expansion of state powers in order to stem the growing trend of “murder, robbery, rape, theft, sabotage, and other counter-revolutionary incitement.” See 周国均 [Zhou Guojun], “执法也要依靠人民” [Enforce the Law and Rely on the People], *政法论坛* [POLITICS AND LAW TRIBUNE], (Jan. 1980).

“目前,社会上各种反革命分子,严重破坏分子和犯罪集团,肆意进行凶杀,抢劫,强奸,流氓,盗窃,反革命煽动等破坏活动,严重地扰乱了社会治安秩序,破坏了社会主义公有制,威胁着人民生命财产的安全.”)

⁴⁰⁰ See Chen Guangzhong, Chen Ruihua, & Tang Weijian, “市场经济与刑事诉讼法学的展望” [Prospects of Market Economics and the Study of Criminal Procedure], 5 *中国法学* [CHINESE LEGAL STUDIES] (1994).

度显得滞后,而需要修改”。⁴⁰¹ In addition, fiscal measures of the 1980s and 1990s designed to reduce the budgets of most governmental organs in China created strong incentives to reduce the costs of pre-trial investigations and of trials themselves by limiting procedural obstacles raised by the expansion of defendant rights.⁴⁰² The expansion of criminal defendant rights would thus be especially surprising because, unlike civil and administrative channels, in criminal proceedings only the state is permitted to initiate proceedings against a defendant. As such, the desired outcome for the state is always the same—conviction.

Another motive prompting the reform of criminal procedure was the need for legal clarity. Over the course of the 1980s and 1990s, the 1979 CPL came to conflict with subsequently adopted law. The original 1979 CPL, for example, provided for a check on government power in the form of 人民陪审员 (“people’s assessors”) to work alongside judges during criminal cases (see 1979 CPL, art. 105). As early as 1982, the revised Constitution removed this requirement by announcing that people’s courts “independently exercise the power of adjudication and are not subject to interference by administrative organs, social organizations, or individuals.”⁴⁰³ In 1983, moreover, the so-called Court Organization Law explicitly made such assessors optional.⁴⁰⁴ In addition, due to the vagueness of many of the 1979 CPL rules—which legal drafters assembled in the absence of legal experts—various bureaucracies such as the police, procuratorate, and courts issued numerous official interpretations or implementing rules that conflicted with provisions of the CPL. In total, the NPC and the State Council promulgated 24 separate criminal acts or regulations and 130

⁴⁰¹ 通蜀 [Tong Shu], “刑事诉讼法修改:中国律师的渴望” [Procedural Reform: A Chinese Lawyer’s Longing], 中国律师 [CHINA LAWYER], (March 1996).

⁴⁰² Interview, 9/17/2010.

⁴⁰³ See CONSTITUTION OF THE PEOPLE’S REPUBLIC OF CHINA (adopted Dec. 4, 1982).

⁴⁰⁴ See Law of the People’s Republic of China for the Organization of People’s Courts, art. 10 (amended Sept. 2, 1983).

provisions that supplemented or directly conflicted with the 1979 CPL.⁴⁰⁵

By the end of the 1980s the NPC faced a criminal procedure system full of internal contradictions and in glaring need for reform.⁴⁰⁶ In early 1991, the NPC's Criminal Law Office of the Legal Work Committee discussed with law professors at China University of Politics and Law (CUPL), located in Beijing, the possibility of reforming the increasingly inadequate 1979 CPL.⁴⁰⁷ In the following year, Chen Guangzhong, then President of CUPL and the leading criminal procedure scholar in the PRC, received funding from China's National Social Sciences Fund to study foreign criminal procedure systems.⁴⁰⁸ Selecting Chen, a prominent academic with many lines in the transnational stream of legal norms flooding into China, to lead the drafting process demonstrated the NPC leadership's new willingness to incorporate domestic and foreign expertise in the legislative drafting process, as well as an example of the powerful role played by scholars in the legal development process in civil law countries.⁴⁰⁹

Chen, tasked with leading the reform effort, and a team of other scholars from various elite Beijing law schools were both eager and well positioned to play the role of transnational legal broker, much as their scholarly counterparts in European civil

⁴⁰⁵ See Luo (1998), at 5.

⁴⁰⁶ The growing institutional independence of the NPC in matters of legal development has been observed by scholars such as Murray Scot Tanner and Michael Dowdle. See MURRAY SCOT TANNER, *THE POLITICS OF LAWMAKING IN CHINA: INSTITUTIONS, PROCESSES AND DEMOCRATIC PROSPECTS* (1999); Michael Dowdle, "The Constitutional Development and Operations of the National People's Congress," 11 COLUM. J. ASIAN L. 1 (1997).

⁴⁰⁷ Interview, 9/20/2010.

⁴⁰⁸ See *OPENING TO REFORM?*, at 15.

⁴⁰⁹ See "乔石委员长在第八届全国人大常委会第二次会议上的讲话" [Chairman Qiao Shi's Talk at the Second Session of the Standing Committee of the Eighth National People's Congress], at 4. 中华人民共和国全国人民代表大会常务委员会公报 [Communiqué of the Standing Committee of the National People's Congress of the People's Republic of China] (1993).

law countries had been doing for centuries (see Chapter 2). As Randall Peerenboom observed:

Chen Guangzhong's criminal law research center...played a pivotal role in raising awareness of criminal law standards under international law. Academics [in general] have also been instrumental in preparing judicial training manuals and developing other methods to help raise the level of competence of the judiciary and legal profession, such as holding mock trials conducted by actual judges and lawyers from both a common and civil law system.⁴¹⁰

Indeed, as estimated by one senior participant in the research team, roughly one-third of the team led by Chen had prior overseas experience with foreign law.⁴¹¹ Of the remaining members, almost all had PhDs in law and extensive exposure to comparative law and the foreign legal community present in Beijing.⁴¹²

In addition to elevating the role of scholars in the drafting process, officials relaxed their prohibition on the explicit consideration of foreign sources by these scholars. As one Chinese participant recounted:

[L]egislators [and scholars] gave comparatively full consideration to the two or three hundred years of valuable experience of the two main legal families [common law and civil law] of the world. We did our best to take into account [these experiences] and bring our country's views into line with the fruits of common experience and litigation culture, as well as a number of international standards. For example, in order to protect the litigation rights of defendants, we permitted lawyers to act for the defendant at a much earlier stage of the litigation process (during

⁴¹⁰ See PEERENBOOM, at 155.

⁴¹¹ Interview, 9/13/2010.

⁴¹² Id.

detention by the public security organs). In publicly prosecuted cases, we increased the rights of victims to obtain legal representation and legal advice. Other examples [were] to transplant the Western presumption of innocence and the adversarial system into trial procedure.⁴¹³

Most other participants noted their extensive consultation of foreign sources, including foreign journals, foreign statutes, and even foreign case law.⁴¹⁴

By the time of the First Plenary Session of the Eighth National People's Congress in 1993, sufficient support for a revised CPL had emerged among the various bureaucracies.⁴¹⁵ The Criminal Law Department of the Legislative Affairs Commission (LAC), the legislative drafting organ of the NPC chiefly responsible for establishing a drafting group and responsible for recommending whether or not a draft should appear on the agenda of the NPC,⁴¹⁶ soon after convened a series of meetings at which officials reached a consensus about the need—if not extent—of reform of the 1979 CPL.⁴¹⁷

In October of 1993 the LAC, a body which can delegate legislative drafting to

⁴¹³ See Fan Chongyi, "The Process of Revising 'The Criminal Procedure Law of the People's Republic of China' 1996," at 4-5.

⁴¹⁴ Interview, 9/13/2010; 9/20/2010; 9/20/2010.

⁴¹⁵ See Fan Chongyi, "The Process of Revising 'The Criminal Procedure Law of the People's Republic of China' 1996"; OPENING TO REFORM?, at 15.

⁴¹⁶ The Legislative Affairs Commission, which possesses a research staff of over 200 people and specializes in various fields of law, including criminal law, reports to the NPC Law Committee on proposed draft laws and makes a recommendation as to whether or not the draft should be placed on the agenda of the NPC. The Law Committee, which consists of representatives from the NPC, many of which are appointed by the CCP directly, examines and discusses all draft laws. See Fu Jian, "China's Legislative Affairs Commission," HONG KONG LAWYER 38 (Apr. 1994); Peter Howard Corne, "Creation and Application of Law in the PRC," 50 AM. J. COMP. L. 369-443 (2002); Marc Rosenberg, "The Chinese Legal System Made Easy: A Survey of the Structure of Government, Creation of Legislation, and the Judicial System Under the Constitution and Major Statutes of the People's Republic of China," 9 U. MIAMI INT'L & COMP. L. REV. 225 (2001).

⁴¹⁷ Interview, 9/13/2010.

experts, formally tasked the team of scholars led by Chen to compose a first draft of the revised CPL. In the meantime, as one participant recalled, these scholars traveled to the United Kingdom, the United States, Canada, Japan, France, Germany, Italy, Korea, and Russia to research various criminal procedure systems of both civil and common law countries.⁴¹⁸ In addition, with the financial assistance of the Ford Foundation, they convened several conferences in Beijing with foreign experts such as Jerome Cohen, all of whom, one participant recalled, were extremely influential in shaping the views of the research team.⁴¹⁹ Especially influential, several participants noted, were the American experts and the sources they supplied.⁴²⁰ This influence was due in large part to the linguistic skills of the participants. While some spoke German, Japanese, and Russian, most spoke and read English.⁴²¹ Moreover, another participant recalled, at least seventy percent of these scholars already had legal experiences abroad, primarily in the United States.⁴²² The more foreign exposure these scholars had, she noted, the more likely they were to incorporate it explicitly—with no attempt to ‘localize’ it—into their suggestions for criminal procedure reform.⁴²³

Upon its return to China, the research team submitted to the central organ of the CCP a report of the views of various leading legal scholars on suggested reforms to the CPL in a so-called “Report of Important Matters.” By July of the following year, Professor Chen submitted a draft, complete with annotated commentary, to the LAC.⁴²⁴ This version formed the basis of the LAC’s subsequent draft, released as a

⁴¹⁸ Interview, 9/20/2010.

⁴¹⁹ Interview, 9/20/2010.

⁴²⁰ Interview, 9/20/2010.

⁴²¹ Id.

⁴²² Interview, 9/20/2010.

⁴²³ Id.

⁴²⁴ See 中华人民共和国刑事诉讼法修改建议稿与论证 [ANNOTATED PROPOSED DRAFT OF THE REVISED CRIMINAL PROCEDURE LAW OF THE PEOPLE’S REPUBLIC OF CHINA] (Chen Guangzhong & Yan Duan, eds., 1995); Fan, “The Process of Revising ‘The Criminal Procedure Law of the People’s Republic of China’ 1996,” at 2.

“draft for comment” (“征求意见稿”) in 1995.⁴²⁵ In January 1996, the Standing Committee of the NPC delegated Wang Hanbin, Ren Jianxin, and Luo Gan to confer with the leadership cadres of the Political Committee of the Central Committee. According to one participant, very little of the proposed final draft generated much debate.⁴²⁶ As another recalled, the officials to whom they reported had very little legal experience and were quite open to the suggestions raised by the research team,⁴²⁷ even to new ideas such as the presumption of innocence and a system akin to plea bargaining.⁴²⁸ The revised draft was then submitted to the 18th Meeting of the Eighth Standing Committee of the NPC for final review. President Jiang Zemin formally promulgated the final draft in Presidential Order #64 and the law went into effect on Jan. 1, 1997.

2. Legal Family as Legal Structure: Global Advocates, Local Scholars

The context of China’s legal family also sheds light on the conditions under which China’s CPL reform took place. China’s openness to foreign legal influence, which occurs at the highest levels,⁴²⁹ stems in part from the fact that the Chinese legal system derives from civil law origins and is today created by a relatively small handful

⁴²⁵ At most points of this legislative process, the draft revision of the CPL was scrutinized by the CCP. As Murray Scot Tanner has observed, CCP rules provide that all “important laws” (“重要法律”) are to be reviewed by the entire Politburo or its Standing Committee before being submitted to the NPC. *See* Murray Scot Tanner, “How a Bill Becomes a Law in China: Stages and Processes in Lawmaking,” *CHINA QUARTERLY* 39-64 (1995). Under the Constitution, the CPL exists as a so-called Basic Law, which is the most authoritative form of law and must be enacted by the full NPC rather than merely the Standing Committee of the NPC. *See* 1982 CONSTITUTION, arts. 62(3) and 67(2).

⁴²⁶ Interview, 9/13/2010.

⁴²⁷ Interview, 9/20/2010.

⁴²⁸ Interview, 9/20/2010.

⁴²⁹ *See* KENNETH LIEBERTHAL & MICHEL OKSENBURG, *POLICY MAKING IN CHINA: LEADERS, STRUCTURES, AND PROCESSES* 31 (1988).

elites,⁴³⁰ each with varying degrees of legal expertise.⁴³¹ The Politburo Standing Committee, for example, the *de facto* highest political decision-making body in the country, has never included a single member educated in law. Moreover, less than one percent of the 3,000 delegates to the national legislature are lawyers.⁴³² As one participant with extensive experience as a legal representative of international commercial interests noted, “legislators do not have the relevant experience to write the law themselves.”⁴³³ In addition, she continued, “there’s very little for them to draw from in China, so they turn to attorneys or scholars from abroad [for advice].”⁴³⁴

These foreign attorneys and scholars, eager to impress upon and “specifically target” such inexperienced domestic actors tasked with developing and drafting China’s laws, currently constitute a sizable international and transnational epistemic community in Beijing.⁴³⁵ Their efforts range from lobbying directly for certain legal

⁴³⁰ This “handful” does not refer to members of the larger body—comprised of at least eleven different sources—that oversees the increasingly large number of non-statutory, administrative or regulatory laws. Over the past decades, administrative regulations have become a major component of China’s legal system. These regulations amount to more than twice the number of laws enacted by the National People’s Congress. See William P. Alford & Yuanyuan Shen, “Limits of Law in Addressing China’s Environmental Dilemma,” 16 *STAN. ENVTL. L.J.* 125 (1997). This large body of domestic legal actors, however, are similarly open to the influences of transnational legal advocates. In addition to the recent Administrative Litigation Law, which introduced a more pluralist approach to regulation, the very drafters of that law, including Luo Haocai, studied at Columbia University under Walter Gelhorn, the principal drafter of the U.S. Administrative Procedure Act. See R. Randle Edwards, “Thirty Years of Legal Exchange with China: The Columbia Law School Role,” 23 *COLUM. J. ASIAN L.* 3 (2009), at 12.

⁴³¹ The top tier of China’s government is filled primarily with technocrats. The Law Committee of the National People’s Congress, for example, currently includes only one official with legal training, Xu Xianming. His colleagues are primarily engineers, physicists, and former military officials. See CHINA VITAE, LAW COMMITTEE OF THE NPC, available at <http://www.chinavitae.com/institution/PC/1610.208>.

⁴³² See Alford, “A Second Great Wall?,” at 202.

⁴³³ Interview, 9/14/2010.

⁴³⁴ *Id.*

⁴³⁵ See *id.* at 200; see also Andrew Mertha, “Shifting Legal and Administrative Goalposts: Chinese Bureaucracies, Foreign Actors, and the Evolution of China’s Anti-

reforms to draft laws published for comment to shaping indirectly Chinese legal discourse through the socialization of new attorneys and scholars.⁴³⁶ One respondent cited as a recent example of direct lobbying for reform the recent Partnership Act, which saw the inclusion of many aspects of U.S. corporate law desired by foreign commercial interests. Demonstrating the indirect effect of the transnational legal community, she cited the socialization of Chinese attorneys by the presence of Western law firms. Such gradual socialization, she noted, has thoroughly altered the constitutive notions among Chinese attorneys of how law firms are supposed to function, as well as how the law itself operates, including the nature and form of the contract.⁴³⁷ Figure 3.1, pictured below illustrates the basic structure of the Chinese legislative process and the types of actors endeavoring to shape the outcome of Chinese legal development.

As a civil law country, in which legal innovation falls more to legal scholars than it does judges, China's expanding pool of law professors and legal experts played a central role in the shaping of CPL reform and the introduction of foreign norms. Indeed, while most law reform is instigated by government officials, a considerable amount stems from active legal scholars seeking to set the reform agenda.⁴³⁸

Counterfeiting Enforcement Regime,” in *ENGAGING THE LAW IN CHINA: STATE, SOCIETY, AND POSSIBILITIES FOR JUSTICE* 161 (Neil J. Diamant, Stanley B. Lubman, & Kevin O'Brien eds., 2005) (noting the “growing importance of foreign actors within the context of China’s legal development.”). This considerable variety among the types of foreign actors involved, which includes supranational, international, and transnational variants, allows for controls on the character of the foreign actor. Examples include supranational organizations such as the United Nations Development Programme, the World Bank, the E.U.-China Human Rights Dialogue; international efforts such as the U.S.-China Rule of Law Initiative; and transnational groups such as the Yale China Law Center, American Bar Association Asian Law Initiatives Council, Ford Foundation, Asia Foundation, American Society of International Law, and Deutsche Gesellschaft für Technische Zusammenarbeit.

⁴³⁶ Interview, 9/14/2010.

⁴³⁷ Interview, 9/14/2010.

⁴³⁸ Interview, 9/7/2010; 9/10/2010.

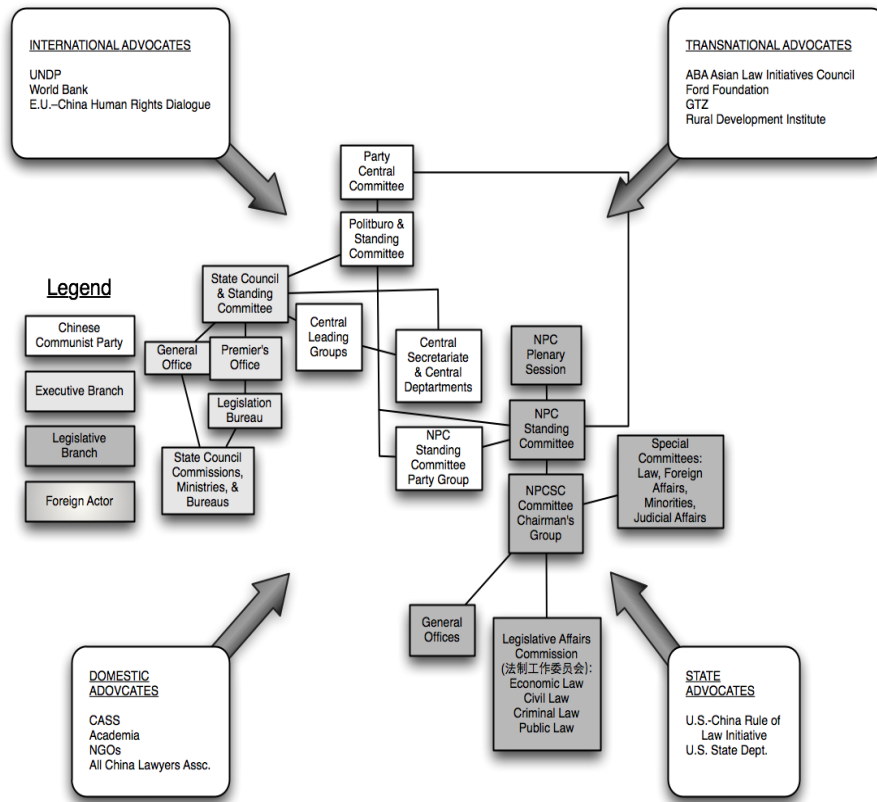


Figure 3.1. PRC Government Structure and Legal Advocates⁴³⁹

The increasing independence of scholars and experts during the early 1990s meant the drafting of the 1997 CPL was, unlike the drafting of its predecessor, far more open to the introduction of foreign legal norms via a transnational epistemic community committed to China's legal development. Indeed, according to various participants in the reform process, the contribution of academics to the shape of reform was far more significant than has been described in some scholarship concerning the process of legal reform in China.⁴⁴⁰ In many instances, the public discussion of legal reform does not occur until it is clear what the central leadership of

⁴³⁹ Figure adapted from MURRAY SCOT TANNER, *THE POLITICS OF LAWMAKING IN POST-MAO CHINA: INSTITUTIONS, PROCESSES, AND DEMOCRATIC PROSPECTS* (1999).

⁴⁴⁰ Interview, 9/13/2010; 9/20/2010; 9/20/2010.

the party prefers as the outcome. In the case of the Labor Law, for instance, public discussion was curtailed until party leaders had decided how to proceed.⁴⁴¹

In the case of the reform of the criminal procedure system, however, participants in the mid 1990s criminal procedure reform recalled being relatively unconstrained with respect to discussing certain aspects of the law, especially those issues that were not already points of concern in Chinese political discourse. Thus, while the legal epistemic community in Beijing could not advocate openly for reform of the death penalty in the pages of Chinese law journals,⁴⁴² they could discuss more novel and entrenched practices such as the presumption of innocence, the right to an attorney, adversarial reforms, and plea bargaining.⁴⁴³ While such discussions were somewhat rare, it is still no surprise that the presumption of innocence was discussed openly in academic journals as early as 1980.⁴⁴⁴ Discussions of plea-bargaining and summary procedure started later that same year.⁴⁴⁵ Analyses of adversarial systems followed soon after in 1982.⁴⁴⁶ The following subsection describes the creation and growth of this epistemic community in the years preceding the promulgation of the 1997 CPL.

a. The Development of a Legal Epistemic Community in the PRC

The 1980s was an active period in the development of China's legal community. During this period, the PRC began to experiment with various international human rights institutions and instruments. China joined the United Nations Human Rights Commission and acceded to various human rights treaties, including the Convention Against Torture, the Convention on the Rights of the Child,

⁴⁴¹ Correspondence with Daniela Stockmann, 9/29/2010.

⁴⁴² Interview, 9/7/2010.

⁴⁴³ Interview, 9/13/2010; 9/20/2010; 9/20/2010.

⁴⁴⁴ See 康树华, 苏维埃刑事诉讼法中的“无罪推定”原则, 1 国外法学 (1980).

⁴⁴⁵ See 陈建国, 日本司法制度简介, 4 国外法学 (1980).

⁴⁴⁶ See 汪纲翔, 民事诉讼中举证责任问题小议, 8 法学 (1982).

and the Convention on the Elimination of All Forms of Discrimination Against Women.⁴⁴⁷ These international commitments, and the socializing among transnational advocates that they brought about, did much to expand the vocabulary of China's legal elite. As early as 1989, legal scholars were publishing calls to "revise and perfect" ("修改与完善") the 1979 CPL to meet global standards.⁴⁴⁸

In addition to China's state-level engagement with international treaty organizations, which created an immediate demand for international legal expertise, and in the face of widespread international condemnation after 1989, the CCP lifted its informal ban on domestic research and publications on human rights issues. To bring "order out of chaos" ("拨乱反正"), Beijing permitted a much broader comparative search for legal solutions and, as criminal procedure scholar Chen Ruihua described it, "the forbidden zone of legal research shrank" ("法学研究的'禁区'日益缩小").⁴⁴⁹ Subsequent scholarship scoured the globe for foreign theories of civil and political rights.⁴⁵⁰ Legal scholars began actively looking and traveling overseas—to France, Germany, Italy, Canada, the United Kingdom, the United States, and elsewhere—to examine how other states administered criminal justice.⁴⁵¹

⁴⁴⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Mar. 1, 1980, 1249 U.N.T.S. 13.

⁴⁴⁸ See 法学 [LEGAL STUDIES], 1–6 (1989), at 125.

⁴⁴⁹ 陈瑞华 [Chen Ruihua], "二十世纪中国之刑事诉讼法学" [20th Century Chinese Criminal Procedure], 中外法学 [PEKING UNIVERSITY LAW JOURNAL], (June 1997).

⁴⁵⁰ See, e.g., Pang Sen, 当代人权ABC [THE ABCS OF CONTEMPORARY HUMAN RIGHTS] Institute of Law, Chinese Academy of Social Sciences, eds. (Social Sciences Documentary Press, Beijing: 1993); 西方人权学说 [WESTERN THEORIES OF HUMAN RIGHTS], Huang Nansen & Shen Zongling, eds. (Sichuan People's Press, Chengdu: 1994).

⁴⁵¹ Interview, 9/20/2010; see also Sida Liu & Terence C. Halliday, "Recursivity in Legal Change: Lawyers and Reforms of China's Criminal Procedure Law," 34 LAW & SOCIAL INQUIRY 911, 919 (2009).

In this newly expanded intellectual environment, however slight the expansion, Chinese universities quickly became active conduits of foreign legal norms by convening conferences dedicated to the subject of comparative criminal procedure law at which members of an active transnational movement to reform China's legal system participated alongside Chinese scholars.⁴⁵² Members of this movement included: liaisons from supranational organizations such as the United Nations,⁴⁵³ the World Bank,⁴⁵⁴ and the European Union-China Human Rights Dialogue,⁴⁵⁵ representatives of international efforts such as the U.S.-China Rule of Law Initiative⁴⁵⁶ and the German aid agency Gemeinschaft für Technische Zusammenarbeit,⁴⁵⁷ and members of

⁴⁵² Interview, 9/20/2010; *see also* Cui Min, 中国刑事诉讼法的新发展—刑事诉讼法修改的全面回顾 [NEW DEVELOPMENTS IN CHINA'S CRIMINAL PROCEDURE LAW—A COMPREHENSIVE REVIEW OF THE DISCUSSIONS ON THE REVISIONS TO THE CRIMINAL PROCEDURE LAW] (People's Police University Press, Beijing: 1996).

⁴⁵³ The UNDP, for instance, sponsored legal research on China's concepts of property and contract. *See, e.g.*, Tim Hanstad & Guiping Lu, "Rural Land Use Rights: Property or Contract Rights?," in Hanstad & Schwarzwald ed., CHINA'S RURAL LAND SYSTEM: LEGAL REFORM AND THE RULE OF LAW (1999) (CPR/96/509). In 1994 the UN convened the 1994 Beijing International Conference on the Reform of Criminal Procedure.

⁴⁵⁴ *See* Robert W. Gordon, "The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections," 11 THEORETICAL INQUIRIES L. 441 (2010).

⁴⁵⁵ European Union efforts to influence China's legal development began in the early 1990s. *See* Council Regulation (EEC) No 443/92 of 25 February 1992 on Financial and Technical Assistance to, and Economic Cooperation with, the Developing Countries in Asia and Latin America; *See also* Björn Ahl, "E.U.-China Legal Development Co-operation," 5 ASIA LAW REVIEW (2008).

⁴⁵⁶ *See* Paul Gewirtz, "The U.S.-China Rule of Law Initiative," 11 W. & MARY BILL RTS. J. 602 (2003); Matthew Stephenson, "A Trojan Horse in China?" in PROMOTING THE RULE OF LAW ABROAD, Thomas Carothers ed. (2006) (discussing the China Rule of Law Initiative started under Clinton), at 191.

⁴⁵⁷ The GTZ operates a full-time office in Beijing complete with several lawyer-staffers. On GTZ's legal reform efforts in China, *see*: <http://www.law-reform.cn/> (last visited: April 29, 2010). While GTZ has operated in China for many years, Gerhard Schroder and Jiang Zemin did not formalize the Rule of Law Dialogue with the Germany's Federal Ministry of Justice until 1999. *See* Press Office of the Federal Ministry of Justice, available at: <http://www.bmj.bund.de/>, (last visited: April 29, 2010).

transnational groups such as various national bar associations,⁴⁵⁸ the Ford Foundation,⁴⁵⁹ and the Asia Foundation.⁴⁶⁰

These nascent bi- and multilateral linkages to the global legal community established during the 1980s resembled similar efforts by international epistemic communities to affect outcomes and alter the balance of power among domestic groups in other policy domains, including Chinese attitudes toward issues as varied as the environment,⁴⁶¹ gender rights,⁴⁶² and foreign policy.⁴⁶³ These linkages, many of

⁴⁵⁸ The American Bar Association began sending delegations to China through its Asian Law Initiatives Council in 1978, the first led by Stanley Lubman. *See ABA Rule of Law Initiative: China*, available at: <http://www.abanet.org/rol/asia/china.html> (last visited: April 29, 2010). The Canadian Bar Association began working with China's All China Lawyers Association in 1994. *See CBA/ACLA Criminal Law Reform and Advocacy Project in China*, available: www.cba.org.

⁴⁵⁹ The Ford Foundation began supporting efforts to train Chinese scholars in international and comparative law—so-called “training the trainers” programs—as early as 1979. *See* Edwards, (2009), at 11.

⁴⁶⁰ *See* Stanley Lubman, “Looking for Law in China,” 20 COLUM. J. ASIAN L. 1 (2006), at 89. There are now more than 200 transnational nongovernmental organizations operating in China. *See* China Development Brief, available at: <http://www.chinadevelopmentbrief.com/dingo/> (last visited: April 29, 2010).

⁴⁶¹ *See* Elizabeth Economy, “The Impact of International Regimes on Chinese Foreign Policy-Making: Broadening Perspectives and Policies...But Only to a Point,” in THE MAKING OF CHINESE FOREIGN SECURITY POLICY IN THE ERA OF REFORM, 1978-2000 (David M. Lampton ed., 2001), at 236; Hyung-Kwon Jeon & Seong-Suk Yoon, “From International Linkages to Internal Divisions in China: The Political Response to Climate Change Negotiations,” 46 ASIAN SURVEY 846 (2006).

⁴⁶² *See* Cecilia Milwertz & Wei Bu, “Non-Governmental Feminist Activism in the People's Republic of China: Communicating Oppositional Gender Equality Knowledge,” in SOCIAL MOVEMENTS IN CHINA AND HONG KONG: THE EXPANSION OF PROTEST SPACE (Khun Eng Kuah-Pearce & Gilles Guiheux, eds. 2009), at 227; SALLY E. MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE (2006).

⁴⁶³ *See* 国际政治理论探索在中国 [EXPLORATIONS OF THEORIES OF INTERNATIONAL POLITICS IN CHINA], (Shanghai People's Publisher: 1998) (this book was itself a compilation of essays prompted by an international conference of IR scholars convened in Beijing in 1991); 新时期中国国际关系理论研究 [RESEARCH ON INTERNATIONAL RELATIONS THEORIES IN CHINA'S NEW ERA] (1999); GERALD CHAN, CHINESE PERSPECTIVES ON INTERNATIONAL RELATIONS: A FRAMEWORK FOR ANALYSIS (1999); Samuel Kim, “China and the United Nations,” in CHINA JOINS THE WORLD: PROGRESS AND PROSPECTS (Elizabeth Economy and Michel Oksenberg, eds.,

which were sought after by Chinese officials eager to import expertise on pressing legal and foreign policy issues, had a substantial effect on China's epistemic community of foreign policy and legal scholars.⁴⁶⁴ China's participation in the U.N. Conference on Disarmament and the U.N. Human Rights Commission, to cite just two examples, socialized a steady stream of Geneva-trained arms control and human rights experts in China that in turn affected Chinese policy throughout the 1980s and 1990s.⁴⁶⁵ As Evan Medeiros recently observed, this socialization of Chinese policymakers has continued at an even greater rate in the past few years. China now enjoys an arms control community numbering in the hundreds and located across a range of governmental bureaucracies.⁴⁶⁶ In a way similar to the expansion and socialization of China's arms control community that Medeiros describes, the transnational socialization of China's legal community likewise developed over three stages—creation, engagement, and professionalization.

i. Creation

During the first stage of China's contemporary legal development, the arrival of foreign legal expertise was a product of two domestic and international factors: 1.) the immediate need for expertise stemming from the commitment of post-Mao leaders to formalize China's damaged legal system and the initiation of the 'open door'

1999), at 74; *THE MAKING OF CHINESE FOREIGN SECURITY POLICY IN THE ERA OF REFORM, 1978-2000* (David M. Lampton ed., 2001), at 284; Song Xinning, "Building International Relations Theory with Chinese Characteristics," 10 *JOURNAL OF CONTEMPORARY CHINA* 61 (2001).

⁴⁶⁴ See David M. Lampton, "China's Foreign and National Security Policy-Making Process: Is It Changing and Does it Matter?," in *THE MAKING OF CHINESE FOREIGN SECURITY POLICY IN THE ERA OF REFORM, 1978-2000* (David M. Lampton ed., 2001), at 10.

⁴⁶⁵ See KIM (1999), at 74.

⁴⁶⁶ See EVAN S. MEDEIROS, *RELUCTANT RESTRAINT: THE EVOLUTION OF CHINA'S NONPROLIFERATION POLICIES AND PRACTICES, 1980-2004* (2007), at 210.

policy;⁴⁶⁷ and 2.) the efforts of foreign law scholars and practitioners eager to learn, teach, and exploit new business opportunities in China.

In an effort to improve China's position in the international system, one of Deng Xiaoping's first moves was to reverse what Rosemary Foot described as China's "separation from the main currents of international discourse."⁴⁶⁸ Indeed, by the late 1970s, less than one-third of officials serving on the Supreme People's Court had any legal training, let alone training in foreign and international law.⁴⁶⁹ To join the international dialogue, Beijing recognized the need for an expert class of legal scholars. The lack of legal expertise was first addressed with the introduction of the entrance examination system for universities. To supplement the return of higher education, Beijing also, for the first time, opened its doors to foreign legal experts. Over the first half of the 1980s, foreign legal scholars entered China on the heels of pioneers like Jerome Cohen, who was invited to live in China and lecture on the fundamentals of U.S. law in 1979.⁴⁷⁰ Cohen's successful arrival in Beijing to teach law and serve as the first Westerner permitted to practice law since 1949 was made possible by the initiative of Xiao Yang, then head of the Beijing Economic Commission and eager to improve the legal resources of China's growing number of

⁴⁶⁷ This is not to say foreign lawyers had no success in affecting policy in China in the previous decade. U.S. lawyers were instrumental in the founding of the U.S.-China Trade, Inc. (the precursor to the U.S.-China Business Council), the first NGO to promote the U.S.-China trade relationship. See Eugene Theroux, "The Formation of the U.S.-China Business Council: A Look at the Score," *CHINA BUS. REV.*, July 1, 1993.

⁴⁶⁸ See FOOT (2000), at 16.

⁴⁶⁹ "江华同志在河南省高级人民法院干部会上的讲话" [Speech of Jiang Hua, Henan Province Higher People's Court], 人民司法 [PEOPLE'S JUDICATURE], (Jan. 1980) ("最高人民法院现有干部三百三十多个人,受过法律教育的有九十七人,你看三分之一都不到").

⁴⁷⁰ See Pamela Kruger, "China's Legal Lion," 29 *THE LAW SCHOOL* 30, 36 (2009).

commerce officials.⁴⁷¹ On Cohen's coattails, foreign legal scholars came from jurisdictions as diverse as the United States, Japan, West Germany, France, and the Netherlands.⁴⁷² In a review of transnational legal exchanges with China written in 1985, Randle Edwards noted that the PRC enthusiastically hosted visits of legal scholars from prestigious U.S. law schools and proved eager to "train a body of Chinese lawyers familiar with U.S. law and legal procedures."⁴⁷³ Despite the lack of any formalized legal structure, these foreign lawyers also opened law firms and quickly emerged as the primary source of legal representation in major transactions.⁴⁷⁴ According to one twenty-five-year veteran of the foreign legal community in Beijing, as early as the 1980s foreign lawyers were actively solicited by government officials to offer technical assistance in legal development and legislative drafting.⁴⁷⁵ "In the wake of the Cultural Revolution," he noted, "they were shorthanded" when it came to domestic legal expertise. "Officials," he continued, "would bring [foreign lawyers] in and subject them to a Socratic dialogue" in order to better understand and absorb foreign legal tools. In the absence of both domestic staff and legal knowledge, foreign lawyers were thus well positioned to introduce large amounts of foreign law. It is likely due to this vulnerability, he observed, that the PRC's first Labor Contract Law so largely mirrored Anglo-American "at-will" legal traditions.⁴⁷⁶

⁴⁷¹ With so few foreign visitors to China during the Mao era, Cohen's first Chinese visa, issued in 1972, was personally approved by Premier Zhou Enlai himself.

⁴⁷² See Han Depei & Stephen Kanter, "Legal Education in China," 32 AM. J. COMP. L. 543 (1984) at 559 (noting other beneficial exchanges such as the visit to the United States of various Chinese law school deans); see also R. Randle Edwards, "Thirty Years of Legal Exchange with China: The Columbia Law School Role," 23 COLUM. J. ASIAN. L. 3 (2009).

⁴⁷³ See R. Randle Edwards, "Legal Training for China Ventures," PLI COMM. LAW & PRACTICE COURSE HANDBOOK SERIES No. 349 (1985), at 305.

⁴⁷⁴ Interview, 9/15/2010.

⁴⁷⁵ Id.

⁴⁷⁶ Now that more Chinese experts are involved in the drafting of law, it is not surprising under the two-tailed model of diffusion that the most recent Labor Contract

In addition to this newfound openness to foreign visitors, Chinese scholars also began going abroad for continued legal education and returning with new legal solutions to address the governance concerns of China's leadership. Sponsored by the U.S.-based Committee on Legal Educational Exchange with China (CLEEC) and the PRC Ministries of Education and Justice, with funding from the Chinn Ho, Ford, and Luce Foundations, as well as the National Endowment for Democracy, as many as seventy-five Chinese law professors from the top Chinese law faculties participated in legal training in the United States between 1983 and 1988, including LL.M. programs at Columbia University, New York University, and elsewhere. Other Chinese scholars attended law schools in Japan, Canada, Europe, and Australia.⁴⁷⁷ By the late 1990s, as many as 250 Chinese academics were provided a U.S. legal education under the sponsorship of CLEEC.⁴⁷⁸

Aided by their extensive exposure to foreign law schools, legal scholars, and legal doctrine, Chinese legal experts supported by CLEEC developed into a formidable source of judicial expertise in China ready to challenge the entrenched positions of the highly controlled state institutions.⁴⁷⁹ Indeed, by 2002, students from the CLEEC program headed at least six of China's top law schools.⁴⁸⁰ Eminent scholars such as Gong Xiangrui of Peking University and Wang Mingyang of China University of Political Science and Law pursued advanced legal education overseas

Law (LCL) is far more affected by socialist labor discourse and thus far more pro-employee than the initial LCL.

⁴⁷⁷ See Mark Sidel, "Dissident and Liberal Legal Scholars and Organizations in Beijing and the Chinese State in the 1980s," in *URBAN SPACES IN CONTEMPORARY CHINA: THE POTENTIAL FOR AUTONOMY AND COMMUNITY* (Deborah Davis, ed. 1995), at 327.

⁴⁷⁸ See Stephenson (2006), at 193.

⁴⁷⁹ See Sidel (1995), at 328.

⁴⁸⁰ See James V. Feinerman, *Human Rights in China in the Context of Rule of Law: Hearing Before the Congressional-Executive Commission on China*, 107th Cong., Feb. 7, 2002, at 60.

and brought back with them novel American doctrines of due process and administrative procedure.⁴⁸¹ It was even noted by several participants that the legal reforms by the 1997 CPL drafters were deeply affected by their common-law training.⁴⁸² This biased exposure also accounts for why reforms in the field of criminal law include so many common-law terms, including intent, reckless, knowledge, negligence, foreseeability, and causation.⁴⁸³

In addition to these early efforts, the State Council's Bureau of Legislative Affairs (BLA) reached out to the United Nations Development Programme to request a foreign consultant to assist the training of Chinese legislative drafters in foreign law. The extensive training that resulted included three summer workshops involving as many as 300 BLA drafters and many foreign advisors, primarily from the United States. In addition, 180 participants were sent on two-week overseas study tours and 50 more were sent to a 4-month course in law at Boston University.⁴⁸⁴

ii. Engagement

Overlapping with the creation of China's transnational legal community in the decade following Deng's ascension to power, China's legal community began formally engaging with the transnational epistemic community of legal scholars in the late 1980s. Central to the institutionalization of this engagement was the explosion in the number of law schools in China, rising from as few as two in 1977 to more than

⁴⁸¹ See 龚祥瑞 [Gong Xiangrui], 比较宪法与行政法 [COMPARATIVE CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW], (1985); 王名扬 [Wang Mingyang], 英国行政法 [BRITISH ADMINISTRATIVE LAW], (1987); see also He Haibo, "The Dawn of the Due Process Principle in China," 22 COLUM. J. ASIAN L. 57 (2008).

⁴⁸² Interview, 9/7/2010; 9/13/2010.

⁴⁸³ See Luo (1998), at 17; Ian Dobinson, "Criminal Law," in INTRODUCTION TO CHINESE LAW (Wang Chenguang & Zhang Xianchu eds., 1997), at 110.

⁴⁸⁴ See A. Seidman and R.B. Seidman, "International Transfer Knowledge about Law—Lessons from China and the Lao People's Democratic Republic," 3 YEARBOOK OF LAW & LEGAL PRACTICE IN EAST ASIA 1 (1998).

100 by the time of the 1997 revisions.⁴⁸⁵ China's national pool of only 600 law students quickly numbered in the thousands.⁴⁸⁶ These institutions and their students, both of which attracted considerable attention from the transnational legal epistemic community, served as nodes of norm diffusion by engaging deeply with various foreign bar associations, funding organizations such as the Ford Foundation, and numerous other non-state actors. China law scholars from American institutions like Jerome Cohen, Stanley Lubman, and William Alford, were particularly well suited and eager to engage with their Chinese counterparts, having already invested years in educational exchanges with Taiwan.⁴⁸⁷ Some of their counterparts in Beijing, including Rui Mu, were eager to reciprocate with visits to the United States. Rui's post-Mao visit to Columbia University was his first since 1948.⁴⁸⁸ Such efforts to engage the Chinese legal academics achieved even greater penetration with the support of CLEEC, who financed the creation of law libraries and legal information in print and electronic form during this period.⁴⁸⁹

Like Rui, by the mid-to-late 1980s, rank-and-file members of the Legislative Affairs Commission were also sent abroad to observe their foreign counterparts.⁴⁹⁰ In addition, a small number of foreign nongovernmental organizations were allowed to form institutional relationships and exchanges with Chinese think tanks that housed dedicated legal research programs such as the Chinese Academy of Social Sciences

⁴⁸⁵ See John W. Head, "Feeling the Stones when Crossing the River: The Rule of Law in China," 7 SANTA CLARA J. INT'L L. 25, 72 (2010).

⁴⁸⁶ See He Weifang, "China's Legal Profession: The Nascence and Growing Pains of a Professionalized Legal Class," 19 COLUM. J. ASIAN L. 138 (2005), at 145.

⁴⁸⁷ Edwards (2009), at 4.

⁴⁸⁸ Id. at 6.

⁴⁸⁹ See Feinerman (2002), at 60.

⁴⁹⁰ Interview, 9/10/2010. This practice has ended due to the cost and perceived availability of foreign law through online resources such as Westlaw, LexisNexis, and Hein Online.

(CASS).⁴⁹¹ In 1988, the Ford Foundation, with its well-funded program dedicated to comparative legal research, became the first international NGO to establish an office in China.⁴⁹² The following year, the U.K. Department for International Development initiated a twenty-year project to train Chinese attorneys in the United Kingdom. As agreed to in a memorandum of understanding—signed by the Ministry of Justice, the All China Lawyers Association, the Office of the Lord Chancellor, and the China Law Council of the British Law Society—the School of Oriental and African Studies in London accepts fifteen Chinese attorneys each year for classroom training and practical experience in the offices of a British solicitor and barrister.⁴⁹³ Through this program alone as many as 280 Chinese lawyers have gained extensive international legal experience. In this way, Beijing in the 1980s was answering Chen Guangzhong’s early calls to “fill the gaps in Chinese criminal procedure law by learning from foreign criminal procedure law” (“提出通过借鉴国外刑事诉讼法学的理论成果填补中国刑事诉讼法学基本理论空白的想法”).⁴⁹⁴ As the dean of one of China’s most prestigious law schools noticed, this experience had a direct effect on the development of Chinese law: “It was obvious that those who went abroad have drawn from those experiences [in their legislative drafting work].”⁴⁹⁵

⁴⁹¹ See Jillian S. Ashley & He Pengyu, “Opening One Eye and Closing the Other: the Legal and Regulatory Environment for ‘Grassroots’ NGOs in China Today,” 26 B.U. INT’L L.J. 29 (2008).

⁴⁹² See Yin Deyong, “China’s Attitude toward Foreign NGOs,” 8 WASH. U. GLOBAL STUD. L. REV. 521 (2009), at 522.

⁴⁹³ See *Lord Chancellor’s Scheme for Young Chinese Lawyers*, British Council, available at: <http://www.britishcouncil.org/china-society-access-to-justice-letsyounglawyer.htm>.

⁴⁹⁴ 陈光中 [Chen Guangzhong], 加强对刑事诉讼法学:基本理论问题的研究和开拓 [STRENGTHENING CRIMINAL PROCEDURE LAW: BASIC THEORETICAL PROBLEMS AND DEVELOPMENT], (1984); 陈瑞华 [Chen Ruihua], 二十世纪中国之刑事诉讼法学 [Twentieth Century Criminal Procedure in China], 中外法学 [FOREIGN LAW], (June 1996).

⁴⁹⁵ Interview, 9/10/2010.

Additional European efforts to expose China to foreign law were later pronounced by Article 177.2 of the Treaty Establishing the European Community, which declares that it is community policy to develop the rule of law around the world.⁴⁹⁶ Europe's early efforts to do so then expanded dramatically after the passage of Council Resolution 443/92, a resolution establishing financial and technical legal assistance to developing Asian states.⁴⁹⁷ Europe's goal of engaging and persuading their Chinese counterparts in matters of legal reform was made transparent by the statements of EU officials: "China's political importance makes its stability of great concern both to its neighbors and to the world community at large. We believe that this stability is best served by political, economic, and social reform in line with international norms."⁴⁹⁸ As David Lampton noted with respect to China's IR community, such an increasing exposure to foreign legal advocates led China's community of legal scholars to "search ever more broadly for information upon which to fashion decisions."⁴⁹⁹ The comparable professionalization of China's legal scholars and the expanding exposure to foreign law meant that "the instruments of this search are multiplying, as is the distance from the Center at which information is being sought."⁵⁰⁰ In addition to these European agents, U.S. groups established in Beijing and providing technical Rule of Law assistance include International Bridges to Justice, the American Bar Association's Rule of Law Initiative, the Natural Resources Defense Council, the Carter Foundation, and numerous others. The assistance these groups came to offer ranged from legal briefing techniques to the drafting of full

⁴⁹⁶ See CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY art 177.2, Dec. 29, 2006, 2006 O.J. (C 321E).

⁴⁹⁷ See COUNCIL REGULATION 443/92 (Feb. 25, 1992).

⁴⁹⁸ See COMMUNICATION OF THE COMMISSION: A LONG-TERM POLICY FOR EUROPE-CHINA RELATIONS (1995), available at: http://ec.europa.eu/comm/external_relations/china/com95_279en.pdf.

⁴⁹⁹ See LAMPTON (2001), at 28.

⁵⁰⁰ See *id.* at 28.

provisions of law.⁵⁰¹

To entrench this expanding pool of domestic legal expertise still further, the early 1990s witnessed the rapid expansion of China's legal educational institutions, much of which was modeled on American law schools. In 1993, officials from the Ministry of Justice and the Ministry of Education pooled their efforts to improve legal education in the PRC through a study of various foreign legal education programs, but most especially the American juris doctorate graduate degree program.⁵⁰² As Huo Xiandan explains, legal reformers were keen to “draw lessons [for China's juris master model] from the success of legal education in the United States” (“注意借鉴美国的JD教育的成功经验”).⁵⁰³ The Academic Degree Committee of the State Council, the Ministry of Education, and the Ministry of Justice approved the model in 1993. By that year, China's efforts to professionalize its legal community amounted to as many as 135 law schools or departments, 114 schools of higher education providing law training, and 58 judicial and public security schools.⁵⁰⁴ This effort to “Americanize” its legal education system has continued, most recently with the imposition of certain requirements for legal faculty in China. In 2010, for example, the Beijing University of Transnational Law announced the requirement that candidate professors have a “native fluency” in English and hold a JD degree, which as few as three countries outside the United States award. Such a requirement, which was

⁵⁰¹ Interview, 9/16/2010.

⁵⁰² 霍宪丹 [Huo Xiandan], “教育:以法治国的人才库—中国法律硕士专业学位(JM)教育的探索与改革” [JM Education: The Brain Bank for Ruling the Country According to Law--Probing and Exploring China's Juris Master Professional Degree (JM) Education], 7 中国律师 [CHINA LAWYER] 58, 59 (2002).

⁵⁰³ Id.

⁵⁰⁴ 霍宪丹 [Huo Xiandan], “法硕复习报考指导” [LL.M. Candidates Review Guide], available at: <http://bbs07.kaoyan.com/t266379p1> (last visited: 6/4/2010); 中国法律年鉴 [YEARBOOK OF CHINESE LAW] (Beijing 2002).

possibly introduced in order to secure ABA accreditation, nonetheless entrenches the role of legal scholars serving as conduits of foreign law in China.

iii. Professionalization

In the final stage in the development of China's transnational epistemic community of legal scholars, the late 1980s and early 1990s witnessed the professionalization of a "cosmopolitan"⁵⁰⁵ community of legal elites with access to both foreign legal expertise as well as domestic decision-makers. Attempts to professionalize this elite corps began with the introduction of the National Bar Examination in 1987. However, given the persistently low passage rates among takers of this exam (less than seven percent in 2002),⁵⁰⁶ many of China's law graduates went on to non-attorney positions in various corners of the Chinese bureaucracy, thereby diffusing this legal knowledge throughout the bureaucratic apparatus.⁵⁰⁷ Just as in Evan Medeiros's description of the professionalization of China's epistemic community of international relations experts, these graduates, trained in various aspects of law, spread out through the halls of various powerful branches of government, including the judiciary, procuracy, the Ministries of Justice and Public Security, NPC and State Council support offices like the Legislative Affairs Commission and Legislative Affairs Office, as well as the academic community. As one respondent similarly noted, many members of LAC, the body primarily responsible for legislative drafting, often have advanced legal degrees, extensive legal experience abroad, and considerable exposure to the transnational legal actors that

⁵⁰⁵ See David M. Lampton, "China's Foreign and National Security Policy-Making Process: Is it Changing, and Does it Matter," in *THE MAKING OF CHINESE FOREIGN AND SECURITY POLICY IN THE ERA OF REFORM, 1978-2000* (David M. Lampton ed., 2001), at 28.

⁵⁰⁶ 陈焱 [Chen Yan], "36万人考2.4万过线 司考录取比例低不低" [360,000 Take the Test, 24,000 pass—Are Passage Rates Low?], available at: <http://www.eol.cn/article/20020702/3060542.shtml>.

⁵⁰⁷ Interview, 9/20/2010.

flock to Beijing.⁵⁰⁸

With the continued institutionalization of transnational legal exchanges among legal professionals in China, the socialization of China's leading law scholars overseas has likewise continued apace. Among the top ten law schools in China today,⁵⁰⁹ at least eight are directed by deans with extensive experience overseas in the form of serving as visiting scholars (7),⁵¹⁰ publishing in English international law journals (3),⁵¹¹ or receiving a legal education (2).⁵¹² The transnational socialization of Chinese

⁵⁰⁸ Interview, 9/7/2010.

⁵⁰⁹ 武书连, 吕嘉, & 郭石林 [Wu Shulian, Lü Jia & Guo Shilin], "2007中国大学法学A等学校" [A-List Law Schools in China], Aug. 1, 2007, available at: <http://edu.sina.com.cn/1/2007-01-08/1747136912.html>.

⁵¹⁰ Zhu Suli, Dean of Beijing University School of Law, served as a visiting scholar at Cornell Law School; Han Dayuan, Dean of the People's University School of Law, served as a visiting scholar at Harvard Law School; Xiao Yongping, Dean of Wuhan University School of Law, served as a visiting scholar at the University of Birmingham and the Max-Planck Institute of Foreign Law and Private International Law; Wang Zhenmin, Dean of Tsinghua University School of Law served as a visiting scholar at Harvard Law School, the University of Hawai'i, Southern Methodist University, and the University of Melbourne. Huang Jin, Dean of the China University of Political Science and Law, served as visiting scholar at Yale University School of Law; Yao Jianzong, Dean of Jilin University, served as a visiting scholar at the London School of Economics; Sun Nanshen, Dean of Fudan University School of Law, served as a visiting scholar at the University of Wisconsin and the University of Glamorgan (UK).

⁵¹¹ See Zhu Suli, "Political Parties in China's Judiciary," 17 *DUKE J. COMP. & INT'L L.* 533 (2007); Zhu Suli, "Perspectives on Contemporary Legal Developments in Chinese Law 'Federalism' in Contemporary China—a Reflection on the Allocation of Power between Central and Local Government," 7 *SING. J. INT'L & COMP. L.* 1 (2003); Xiao Yongping, "Selected Topics on the Application of the CISG in China," 20 *PACE INT'L L. REV.* 61 (2008); Huang Jin, "Private International Law in the Chinese Judicial Practice in 2001," 2 *CHINESE J. INT'L L.* 387 (2003); Huang Jin, "Chinese Judicial Practice in Private International Law," 4 *CHINESE J. INT'L L.* 647; Huang Jin, Du Huanfang, "Chinese Judicial Practice in Private International Law: 2003," 7 *CHINESE J. INT'L L.* 227 (2008); Huang Jin, "Chinese Judicial Practice in Private International Law: 2006," 8 *CHINESE J. INT'L L.* 715 (2009).

⁵¹² Zhu Suli, Dean of Beijing University School of Law received an M.A. and Ph.D. from Arizona State University, as well as an LL.M. from McGeorge School of Law. Sun Xiaoshuang, Dean of Zhejiang University School of Law received an LL.M. in international property law from the University of Edinburgh.

legal practitioners has likewise become entrenched during the professionalization of China's legal community. With large Anglo-American law firms having led the way during the resurrection of the legal profession in China, the Anglo-American culture of lawyering has very much taken root among Chinese legal professionals in Beijing and elsewhere in China.⁵¹³ The early influence of Western law firms, one American lawyer in Beijing noted, established a "percolation of knowledge" about common law legal traditions and ways of lawyering. "We were there before they were," he noted, "and so we have very much affected what has come since."⁵¹⁴

The professionalization and stabilization of such an extensive body of foreign legal knowledge in China, spread broadly throughout the politico-legal system, was made possible in large part by the settling of the regime's commitment to economic development and the requisite transnational legal knowledge such growth requires.⁵¹⁵ This commitment, however, which was entrenched by Deng's *nanxun* and the subsequent leadership of figures such as Zhu Rongji, was visible even as early as 1985 with the decision of the State Council to conform its copyright system to two principal international copyright conventions, the Berne Convention and the Universal Copyright Convention. During this lead up to the ultimate promulgation of the law in 1990, the drafting committee of the National Copyright Administration solicited the advice of several international legal experts and even submitted a draft for comment to the leadership of the World Intellectual Property Organization.⁵¹⁶

Similar Chinese legal development projects supported by expertise abroad included the first legal aid clinic modeled on the U.S. law school format funded by the Ford Foundation in 1992, three years after the opening of their first branch office in

⁵¹³ Interview, 9/15/2010.

⁵¹⁴ *Id.*

⁵¹⁵ Interview, 9/7/2010.

⁵¹⁶ ZHENG CHENGSI & MICHAEL PENDLETON, *COPYRIGHT LAW IN CHINA* (1991), at 66.

China.⁵¹⁷ This type of clinical legal training, often described as an originally American phenomenon, quickly spread among Chinese law schools around the country.⁵¹⁸ Other foreign legal development efforts in China included: Ford Foundation grants to improve the law-drafting capabilities of the Legislative Affairs Commission; exchanges led by the U.S.-Asia Law Institute to provide drafting advice to the Ministry of Labor, which sought assistance in the drafting of a forthcoming general labor law; and formalized transnational relationships with the Ministry of Justice, the Supreme People’s Court, the mainland-based International Academy of Trial Lawyers, and the All China Lawyers Association, which functions as China’s bar association.⁵¹⁹ These efforts were given further support in the mid 1990s with the establishment in the United States of the rule-of-law initiative and the creation of the post of special coordinator for global rule of law within the U.S. Department of State.⁵²⁰ Together, respondents noted, the efforts of these foreign organizations—which range from matters as diverse as criminal law, raised by advocates from the Yale China Law Center, to private and commercial law—have shaped the legal mindsets of China’s legal elite.⁵²¹

Finally, awareness of foreign law among China’s legal professionals has been entrenched still further by the extensive overseas training of China’s next generation of legal scholars, a generation which has, one member noted, “has enjoyed far more

⁵¹⁷ See Center for Protection of the Rights of Disadvantaged Citizens of Wuhan University, *For a Society of Justice and Fair Judgments to the Disadvantaged* (pamphlet).

⁵¹⁸ See Pamela N. Phan, “Clinical Legal Education in China: in Pursuit of a Culture of Law and a Mission of Social Justice,” 8 *YALE HUM. RTS. & DEV. L.J.* 117 (2005); Ji Weidon, “Legal Education in China: A Great Leap Forward of Professionalism,” 2004 *KOBE. UNIV. L. REV.* 1, 13 (2004).

⁵¹⁹ See Ron Brown, “Legal Exchange with China,” 1995 *HAW. B.J.* 22 (1995).

⁵²⁰ See Stephenson (2006), at 194.

⁵²¹ Interview, 9/7/2010.

opportunities to go abroad.”⁵²² As estimated by another member of this generation, who himself studied in Europe, roughly fifty percent of China’s elite legal scholars go abroad for advanced legal study.⁵²³ Another member noted that, if disaggregated, as many as ninety percent of top law professors younger than fifty years of age have overseas legal experience.⁵²⁴ Moreover, one respondent surmised, at least ninety percent of scholars involved in legal drafting speak and read English. This great exposure to foreign law, he noted, results in a greater appreciation for and acceptance of foreign legal norms.⁵²⁵ Indeed, various respondents noted that they had incorporated the law learned abroad into their work at home.⁵²⁶ One respondent described her experiences as a visiting scholar at the Vern Institute of Justice, a New York-based criminal procedure think tank and advocate of empirical legal studies. This experience, she noted, resulted in the adoption of a pilot law project in China and has attracted positive responses from Beijing officials. In addition, she recalled being exposed by Vern colleagues to U.S. jurisprudence on criminal law and mental health. This exposure, she noted, may significantly affect upcoming reforms adopted in the wake of the recent “cop killer” event in Shanghai. Such foreign influence continues after these professionals return home to China and continue to read U.S. legal publications through Hein Online, which nearly every respondent noted as a significant influence, and various foreign legal blogs, which Chinese scholars view through internet providers that evade the government-enforced firewall.⁵²⁷

The domestic impact of such exposure of China’s legal elite to foreign law was recently made clear at the highest levels of the Chinese court system when the

⁵²² Id.

⁵²³ Interview, 9/7/2010.

⁵²⁴ Interview, 9/13/2010.

⁵²⁵ Interview, 9/7/2010.

⁵²⁶ Id.

⁵²⁷ Interview, 9/20/2010.

Supreme People's Court was faced with a novel civil claim sought by a woman whose life was parodied in a television drama. With no clear Chinese law providing for such protections of primacy, the Court invited various scholars to brief them on how to proceed. One such scholar, who had extensive experience with U.S. jurisprudence, introduced novel legal arguments from U.S. case law favoring reputational and privacy rights. The Court, persuaded by the scholar, found in favor of the plaintiff.⁵²⁸ In another recent instance, courts have begun issuing restraining orders to help combat domestic violence against women. The arrival of this legal device in China is largely due to the efforts of Chen Min, an attorney affiliated with a think tank attached to the Supreme People's Court and who studied in Canada, where she was first exposed to such injunctions.⁵²⁹ Yet another recent example of foreign legal influence can be seen in pilot programs led by Chinese scholars of U.S. environmental law scholarship to relax the standing rules applied by certain environmental tribunals. As one director of a transnational legal assistance organization described, "a lot if not all cases [of successful reform] comes in part from exposure [to international and foreign law]."⁵³⁰ The following section examines the writings of Chinese legal observers during the course of this professionalization and sheds light on how foreign law was discussed in the years prior to the reform of China's criminal procedure laws.

IV. Legal Discourse in Chinese Periodicals

During the lengthy process of reforming China's criminal procedure law, legal journals throughout China published articles both supportive of and resistant to the prospect of expanding defendant rights. Figure 3.2, which depicts frequency counts of articles concerning the eight key criminal procedure reforms that were published in

⁵²⁸ Interview, 9/10/2010.

⁵²⁹ Id.

⁵³⁰ Interview, 9/10/2010.

Chinese legal and political journals, presents a useful comparison illustrating how the political landscape surrounding criminal procedure changed in the years prior to the passage of the 1997 CPL.

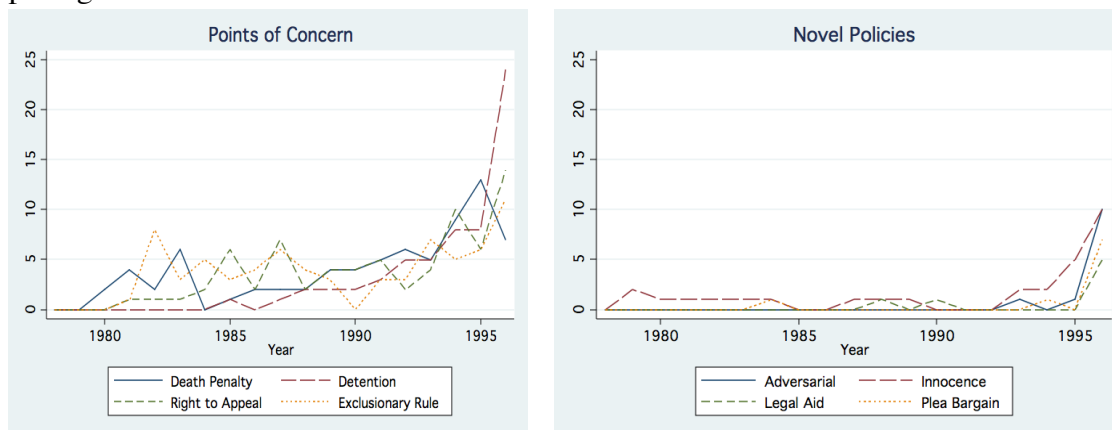


Figure 3.2. *Legal Discourse in Post-Mao China*

The graphs above depict articles related to criminal procedure that include in-depth discussions of particular policies.⁵³¹ With respect to “points of concern,” one can see that Chinese legal commentators participated in active discussions of certain policies throughout the entire post-Mao period, even in the years preceding the arrival of transnational legal advocates in the late 1980s. These contested policies *qua* points of concern—death penalty, detention, the exclusion of unlawfully obtained evidence, and the right to appeal—generated debate as early as the passage of the 1979 CPL and continued all the way through the to the eventual revision of that law in 1997. The persistence of this discussion suggests that once legislators were presented a draft of the 1997 CPL, those resistant to pro-defendant reforms could draw from the extensive vocabulary of opposition generated over the previous years.

⁵³¹ To determine which articles discussed the topics in detail, I searched for multiple mentions of the policy in question in both the abstracts and full texts of all articles related to criminal procedure published in politico-legal periodicals compiled by the China Academic Journals database.

With respect to novel policies, however, it is clear that those policies that did ultimately survive the drafting process—the presumption of innocence, the right to legal aid, plea bargaining, and adversarial procedure—were far less salient in China’s legal discourse in the years prior to CPL reform. These novel policies and challenges to entrenched practices do not often appear in the pages of journals until the early 1990s when domestic and transnational advocates place them on the agenda. Opponents of these reforms thus had little extant discourse with which to resist those policies and the persuasive foreign reasoning raised in support of them.⁵³² One respondent directly familiar with legal drafting in China noted that it is these novel issues that attract the most thorough considerations of foreign law. “We always,” he noted, “resort to foreign law when presented with a new issue.”⁵³³

Before conducting a more rigorous content analysis of Chinese legal discourse in the following Chapter, it is worth first conducting an additional plausibility probe through a manual survey of these Chinese legal periodicals to see if the two-tailed model of diffusion supplies any analytical leverage in the context of Chinese criminal procedure reform. The following subsections examine the discourse of legal analyses of criminal procedure law published in major Chinese publications prior to the 1997 CPL reform. As Allen Carlson similarly noted in the context of Chinese interpretations of the norm of sovereignty, such a survey of influential publications provides a useful discursive measure of how elite political actors viewed Chinese legal reform at the time.⁵³⁴ Moreover, by examining the observations of China’s leading legal scholars and practitioners in the original Chinese, and intended for Chinese audiences, such a survey avoids the selection problem of reading only English-

⁵³² Interview, 9/7/2010.

⁵³³ Interview, 9/10/2010.

⁵³⁴ See ALLEN CARLSON, *UNIFYING CHINA, INTEGRATING WITH THE WORLD* (2005), at 22-23.

language publications that are repackaged for foreign audiences. As Daniel Lynch has observed, such primary source material better meets the call by Thomas Christensen, Alastair Iain Johnston, and Robert Ross to “see China and the world the way that influential Chinese see China and the world.”⁵³⁵ While of course, Lynch notes, “there is no straight line from what elites say and write to what China will actually do,” a survey of Chinese language materials by the relevant Chinese actors nonetheless reveals important insights into what the political environment is actually like.⁵³⁶ As described in the subsections below, the writings of Chinese legal observers further suggest a tension between extant discourse and the adoption of foreign legal norms and confirm, as one Chinese lawyer described, that “China certainly has a legal culture, but certain parts can be influenced by foreigners.”⁵³⁷ At the same time, moreover, the texts show many of the same scholars adopting foreign legal discourse to frame new legal protections or challenge entrenched legal practices rather than localizing the norm within existing Chinese legal practices.

a. Points of Concern in Chinese Legal Discourse

In the immediate aftermath of Deng’s ascension to power, Chinese legal observers were quick to recognize the need for a new legal regime. As Zhang Zipei displayed as early as 1979 in the pages of *Legal Research*, Chinese legal scholars generally agreed with the pronouncement of the Third Plenum that “There must be laws to follow, and the laws must be strictly observed” (“有法可依,有法必依”).⁵³⁸

⁵³⁵ See David Lynch, *Chinese Thinking on the Future of International Relations: Realism as the Ti, Rationalism as the Yong?*, 197 CHINA QUARTERLY 87 (2009), at 91 (quoting Thomas Christensen, Alastair Iain Johnston, and Robert Ross, *Conclusions and Future Directions*, in Johnston and Ross eds., *NEW DIRECTIONS IN THE STUDY OF CHINA’S FOREIGN POLICY* (2006), at 380.

⁵³⁶ *Id.*

⁵³⁷ Interview, 9/5/2010.

⁵³⁸ See 张子培 [Zhang Zipei], “论刑事诉讼法的指导思想” [The guiding Ideology of the Criminal Procedure Law], 法学研究 [LEGAL RESEARCH], 1979.

How to answer this call, however, varied by policy. Even in articles promoting the introduction of foreign adversarial procedures such as the participation of defense counsel in the collection and presentation of evidence, much of the discourse resonated with China's traditional pro-state position in which "criminal procedure is designed to safeguard the socialist legal system" ("刑事诉讼目的都是为了维护社会主义法制").⁵³⁹ Many observers advocated instead for the consideration of China's "specific experience" ("具体经验")⁵⁴⁰ and of the need, as described Zhang Guoqing, a professor of law at Peking University (Beida), to consider the "concrete practice of China's criminal procedural experience" ("结合我国刑事诉讼的具体实践经验").⁵⁴¹ Even more pointedly, scholars such as Yue Liling of the China University of Political Science and Law (CUPL) and Chen Ruihua of Beida, cautioned against "blind legal transplants that belittle [their] laws" (盲目地进行法律移植和对本国法律的妄自菲薄).⁵⁴²

On matters about which China already possessed an extant discourse—e.g. the right to appeal, the exclusion of evidence unlawfully obtained, and the death penalty—opponents of pro-defendant reforms were quick to voice their opposition, claiming the protection of a "criminal procedure system with Chinese characteristics" ("中国特色的刑事诉讼制度和体系") that is reluctant to extend legal protections to criminal

⁵³⁹ 李文君 [Li Wenjun], "律师应当享有收集刑事证据的权利" [Counsel Should Have the Right to Collect Evidence], 当代法学 [CONTEMPORARY LEGAL STUDIES], (Apr. 1994).

⁵⁴⁰ See Zhang Zipei (1979).

⁵⁴¹ See 张国庆 [Zhang Guoqing], "论刑事诉讼中公、检、法三机关的关系" [On Criminal Proceedings, the Public Prosecutor, and the Relationship Between the Three Organs], 洛阳大学学报 [LUOYANG UNIVERSITY JOURNAL], (Sept. 1994).

⁵⁴² 岳礼玲 & 陈瑞华 [Yue Liling & Chen Ruihua], "刑事程序公正的国际标准与修正后的刑事诉讼法" [International Standards of Criminal Due Process and the Amended Criminal Procedure Code], 政法论坛 [POLITICAL SCIENCE & LAW], (Mar. 1997).

defendants (“强调防卫行为只有在明显超过必方 与犯罪分子的对抗日益加剧”).⁵⁴³ Likeminded scholars such as Xia Youping of Fudan University noted that “all criminal proceedings are rooted in the appropriate socio-economic, political, environmental, and historical background” (“任何刑事诉讼模式,都根植于相应的社会经济,政治环境和历史背景”) marked by China’s “unique cultural traditions” (“独特的文化传统印记”).⁵⁴⁴ He notes that this background, as well as China’s resistance to foreign efforts to influence legal reform, dates back at least to the Qing Dynasty (“从清末到民国所引进和移植的外域诉讼制度,由于受到中国传统诉讼文化的顽强抵抗而难于对其产生影响”).⁵⁴⁵ By his description, Chinese resistance to the importation of certain procedures stems from the “inner spirit and external style” (“内在精神和外在样式”) of Chinese law, an argument not dissimilar from Bordieau’s *habitus*.⁵⁴⁶

Issues about which Chinese legal observers were most likely to raise concerns regarding the adoption of foreign rules were those about which there was already a long-standing discourse, such as the right to appeal and the exclusion of evidence unlawfully obtained. These authors claim the suitability of existing Chinese procedures, noting that the “procedural errors are few” and that there need not be such external checks on the traditional cooperation among the procuratorate, prosecutor, and court (“法三机关 互相配合做得好,工作效率就高,错误就少”).⁵⁴⁷ Moreover,

⁵⁴³ 王芳 & 王浩任 [Wang Fang & Wang Haoren], “立法民主的体现 人民意志的结晶” [New Legislation Reflects the Crystallization of Democratic Reforms], 人大建设 [PEOPLE'S CONGRESS CONSTRUCTION] (Aug. 1997).

⁵⁴⁴ 谢佑平 [Xie Youping], “刑事诉讼模式评论” [Criminal Procedure Reviews], 云南大学学报(法学版) [JOURNAL OF YUNNAN UNIVERSITY (LAW EDITION)] (Feb. 1996).

⁵⁴⁵ 谢佑平 [Xie Youping], “谈中国诉讼法制的现代化” [Discussion of the Modernization of Legal Proceedings in China], 学习与探索 [STUDY AND EXPLORE], (Jan. 1993).

⁵⁴⁶ Id.

⁵⁴⁷ Zhang (1994).

these scholars attest that Chinese traditions concerning such rules have always emphasized procedural law as a source of “social control” (“社会控制”), and that such a pro-state approach is “to a large extent inherited and reflects [China’s] history and traditional cultural requirements” (“在很大程度上继承和反映了这一历史文化传统的内涵和要求”).⁵⁴⁸ This link to China’s procedural past, Xie Youping claims, “cannot be broken” (“不可割裂的联系”), nor should procedural reforms erase the “differences reflected in Chinese and Western models of criminal procedure law” (“区别的显著的差别表现在中国与西方刑事诉讼模式”).⁵⁴⁹ Chinese criminal procedure law, it follows, “cannot leave [its] national conditions” (“我国刑事诉讼模式选择不能离开我国的国情”).⁵⁵⁰

Many other authors appeared similarly reluctant to import certain procedural devices that challenged extant “points of concern.” Song Yinghui, a professor of law at CUPL who otherwise lauds China’s adoption of a “right to silence” (“沉默权”), “Anglo-American plea-bargaining” (“英美国家的辩诉交易”), and “the Anglo-American adversarial system” (“英美当事人主义的引进”), nonetheless notes that “the more difficult question is whether we should give victims the right to appeal” (“困难的问题是应否赋予被害人上诉权”).⁵⁵¹ Moreover, in order to support his argument that China should not introduce the exclusionary rule, the author misstates the application of the doctrine in the United States, stating that the rule has resulted in countless acquittals and “greatly inhibited criminal punishment” (“这就极大地抑制了刑事诉讼在惩治犯罪方面的功能”).⁵⁵² Other authors similarly misstate facts in order

⁵⁴⁸ Xie (1996).

⁵⁴⁹ Xie (1996).

⁵⁵⁰ 幸海 [Xing Hai], “两大法系刑事诉讼价值” [The Value of Two Theories of Law], 法学评论 [LEGAL THEORY], (Feb. 1995).

⁵⁵¹ 宋英辉 [Song Yinghui], “论我国刑事诉讼制度改革” [On the Reform of Criminal Procedure], 政法论坛 [POLITICS AND LAW], (May 1995).

⁵⁵² Song (1995).

to raise opposition to reforms directed toward contested practices, including the number of countries that retain the death penalty. One such scholar advocating against the abolition of the practice does so by arguing falsely that “a majority of the countries in the world retain [capital punishment]” (“目前世界上保留死刑的国家仍稍占多数”).⁵⁵³ Scholars such as Wang Jianmin similarly noted that “the approach to capital punishment within party and the country” (“我们党和国家对待死刑”) has deep roots that should not be uprooted.⁵⁵⁴ Even reform-minded scholars such as Chen Guangzhong of CUPL did not support its abolition, stressing instead the “ancient history” of the practice in China dating back to the Sui dynasty (“死刑制度正式开始于隋朝”).⁵⁵⁵ It is thus not surprising that many of the rules governing the administration of the death penalty were lifted out of the CPL reform process and shifted to administrative regulations, a move that often occurs “in controversial areas where a consensus among the drafters or between powerful interest groups has not been forged.”⁵⁵⁶

b. Novel & Entrenched Practices in Chinese Legal Discourse

As anticipated by the two-tailed model of norm diffusion, however, appeals to national tradition and resistance to the importation of foreign law were less

⁵⁵³ 阮学智 [Ruan Xuezhi], “新刑法简介及评析” [Introduction and Evaluation of the new Criminal Code], 人民政坛 [PEOPLE'S POLITICAL TRIBUNE], (June 1996). In fact, more than two-thirds of countries have abolished the death penalty in law or in practice. See Amnesty International, Abolish the Death Penalty, available at: <http://www.amnesty.org/en/death-penalty>.

⁵⁵⁴ See 王建民 [Wang Jianmin], “试论被害人陈述” [On the Victim's Statement], 政法论坛 [POLITICAL SCIENCE AND LAW TRIBUNE], (Apr. 1987). See also “江华同志在河南省高级人民法院干部会上的讲话” [Speech of Jiang Hua, Henan Province Higher People's Court], 人民司法 [PEOPLE'S JUDICATURE], (Jan. 1980) (stressing that China should not abolish the death penalty (我们不废除死刑)).

⁵⁵⁵ 陈光中 [Chen Guangzhong], “中国古代的上诉、复审和复核制度” [The Ancient Chinese Appeal System], 法学评论 [LAW REVIEW], (Jan. 1983).

⁵⁵⁶ See Corne (2002), at 375.

pronounced in Chinese legal periodicals discussing novel legal procedures or proposals to reform entrenched cultural practices. Moreover, such discussions did not attempt to localize those reforms with existing Chinese legal practices. Indeed, many scholars spoke positively of the human rights protections afforded by modern criminal procedure, noting that those rights stand as the central “purpose of criminal procedure law in modern civilized countries” (在现代文明国家刑事诉讼法的任务,是在强调...人权的保护), a category of which China was attempting to become a member.⁵⁵⁷ Several scholars, including Yue Liling of CUPL and Chen Ruihua of Beida, even noted and bemoaned the efforts of legal nationalists who “think the so-called international standards of fair trial of certain Western countries are actually tools to impose legal standards on developing countries” (“有人认为,所谓公正审判的国际标准实际上是些西方国家通过联合国的法律文件强加给发展中国家的法律标准”) and who likewise “insist that in the field of criminal justice there do not exist any ‘international’ or ‘basic standards,’ only ‘national conditions’” (“在刑事审判领域根本不存在什么“国际标准”,“最低标准”或“基本标准”每一个国家都有自己的国情”).⁵⁵⁸ Such legal nationalists and localizers of foreign norms, they note, “ignore the universality of criminal justice” (“它们忽视了各国刑事审判制度的普遍性和共性”).⁵⁵⁹

Many of the same legal observers who protested the adoption of Western transplants contrary to China’s criminal justice traditions cited in the previous

⁵⁵⁷ 吴家玉 & 杨树君 [Wu Jiayu & Yang Shujun], “刑事诉讼法的人权保障” [The Human Rights Protections of Criminal Procedure Law], 牡丹江师范学院学报 [MUDANJIANG NORMAL UNIVERSITY JOURNAL], (March 1997).

⁵⁵⁸ 岳礼玲 & 陈瑞华 [Yue Liling & Chen Ruihua], “刑事程序公正的国际标准与修正后的 刑事诉讼法” [International Standards of Criminal Due Process and the Amended Criminal Procedure Code], 政法论坛 [POLITICAL SCIENCE & LAW], (Mar. 1997).

⁵⁵⁹ Id.

subsection nonetheless voiced enthusiastic support for the novel reforms proposed by the 1997 CPL. Moreover, they did so without attempting to localize the reforms and even while noting expressly that such reforms “were transplanted from the West” (“都是从西方借鉴和移植”) and based “on the Western system of litigation” (“西方诉讼模式内部来说”).⁵⁶⁰ More specifically, they noted with praise that the “draft amendment references and absorbs the experiences of foreign countries” (“草案的重大改革,参考和吸收了外国的经验”) and serves to further integrate China into the international system of legal norms and practices (“国际法接轨”).⁵⁶¹

Among the passages lending support to the adoption of foreign law, most legal scholars offered little resistance to the adoption of the presumption of innocence. This support came in spite of the recognition among those scholars that China traditionally offered no such benefit to defendants, operating instead under what Xie Youping of Fudan University referred to as a “presumption of guilt” (“有罪推定”).⁵⁶² Zhang Guoqing of Beida, for example, noted prior to the passage of the 1997 CPL that “under the existing criminal system, the defendant is essentially treated as guilty from the outset through the investigation, prosecution, judicial detention, arrest and all the way through the trial”:

在现有的刑事诉讼制度之下,从一开始被告人,基本上就被当作有罪的人来对待...侦查,检察,审判机关对于被告人的拘留,逮捕,起诉,审判都是基于被告人有罪这个前提才决定的。⁵⁶³

Suggesting China’s growing acceptance of the universal right to be presumed innocent, however, he noted that, “with the development of human civilization, more and more people are beginning to agree with the presumption of innocence”

⁵⁶⁰ Xie (1996).

⁵⁶¹ Tong (1996).

⁵⁶² Xie (1993).

⁵⁶³ Zhang (1994).

(“随着人类文明的发展,越来越多的人开始赞同无罪推定的主张”) and advocated that “the presumption of innocence should be implemented in China” (“在我国刑事诉讼中,保护当事人的合法权益,就应当实行无罪推定”).⁵⁶⁴

This support for such a reform among Chinese legal practitioners and scholars did not come via a process of norm localization or through the grafting of the norm onto extant Chinese discourse. Rather, Zhang and others gave complete credit to foreign actors as the source, recognizing that in “major Western capitalist countries”⁵⁶⁵ and among “capitalist class thinkers” (“资产阶级思想家”)⁵⁶⁶ “no one can be described as a criminal” until a court adjudicates a defendant as such (“西方主要资本主义国家...任何人都不能被称为罪犯”).⁵⁶⁷ Other scholars supportive of the presumption of innocence similarly identified the doctrine of “being presumed innocent until proved guilty according to law” (“被依法证明有罪之前推定无罪”) as a principal “criterion of international human rights law” (“作为国际人权法律的一个准则”). Support for the reform cited by these scholars included a range of foreign law and international legal instruments, including measures adopted by the United Nations General Assembly (联合国大会), the International Convention on Civil and Political Rights (联合国公民权利和政治权利国际公约), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (禁止酷刑和其他残忍,不人道或侮辱人格的待遇或处罚公约), the United Nations Congress on the Prevention of Crime and Treatment of Offenders (联合国预防犯罪和罪犯待遇大会), the United Nations Human Rights Commission (联合国人权委员会), the African

⁵⁶⁴ Zhang (1994).

⁵⁶⁵ Zhang (1994).

⁵⁶⁶ 通蜀 [Tong Shu], “刑法修改:中国律师的渴望” [Procedural Reform: A Chinese Lawyer’s Longing], 中国律师 [CHINA LAWYER], (March 1996).

⁵⁶⁷ Zhang (1994).

Charter on Human and Peoples' Rights (非洲人类及人民权利宪章), the Inter-American Convention on Human Rights (美洲人权公约), and the European Court of Human Rights (欧洲人权法院), as well as foreign scholarship such as American legal theorist Ronald Dworkin (美国学者德沃金), among others.⁵⁶⁸ Still others recognized these reforms included in the 1997 CPL as the direct “absorption of and reference to overseas experience” (“吸收并参考了国外的经验”).⁵⁶⁹ Professor Hong Daode of CUPL, for example, likewise described the presumption of innocence as the “embodiment of civilized procedural law” (“体现诉讼文明”).⁵⁷⁰

Another challenge to an entrenched legal practice that enjoyed widespread support in Chinese legal periodicals was the introduction of Anglo-American adversarial procedures such as cross-examination and the expansion of the right to an attorney. Support for such reforms was expressed along with the understanding that China traditionally employed an inquisitorial approach derived from the civil law tradition.⁵⁷¹ Li Weiping, for example, a scholar at Henan University School of Law, noted that the 1997 CPL “adopted much from accusatorial procedures in the

⁵⁶⁸ 岳礼玲 & 陈瑞华 [Yue Liling & Chen Ruihua], “刑事程序公正的国际标准与修正后的 刑事诉讼法” [International Standards of Criminal Due Process and the Amended Criminal Procedure Code], 政法论坛 [POLITICAL SCIENCE & LAW], (Mar. 1997).

⁵⁶⁹ 通蜀 [Tong Shu], “刑诉法修改:中国律师的渴望” [Procedural Reform: A Chinese Lawyer's Longing], 中国律师 [CHINA LAWYER], (March 1996).

⁵⁷⁰ 洪道德 [Hong Daode], “完善诉讼立法提高执法水平” [Improve Judicial Laws to Improve the Enforcement of Law], 政法论坛 [POLITICAL SCIENCE AND LAW], (Oct. 1994).

⁵⁷¹ See, e.g. 刘军 & 周善来 [Liu Jun & Zhou Shanlai], “浅析刑事审判制度的完善” [Improvement of the Criminal Justice System], 政法天地 [WORLD POLITICS], (June 1996) (advocating that China should “learn and absorb the advantages of the Adversarial trial mode” (借鉴、吸收了控辩式庭审方式的优点)); 曾洁 [Zeng Jie], “律师刑事诉讼辩护职责初探” [Exploring the Law of Criminal Defense], 湘潭师范学院学报 [JOURNAL OF XIANGTAN NORMAL UNIVERSITY], (May 1997).

West” (“我们的庭审方式是借鉴西方的控辩式”).⁵⁷² Other scholars similarly noted that a defendant’s right to an attorney derives not from China’s traditional procedural rules, but rather “international human rights law”⁵⁷³ and the constitutional principles of Western countries (“被告人有权获得辩护,便成为西方各国一项重要的宪法原则”).⁵⁷⁴

The openness to the adoption of these procedural reforms extended beyond the legal academy. Indeed, one scholar noted the broad support for foreign adversarial reforms observed by CPL drafters attending meetings with hundreds of citizens from as many as twenty-two provinces, autonomous regions, and municipalities. These drafters received as many as eighty papers advocating certain legal reforms, most of which advocated “learning from the successful absorption of foreign experience” (“改革固然应当借鉴外国成功经验”) and “conform[ing] to world trends in the development of criminal procedure law” (“顺应世界各国刑事诉讼制度的普遍发展趋势”), including the introduction of defense attorneys earlier in the investigatory proceedings.⁵⁷⁵ Other legal observers voiced support for similar adversarial reforms while noting openly that “such procedures were mainly practiced in Anglo-American common law countries” (“当事人主义诉讼模式,主要实行于英美法系国家”) and that they should be adopted even though they conflicted directly with China’s “long history and unique culture of law” (“悠久的历史 and 独特的法律文化”).⁵⁷⁶ Still others such as Tao Mao of Suzhou University School of Law cited directly to a suspect’s right to

⁵⁷² 曾英杰, 田秀文 et al. [Ceng Yingjie & Tian Youxiu et al.], “刑事诉讼法, 该怎样更好地贯彻实施?” [Criminal Procedure Law, How to Improve its Implementation?], 人大建设 [PEOPLES’ CONGRESS CONSTRUCTION], (July 1997).

⁵⁷³ Yue & Chen (1997).

⁵⁷⁴ Tong (1996).

⁵⁷⁵ Hong (1994).

⁵⁷⁶ Xie (1993).

an attorney established under the landmark U.S. Supreme Court case *Miranda v. Arizona*⁵⁷⁷ (“米兰达案件”) and the fact that “most other countries allow lawyers to participate at the investigative stage of the proceedings” (“在国外多数国家允许律师在侦查阶段参与诉讼”), including the United States, France, and Japan.⁵⁷⁸

Finally, a manual survey of Chinese legal periodicals suggests similarly broad support for the adoption of American-style plea-bargaining. As with other discussions of novel legal reforms introduced by the 1997 CPL, the authors openly recognize the foreign origins of the law and make no discernable effort to graft the reforms onto extant legal norms or to otherwise localize the procedures. Yang Xiuli, for example, drew extensively from the writings Richard Posner, whom he described as the “representative scholar of the Western School of Law and Economics” (“西方经济分析法学派的代表”).⁵⁷⁹ Other scholars voiced enthusiastic support for the procedure despite similarly noting its origins in Anglo-American countries.⁵⁸⁰ These authors did not localize the reform by grafting it onto existing procedural tools to improve the efficiency of criminal litigation, but rather openly cited it as part of a “worldwide trend” (“世界性趋势”) in the realm of criminal procedure.⁵⁸¹ This recognition of the procedure as a foreign import continues today with the cooperation of the China Prosecutors Association with the Ford Foundation. Xie Pengcheng, a lead Chinese researcher

⁵⁷⁷ 384 U.S. 436 (1966).

⁵⁷⁸ 陶髦 [Tao Mao], “改革诉讼制度进一步推进诉讼民主化” [Further Promote the Reform of Litigation Democratization], 政法论坛 [POLITICAL SCIENCE AND LAW], (May 1993).

⁵⁷⁹ 杨秀莉 [Yang Xiuli], 论存疑不起诉 [On Preserving Suspicion and Non-Prosecution], 法学论坛 [LAW FORUM], (June 1996).

⁵⁸⁰ Hong (1994).

⁵⁸¹ *Id.*

on the project openly notes the American origins of plea bargaining and is conducting a broad comparative study of other continental legal systems to see how the procedure can be adopted successfully into a civil law system.⁵⁸²

V. The Way Forward

As anticipated by the two-tailed model of diffusion, this descriptive comparison of the discussion of proposed legal reforms among Chinese legal scholars suggests that those proposals that were the most novel or challenged entrenched practices proved the most able to survive the legislative process. Those proposals that evoked the preestablished cognitive scripts and vocabulary of opponents were, by contrast, less successful. In the next Chapter, I explore these publications further through a computer-aided content analysis of articles related to criminal procedure law. This CATA analysis shows that in China's increasingly open legislative process, domestic and transnational advocates were able to introduce various pro-defendant reforms onto the political agenda. Moreover, it shows that the presence of an extant domestic discourse affected the likelihood that Chinese officials, academics, and legal practitioners viewed a proposed policy favorably or unfavorably.

⁵⁸² See Xie Pengcheng, *Ideas and Methods of Plea Bargaining Research*.

CHAPTER 4

DEFENDANTS AND DISCOURSE: A CONTENT ANALYSIS OF THE CRIMINAL PROCEDURE DEBATE IN THE PRC

I. *Introduction*

During several periods in the 1980s and 1990s, China's legal scholars enjoyed more freedom to debate the relative merits of law than many of them had experienced in decades.⁵⁸³ Scholars openly discussed issues ranging from evidentiary problems,⁵⁸⁴ to China's legal culture,⁵⁸⁵ to the basic purposes and functions of courts.⁵⁸⁶ In the pages of China's legal and political periodicals, these scholars debated criminal procedure reforms and actively engaged with the question of whether China is, or should be, governed by the "rule of law," a debate stoked by both domestic⁵⁸⁷ and foreign actors.⁵⁸⁸ This Chapter explores the dynamics of this discussion, examining the

⁵⁸³ These periods of openness and experimentation (*fang*), however, did not occur without recursive periods of retrenchment (*shou*). See RICHARD BAUM, BURYING MAO: CHINESE POLITICS IN THE AGE OF DENG XIAOPING (1994).

⁵⁸⁴ See, e.g., Chen Yiyun (ed), 证据学 [The Study of Evidence] (1991); He Jiahong, "让证据 走下人造的神坛" [Let the Evidence Walk Down from the Man-made Altar], 5 法学研究 [Legal Studies] (1999).

⁵⁸⁵ See, e.g., Zhu Suli, 法治及其本土资源 [Rule of Law and its Indigenous Resources] (1996); He Weifang, 全能形衙门: 传统与影响 [Omnipotent Government: Tradition and Effect], 南方周末 [Southern Weekend] (January 16, 1998).

⁵⁸⁶ He Weifang, 司法的理念与制度 [The Concepts and Systems of Judicature] (1998); Zhu Suli, "为什么送法下乡?" [Why Hold Court in the Countryside?] 2 社会学研究 [Sociological Research] (1998).

⁵⁸⁷ See, e.g., Luo Haocai & Wang Xixin, "法制国家中的程序建设" [The Construction of Legal Procedure in the Rule of Law Context], 1 行政法 [Administrative Law Review] (1999); Jiang Ming'an, "行政的现代化与行政程序制度" [The Modernization of Administrative Process and Administrative Procedure], 55 中外法学 (1998); Wang Xixin, "Administrative Procedure Reforms in China's Rule of Law Context," 12 COLUM. J. OF ASIAN L. 251 (1998).

⁵⁸⁸ See, e.g., Jacques deLisle, "Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and

relationship between discourse and the ability of domestic and transnational legal advocates to shape policy outcomes during moments of legal reform. As will be shown, the analysis demonstrates the power of extant discursive language as well as the usefulness of the two-tailed model of legal diffusion.

II. *Data & Methodology*

China presents a fertile domain of inquiry for this study. Firstly, China's legal system, modeled after the centralized, code-based systems of continental Europe and the Soviet Union, presents a useful setting to examine processes of diffusion to civil law countries. As a civil law country, the judicial opinions of judges are rarely published in China, and these opinions do not possess any official precedential effect on subsequent parties or courts.⁵⁸⁹ Instead, legal evolution occurs in the political and

Beyond, 20 U. PA. J. INT'L ECON. L. 179 (1999); John K.M. Ohnesorge, "On Rule of Law Rhetoric, Economic Development, and Northeast Asia, 25 WISC. INT'L L. J. 301 (2007).

⁵⁸⁹ Although the Chinese legal system strictly adheres to the civil-law tradition whereby judges have no *stare decisis* effect on subsequent cases, there have in recent years been several notable efforts among some Chinese judicial officials to develop the role of judicial precedent in Chinese law, or what some have called "*stare decisis* with Chinese characteristics." This has generally taken the form of courts mirroring the decisions of sister courts in a "semi-precedential" fashion or selecting "precedents" that are not technically binding but carry an expectation of being followed. Nonetheless, unless the Constitution is amended, there are currently few legal matters beyond "informal patterns of precedent" concerning sentencing guidelines and the definition of certain legal concepts over which Chinese courts can assert legal precedent. Moreover, Xiao Yang, the recent president of the Supreme People's Court stated unequivocally that any judicial interpretation is to be sent to the NPC for its official review as the supreme authority on law and legal interpretation. See Tian Yu, "Promote the Judicial System Scientifically, Resolve Ten Issues Scrupulously: Interviews with President Xiao Yang of the Supreme Peoples' Court," Xinhuanet (Jan. 5, 2005), available at: http://news.xinhuanet.com/politics/2006-01/05/content_4014729.htm; Benjamin L. Liebman, "China's Courts: Restricted Reform," in Donald C. Clarke ed., CHINA'S LEGAL SYSTEM: NEW DEVELOPMENTS, NEW CHALLENGES (2008); Chris X. Lin, "A Quiet Revolution: An Overview of China's Judicial Reform," 4 ASIAN-PACIFIC LAW & POLICY JOURNAL 255, 301 (2003);

party branches. The hierarchy of laws reflects this centralized arrangement. Officially, the most authoritative laws in the country are Basic Laws passed by the NPC (including the Criminal Procedure Law), followed by non-Basic Laws and legislative interpretations passed by the Standing Committee of the NPC. Moreover, legal development and drafting responsibilities are concentrated in a similarly centralized fashion among national-level party and political organs.⁵⁹⁰ While ultimate power of course rests with the CCP, the Standing Committee of the NPC nonetheless, through the operation of Legislative Affairs Commission (LAC), occupies an influential role during the process of legislative drafting.

This is not to say China does not possess complex center-local relations or areas of law that have experienced significant degrees of decentralization in recent years. While China's current Constitution proclaims it to be a "unitary" state with its local state organs governed by "the unified leadership of the central authorities,"⁵⁹¹ Mao Zedong himself noted that "centralized power and devolved power exist simultaneously."⁵⁹² Indeed, China's traditional structure of authority emphasized diffuse authority with the county government serving as the source of most aid and administration, with the central government playing a very limited role.⁵⁹³ In the contemporary period, scholars continue to debate whether China's political arrangement is best described as decentralization, local capture, central incapacity, de-

R.H. Fallon, Jr., "Adopting and Adapting: Clinical Legal Education and Access to Justice in China," 120 HARV. L. REV. 2134, 2144 (2007).

⁵⁹⁰ CONSTITUTION arts. 3, 62, 67 (PRC).

⁵⁹¹ CONSTITUTION art. 3(1982) (P.R.C.), *available at*:

<http://english.peopledaily.com.cn/constitution/constitution.html>.

⁵⁹² Mao Zedong, "Talks at the Chengtu Conference," in SELECTED WORKS OF MAO ZEDONG: VOL. VIII, *available at*: www.marxists.org.

⁵⁹³ Jae Ho Chung, "Studies of Central-Provincial Relations in the People's Republic of China: A Mid-Term Appraisal," 142 CHINA QUARTERLY 487 (1995).

concentration, devolution, or delegation.⁵⁹⁴ Whatever the outcome of this debate, China's central government nonetheless lacks durable restrictions on its authority in the realm of policymaking, especially with respect to NPC Basic Laws.⁵⁹⁵

In addition to possessing broad centralized power in its law-making authority, China is also an apt case for this study because it has during several modern and contemporary periods undergone massive projects of legal reconstruction (and subsequent destruction) that ultimately proved quite open to influence from transnational actors.⁵⁹⁶ China's ongoing legal reform in the post-Mao era thus presents a useful setting to examine whether legal diffusion is more likely to occur when

⁵⁹⁴ Zheng Yongnian, "Institutional Economics and Central-Local Relations in China: Evolving Research," 3 CHINA: AN INTERNATIONAL JOURNAL 240 (2005); Gabriella Montinola, Yingyi Qian, & Barry R. Weingast, "Federalism, Chinese Style: The Political Basis for Economic Success in China," 48 WORLD POLITICS 50 (1995); Ehtisham Ahmad, Li Keping, & Thomas Richardson, "Recentralization in China?," presented at the IMF Conference on Fiscal Decentralization (2000); Yasheng Huang, "Central-Local Relations in China During the Reform Era: The Economic and Institutional Dimensions," 24 WORLD DEVELOPMENT 655, 665 (1996).

⁵⁹⁵ MICHAEL OKSENBERG & KENNETH LIEBERTHAL, POLICY MAKING IN CHINA: LEADERS, STRUCTURES AND PROCESSES 338 (1988).

⁵⁹⁶ Interview, 9/7/2010; 9/13/2010; 9/20/2010; *see also* William P. Alford, "A Second Great Wall?: China's Post-Cultural Revolution Project of Legal Reconstruction," 11 CULTURAL DYNAMICS 193, 198 (1999). In the 1940s, Guomindang [GMD] officials adopted Japan's strategy of importing aspects of German civil procedure to replace local rules. *See* Alison W. Conner, "The Comparative Law School of China," in UNDERSTANDING CHINA'S LEGAL SYSTEM 212 (C. Stephen Hsu ed., 2003). Areas under communist control, meanwhile, were subject to different rules aimed at serving the purpose of the party's revolutionary ideology. *See* William C. Jones, "Trying to Understand the Current Chinese Legal System," in UNDERSTANDING CHINA'S LEGAL SYSTEM 29 (C. Stephen Hsu ed., 2003). Once victorious in the civil war, the CCP ultimately abolished all law, including statutes prohibiting murder or rape. *See* WRONGS AND RIGHTS: A HUMAN RIGHTS ANALYSIS OF CHINA'S REVISED CRIMINAL LAW (1998). Since the introduction of economic liberalization in the post-Mao period, legal reconstruction and a perceived need to draw from foreign laws has with an enthusiasm not seen since GMD reforms. *See* Liang Zhiping, "Tradition and Change: Law and Order in a Pluralist Landscape," 11 CULTURAL DYNAMICS 215, 215 (1999); Pitman B. Potter, "Legal Reform in China: Institutions, Culture, and Selective Adaptation," 29 LAW & SOCIAL INQUIRY 465, 465 (2004).

transnational legal advocates promote the introduction of norms that are: 1.) novel to the targeted legal system; 2.) associated with an established normative discourse; or 3.) opposed to entrenched normative practices. The following section outlines the challenges of explaining this diffusion and proposes a remedy.

A more compelling research design than the one outlined below would consist of a close analysis of primary documents detailing the debates among interested legislators and participants in the drafting process, as well as extensive interviews with those lawmakers. China, however, presents researchers with the empirical challenge of studying the diffusion of law into a regime that is especially reluctant to discuss the process of lawmaking.⁵⁹⁷ Moreover, it presents a regime that has not made official records of the deliberations publicly available and makes any open discussion of such deliberations vulnerable to charges under China's state secrets law.⁵⁹⁸ Moreover, as one respondent noted, "It is especially hard for any foreigner to study [Chinese criminal procedure] reform."⁵⁹⁹ Indeed, more than one respondent requested that the battery of my mobile phone be removed so that the device could not be used by security agents as a remote microphone. Another requested that we meet on the opposite side of Beijing from her workplace so that she would not be seen discussing the issue with a foreigner. Given these challenges, this Chapter aims to supplement the limited number of firsthand accounts available through the additional use of proxies: published accounts of the deliberations leading up to the revised 1997 CPL written by

⁵⁹⁷ This is not to say, though, that such pressure has not been successful. Former NPC Vice-Chairman Wang Hanbin noted that the 1997 revisions to the 1979 Criminal Procedure Law would serve to refute "Western countries' smears and slanders" against the PRC's lack of human rights protections in its justice system. See 刑法修改意义重大 [The Great Significance of the Criminal Procedure Law Reforms], 法制日报 [*Legal Daily*], Feb. 1, 1996. Nonetheless, candidness on such matters is difficult to come by.

⁵⁹⁸ Interview, 7/30/2008. See also *Law on the Protection of State Secrets of the People's Republic of China*, art. 8 § 2 (1989).

⁵⁹⁹ Interview, 9/7/2010.

both domestic and transnational participants, as well as Chinese scholarship and commentary concerning the proposed revision of the CPL published by members of various interest groups, including public security officials, prosecuting and defense counsels, academics, military officials, and legislative actors.

A content analysis of transcripts of drafting sessions or memoranda exchanged among the legislative drafters would supply the greatest insight into the discursive activity of the relevant actors involved in the 1997 CPL reform, but such material is not available to the public. To compensate for this, the content analysis described below examines articles concerning CPL from a multitude of different media sources. While such media content may generate questions about the “true” positions of the publishers of that content, it nonetheless, through an objective assessment of the language used by the authors and allowed by the editors, supplies some evidence as to policy positions and allows us to make a number of context-specific inferences.⁶⁰⁰ Indeed, this form of analysis has yielded many insights about the tone and tenor of elite and popular opinion in China. Most recently, scholars such as Daniela Stockmann and James Reilly have applied such methods to track Chinese media discussions of Japan.⁶⁰¹ As Stockmann explains, a broad analysis of media sources reveals a fuller picture of Chinese attitudes toward an issue than would a thorough reading of any single publication. In her study, a content analysis of both the relatively staid People’s Daily and the relatively unrestrained Beijing Youth Daily revealed a rich discursive terrain that contained both the state’s official position as well as expressions of

⁶⁰⁰ See CARLSON (2008), at 22-23.

⁶⁰¹ See Daniela Stockmann, *Who Believes Propaganda? Media Effects during the Anti-Japanese Protests in Beijing*, 202 THE CHINA QUARTERLY 269 (2010), at 278-79; and James Reilly, *China’s History Activism and Sino-Japanese Relations*, 4 CHINA: AN INTERNATIONAL JOURNAL 189 (2006), at 215 (citing 中国报纸对日本报导内容分析 [A Content Analysis of Chinese Newspapers’ Reporting on Japan], available at: <http://www.comrc.com.cn/crc/cmdc/bz/002.htm>).

popular anger against Japanese policy.⁶⁰²

Following Stockmann's lead, I have arranged a unique database of approximately 320 Chinese-language journals related to law, public security, military affairs, and politics that were published during the period of criminal procedure reform (1978-1997). This database is comprised of journals included in the China Academic Journals (CAJ) database, the largest full-text database of Chinese journals.⁶⁰³ (See Appendix) I selected these journals for the sample in order to include both national and regional coverage as well as to supply a broad spectrum of institutional and normative positions: executive or legislative publications; judicial publications; CCP/Party publications; and ostensibly non-governmental publications.

Together, 161 of the journals derive from non-governmental sources (42 university journals and 119 other non-government publications), while 159 are published by various ministries, congresses, courts, or party organs (103 CCP publications and 56 others from executive, judicial, legislative, and military bodies). As for geographic distribution, illustrated in figure 4.1, the database of journals covers 29 of China's 31 provinces, municipalities, and autonomous regions.⁶⁰⁴ This customized database offers a novel solution to a methodological problem identified by Stockmann.⁶⁰⁵ As she explains, content analysis of Chinese media outlets suffers from a selection bias due to the different technologies by which those outlets distribute their

⁶⁰² See Stockmann (2010), at 278-79.

⁶⁰³ As Taylor Fravel explains, CAJ is "one of the most important sources [of information about China] available on the web." See M. Taylor Fravel, "Online and on China: Research Sources for the Information Age," 163 *CHINA QUARTERLY* 821 (2009), at 831.

⁶⁰⁴ Only Tibet and Hainan are not represented in the sample. Beijing, not surprisingly, is overrepresented in the origin of publications related law, government, and security (115 of the sample are printed in Beijing).

⁶⁰⁵ See Daniela Stockmann, "Information Overload?: Collecting, Managing, and Analyzing Chinese Media Content," in *CONTEMPORARY CHINESE POLITICS SOURCES, METHODS, AND FIELD STRATEGIES* (Allen Carlson, Mary Gallagher, Kenneth Lieberthal, & Melanie Manion eds. [forthcoming]), at 191.

content. Some, she notes, allow for searches based on keywords of txt-files. Others, however, provide non-searchable pdf-files ill-suited to existing content analysis software.



Figure 4.1. *Geographic Distribution of Database Periodicals*

In the database created here, I address the issue of selection bias by applying the most recent optical character recognition (OCR) software to pdf-files published by Chinese media outlets. OCR software, which can recognize the sequence of lines and curves of a hand-written or typed Chinese character, transforms the shapes of Chinese text into a searchable, computerized font. This transformation allows for a unique large-*n* computer-aided content analysis of Chinese journals from the earliest years of the reform period. Technologies of Chinese OCR have improved greatly, resulting in recognition rates above ninety-five percent.⁶⁰⁶ Any systematic error in character

⁶⁰⁶ See Jason J.S. Chang & Shun-der Chen, “The Postprocessing of Optical Character Recognition Based on Statistical Noisy Channel and Language Model,” *Language*,

recognition, moreover, is likely distributed uniformly throughout the sample of texts, and so should not bias the results.

Using statistical analysis with data derived from Yoshikoder software, a computer-aided textual analysis (CATA) developed as part of the Identity Project at Harvard University's Center for International Affairs, the analysis below includes a content analysis of a sample of more than 3,000 articles concerning criminal procedure law for discussions of key legal innovations suggested by domestic and Western legal advocates prior to the adoption of the 1997 Criminal Procedure Law.⁶⁰⁷ CATA, here facilitated by Yoshikoder, provides several advantages over traditional content analysis. Firstly, like any content analysis software, Yoshikoder offers consistency, avoiding the many problems associated with human coding such as intercoder variation, coder inattention, and coder fatigue.⁶⁰⁸ Secondly, CATA software like Yoshikoder improves accuracy by avoiding the problem of prior knowledge.⁶⁰⁹ A human coder approaches a text with knowledge of its source and of the author's institutional position, and so the coder may be inclined to code certain text units accordingly. CATA, by contrast, codes text out of any socio-political context, and

Information, and Computation: Proceedings of the 10th Pacific Asia Conference (Dec. 27, 1995), at 128.

⁶⁰⁷ Content analysis has been successfully applied to understand the opinions of a variety of Chinese political and legal actors. *See, e.g.*, Daniela Stockmann & Mary Gallagher "Mass Media Mobilization as a Means of Legal Reform in China," Paper presented at the annual meeting of the American Political Science Association, Chicago (2007); Edward X. Gu, "The Economics Weekly, the Public Space and the Voices of Chinese Independent Intellectuals," *CHINA QUARTERLY* 147 (1996); Cheng Li & Lynn White, III, "China's Technocratic Movement and the World Economic Herald," 17 *MODERN CHINA* 3 (1991); Andrew G. Walder, "Press Accounts and the Study of Chinese Society," *CHINA QUARTERLY* 79 (1979); Kuang-sheng Liao & Allen S. Whiting, "Chinese Press Perceptions of Threat: The U.S. and India, 1962." *CHINA QUARTERLY* 53 (1973); Carlson (2008); and Johnston and Stockmann (2006).

⁶⁰⁸ *See* KIMBERLY A. NEUENDORF, *THE CONTENT ANALYSIS GUIDEBOOK* (2002), at 112.

⁶⁰⁹ *Id.* at 113.

thereby limits such biases to the development of the content dictionary.

While advancements in content analysis software continue apace, most recently with the introduction of an advanced software for cluster analysis developed by Gary King and Justin Grimmer, Yoshikoder offers the added value of employing useful Chinese-language dictionary reports to measure the positive and negative words contained in a Chinese text.⁶¹⁰ These reports are thus useful tools to gauge the tone of large numbers of written materials from the PRC.⁶¹¹ References to key terms, and the manner in which the authors discuss them as measured by these reports, provide valuable insights into the perspectives of various institutional interest groups and individuals by identifying positively and negatively valenced words.⁶¹² For example, an essay in the *China Law Journal* (中国法学) by Chen Jianguo, an official from the Supreme People's Court, arguing that the proposed CPL reform should incorporate the presumption of innocence (what he refers to in the article as “无罪假定”) would be coded as a positive citation to the norm.⁶¹³ In addition, the software includes a so-called “tokenizer plugin” that performs the necessary segmentation for Chinese words, as spoken in the PRC, to ensure that Chinese texts are segmented into words appropriately.⁶¹⁴

⁶¹⁰ See Justin Grimmer and Gary King, *Quantitative Discovery from Qualitative Information: A General-Purpose Document Clustering Methodology*, presented at the Annual Meeting of the American Political Science Association, 2009.

⁶¹¹ See Stockmann; Hassid.

⁶¹² For further discussion of the uses of Yoshikoder: see Alastair Iain Johnston & Daniela Stockmann, “Chinese Attitudes toward the United States and Americans,” in *ANTI-AMERICANISMS IN WORLD POLITICS*, Peter J. Katzenstein & Robert O. Keohane, eds. (Cornell University Press, Ithaca, NY: 2007); Ian Lamont, *Making a Case for Quantitative Research in the Study of Modern Chinese History: The New China News Agency and Chinese Policy Views of Vietnam, 1977-1993* (unpublished thesis) (2008).

⁶¹³ 陈建国, 应把无罪假定原则入刑事诉讼法 [Criminal Procedure Law Should Import the Presumption of Innocence Principle], 6 中国法学 (1994), at 35.

⁶¹⁴ The use of such a “segmenter” is necessary for Chinese because Chinese text does not include spaces between words in a sentence.

Table 4.1. Coding Chinese Legal Periodicals

<i>Normative position</i> (of the author) [continuous variable]	1. Positive 2. Negative 3. Neutral
<i>Rational interest</i> (of the author) [binary variable]	1. Official 2. Unofficial
<i>Geographic association</i> (with the proposed reform) [continuous variable]	1. Foreign origin 2. Domestic origin 3. Neutral as to origin
<i>Geographic location</i> (of the publication) [binary variable]	1. National/Beijing 2. Regional/Non-Beijing
<i>Proposed Legal Reform</i> [continuous variable]	1. Rules of Evidence 2. Rules of Detention 3. Right to Counsel 4. Plea Bargaining 5. Adversarial 6. Innocence 7. Death Penalty 8. Appeal

I compiled the complete list of eight legal reforms (see table 4.1 above) emphasized by transnational actors by drawing from publications by domestic legal advocates involved in China's reform process, as well as leading legal publications from various foreign state and non-state actors.⁶¹⁵ These publications include useful citations to specific articles of the Criminal Procedure Law that foreign advocates targeted for reform, as well as drafts of changes proposed by those advocates.⁶¹⁶

⁶¹⁵ Such a list introduces a risk of selection bias. For example, not every advocate translates the presumption of innocence, as Chen Jianguo does, as 无罪假定. Variations include 无罪推定, 清白, 无辜, 不得确定有罪, 推定他是无罪, 是否有罪, to name but a few. To address this concern, the content analysis will apply synonymy and translation to key concepts of interest—e.g. $w_j = w_k$ and w_l is the translation of w_m .

⁶¹⁶ Such publications include, *inter alia*: CHINA: TORTURE AND ILL-TREATMENT OF PRISONERS, AMNESTY INTERNATIONAL, EDS. (1987); GOING THROUGH THE MOTIONS: THE ROLE OF DEFENSE COUNSEL IN THE TRIALS OF THE 1989 PROTESTORS, Human Rights in China, eds. (1989); *Report of the Australian Human Rights Delegation to China*, 14-26 July 1991 (Department of Foreign Affairs and Trade, Canberra: 1991);

In order to test the hypotheses specified in Chapter 3, I coded any mention in a selected Chinese publication of a legal reform advocated in the abovementioned publications (e.g. “presumption of innocence,” “due process,” “plea bargain”) according to the attributes listed in table 4.1. Next, to conduct the opinion extraction, I employed Yoshikoder to code each article for the positive, negative, or neutral positions of the author by measuring the proportion of pro- and anti-reform terms that I selected through a manual search of Chinese legal writing. I also coded each article for the proportion of terms developed for such CATA analysis by linguists at National Taiwan University.⁶¹⁷ These scholars have translated and expanded upon the General Inquirer (GI) approach to content analysis. Dictionary-based GI programs, first developed by Philip Stone, assesses emotional tone, cognitive orientation, and word patterns present in a text.⁶¹⁸ The GI approach thus adopts a method of analyzing the “sentiment degree” of Chinese characters by specifying sensitive annotation tags to identify author opinions toward a list of key terms.⁶¹⁹ Yoshikoder performs tasks similar to GI, examining word frequencies, analyzing overall tone, and allowing for the custom development of content dictionaries in order to operationalize key aspects

PUNISHMENT WITHOUT CRIME: ADMINISTRATIVE DETENTION, Amnesty International, eds. (1991); *Visit to China by the Delegation led by Lord Howe of Aberavon: Report* (HMSO, London: 1993); CRIMINAL JUSTICE WITH CHINESE CHARACTERISTICS, Lawyers Committee for Human Rights (1993); U.S. DEPARTMENT OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1994 (Washington, DC: 1995); Ann Kent, “China and the International Human Rights Regime: A Case Study of Multilateral Monitoring, 1989-94,” 17 HUMAN RIGHTS QUARTERLY (1995); CHINA: NO ONE IS SAFE, Amnesty International (1996).

⁶¹⁷ See Ku, et al.; Stockmann (forthcoming).

⁶¹⁸ See PHILIP J. STONE, DEXTER C. DUNPHY, MARHSALL S. SMITH, AND DANIEL M. OGILVIE, *THE GENERAL INQUIRER: A COMPUTER APPROACH TO CONTENT ANALYSIS* (MIT Press: 1966).

⁶¹⁹ See, e.g. KIMBERLY A. NEUENDORF, *CONTENT ANALYSIS GUIDEBOOK*.

of document meaning.⁶²⁰

III. *Content Analysis*

a. Citations to Foreign Law in the Era of Legal Reform

The first step of this content analysis establishes the frequency with which Chinese publications related to law, politics, and security discussed foreign law in articles concerning criminal procedure. This preliminary analysis is designed to determine the policy emphasis of Chinese reformers by examining the salience of particular sources of law. The salience of foreign law in articles discussing criminal procedure law in China sheds light on the relative emphasis placed on those actors as a source of inspiration or—at the very least—a site of comparison.⁶²¹ The substantive policy positions held by Chinese reformers, and their engagement with extant domestic discourse, will be examined in step two of the content analysis. It should be noted, however, that this method of analysis assumes that researchers can infer meaningful insights from the frequency with which certain words appear in a particular political text. Such an assumption is not problematic in analyses such as the one conducted below in which the goal is simply to determine the overall discursive landscape of a particular political community—i.e. the shared language with which actors discuss particular policies. This assumption, however, would be untenable if such a frequency count were applied to measure the relative influence of competing domestic discourses—i.e. a study to determine whose language was most influential among the various legal scholars. For such an analysis, one would have to apply

⁶²⁰ See Will Lowe, Yoshikoder: An Open Source Multilingual Content Analysis Tool for Social Scientists, paper presented at the American Political Science Association, 2008.

⁶²¹ See IAN BUDGE, HANS-DIETER KLINGEMANN, ANDREA VOLKENS, JUDITH BARA, & ERIC TANENBAUM, *MAPPING POLICY PREFERENCES: ESTIMATES FOR PARTIES, ELECTORS, AND GOVERNMENTS 1945–1998* (Oxford University Press: 2001).

forensic linguistic tools to examine word patterns over time, tracing the path of a particular term or argument back to a seminal text. Here, by contrast, the variable of interest is the shared discursive environment in which legal commentators debate legal norms and practices. As such, word frequency data, which merely posits that “the greater the importance of the variable to the source, the more often it will be mentioned,” supplies an appropriate measure.⁶²²

In order to determine the population of articles for this frequency analysis, I first collected every article related to criminal procedure law contained in CAJ publications related to law, politics, and security between 1978 and 1997. This search uncovered a total of 3,231 articles related to CPL out of 659,048 articles published by those journals over the course of the two decades preceding the 1997 CPL reform.⁶²³ Next, I searched the population of CPL-related articles for articles that mentioned foreign countries or international organizations. Specifically, I searched the full texts of articles for mentions of the United States, the United Kingdom, France, Germany, and the United Nations. I searched for mentions of these countries for several reasons. Firstly, the inclusion of the archetypical civil law and common law countries allows me to test whether Chinese media discussions of CPL appeal to solutions from one legal family more than another—i.e. whether such similarities ease the ability of legal advocates to localize procedural norms. Secondly, the list includes only those Western countries mentioned in the abstracts of the 3,121 articles related to criminal procedure law. To determine which search terms would be most relevant I examined the abstracts of articles as a proxy for their full textual content. This allowed me to focus

⁶²² See HARRY T. REIS AND CHARLES M. JUDD, *HANDBOOK OF RESEARCH METHODS IN SOCIAL AND PERSONALITY PSYCHOLOGY* (Cambridge University Press: 2000), at 322.

⁶²³ This proportion is comparable to the number of articles devoted to civil procedure reform during the same time period. The same journals published 2740 articles related to civil procedure law between 1978 and 1997, a period that includes the major overhaul of China’s civil procedure code in 1991.

the subsequent full-text inquiry on only those countries and institutions of major importance to the Chinese media discussion of CPL and remove from the analysis those countries mentioned only in passing.⁶²⁴

Table 4.2. *Number of Citations to the UN and Foreign States in CPL Articles*⁶²⁵

	'78-'82	'83-'87	'88-'92	'93-'97
<i>U.S.</i>	6 (2.5%)	28 (6.4%)	61 (9.9%)	279 (13.9%)
<i>U.K.</i>	10 (4.3%)	29 (7.4%)	54 (8.8%)	207 (10.3%)
<i>France</i>	12 (5.1%)	36 (9.2%)	64 (10.4%)	263 (13.2%)
<i>Germany</i>	7 (3%)	19 (4.8%)	58 (9.4%)	218 (10.9%)
<i>U.N.</i>	0 —	5 (1.2%)	7 (1.1%)	157 (7.8%)

⁶²⁴ This method has been used in similar event-count studies in both IR and comparative politics and is an effective way to identify highly aggregated trends. See Scott L. Althaus, Jill A. Edy, & Patricia F. Phalen, "Using Substitutes for Full-Text News Stories in Content Analysis: Which Text Is Best?," 45 *AMERICAN JOURNAL OF POLITICAL SCIENCE* 707 (2001); Christian Davenport, "Multi-Dimensional Threat Perception and State Repression: An Inquiry into Why States Apply Negative Sanctions," 39 *AMERICAN JOURNAL OF POLITICAL SCIENCE* 683-713 (1995); Doug McAdam, "Tactical Innovation and the Pace of Insurgency," 48 *AMERICAN SOCIOLOGICAL REVIEW* 735-754 (1983); and Lance Bennett "Toward a Theory of Press-State Relations in the United States," 40 *JOURNAL OF COMMUNICATION* 103-125 (1990).

⁶²⁵ Numbers in parentheses represent the number of citations as a proportion of the total number of articles related to criminal procedure.

Finally, I counted references to the United Nations to gauge the frequency with which the Chinese media included references to what many scholars consider the principal source of international legal norms regarding civil and political rights. Table 4.2 and figure 4.2 detail the number of articles with references to the United Nations and the four common and civil law countries as well as the proportion of articles that discussed a foreign jurisdiction or the United Nations. Contrary to the expectation that the laws of other civil law systems should be more salient in the legal development of a fellow civil law state, the data suggest no statistically significant relationship other than an overall growing interest in foreign and international law overall.

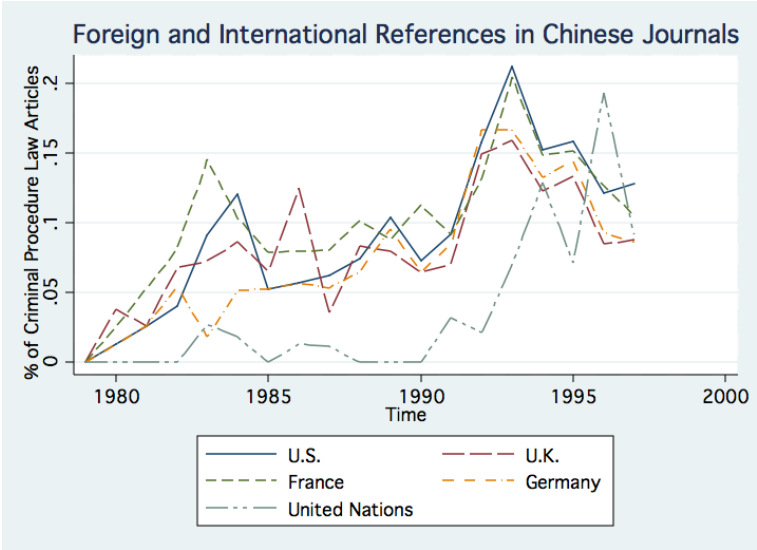


Figure 4.2. *Proportion of Citations to the UN and Foreign States in CPL Articles*

To examine whether authors discussed foreign or international law together as a whole corpus of alternative law, or whether some countries’ legal norms stood apart, I also searched the universe of articles related to CPL for exclusive mentions of the United Nations or of particular legal systems. This search reveals whether Chinese legal commentators give some foreign and international sources greater attention than others. Figure 4.3 and table 4.3, which examine exclusive citations to certain foreign

and international sources, depict the results of this search.

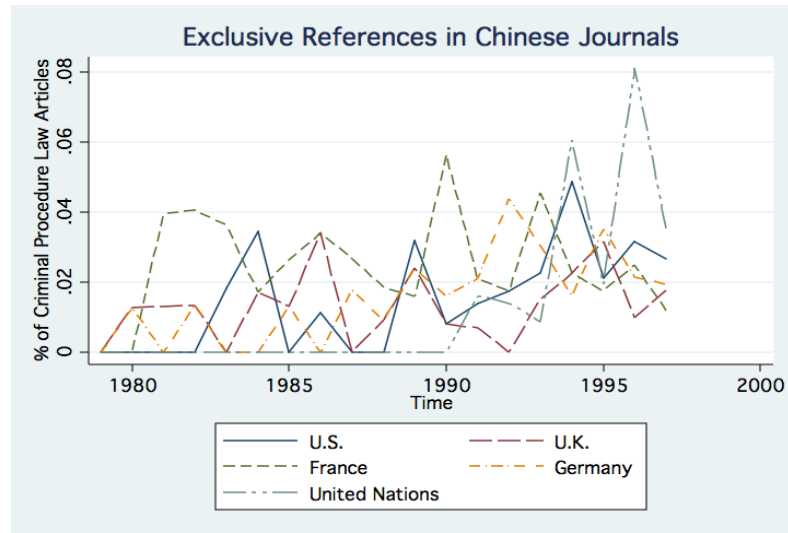


Figure 4.3. *Exclusive Citations to the UN and Foreign States*

Table 4.3. *Exclusive Citations to the UN and Foreign States in CPL Articles*⁶²⁶

	'78-'82	'83-'87	'88-'92	'93-'97
<i>U.S.</i>	0	4	9	61
	—	(1.7%)	(1.4%)	(3%)
<i>U.K.</i>	3	5	6	36
	(1.2%)	(1.2%)	(0.9%)	(1.8%)
<i>France</i>	6	11	16	41
	(2.5%)	(2.8%)	(2.6%)	(2%)
<i>Germany</i>	2	3	14	45
	(0.8%)	(0.7%)	(2.2%)	(2.2%)
<i>U.N.</i>	0	0	4	59
	—	—	(0.6%)	(2.9%)

⁶²⁶ Numbers in parentheses are citations as a proportion of the total number of articles related to criminal procedure.

Contrary to the hypothesis that the legal family of a state determines the jurisdictions into which that state will look for inspiration for reforms of its own laws, these descriptive statistics suggest that neither civil law nor common law systems weigh more heavily in Chinese media discussions of criminal procedure law. Indeed, the proportion of CPL-related articles that discuss common law countries in general or exclusively (24.2%; 4.8%) is slightly greater than of those articles discussing civil law systems (24.1%; 4.2%), thus further contradicting the expectations of both legal family and norm localization theories. Moreover, the data suggest, counterintuitively, that the United States stands as the most influential source of foreign law in China. This finding, while surprising, confirms the observation of multiple respondents, all of whom cited the United States as the most frequent source of legal solutions adopted by Chinese legal reformers.⁶²⁷ Moreover, the data does not reveal the additional subtle ways in which U.S. law affects legal reform in the PRC. More specifically, it does not capture citations to U.S. law obscured by legal innovations transplanted to legal systems such as Taiwan, Japan, and Korea that are then subsequently adopted by China.⁶²⁸

To analyze this finding more rigorously, as well as to test additional hypotheses described in Chapter 3, I conducted multiple tests of the frequency count data. The analysis of these hypotheses, however, presented several issues because the dependent variable—citation to a foreign or international source—is a rare event count. Event counts are variables that represent the number of times a particular event occurred during a certain time period—arbitrarily marked by month, year, or some other convenient period—and so take on a value of some positive integer or zero.⁶²⁹

⁶²⁷ Interview, 9/7/2010; 9/10/2010; 9/20/2010.

⁶²⁸ Interview, 9/10/2010.

⁶²⁹ See Gary King, “Event Count Models for International Relations: Generalizations and Applications,” 33 INT’L STUD. QUARTERLY 123 (1989).

The distribution of such data precludes the use of methods such as standard mean difference tests or ordinary least squares regression that assume population normality of the dependent variable.⁶³⁰

Table 4.4. *Negative Binomial Regression of Citations of Foreign Law in Chinese Periodicals*⁶³¹

TOTAL MENTIONS		UNIQUE MENTIONS	
VARIABLE		VARIABLE	
<i>Economic and Military Aid</i>	0.0001007 (0.0004733)	<i>Economic and Military Aid</i>	-0.0002456 (0.0005593)
<i>Constitutional Maturity</i>	0.0590324*** (0.0100945)	<i>Constitutional Maturity</i>	0.063162*** (0.0166867)
<i>Legal Family</i>	- 0.0110026 (0.2691848)	<i>Legal Family</i>	0.1622735 (0.1753918)
<i>Wald chi square</i>	41.53***	<i>Wald chi square</i>	15.52***

Given the nature of the data, the most appropriate means of analysis is a negative binomial panel regression with robust variance estimators. Such a model can manage data that is both cross-sectional and time-series, as well as a dependent variable truncated at zero. As table 4.4 illustrates, the relationship between the frequency with which Chinese legal scholars and commentators appealed to foreign sources bore no statistically significant relationship to the amount of aid received from a state or the legal family of the foreign jurisdiction. Instead, the finding confirms the impression shared by several respondents that it was simply the persuasiveness of

⁶³⁰ See *id.* at 126.

⁶³¹ Conducted in Stata using the following command: *xtnbreg [variables], exposure(total # of CPL articles), vce(robust)*. Note: *** significant at the 1% level, p < 0.01.

foreign law, not its origin, that mattered.⁶³²

In addition, the only statistically significant result counters the expectation that as a state's constitution ages, the frequency with which legal scholars and officials appeal to foreign jurisdictions goes down. Here, China proved more open to foreign sources as it reentered the international community following Mao's death. Contrary to many expectations of comparative law scholars, China did not grow more confident of its domestic jurisprudence. Rather, China grew more curious about the jurisprudence of other states.

These results reveal that the most common explanations of legal diffusion do not survive rigorous scrutiny and suggest conditions such as distributions of power and legal family have no statistically significant relationship with the ultimate sources of legal influence. To examine the role played by discourse in determining the source and content of law, the following subsection performs additional content analysis of Chinese articles concerning criminal procedure reforms prior to the adoption of the 1997 CPL.

b. Opinion Extraction and Support for Criminal Procedural Reform

At the time of the drafting of the 1997 CPL, which began in 1991, just two years after the Tiananmen Square massacre, officials in Beijing did not appear eager to introduce procedural reforms that would serve to restrain their ability to marshal the resources of the state against perceived criminals. As Anthony Dicks observed in 1989, prior to the reform of the CPL, "In the field of law and order, there is little necessity for any change in the law to accommodate the immediate needs of the leadership."⁶³³ Such cynicism toward the CCP-dominated legal system proved well-founded by the final version of the 1997 CPL. Indeed, as Stanley Lubman observed

⁶³² Interview, 9/7/2010; 9/13/2010; 9/20/2010.

⁶³³ Dicks, "Chinese Legal System," at 462.

just after its promulgation, “The criminal process in the 1990s, although it has undergone reform, still displays greater continuity between current institutions and practices and those of the Maoist period than any other area of the law.”⁶³⁴

Nonetheless, several scholars maintain that through the 1997 CPL reforms China’s legal system made many strides towards a convergence with the best practices of the international community.⁶³⁵

In order to examine the relationships among discourse, advocacy, and procedural reform, as well as to uncover why some reforms succeeded while others failed, it is first necessary to identify which reforms transnational advocates proposed prior to the passage of the 1997 CPL. It is also necessary to identify which of the proposed reforms already existed within a domestic discourse, and which did not. In the following sections, I outline this variation and conduct a computer-aided content analysis to demonstrate the relationship between support for a particular reform and its discursive environment. As will be shown, while the 1997 CPL did import several of the so-called best practices of the transnational legal community, the law made fewer advances in matters of state power about which an active discourse already existed among Chinese officials and legal actors. Moreover, it demonstrates that the two-tailed model of diffusion explains aspects of the reform that other models cannot.

The revised 1997 CPL expanded the number of articles in the code from 164 to 225. In these new articles, as well as in the revised articles that remained (the 1997 CPL included more than 110 amendments), legislative drafters worked to transplant the many new legal concepts that survived the scrutiny of the mark-up process. Based on a review of transnational and Chinese legal writings about the 1997 CPL, the key issues of reform that drew the attention of foreign and domestic advocates in the

⁶³⁴ LUBMAN, *BIRD IN A CAGE*, p. 71.

⁶³⁵ *See, e.g.,* RANDALL PEERENBOOM, *CHINA’S LONG MARCH TO THE RULE OF LAW* (Cambridge University Press: 2002).

drafting process fell into the eight following categories:

- Rules of Evidence*—including the fruit of the poisonous tree doctrine (i.e. the admissibility of evidence derived from coercive measures);
- Rules of Detention*—including the practice of “detention for investigation;
- Right to Counsel*— including the division of authority between police and the courts with respect to investigation and trial;
- Plea Bargaining*—including the procuratorate power of conviction without punishment;
- Adversarial Procedures*— including the expanded role of defense counsel;
- Presumption of Innocence*—including the right of the accused to maintain innocence until adjudicated guilty;
- Death Penalty*—including procedures governing enforcement of the death sentence; and
- Appeal*—including the right of defendants to seek higher review of an adverse decision.⁶³⁶

In the following subsections, I describe the presence (or absence) of each of these policies in China’s legal history prior to the 1997 CPL. This review demonstrates that these policies vary in the degree to which an active domestic discourse preexisted the post-Mao push to reform China’s criminal procedure law. Moreover, it suggests that those policies about which little discourse existed were most amenable to reform.

i. Bureaucratic Politics and the 1997 CPL

Before examining what role discourse played in determining whether certain proposed reforms survived the drafting process, it is worth first considering whether a bureaucratic politics perspective can fully explain the variation. In certain policy domains, the difference between reforms that ultimately survive the drafting process and those that fail often lies not in the discursive environment but rather in the fact that: 1.) successful reforms do not involve overlapping bureaucratic or institutional interests and so are easier for officials to revise or ignore; and 2.) reluctant officials

⁶³⁶ See Fan, at 4; Biddulph, at 228 n.11; R. KEITH & ZHIQIU LIN, LAW AND JUSTICE IN CHINA’S NEW MARKETPLACE (Palgrave, New York: 2001).

anticipate that such reforms will not be implemented by the responsible government organs.⁶³⁷ Accordingly, bureaucratic actors mollify transnational and domestic advocates by agreeing to certain provisions at time *t-1* that they do not expect will constrain them at time *t*.

Whether proposed reforms were ultimately adopted or resisted during the drafting process of the 1997 CPL, however, cannot be fully explained by such a bureaucratic model. Firstly, as with the successful procedural reforms such as the presumption of innocence, adversarial procedures, the right to counsel, and plea-bargaining, resisted procedures such as the right to seek an appeal, the decision of whether to exclude evidence unlawfully obtained, and the administration of capital punishment are all procedures that operate primarily within the authority of a single bureaucratic organ—the people’s courts. As such, these resisted procedural reforms did not significantly implicate the policy portfolios of other bureaucracies that possessed competing interests or rulemaking power. Unlike the negotiation of an international treaty, wherein officials at the national-level are involved in the negotiation of an agreement that is to be implemented by provincial and local government agencies and bureaus outside the policy portfolio or interests of national-level officials, the 1997 CPL was drafted with the direct involvement of the judiciary and mainly concerned procedures limited to that bureaucratic entity.⁶³⁸ If adopted, the application and reach of the proposed rules would thus not have encroached upon the functions of other agencies in significant ways. It comes as no surprise, then, that a content analysis of attitudes toward the proposed reforms reveals no statistical difference among the various bureaucracies involved in the criminal justice system.

Moreover, while an exclusionary rule administered by court officials could

⁶³⁷ See Mertha & Pahre (2005).

⁶³⁸ See Luo (2000), at 7.

affect the manner by which officials within the Ministry of Public Security or the People's Procuratorate gather evidence, there are a number of internationally recognized exceptions to the doctrine and numerous ways for a court to circumvent such a rule, should it desire to do so. European countries, for example, have long applied a balancing test whereby a court need only consider whether the introduction of evidence unlawfully obtained would result in the denial of a defendant's right to a "fair trial," as guaranteed by Article 6 of the European Convention on Human Rights.⁶³⁹ In 1950, for example, a Scottish court faced with such a question applied a test to balance "(a) the interest of the citizen to be protected from illegal or irregular invasions of liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Courts of law on any merely formal or technical ground."⁶⁴⁰ In the United States, which developed some of the strictest rules concerning unlawfully obtained evidence during the latter years of the Warren Court, courts nonetheless recognize various exceptions, including the inevitable discovery rule, independent source doctrine, good faith, and dissipation of taint.⁶⁴¹ As such, the difficult interagency deal-making that can frustrate attempts at legal reform was less pronounced in the case of reforming China's criminal procedure law than in cases where legal reforms to be implemented by one party were agreed to by another. It follows that a bureaucratic politics explanation of why some reforms were deemed acceptable, while others were not, does not fully explain the variation in the reforms ultimately adopted in the 1997 CPL.

In addition, the respective interests of center and local judicial officials are not

⁶³⁹ See Stephen C. Thaman, 'Fruits of the Poisonous Tree' in Comparative Law, 16 Sw. J. Int'l L. 333 (2010), at 352.

⁶⁴⁰ Id. (citing *Lawrie v. Muir* [1950] J.C. 19, at 26 (Scot.)).

⁶⁴¹ See, e.g., *Nix v. Williams*, 467 U.S. 431 (1984); *Murray v. United States*, 487 U.S. 533 (1988); and *United States v. Leon*, 468 U.S. 897 (1984).

as opposed as center and local administrative officials responsible for the implementation of rules governing commercial and trade matters such as intellectual property rights (IPR). In IPR matters, national-level officials are interested in resolving foreign trade disputes, preventing future ones, and avoiding economic sanctions, whereas local officials tasked with implementing the national policy are beholden to local governments rather than their national-level counterparts.⁶⁴² As such, local protectionism can trump national interests in commercial and arbitral proceedings.⁶⁴³ Similarly, in administrative proceedings, wherein a citizen files suit against corrupt local government officials, those local government officials can influence the proceedings in their favor and against the wishes of national-level officials interested in rooting out local corruption.

In the case of criminal procedure law, by contrast, the fact that judges are hired, paid, promoted, and fired by local officials does not necessarily exacerbate to the same extent the tensions between judicial obligations to local governments (*kuai*) and administrative superiors (*tiao*).⁶⁴⁴ In criminal matters, in most cases the priorities of national and local officials are largely the same—convicting the accused. Moreover, when central and local interests do conflict they primarily conflict not on matters of criminal procedure implicated by the proposed 1997 reforms, but rather on the antecedent decision of whether to arrest or prosecute at all.⁶⁴⁵ Indeed, Murray Scot Tanner and Eric Green recently observed that one of the greatest obstacles to the development of the “rule of law” in China and to the effective enforcement of

⁶⁴² See Mertha & Pahre (2005), at 705.

⁶⁴³ See Lubman (2006), at 30.

⁶⁴⁴ On *tiao/kuai* tensions see Andrew Mertha, *China's Soft Centralization: Shifting Tiao/Kuai Authority Relations*, 184 CHINA QUARTERLY 791, 792 (2005). On the local control of judges, see Jerome A. Cohen, *Chinese Legal Reform at the Crossroads*, 169 FAR E. ECON. REV. 23, 25 (Mar. 2006); LUBMAN (1999).

⁶⁴⁵ Criminal Procedure Law, arts. 83, 86.

Beijing's criminal justice priorities has been China's highly localized policing system in which local government officials retain considerable organizational, financial, and personnel power over local security officials, thus thwarting the policy priorities of the central government. This relationship, which is described by Chinese policymakers as "the integration of vertical and horizontal leadership, with horizontal leadership as primary," creates powerful institutional incentives for "local police abuses, corruption, predation, and 'protectionism.'"⁶⁴⁶ As they describe, the control by local governments over the resources and management of local security officials results in various local criminal activities evading prosecution in lower level courts.⁶⁴⁷ In these cases, local governments intervene to prevent the relevant local officials from the Public Security Bureau or the People's Procuratorate—the state organ responsible for approving arrests and investigating criminal cases—from prosecuting the case or to compel them to prosecute poorly rather than leaving it to judges to find the defendants innocent.⁶⁴⁸ In this way, as He Weifang describes, "reliance on the judiciary has been not more than secondary" to other institutional channels available to policy makers trying to dictate outcomes.⁶⁴⁹

Secondly, given the unequal distribution of power in favor of the state within the Chinese political system, however, all of the reforms—both successful and unsuccessful—can be, and have been, easily circumvented by state actors affected by the proposed reforms. Chinese officials at all levels have, when expedient for them to

⁶⁴⁶ Murray Scot Tanner, & Eric Green, *Principals and Secret Agents: Central versus Local Control Over Policing and Obstacles to t"Rule of Law" in China*, 191 CHINA QUARTERLY 644 (2007).

⁶⁴⁷ *Id.*, at 669.

⁶⁴⁸ See He Weifang, *The Police and the Rule of Law: Commentary on "Principals and Secret Agents*, 191 CHINA QUARTERLY 671, 672 (2007). Ira Belkin, *China's Criminal Justice System: A Work in Progress*, 6 WASH. J. OF MODERN CHINA 61, 74 (2000). The Procuratorate itself rarely conducts trials. The last trial conducted by the Supreme People's Procuratorate was the Gang of Four trial in 1979.

⁶⁴⁹ He (2007), at 673.

do so, circumvented the existing rules governing the number of appeals permitted, the administration of the death penalty, and rules governing detention. Even since the introduction of decentralizing reforms, central authorities retain the power to reopen any case in any jurisdiction. Moreover, Chinese law contains broad and ill-defined retrial procedures, allowing multiple national actors, including the CCP, the Procuratorate, and higher courts, to reopen final lower-court decisions.⁶⁵⁰ In the 2003 Liu Yong Mafia Case, for example, an intermediate court in Liaoning tried Liu Yong and found him guilty of organized criminal activity, bribery, and illegal possession of weapons, sentencing him to death. The Liaoning Higher People's Court subsequently commuted the death penalty, finding that his confession had been extracted through torture. Facing a public outcry for such leniency and, more importantly, pressure from the CCP to alter the decision,⁶⁵¹ the Supreme People's Court invoked a questionable procedural device to again revise the decision of the intermediate court in order to achieve the desired result, thus re-imposing the death penalty for Liu.⁶⁵²

Regulations governing detention have likewise proved easy for officials to circumvent through appeals to the opaque rules governing matters of "state secrets," which are expansively defined and, in the absence of statutory guidance, equip authorities with considerable power to detain citizens at will and without review.⁶⁵³ In addition, any obstacles posed by an exclusionary rule could likewise be easily avoided by the adoption of the numerous exceptions to the inadmissibility of evidence unlawfully obtained, as is the practice in most countries that apply a version of the

⁶⁵⁰ Id. at 138.

⁶⁵¹ Interview, March 5, 2009.

⁶⁵² 最高人民法院再审理刘涌案刑事判决书(全文) [Criminal Judgment of the Supreme People's Court on the Retrial of Liu Yong's Case], available at: <http://www.chinacourt.org/public/detail.php?id=96393> (last visited June 18, 2010).

⁶⁵³ Human Rights in China, *State Secrets: China's Legal Labyrinth* (Sheridan Press, 2007); Amnesty International, "State Secrets: A Pretext for Repression," available at: <http://web.amnesty.org/library/index/engasa170421996#SSL>.

doctrine. With PRC authorities thus so readily able to circumvent the “notoriously flexible”⁶⁵⁴ criminal procedures already in place, it is unclear why officials would resist the adoption of additional easily avoided procedures while accepting others.

ii. Novel Reforms: Successful Transplants into the 1997 CPL

1. *Presumption of Innocence*

One of the greatest innovations included in the 1997 CPL is the inclusion of the general principle that the defendant is innocent until found guilty by a properly administered court of law. Traditionally, it was uncontroversial to deem a citizen a criminal as soon as he or she was in the custody of public security officials. Nor was it controversial to presume the detained guilty until he or she could prove innocence in the course of a trial.⁶⁵⁵ The principle that those charged with a crime by the state may be innocent is relatively new to criminal law discourse in the PRC. Indeed, prior to 1992, one respondent noted, “[Chinese legal scholars] were not even permitted to discuss the issue.”⁶⁵⁶ According to at least one former public security official, the term “suspect” had been purposely avoided by government officials in order to affirm the underlying belief that a detained person is guilty of a crime rather than just suspected of one.⁶⁵⁷ While the term “presumption of innocence” (“无罪假定”) does not appear in the 1997 CPL reforms, the underlying principle is present throughout the revised law. For example:

第十二條 [Article 12]:

未經人民法院依法判決,對任何人都不得確定有
罪 [No person shall be found guilty without being

⁶⁵⁴ See Cohen (2003).

⁶⁵⁵ See, e.g., Henry M. Field, “Criminals Before the Judge,” in FROM EGYPT TO JAPAN (Scribner, New York: 1877), at 378.

⁶⁵⁶ Interview, 9/7/2010.

⁶⁵⁷ See David Finkelstein, “The Language of Communist China’s Criminal Law,” 27 JOURNAL OF ASIAN STUDIES 503, 507 (1968).

judged as such by a People's Court according to law].

第一百六十二條 [Article 162]:

在被告人最后陳述后,審判長宣布休庭,合議庭進行評議,根據已經查明的事實,證據和有關的法律規定,分別作出以下判決 [*After a defendant makes his final statement, the presiding judge shall announce an adjournment and the collegial panel shall conduct its deliberations and, on the basis of the established facts and evidence and in accordance with the provisions of relevant laws, render one of the following judgments*]:

(一)案件事實清楚,證據確實、充分,依據法律認定被告人有罪的,應當作出有罪判決 [(1) *if the facts of a case are clear, the evidence is reliable and sufficient, and the defendant is found guilty in accordance with law, he shall be pronounced guilty accordingly*];

(二)依據法律認定被告人無罪的,應當作出無罪判決 [(2) *if the defendant is found innocent in accordance with law, he shall be pronounced innocent accordingly*];

(三)證據不足,不能認定被告人有罪的,應當作出證據不足,指控的犯罪不能成立的

無罪判決 [(3) *if the evidence is insufficient and thus the defendant cannot be found guilty, he shall be pronounced innocent accordingly on account of the fact that the evidence is insufficient and the accusation unfounded*].

Under such provisions, despite retaining tools such as long-term detention without trial, a people's court cannot officially deem a criminal defendant guilty prior to a lawful judgment by a people's court. Nor can a court deem a criminal defendant guilty where the evidence fails to substantiate such a claim. In addition to this additional language stressing the need to first prove a defendant guilty through a procedurally sound process, the 1997 CPL makes the important distinction between suspects and defendants. In the 1979 CPL, persons suspected of committing a crime are uniformly referred to as defendants. After 1997, persons suspected of committing a crime are merely "suspects" until criminal proceedings against them begin, at which point they become "defendants."

This is not to say the practice of achieving "lawful" judgments in China meets the substantive and procedural elements of a fair trial required under Article 14 of the International Covenant on Civil and Political Rights, of which China is a signatory.⁶⁵⁸ Indeed, despite amounting to "a significant stride towards guaranteeing [PRC] citizens

⁶⁵⁸ China became of a signatory of the International Covenant on Civil and Political Rights just one year after the promulgation of the 1997 CPL. China, however, is still yet to ratify the covenant. *See* Office of the United Nations High Commissioner for Human Rights, Ratifications and Reservations, International Covenant on Civil and Political Rights, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited June 21, 2010).

the right to a fair trial,”⁶⁵⁹ the procedural rights afforded by the 1997 CPL have been violated routinely by various government actors.⁶⁶⁰ Rather, the reformed provisions of China’s criminal procedure law such as an expansion of the presumption of innocence merely afford the promise—not necessarily the practice—of broader rights protection.

2. Plea-Bargaining

One entirely novel (and surprising) innovation in the 1997 CPL is the so-called “summary procedure” (“简易程序”).⁶⁶¹ This practice essentially mirrors aspects of the American plea-bargaining system. The transplanted Chinese variant applies where the punishment applicable to the crime amounts to less than three years in prison and the prosecutor consents to the use of the summary procedure. The subsequent trial consists of a single judge rather than a full collegiate bench and the prosecutor need not be present.⁶⁶²

The arrival of a plea-bargain-style procedure to China, while not necessarily a reform that is pro-defendant in character,⁶⁶³ nonetheless surprised comparative legal scholars who claimed civil law and common law systems are founded upon two incompatible procedural cultures premised upon “two different sets of basic understandings of how criminal cases should be tried and prosecuted.”⁶⁶⁴ Civil law systems, scholars note, are generally averse to the practice of plea-bargaining because of their conception of criminal procedure as an official investigation performed by court officials in pursuit of the “truth.” Adversarial common law systems, by contrast,

⁶⁵⁹ Jennifer Smith & Michael Gompers, “Realizing Justice: The Development of Fair Trial Rights in China,” 2 *Chinese L. & Pol’y Rev.* 108, 111 (2007).

⁶⁶⁰ 2009 Annual Report for China, *Amnesty International*, available at: <http://www.amnestyusa.org/annualreport.php?id=ar&yr=2009&c=CHN>.

⁶⁶¹ See 1997 CPL, arts. 174-179.

⁶⁶² Art. 175.

⁶⁶³ See Albert W. Alschuler, “Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System,” 50 *U. Chi. L. Rev.* 931 (1983).

⁶⁶⁴ See Langer (2004), at 4.

deem the purpose of criminal procedure to be the impartial governance of a dispute between two parties—prosecution and defense.⁶⁶⁵ Contrary to such views, China has proved readily accepting of a variant on American plea-bargaining procedures despite its structure as a civil law system.⁶⁶⁶ The adoption of the procedure, it follows, suggests the successful challenge of local constitutive notions of the purpose of law and the legal system.⁶⁶⁷ Indeed, as one participant in the reforms recalled, the drafting group were not concerned with finding legal solutions from fellow civil law systems. “Civil law systems are simply not as developed [as common law systems],” he noted.⁶⁶⁸

3. Adversarial Procedure

Due perhaps to the considerable familiarity with the U.S. legal system among the research team led by Chen Guangzhong, if not their “general preference” for U.S. law,⁶⁶⁹ the 1997 CPL greatly expanded the official role played by defense counsel in the process of gathering evidence and participating in courtroom trials.⁶⁷⁰ Traditionally, China’s dynastic legal system provided little procedural guidance as to the role of counsel in the representation of private individuals or the notion of defendant rights.⁶⁷¹ In contrast to the Anglo-American, accusatorial tradition, which pits the accuser as the adversary of the accused, judicial proceedings in China did not depend on the initiative of the parties or their legal representatives.⁶⁷² Instead, inquisitorial systems

⁶⁶⁵ *Id.*

⁶⁶⁶ See Máximo Langer, “Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure,” 33 AM. J. CRIM. L. 223 (2006).

⁶⁶⁷ Foreign efforts to further reform Chinese attitudes in this area have continued most recently with creation in 2006 of the Ford Foundation’s Plea-Bargaining Research project arranged in collaboration with the China Prosecutors Association. See Xie Pengcheng, “Ideas and Methods of Plea Bargaining Research.”

⁶⁶⁸ Interview, 9/13/2010.

⁶⁶⁹ Interview, 9/18/2010.

⁶⁷⁰ See Luo (2000), at 13.

⁶⁷¹ See Jones, at 10.

⁶⁷² HE JIAHONG, CRIMINAL PROSECUTION IN THE PRC AND THE USA: A COMPARATIVE STUDY (China Procuratorial Press: 1995), at 31.

such as that of traditional China are premised on the notion that courts best achieve truth and public confidence through the disinterested inquiry of a judge. Much like the inquisitorial approach in other civil law systems, when an imperial Chinese magistrate took jurisdiction over a case he summoned all interested parties and interrogated them himself.⁶⁷³ Lawyers were not involved in the process.⁶⁷⁴ If the case involved non-testimonial evidence that could not be brought into court, he would go and examine it personally.⁶⁷⁵ Adversarial systems, by contrast, are premised on the notion that zealous advocacy by two opposed parties, mediated by a neutral arbiter of the law, best promotes just outcomes and public confidence in the procedural process.

The similarities of China's traditional justice system to the continental, inquisitorial style became more apparent when reformers of China's waning Qing dynasty consciously imported German-inspired legal codes via Japan.⁶⁷⁶ These continental influences continued through both the Republican and Maoist periods that followed, wherein the court itself took the lead in interrogating witnesses and gathering evidence.⁶⁷⁷ Even today, it is noted that "China's civil law, criminal law, and procedural codes clearly reflect a continental influence."⁶⁷⁸ This stems in part not only from the importation of continental codes via Japan, but also because under the principle of "democratic centralism,"⁶⁷⁹ statutory law promulgated by the legislative

⁶⁷³ See William Alford, "Arsenic and Old Laws: Looking Anew at Criminal Justice in Imperial China," 72 CAL. L. REV. 1180 (1984).

⁶⁷⁴ See PEERENBOOM, at 37.

⁶⁷⁵ See Jones, at 10; L. HUANG, A COMPLETE BOOK CONCERNING HAPPINESS AND BENEVOLENCE, C. Djang, trans. (1984).

⁶⁷⁶ See HE, at 124 (1995) (noting that "As in continental European countries, the prosecutorial organ, called the Bureau of Procuratorate, was also established within each of the trial courts.").

⁶⁷⁷ See PEERENBOOM, at 359,

⁶⁷⁸ He, at 147.

⁶⁷⁹ See Constitution arts. 3, 62, 67.

branch stands as the highest legal authority, not the judgments of a reviewing court.⁶⁸⁰

Despite this legal tradition, the 1997 CPL reforms reflect the considerable influence of Anglo-American common law philosophy that advocates adversarial adjudication.⁶⁸¹ The reforms alter the burden of collecting evidence and presenting the legal questions from the presiding judge onto the procuratorate and defense counsel.⁶⁸² Only if there is sufficient doubt about the evidence should the court investigate evidence itself.⁶⁸³ Otherwise, judges are to remain, at least ostensibly, the impartial umpires of the contest between the prosecution and defense.⁶⁸⁴ Moreover, under the 1979 CPL rules, a defense counsel could not cross-examine a witness, instead relying on the chief judge to raise questions.⁶⁸⁵ Under the amended 1997 CPL, defense counsel may cross-examine any witness,⁶⁸⁶ present opinions on the evidence, and raise doubts about the prosecutors case.⁶⁸⁷ “The court,” as one scholar describes the effect of the 1997 CPL reforms, “has [since] had to learn to accept a more impartial role as a neutral adjudicator.”⁶⁸⁸ This shift from the court-led inquisitorial system to the more public, adversarial approach has, at least officially, “put defense counsel in a more equitable position with public prosecutors in courtroom hearings” than it was prior to the 1997 CPL reforms.⁶⁸⁹ It is worth noting again that while such reforms represent a

⁶⁸⁰ See Constitution art. 3. At the democratic center sits the NPC. See Constitution arts. 57, 62, and 67.

⁶⁸¹ Jiang Ping, former President of the China University of Political Science and Law, illustrated this growing affinity for common law over civil law when he announced that “China should enact a civil code with an *open* spirit.” See Jiang Ping, 制定民法典的几点宏观思考 [Several Thoughts on the Drafting of the Civil Code] 3 政法论坛 (1997).

⁶⁸² Art. 157; PEERENBOOM, at 359.

⁶⁸³ Art. 158.

⁶⁸⁴ Arts. 156-160.

⁶⁸⁵ Luo (2000), at 15.

⁶⁸⁶ Art. 156.

⁶⁸⁷ Art. 160.

⁶⁸⁸ See PEERENBOOM, at 359.

⁶⁸⁹ LUO (2000), at 14.

shift, however gradual, toward greater protections of the accused, the implementation of those reforms has proved variable when the interests of the state are challenged.⁶⁹⁰ As William Alford noted, “many [PRC] judges seem to be experiencing considerable difficulty in accepting the type of novel, if still modest, adversarial role provided to defense counsel in the 1996 revisions to the criminal procedure law.”⁶⁹¹ Nonetheless, the novel reforms erected a rudimentary adversarial framework within which adversarial legal claims can be raised.

4. Right to Counsel

A related reform that similarly shifted the structure of criminal procedure in China from the inquisitorial toward a more adversarial style, and which successfully survived the 1997 CPL drafting process, is the expanded right of accused persons to an attorney, even by those that cannot afford one. The justice system in imperial China did not rely on a trained class of lawyers or legal professionals to advocate for a defendant. Rather, as He Weifang explains, “[t]he traditional Chinese legal concept was a direct result of a judicial process dominated by laymen.”⁶⁹² Those subjected to the justice system faced not a legally trained judge, but the moral condemnation of a magistrate educated in the classic Confucian texts in preparation for the Imperial Civil Service Examination (科举考试).⁶⁹³ As Randall Peerenboom describes, “Traditional China held neither law nor lawyers in high esteem.”⁶⁹⁴ Instead, society operated from the Confucian premise that any reliance on lawyers would lead to a ruinous society in

⁶⁹⁰ Zhao Suisheng, *Debating Political Reform in China: Rule of Law vs. Democratization* (2006), at 174-75.

⁶⁹¹ Alford, at 219.

⁶⁹² See He Weifang, “China’s Legal Profession: The Nascence and Growing Pains of a Professionalized Legal Class,” 19 *COLUM. J. ASIAN L.* 138-51 (2005).

⁶⁹³ See He Weifang, “The Judicial System and Governance in Traditional China,” in *THE RULE OF LAW: PERSPECTIVES FROM THE PACIFIC RIM* (Mansfield Dialogues in Asia: 2000), at 97.

⁶⁹⁴ See PEERENBOOM, at 345.

which individuals acted in pursuit of their own interests at the expense of others.⁶⁹⁵ The defendant's role in a criminal trial was thus not the assertion of his or her rights via legal counsel, but instead to embody the "virtues of concession and yielding."⁶⁹⁶ Officials encouraged defendants to confess their presumed guilt rather than contest the charges leveled against them with the aid of a legal representative. Indeed, prior to the 1997 CPL and the 1996 Lawyers Law, which together gave criminal defendants the right to the assistance of legal counsel,⁶⁹⁷ no legal aid system existed to supply defendants with such attorneys.⁶⁹⁸ Since 1997, however, the Chinese judicial system has adopted this novel approach to dealing with defendants processed through the criminal justice system.⁶⁹⁹ Under the revised law, the court must now consider the "economic difficulties" of the defendant as well as provide counsel to a broader class of defendants, including the disabled.⁷⁰⁰ The reforms would have gone even further toward *Miranda*-like rights to counsel, one participant recalled, were it economically feasible for China to do so at the time.⁷⁰¹

In addition to legal aid, under the 1979 CPL, defense counsel entered the proceedings only upon the initiation of the trial, thus minimizing the ability of the defendant to gather and investigate evidence. After 1997, however, defendants in most cases have a right to an attorney "after receiving the first interrogation from an investigative organ or from the day of receiving a compulsory measure."⁷⁰² This enables defendants to receive counsel even prior to being formally charged. Again,

⁶⁹⁵ Id.

⁶⁹⁶ Joseph Chan, "A Confucian Perspective on Human Rights for Contemporary China," in Joanne R. Bauer & Daniel A. Bell, eds., *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* (Cambridge University Press: 1999), at 226.

⁶⁹⁷ 1997 CPL art. 34.

⁶⁹⁸ See PEERENBOOM, at 160.

⁶⁹⁹ See PEERENBOOM, at 359.

⁷⁰⁰ 1997 CPL, arts 34(1)–(3).

⁷⁰¹ Interview, 9/14/2010.

⁷⁰² Art. 96.

while the implementation of this reform has certainly not been uniform among all criminal trials in China, the reform nonetheless introduces a novel procedure and discourse to which defendants can appeal.

iii. “Points of Concern”: Failed Transplants into the 1997 CPL

The drafters of the 1997 CPL did not, however, accept all of the pro-defendant reforms proposed by domestic and transnational legal advocates. As described below, the variation between those procedural reforms that proved successful and those that did not reveals a diffusion process that cannot be fully explained by rational choice or bureaucratic models. More specifically, given that state actors could easily circumvent the various procedural reforms at the implementation stage, such models cannot explain why the state ultimately adopted some reforms that ostensibly reduced the coercive power of the state but failed to adopt others. The following subsections outline these failed proposed reforms and suggest that greater resistance to reform emerged around those policies with cognitive discursive templates already in place.

1. *Death Penalty*

Despite the widespread criticism raised by foreign actors of policies governing the death penalty in China, the 1997 CPL saw very little movement on this issue. Indeed, as one respondent noted, “the death penalty is the hardest policy to reform.”⁷⁰³ In the end, the 1997 amendments “neither increased nor decreased the number of death sentences prescribed in the 1979 Criminal Code or other criminal supplementary laws.”⁷⁰⁴ The few reforms to the death penalty that officials did add to the 1997 reform included the requirement that all death sentences must first be reviewed and approved by the Supreme People’s Court.⁷⁰⁵ This was less a reform than a reversion to the original 1979 CPL article 144 which had been amended by a subsequent interpretation

⁷⁰³ Interview, 9/7/2010.

⁷⁰⁴ PEERENBOOM, at 13.

⁷⁰⁵ See art. 199.

of the law.⁷⁰⁶

The efforts of advocates attempting to reform provisions concerning the death penalty in the 1997 CPL emerged within already rich discursive context. The death penalty may be a constant element of China's penal code throughout its known history. It has not, however, been an unchanging one; the number of capital offenses has fluctuated throughout China's history, up to and including shifts since the establishment of the PRC.⁷⁰⁷ The first known public execution in China occurred as early as 2601 B.C.⁷⁰⁸ Ever since, the need for and appropriateness of the death penalty has been questioned by domestic advocates such as Confucius, with the debate taking clear form early on during the discursive exchanges between the Confucianist and Legalist philosophers that followed him.⁷⁰⁹ Capital punishment as a recurring "point of concern" in imperial China is demonstrated further by the varying ways each dynastic regime defined capital crimes and identified the categories of peoples to which it could be applied.⁷¹⁰ The sensitivity of capital punishment even predates the imperial age, at which time officials believed capital crimes should be held only during autumn and

⁷⁰⁶ That rule's similar requirement of centralized review of capital cases had been obviated by a 1981 NPC Standing Committee Decision Regarding the Approval of Cases Involving the Death Sentence. That 1981 Decision waived the requirement that the Supreme People's Court review and approve of all capital punishments and limited such review to only certain crimes. This Decision was amended still further by the 1983 Organic Law of the People's Courts, which enabled the Supreme People's Court to delegate its power of review in capital cases to high people's courts. Most recently, the Supreme People's Court promulgated new regulations in the Criminal Procedure Law governing the review of death penalty cases. *See*

“最高人民法院关于复核死刑案件若干问题的规定。” Available:

<http://rmfyb.chinacourt.org/public/detail.php?id=106249>.

⁷⁰⁷ These capital offenses were not always formally promulgated during the Maoist period, and so a true measure of the number of offenses that constituted capital crimes cannot be fully tallied.

⁷⁰⁸ Jeremy T. Monthly, "Internal Perspectives on Chinese Human Rights Reform: The Death Penalty in the PRC," 33 *TEX. INT'L L.J.* 189, 192 (1998).

⁷⁰⁹ *See* DE BARY (1960), at 35.

⁷¹⁰ *See* BODDE & MORRIS, at 102.

winter months because they are the appropriate seasons of decay.⁷¹¹ The requirement of higher review in death penalty cases also traces back to dynastic China. In pre-industrial China, where geographic distance exacerbated the problems of insufficient transportation, criminals convicted of capital offences were required to be transported to the provincial capital and could only be executed with the approval of the governor.⁷¹² Officials adhered to this cumbersome rule even in the aftermath of the Taiping Rebellion, during which officials in Guangzhou executed as many as 81,000 people over a fourteen-month period.⁷¹³

The PRC's official position on the death penalty has similarly varied over time, reflecting its status as a continued "point of concern" in Chinese society.⁷¹⁴ Chairman Mao, concerned about the execution of counterrevolutionaries falsely arrested, cautioned against capital punishment and considered it a short-term measure to be used selectively.⁷¹⁵ A leading early criminal law text released by the regime similarly warned: "a correct estimate of the death penalty's active role in the struggle against crime by no means implies the need to retain the death penalty forever. On the contrary, our country is in the process of creating conditions for the gradual abolition of this penalty."⁷¹⁶ Since these early commitments to reduce the application of capital

⁷¹¹ See BODDE & MORRIS, at 45 (citing the *Yüeh Ling*, an ancient calendrical text included in *the Li Chi*). See also JAMES LEGGE, *THE SACRED BOOKS OF CHINA: THE TEXTS OF CONFUCIANISM* (1964).

⁷¹² See Henry Field, "The Execution Ground," in *FROM EGYPT TO JAPAN*, Henry Field, ed. (Scribner, New York: 1877).

⁷¹³ See Henry Field, "A Carnival of Blood," in *FROM EGYPT TO JAPAN*, Henry Field, ed. (Scribner, New York: 1877).

⁷¹⁴ See Monthly, *Internal Perspectives on Chinese Human Rights Reform*, *supra* note 88, at 192-95.

⁷¹⁵ In his speech *The Ten Major Relationships*, Mao proclaimed: "Once a head is chopped off, history shows it cannot be restored, nor can it grow again as chives do, after being cut." MAO ZEDONG, *5 SELECTED WORKS OF MAO ZEDONG* 299-300 (1977).

⁷¹⁶ See JEROME COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA 1949-1963* (1968).

punishment, the number of capital offenses has increased from as few as twenty-nine following the passage of the 1979 Criminal Procedure Law to as many as sixty-eight today.⁷¹⁷ While some exploratory public opinion studies find a majority of people supportive of the death penalty, these studies lack sufficient survey data and offer no consensus view.⁷¹⁸ Demonstrating the public unease with capital punishment still further, officials ended televised and public executions after they grew concerned by public dissatisfaction with the practice.⁷¹⁹

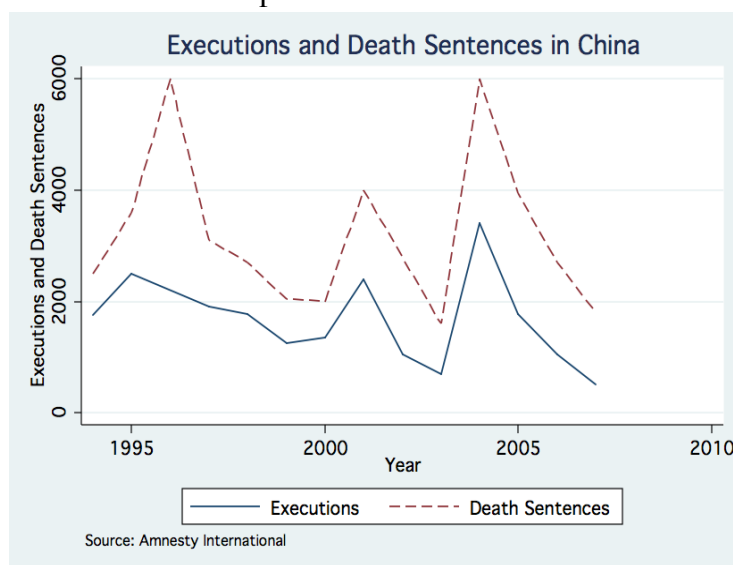


Figure 4.4. Executions and Death Sentences in the PRC

To the extent possible in a society with a controlled media, public discourse concerning the practice of the death penalty has continued apace in contemporary China. As one Chinese scholar who participated in a recent research trip abroad to

⁷¹⁷ See Hong Lu & Lening Zhang, “Death Penalty in China: The Law and Practice,” 33 J. OF CRIM. JUSTICE 367 (2005); and 2008 Annual Report for China, Amnesty International, available at:

<http://www.amnestyusa.org/annualreport.php?id=ar&yr=2008&c=CHN>.

⁷¹⁸ See Bin Liang, Hong Lu, Terance D. Miethe, & Lening Zhang, “Sources of Variation in Pro-Death Penalty Attitudes in China,” 46 BRITISH JOURNAL OF CRIMINOLOGY 119, 119 (2006); ROGER HOOD, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE (2002), at 243.

⁷¹⁹ James Feinerman, Address to Cornell Law School, Clarke Program in East Asian Law and Culture (Dec. 7, 2005).

examine foreign death penalty systems noted, the death penalty is just one of those issues that has “Chinese characteristics.”⁷²⁰ Wei Luo writes that the debate regarding the application of the death penalty in the lead-up to the 1997 CPL reforms remained “on-going” among “Chinese legal experts, law enforcement officers, and the public.”⁷²¹ Although official statistics of the number of executions performed each year is classified as a state secret, data collected from media accounts of executions further reflect the contested nature of the practice, as evidenced by large annual fluctuations in the number of death sentences and executions imposed over the past fifteen years. (See figure 4.4 above) Under the two-tailed model proposed here, the continued contested nature of the practice suggests foreign advocates of abolition faced a formidable domestic opposition able to tap into discourse forged over centuries of capital punishment in China. Such a normative explanation merits exploration given that more than ninety percent of criminologists find that capital punishment is not an effective policy tool to deter proscribed behavior.⁷²² In addition, numerous states that have otherwise clung to coercive tools of governance have effectively abolished the death penalty, either by law or in practice, including Myanmar.⁷²³

2. Detention

The debate over arbitrary detention, while not as prolonged as the debate over the death penalty, has similarly recurred in China throughout the twentieth century.⁷²⁴ This active discussion of authorized detention for examination continued after the

⁷²⁰ Interview, 9/10/2010.

⁷²¹ Luo (1998), at 12.

⁷²² See Michael L. Radelet & Traci L. Lacoek, “Do Executions Lower Homicide Rates?: The Views of Leading Criminologists,” 99 *J. Crim. L. & Criminology* 489 (2009).

⁷²³ Abolitionist and Retentionist Countries, *Amnesty International*, available at: <http://www.amnesty.org/en/death-penalty/>.

⁷²⁴ MARINA SVENSSON, *DEBATING HUMAN RIGHTS IN CHINA: A CONCEPTUAL AND POLITICAL HISTORY* (Rowman & Littlefield, Lanham, MD: 2002).

founding of the PRC and the subsequent formal sanctioning of the practice by an internal document of the CCP Central Committee.⁷²⁵ In the lead-up to the 1997 CPL, participants in the drafting process continued this debate over the appropriate amount of power of public security officials to detain citizens without the prior approval of the procuratorate. The 1979 CPL provided for as many as five forms of pre-trial detention. Many foreign and domestic observers grew especially critical of the controversial practice of “detention for examination” (“收容审查”),⁷²⁶ a commonly abused provision that often resulted in the detention of innocent people for long periods without ever being charged. Under the 1979 CPL, public security officials were empowered to detain a suspect for investigation for as many as ten days.⁷²⁷

China’s detention policy generated considerable discourse in the domestic and foreign media and so the strategy of officials was to conceal information concerning cases of detention for examination.⁷²⁸ Despite the mounting foreign condemnation of the practice, and the active domestic discourse surrounding its reform, the 1997 CPL revisions leave public security officials with considerable flexibility with respect to detention powers, even though extant restrictions on the practice are easily circumvented. While “ostensibly abolished,”⁷²⁹ the expansive ability to detain citizens

⁷²⁵ See *Instruction on Preventing the Blind Outflowing of People from Rural Areas*, Central Committee of the CCP (Beijing: Dec. 18, 1957); *Report on Urgently Preventing the Free Movement of the Population*, Central Committee of the CCP (Beijing: Nov. 7, 1961); Chen, *An Introduction to the Legal System of the People’s Republic of China*, at 205).

⁷²⁶ See, e.g., PUNISHMENT WITHOUT CRIME, at 5; *Howe Report*, at 42; CRIMINAL JUSTICE WITH CHINESE CHARACTERISTICS, at 67; Zhang Jianwei & Li Zhongcheng, “论废止收容审查” [On the Abolition of Detention for Examination], 3 *中外法学* (1994).

⁷²⁷ See 1979 CPL, art. 41.

⁷²⁸ See CHEN, at 205.

⁷²⁹ See Sarah Biddulph, “Mapping Legal Change in the Context of Reforms to the Chinese Police Powers,” in *ASIAN SOCIALISM AND LEGAL CHANGE: THE DYNAMICS OF VIETNAMESE AND CHINESE REFORM*, John Gillespie & Pip Nicholson, eds., (Australian National University Press: 2005), at 214.

survived, with drafters merely revising the language to read:

第六十一條 [Article 61]:

公安機關對於現行犯或者重大嫌疑分子,如果有下列情形之一的,可以先行拘留 [*Public security organs may initially detain an active criminal or a major suspect under any of the following conditions*]:....

(六)不講真實姓名,住址,身份不明的 [(6) *if he does not tell his true name and address and his identity is unknown; and*];

(七)有流竄作案,多次作案,結伙作案重大嫌疑的 [(7) *if he is strongly suspected of committing crimes from one place to another, repeatedly, or in a gang*].⁷³⁰

In addition to avoiding a direct challenge to the practice of detention for examination, the 1997 CPL relaxes the standards for arrest and greatly extends the period of pre-arrest detention.⁷³¹

3. *Right to Appeal*

Advocacy for the right of a defendant to appeal a judgment has likewise fluctuated throughout China's legal history. These oscillations stem in part from the competing influences of Confucianist and Legalist strains of legal philosophy—*li* and *fa*. During imperial periods in which traditional Confucian discourse prevailed, parties enjoyed almost unlimited opportunities to appeal a sentence.⁷³² A party, or members of the party's family, could beg the benevolence of the magistrate's superior at the prefecture or circuit level. Parties could even go so high as to appeal to the moral

⁷³⁰ 中華人民共和國刑事訴訟法.

⁷³¹ See 1997 CPL arts. 60, 61, 69.

⁷³² See Jonathan Ocko, "I'll Take It All the Way to Beijing: Capital Appeals in the Qing," 47 JOURNAL OF ASIAN STUDIES 291 (1988).

superiority the emperor.⁷³³ These expansive and flexible opportunities for parties to appeal a decision, though, declined during periodic swings toward a more Legalist approach, wherein codified regulations governing administrative power reduced the discretion of officials and the effectiveness of appeals to mercy. For these Legalists, law (*fa*), not morality (*li*), was the ordering principle of society.

The 1979 CPL contained no provisions for a hearing to allow a defendant to argue before an appellate court. Drafters remedied the absence of guidelines governing the appeal process only slightly in the law's second iteration. After the revisions to the 1997 CPL, the appellate court may now hear a defendant's appeal and cannot, upon reconsideration, increase his or her sentence. In addition, it provides that the appeal should occur in an open courtroom rather than via written motions. Nonetheless, the NPC rejected numerous proposals to expand the rights of defendants to appeal and to make the process less risky for those defendants willing to challenge the decision of the court.⁷³⁴ Knowing that they were unlikely to see much movement on death penalty and detention issues, several advocates in the drafting team pushed hard for appellate reform. These efforts were repelled by a stiff opposition to the expansive abuses of appeals experienced China's imperial legal system.⁷³⁵

4. Fruit of the Poisonous Tree: The Exclusion of Unlawfully Obtained Evidence

Another common debate that emerged in discourse preceding the promulgation of the 1997 CPL concerned the exclusion of “fruits of the poisonous tree”—i.e. improperly obtained evidence. In the modern era, many societies have established laws excluding certain evidence in order to prevent improper police conduct such as coercing confessions. The pressure in these societies to protect the rights of the

⁷³³ See PEERENBOOM, at 37-8.

⁷³⁴ See OPENING TO REFORM?, at 71.

⁷³⁵ Interview, 9/13/2010.

accused at the expense of successfully extracting a confession, however, chafes against certain traditional criminal procedural rules that have been long debated in China. The 1979 CPL, for instance, contained no provision concerning the admissibility of illegally obtained evidence, providing instead that evidence should be gathered “according to legal procedures.”⁷³⁶

The reluctance of PRC officials to introduce a provision concerning illegally obtained evidence from court proceedings stems in large part from the common, though controversial, use of torture to illicit confessions. In both traditional and contemporary Chinese law, confession and self-criticism has been an essential part of administering justice. According to the Confucian concept of *li*, the proper behavior of an accused person was to confess his or her guilt before the ruler.⁷³⁷ This premise stems from the principle that through the act of confession, criminals express a willingness to be reformed and contribute to the restoration of social harmony.⁷³⁸ In the Qing period, for example, no person could be executed unless he or she first confessed to the crime charged. This requirement of contrition compelled many magistrates to compel such testimony through forceful means.⁷³⁹ Indeed, some magistrates maintained that, “in China there can be no administration of justice without [torture].”⁷⁴⁰ Despite the importance of confessions, officials never uniformly accepted

⁷³⁶ 1979 CPL, art. 32.

⁷³⁷ See JEROME ALAN COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE’S REPUBLIC OF CHINA, 1949-1963* (1968); Benjamin Schwartz, “On Attitudes toward Law in China,” in Milton Katz, *GOVERNMENT UNDER LAW AND THE INDIVIDUAL* (1957).

⁷³⁸ See PEERENBOOM, at 395.

⁷³⁹ For a first-hand account of such practices, see Henry M. Field, “Criminals Before the Judge,” in *FROM EGYPT TO JAPAN* (Scribner, New York: 1877).

⁷⁴⁰ See *id.* at 380. See also Chan, “A Confucian Perspective on Human Rights for Contemporary China,” at 228 (noting that “It is understandable why Confucianism would not reject the right not to be tortured and the right to fair trial...[T]he Confucian perspective would take rights as a fallback auxiliary apparatus that serves to protect basic human interests in case virtues do not obtain or human relationships clearly break down.”).

the practice of compelling confessions and numerous exceptions to the rule developed over time. During certain periods of Chinese history, officials relaxed the confession requirement, and the application of torture to extract such a confession, in cases involving the elderly, juveniles, or members of the elite.⁷⁴¹

Article 43 of the 1997 CPL expressly forbids coerced confessions. This reform, however, does nothing to deter the practice because it fails to address the more general problem of what to do with illegally obtained evidence.⁷⁴² The 1997 CPL, as written, does not stipulate what a magistrate is to do when the legality of evidence is challenged by a party. As such, a confession illegally extracted through torture or coercive means, when submitted into evidence by the prosecution, is unlikely to be excluded by the court. If procedure does not require a trial judge to consider the exclusion of a tortured confession, that judge is unlikely to do so.⁷⁴³

iv. Discourse and Dissent: Analyzing Attitudes to Criminal Procedure Reform in Chinese Legal Periodicals

In this second step of the content analysis, I applied Yoshikoder CATA software to measure the tone of discourse related to the proposed CPL reforms discussed above by using custom-developed positive and negative dictionaries of terms commonly used by Chinese scholars of law.⁷⁴⁴ By measuring the attitude of the different samples of Chinese media analysis of the proposed CPL reforms, this approach gauges the degree to which certain proposals generated controversy among

⁷⁴¹ See PEERENBOOM, at 37; Alison Connor, “Confucianism and Due Process,” in CONFUCIANISM AND HUMAN RIGHTS, Wm. Theodore de Bary & Tu Weiming, eds. (Columbia University Press, 1998).

⁷⁴² Amanda Whitfort, “The Right to a Fair Trial in China: The Criminal Procedure Law of 1996,” 2 CHINESE L. & POL’Y REV. 141 (2007).

⁷⁴³ See *id.*

⁷⁴⁴ For a discussion of a statistical method to analyze sentiment degree of Chinese characters, see Ku Lun-wei, Wu Tung-Ho, Lee Li-Ying, & Chen Hsin-Hsi, “Construction of an Evaluation Corpus for Opinion Extraction.”

Chinese legal commentators.⁷⁴⁵ After selecting the appropriate CATA software for reasons described in the data and methodology section above, it is necessary to develop a content analysis dictionary suited to the task of analyzing Chinese media related to legal development. The following section describes this process.

1. Customizing the Content Analysis Dictionary

Most quantitative content analysis methods allocate units of text according to fixed criteria defined by a so-called “dictionary” of words or phrases associated with certain coding categories. The process of designing such a custom dictionary for content analysis of Chinese media in the 1980s and 1990s presents a difficult challenge that involves both *a priori* and empirical reasoning. The first step is to select root words consistent with the concepts of interest. Then, the researcher must specify all variations of these root words.⁷⁴⁶ Operationalizing these root concepts requires the development of categories that are both exhaustive and mutually exclusive.⁷⁴⁷ I performed this task in several ways, including the human and computer coding schemes discussed below.

The many changes to criminal procedure in China brought about by the 1997 CPL can be categorized into the few major categories explained above: pre-trial detention; presumption of innocence; plea bargaining; the use of illegally-gathered evidence; the right to an appeal; the death penalty; the right to counsel, and the right to appeal. To specify the terms that would capture discussions of these reforms, I conducted a manual review of various Chinese-language texts written by participants

⁷⁴⁵ See, e.g., Michael Laver & John Garry, “Estimating Policy Positions from Political Texts,” 44 AMERICAN JOURNAL OF POLITICAL SCIENCE 619 (2000).

⁷⁴⁶ See, e.g., Descriptions of Inquirer Categories and Use of Inquirer Dictionaries, available at: <http://www.wjh.harvard.edu/~inquirer/homecat.htm>.

⁷⁴⁷ See NEUENDORF.

in the drafting of the proposed criminal procedure laws.⁷⁴⁸ I also included the Chinese terms used by Western legal advocates during the period preceding the 1997 CPL, as well as a review of Chinese language legal dictionaries available in the PRC during that same period.⁷⁴⁹

To supplement this custom dictionary, I next examined a computer-generated list of key words and phrases from the text sample.⁷⁵⁰ First, I separated the texts to be analyzed into two categories: 1.) articles published in official publications such as party journals and government reports; and 2.) articles published in nonofficial publications, such as university journals and political magazines. I then generated a word frequency report of the number of times all words occurred in a systematic random sampling of the two sets of texts.⁷⁵¹ This allowed me to more easily compare the relative frequencies of certain words used to discuss particular legal reforms by

⁷⁴⁸ See, e.g., 陈光中, “修改刑事诉讼法的几点看法” [Some Views on Criminal Procedure Reform], 6 中国法学 (1994), at 31; 徐友军, “中国刑事诉讼与人权” [China’s Criminal Procedure and Human Rights], 2 中外法学 (1992), at 38; 陈瑞华, “修正后的中国刑事诉讼法典” [After the Revision of China’s Criminal Procedure Code], 5 现代法学 (1996), at 15; 陈光中, 中国司法制度的基础理论专题研究 [Basic Theory of China’s Justice System]; 刘根菊, 刑事诉讼法的修改与完善 [Revision and Perfection of Criminal Procedure Law] (1997).

⁷⁴⁹ See 汉英法学大词典 [Chinese-English Dictionary of Law] (中国商业出版社 [China Commercial Press: 1995]; 中华人民共和国法律大辞书 [People’s Republic of China Dictionary of Law] (长春出版社 [Changchun Publishers: 1991]; Kiang Yi-seng, *An English-Chinese Glossary of American Criminal Law and Criminal Procedure*, (Cheng & Tsui: 1989); 英汉法学大词典 [English-Chinese Dictionary of Law] (五洲出版社 [Wuzhou Publishers]: 1988).

⁷⁵⁰ For a description of the sample, see text above concerning the citation analysis.

⁷⁵¹ Systematic random sampling selects every n^{th} unit from a population that is arranged sequentially. In this case, in order to sample the content of roughly 200 articles from the official and non-official publications, the sampling interval was set at 15. A random number from 1 to 15 was selected random, and this number identified the first article to be sampled. Every fifteenth subsequent article was likewise included in the sample. See NEUENDORF, CONTENT ANALYSIS GUIDEBOOK, at 83.

authors supportive and opposed to the proposed legal reforms.⁷⁵²

Next, I allocated words to the dictionary according to whether authors typically used the word in question as a pro- or anti-reform word. I did not deem a word positive or negative unless it had a substantive meaning in terms of that category. Some key words, such as “victim,” occurred in both sets. However, authors stress the word far more frequently in publications holding a more conservative approach to legal reform. As such, I assigned the word to the category of words opposed to criminal procedure reform. For similar reasons, articles that spoke more frequently of defendants tended to support procedural reforms. As such, I included the term “defendant” in the dictionary of pro-reform terms. While this may not always be the case, the number of times it is right far outweighs the number of times it is wrong.⁷⁵³

To measure the degree to which an author taps into an extant discourse or discusses a “point of concern” in society, I also compiled, via a systematic random sample of the texts, a list of words that indicated the author believed himself or herself to be engaging with an extant discourse. This list includes words or phrases such as “so called,” “many comrades believe,” “some comrades think,” etc.

Finally, I included in the dictionary of positive and negative valence terms those words and phrases compiled by linguists at National Taiwan University. This dictionary of more than 20,000 positive and negative terms includes a translation of the content analysis dictionary first developed for the General Inquirer as well as a collection of additional relevant Chinese vocabulary. When combined with the positive and negative words included in my custom dictionary, these charged terms can be counted for their relative frequency along with discussions of key variables (i.e.

⁷⁵² This method of comparison has been used by Laver and Garry in their content analysis of political manifestos. They found, for example, that certain words such as “tax” and “choice” were used with great frequency in conservative manifestos, and almost never in liberal ones. *See* Laver & Garry (2000).

⁷⁵³ For a defense of this method, see Laver & Garry (2000).

proposed reforms). The tone of discourse concerning a reform can then be measured as a score of negative terms to positive terms in the text surrounding the synonyms of that reform. I created this “Opinion Score” by subtracting the ratio of negatively valenced terms contained in the text from the ratio of positively valenced terms. Each article is thus coded with an opinion score above or below zero. The distribution of opinion scores of the selective random sample of articles (n=375) is depicted in figure 4.5, which suggests the distribution of Opinion Scores is, while almost normal, slightly too peaked and the tails too thin (i.e. a high kurtosis measure). As such, the models below include the robust option to determine the same R^2 , b 's, and betas, but with standard errors that do not assume normality.

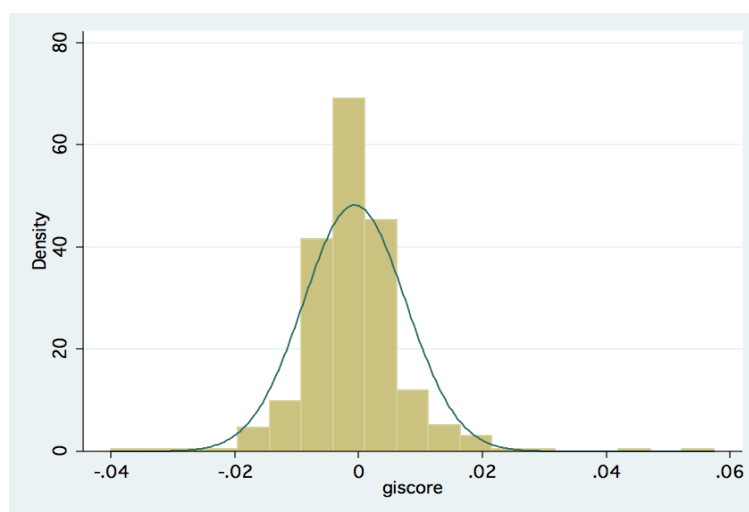


Figure 4.5. *Distribution of Dependent Variable*

2. *Content and Contestation in Chinese Politico-Legal Periodicals*

As hypothesized by the two-tailed theory of diffusion, the models described below demonstrate that the more an author discusses policies about which an active discourse already existed, the more likely that article earned a negative opinion score. Put another way, articles containing discussions of contested practices such as detention, the death penalty, or the right to appeal included more language critical of

criminal procedure reform than did articles that devoted more discussion to novel policy innovations. Moreover, the models cast doubt on norm-localization theorists who hypothesize that contextualizing reforms within Chinese normative discourse improves the chances of domestic support for such reforms.

To test my claim that authors positioning themselves within an extant domestic discourse are more likely to resist efforts of political reform, I first examined whether there exists a statistical relationship between the overall opinion score of an article and the presence of words indicating that the issue is a “point of concern.” To examine this relationship, I performed a simple regression against the Opinion Score of each article, controlling for such factors as the length of the article, which would increase the chance of any word being used, whether the article was published by an official arm of the government, and whether that publisher was based in Beijing.

As table 4.5 indicates, the more an author taps into or brings attention to an existing discourse, the more likely the author holds a negative position on the prospect of reforming criminal procedure. In addition, the findings offer only limited support for any interest-group explanation. Publications issued by official judicial organs appear to advocate in support of criminal procedural reform (though it is without strong statistical significance— $p < 0.09$). This finding corroborates the observation of one participant in Chinese legal reform who noted that the judiciary adopts “the most liberal approach to legal reform.”⁷⁵⁴ This general liberal approach, she noted, is due most likely to the disproportionate degree to which members of that ministry have attained higher education and, another respondent noted, obtained foreign legal experience and exposure.⁷⁵⁵

⁷⁵⁴ Interview, 9/7/2010.

⁷⁵⁵ Interview, 9/10/2010.

Table 4.5. Effect of Extant Discourse on Opinion Score⁷⁵⁶

VARIABLE	COEFFICIENT
<i>Extant Discourse</i>	-0.1971145** (0.0862502)
<i># of Words</i>	1.62e-07 (1.29e-07)
<i>Beijing-Based</i>	-0.0020806 (0.0013081)
<i>Legislative/Executive</i>	-0.0038691 (0.003507)
<i>Judiciary</i>	0.0041249* (0.0024341)
<i>Public Security</i>	0.0000251 (0.0029466)
<i>Unofficial</i>	0.0011541 (0.0022751)

Another participant in CPL drafting similarly recalled that while each ministry was open to the adoption of foreign law during the negotiations, the judiciary was slightly more active in soliciting it.⁷⁵⁷ The degree to which this generally more liberal attitude is institutional rather than personal, however, is uncertain. A domestic participant in Chinese legal reform as well as a foreign director of a transnational legal assistance organization in Beijing both noted that there has been a discernable conservative shift in the openness to foreign legal solutions since the prior director of the judiciary, a lawyer, was replaced by a nonlawyer.⁷⁵⁸ This shift, which supports Alan Watson's insight that laws travel across borders by way of those with legal

⁷⁵⁶ * significant at the 10% level, $p < 0.1$; ** significant at the 5% level, $p < 0.05$.

⁷⁵⁷ Id.

⁷⁵⁸ Interview, 9/17/2010; 9/9/2010.

training, suggests that openness to foreign law is a result of personal experience, not national culture. The weak significance of the finding, though, lends support to the notion that the variation in legal reform was due to the discursive differences among the policies themselves and not institutional interests. Indeed, as one participant in the process recalled, actors from all manner of government agencies generally agreed and debated little of the proposed draft.⁷⁵⁹ It is thus not surprising that legislative and executive branches, as well as public security organs, indicate no statistically significant opposition to pro-defendant reforms.

Even if the proposed reforms ultimately did not survive the drafting process, one would expect such proposed reforms to nonetheless receive disapproving treatment in the journals of the bureaucratic organs implicated by them. This contrary result, in which those political institutions directly weakened by the proposed reforms appear to express no strong position on the direction of reform, challenges any interest group explanation of criminal procedure reform.

Secondly, to analyze the relationship between the policy content of an article on the positive or negative tone of the author, I conducted a pair of general linear models (GLM). These models compare the degrees to which a discussion of particular criminal procedures affected the proportion of positive- and negative-associated terms to test the hypothesis that certain policies triggered more negatively associated terms, whereas others elicited neutral or even positive language.⁷⁶⁰

To corroborate the findings of the GLM models still further, I also conducted a multiple linear regression to examine the relationship of these policies to the overall

⁷⁵⁹ Interview, 9/13/2010.

⁷⁶⁰ The analysis here utilizes GLM regression because the dependant variable is not the opinion score of each article, but rather the number of positive or negative terms as a proportion of the entire article. Proportion data, which consists of values that fall between zero and one, is better analyzed through GLM because it predicts values that also fall between zero and one.

opinion score of the article. As shown in table 4.6, articles that discussed policies lacking any historically rooted discourse in China (see table 3.1) demonstrated a generally positive attitude toward the subject of criminal procedure reform, whereas articles that discussed those policies entangled with a long-standing domestic discourse expressed a far more negative tone. In the words of one participant in Chinese legal reform, who nicely captured an insight of the two-tailed model of diffusion, “culture does not always decide the law.”⁷⁶¹

Table 4.6. *Discourse and Dissent*⁷⁶²

VARIABLE	POSITIVE TONE	NEGATIVE TONE	OPINION SCORE
<i>Discourse</i>	-0.1388372** (.0623205)	0.0654531 (0.0737944)	-0.2042904*** (0.0803882)
<i>Official Publisher</i>	0.0004514 (0.0006709)	-0.0000236 (0.000897)	0.0004749 (0.0010198)
<i># of Words</i>	-3.18e-08 (6.11e-08)	-8.20e-08 (9.37e-08)	5.02e-08 (1.04e-07)
<i>Beijing Based</i>	-0.0008196 (.0006527)	0.0002462 (0.0009273)	-0.0010658 (0.0010427)
<i>Novel Reforms</i>	0.3325654*** (0.1356657)	0.0446924 (0.1174518)	0.287873* (0.163699)
<i>“Points of Concern”</i>	-0.07597 (0.0817349)	0.4193954** (0.1956623)	-0.4953714*** (0.1862333)

Finally, as shown in the Opinion Score column, both sets of reforms proposed prior to the 1997 CPL appear related to the combined opinion score of each article in the direction hypothesized.

As such, the level of discursive content—i.e. whether the author taps into an extant

⁷⁶¹ Interview, 9/7/2010.

⁷⁶² * significant at the 10% level, $p < 0.1$; ** significant at the 5% level, $p < 0.05$; *** significant at the 1% level, $p < 0.01$.

discourse—has a statistically significant relationship with the score, as did whether the author discussed certain reforms more than others.

In the next model, I looked to see if the norm localization hypothesis held up under rigorous analysis. To perform such a test, I examined whether any relationship existed between the presence of nativist language and the degree to which the author taps into existing cognitive scripts or discursive content. To do this, I examined the texts for the use of terms referring to Chinese law and historical tradition (e.g. “culture,” “tradition,” “Chinese people”). As anticipated by the two-tailed model of diffusion, as table 4.7 suggests, there is a strong positive association between the amount of space the author devotes to discussions of China’s normative landscape and the degree to which an author taps into or refers to preexisting cognitive script. This finding, contrary to the expectations of norm localization theory, indicates that the presence of words evoking China’s normative traditions and prevailing attitudes is associated with resistance to transnational influence, not efforts to import such influences.⁷⁶³ Moreover, this finding confirms the observations of several respondents who noted that they never needed to conceal the foreign source of a proposed reform. As one respondent put it, that Chinese legal scholars advocating for a particular reform “will always refer to foreign law to support their suggestions.”⁷⁶⁴ Indeed, as another put it, “when presenting a reform to the government you never hide the foreign source of the law, even if [the reform] is against tradition.”⁷⁶⁵ This finding differs markedly from the approach employed by opponents of foreign legal reform, who, as one respondent stated, “will often resort to the excuse of needing to develop law with

⁷⁶³ Not seeing a statistical relationship between the citation of international sources of law or legal norms is not surprising, given the political climate in which direct appeals to foreign sources of law are discouraged.

⁷⁶⁴ Interview, 9/7/2010.

⁷⁶⁵ Interview, 9/7/2010.

‘Chinese characteristics.’”⁷⁶⁶ This trope, she noted, is often raised in opposition to reform when the opponent “does not have a good argument against the policy and they want to retain the low standard.”⁷⁶⁷ As another Chinese attorney and legal advocate questioned: “law with ‘Chinese characteristics’ — what does that even mean?”⁷⁶⁸

Table 4.7. *Discourse and Localization*⁷⁶⁹

VARIABLE	COEFFICIENT
<i># of Words</i>	-4.80e-06 (.0000149)
<i>Beijing-Based</i>	.0909548 (.1462966)
<i>Official</i>	0.0227136 (.1467638)
<i>National Appeals</i>	59.82188*** (25.362)
<i>International Appeals</i>	10.49557 (39.08094)

It thus follows that there is neither a convincing theoretical reason to expect or evidence to suggest that legal advocates made an effort to ‘localize’ foreign legal concepts or attempted to adopt an ‘Asian values’ frame of proposed legal reforms. Indeed, as various respondents noted, while there has been some borrowing by China from the legal systems of its Asian neighbors, the systems are generally “not regarded well” in comparison to their Western counterparts. This resistance to local law exists despite the fact that many of those Asian systems are themselves a derivation of

⁷⁶⁶ Interview, 9/7/2010.

⁷⁶⁷ Id.

⁷⁶⁸ Interview, 9/10/2010.

⁷⁶⁹ *** significant at the 1% level, $p < 0.01$.

Western models.⁷⁷⁰ One respondent even stated outright that officials in Beijing prefer U.S. examples over examples from elsewhere in Asia.⁷⁷¹ One senior participant in the drafting process similarly noted that U.S. legal procedure was the most common source during the 1997 CPL reform process, despite ostensible differences between the legal systems. As he explained, it was not a matter of localizing ideas to parallel Chinese legal norms. Rather, the preference for U.S. law was prevalent among reformers and officials because the large majority of participants understood English, U.S. legal sources were most readily available for study, and many of the ideas contained within those sources were the most persuasive, especially, he recalled, ideas such as the presumption of innocence and access to legal representation.⁷⁷² In addition to these resources, he noted, there were also numerous U.S. legal experts present in Beijing saying “we want to help you.”⁷⁷³ Moreover, government officials to whom the drafters reported, several participants described, did not care about the source of the legal solution.⁷⁷⁴ Instead, one recalled, “the government wants you to open their eyes” with foreign law.⁷⁷⁵ As another longtime foreign advisor explained, Beijing officials are often open to foreign legal solutions, especially when they are encountering novel problems or otherwise uncharted legal terrain. In such situations, he continued, one need not “localize” the law. One merely need “explain to [the officials] why it is useful.”⁷⁷⁶

It should be noted that almost every respondent cited the overwhelming influence of U.S. law on China’s legal reform. As one typical respondent described,

⁷⁷⁰ Interview, 9/10/2010.

⁷⁷¹ Id.

⁷⁷² Interview, 9/14/2010.

⁷⁷³ Id. This participant could not recall who they were, though he described them as “U.S. legal experts and professors.”

⁷⁷⁴ Interview, 9/13/2010; 9/17/2010.

⁷⁷⁵ Interview, 9/13/2010.

⁷⁷⁶ Interview, 9/15/2010.

the distinction between common law and civil law “evaporated” in the minds of Chinese legal reformers.⁷⁷⁷ To get the attention of Chinese legal actors, transnational rule of law organizations from Europe thus now operate exclusively in English and seek out U.S. legal examples when making their case to their Chinese counterparts. The Canadian Bar Association in Beijing, moreover, is “largely ignored.”⁷⁷⁸ In a similar display of U.S.-centrism among China’s legal elite, a legal scholar at a French rule of law organization based in Beijing recently wrote a book on U.S.-China relations and its legal implications with the knowledge that any focus on France would attract few Chinese readers. Only one Chinese respondent dismissed the idea that U.S. law influenced his work. Instead, he noted, he turned primarily to Germany and Japan for law. “They’ve thought of everything,” he described. “Ideas I’ve never thought of.” When pressed as to why he chose those countries as his sources of novel legal solutions, he conceded that his limited English ability deterred him from delving into U.S. legal scholarship. In addition, his legal experience overseas was limited to research trips sponsored by the governments and organizations of those countries.⁷⁷⁹

Finally, controlling for whether an article was published by an official organ of the state and for the level of discursive language contained in the text, I examined the role of policy issue in the overall positive tone of a publication. As table 4.8 shows, novel and entrenched policy reforms had no statistically significant relationship with the overall positive tone as it evoked no pre-existing normative discourse. The only exception is a demonstrated support for the adoption of adversarial procedures, which elicited strong positive support among authors and is a finding confirmed among respondents. By contrast, discussions of practices already embedded within a discursive landscape such as the death penalty and detention earned a statistically

⁷⁷⁷ Interview, 9/10/2010.

⁷⁷⁸ Interview, 9/9/2010.

⁷⁷⁹ Interview, 9/13/2010.

negative opinion score.

Table 4.8. Opinion Score by Policy⁷⁸⁰

VARIABLE	COEFFICIENT	VARIABLE	COEFFICIENT
<i># of Words</i>	2.84e-07 (1.51e-07)	<i>Adversarial System</i>	.0023829** (.0011688)
<i>Beijing-Based</i>	-.0025135 (.0013677)	<i>Death Penalty</i>	-.0033046** (.0015144)
<i>Extant Discourse</i>	-.2482901*** (.0826132)	<i>Detention</i>	-.0048691*** (.0011121)
<i>Rules of Evidence</i>	-.001493 (.00102)	<i>Legislative/Executive</i>	-.0043493 (.0030993)
<i>Right to Counsel</i>	-.0010407 (.0013665)	<i>Judiciary</i>	.0044049** (.0023044)
<i>Plea Bargaining</i>	.0013278 (.0022794)	<i>Public Security</i>	.0016114 (.0028118)
<i>Presumption of Innocence</i>	.0002704 (.001354)	<i>Unofficial</i>	.0014916 (0.0020248)
<i>Right to Appeal</i>	-.000616 (.0010112)		

While discussions of other contested practices, such as rules governing the admissibility of evidence and appeal, demonstrated no statistically significant relationship with the overall opinion score, the coefficients for these policies are, as hypothesized, negative.⁷⁸¹ Thus, the findings above suggest that in periods of

⁷⁸⁰ ** significant at the 5% level, $p < 0.05$; *** significant at the 1% level, $p < 0.01$.

⁷⁸¹ It should be noted that Taiwan has recently demonstrated equally strong support for the adoption of adversarial practices. Despite being, like China, a member of the civil law legal family, Taiwan has over the past decade introduced significant adversarial reforms. Moreover, these reforms were similarly the product of Taiwan reformers “actively look[ing] abroad” and transnational advocates pushing for expanded defendant rights. See Margaret K. Lewis, “Taiwan’s New Adversarial System and the Overlooked Challenge of Efficiency Driven Reforms,” 49 Va. J. Int’l L. 651, 663 (2009)

uncertainty, legal reformers can succeed in importing novel foreign legal norms to pressing domestic issues. Indeed, “with new problems,” one respondent noted, “we always look abroad because we don’t often know what would be the most suitable solution.”⁷⁸²

IV. Conclusion

The findings presented above suggest domestic legal observers, many of whom can be described as legal nationalist rebels, can shape a debate about proposed legal reforms by referring to a preexisting discursive vocabulary. It is thus not surprising that the proposed reforms most resisted by authors were those that had emerged as “points of concern” in society. Novel reforms, or those that challenged entrenched domestic practices about which little discourse existed, drew far less resistance. Indeed, the model suggests such reforms had no statistically significant effect on the negative position of an author. Extant “points of concern,” by contrast, were far more likely to shape an author’s opinion towards the reform of criminal procedure.

⁷⁸² Interview, 9/7/2010.

CHAPTER 5

DISCOURSES OF DIFFERENCE: LEGAL DEVELOPMENT IN POST-APARTHEID SOUTH AFRICA

“The different approaches adopted in the different national jurisdictions arise not only from different textual provisions and from different historical circumstances, but also from different jurisprudential and philosophical understandings of equality.”

—Justice Kate O’Regan,
Constitutional Court of South Africa⁷⁸³

“Our respective histories, social context, constitutional design differ markedly....We must therefore exercise great caution not to import, through this route, inapt foreign equality jurisprudence.”

—Justice Dikgang Moseneke,
Constitutional Court of South Africa⁷⁸⁴

Justices Kate O’Regan and Dikgang Moseneke illustrate in the above quotations a shared awareness of the thorny historical context in which South African judges operate. Justice O’Regan, a white woman born in the United Kingdom and educated at both the University of Sidney and the London School of Economics, joined the newly established Constitutional Court of South Africa after serving as a professor of civil procedure and labor law at the University of Cape Town.⁷⁸⁵ Dikgang Moseneke, by contrast, received most of his education domestically while serving a sentence for anti-apartheid activity at Robben Island—the prison made notorious by its most famous inmate, Nelson Mandela.⁷⁸⁶ Despite the starkly different biographies of the two justices, their appreciation for South Africa’s unique history, evident in their

⁷⁸³ See *Brink v. Kitshoff*, 1996 4 SALR 197 (CC).

⁷⁸⁴ See *Minister of Finance v. Van Heerden*, 2004 (6) SA 121 (CC).

⁷⁸⁵ See THE UNIVERSITY OF CAPE TOWN LAW FACULTY: A HISTORY, 1859-2004 (Denis Cohen & Daniel Visser, eds., 2004); *Constitutional Court of South Africa*, available at: <http://www.constitutionalcourt.org.za/site/home.htm> (last visited: May 17, 2010).

⁷⁸⁶ See KENNETH S. BROUN, *BLACK LAWYERS, WHITE COURTS: THE SOUL OF SOUTH AFRICAN LAW* (2000).

statements above, illustrates the challenges faced by transnational and domestic legal advocates attempting to affect legal reform amidst such a distinct national context.

This Chapter aims to apply the two-tailed model of legal diffusion described in previous chapters to the recent history of South African legal development and to explore further the effects of discourse and legal structure in the trafficking of legal norms in the international system. In so doing, this Chapter and the next seek to understand the role of discourse in legal development, as well as the manner by which legal structure affects the actual process by which transnational advocates engage with domestic legal actors. More specifically, through the introduction of a “cosmopolitan score” that measures the degree to which a judge is exposed to the international legal community, it examines the behavior of common-law judges operating in what some have described as an “increasingly homogenous epistemic community of international jurists.”⁷⁸⁷

To investigate the relationship between this transnational community of jurists and domestic judicial decision-making, this Chapter makes analytical use of two features of the South African legal system that both distinguish it from and align it with legal development in the People’s Republic of China (PRC). Firstly, with a common law structure left over from the colonial presence of the English, South Africa presents a useful case study to examine legal family as an intervening variable in the process of legal diffusion. Secondly, South Africa has in the post-apartheid period, just as the PRC has done in the post-Mao era, undertaken the substantial task of legal reconstruction. The hundreds of judicial decisions published during this period thus offer a valuable glimpse into the discourse of legal development in South Africa and common law systems more generally. Analyzed together, this collection of South

⁷⁸⁷ See Adam M. Smith, “‘Judicial Nationalism’ in International Law: National Identity and Judicial Autonomy at the ICJ,” 40 *TEX. INT’L L.J.* 197 (2005).

African case law yields important insights for the understanding of norm diffusion and for IR theory more generally.

I. *Laying Down the Law: Judges & the Two-Tailed Theory of Legal Diffusion in South Africa*

As explained in the Chapters above, the two-tailed model of legal diffusion attempts to contribute to our understanding of norm diffusion through an examination of the conditions under which foreign legal norms succeed or fail to travel across sovereign borders. The basic insight of the model is that while increased exposure to international and transnational advocates—and the legal reforms they promote—activates domestic supporters, so too does it activate extant discourses available to those opposed to such reforms. In addition, it suggests that legal advocates can succeed in diffusing legal norms without a process of norm localization stems from the observation in cognitive psychology that when actors have no pre-established scripts to follow, the more open they are to persuasion and the discursive challenges of political opponents. It follows that new legal rights can spread more easily than other models of diffusion anticipate. In matters of female genital mutilation, for example, advocates achieved little success when framing the issue as a matter of communal child abuse. Rather, one advocate observes, success has been achieved by avoiding such “cultural arguments,” relying instead on a novel framing of FGM as a new form of discrimination.⁷⁸⁸ In a similar way, research by scholars of the U.S. Supreme Court finds that legal advocates arguing before U.S. Supreme justices are less successful when raising salient issues about which the justices have preestablished cognitive commitments. In nonsalient cases, by contrast, the justices appear less resolute and so “more amenable to legal persuasion.”⁷⁸⁹ This Chapter attempts to extend a similar

⁷⁸⁸ Interview, 8/17/2010.

⁷⁸⁹ See Andrea McAtee & Kevin T. McGuire, “Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?,” 41 *LAW &*

examination to justices on the Constitutional Court of South Africa.

There is no reason to suspect the two-tailed model of diffusion will apply in the contemporary South African context. In his impressive survey of South African legal history leading up to apartheid, Jens Meierhenrich finds that legal actors in episodes of uncertainty relied on mental models derived from the South African legal tradition.⁷⁹⁰ By his description, politico-legal adversaries operating with a shared understanding of the law and its constitutive purpose—such as in the racial divide it reflects and in its ability to “purify and cure [its] evils”⁷⁹¹—can achieve stability by resorting to those shared legal legacies, even in the chaos and uncertainty of a transitional period. This Chapter aims to further this finding through an investigation of the South African legal culture in the post-apartheid era.⁷⁹² As will be shown, the post-apartheid socialization of certain South African justices in the global community of jurists has caused a partial rift in the legal backgrounds these justices once shared. This rift has altered the constitutive frameworks within which justices operate in nonsalient and novel cases. During periods of uncertainty, it follows, foreign-trained South African jurists are able to draw from legal discourses beyond the South African tradition, including those introduced to them in international conferences, seminar rooms, and overseas tribunals. Indeed, one such internationally engaged former justice describes foreign law in such situations as “immensely helpful” to him when he faced

SOCIETY REVIEW 259 (2007), at 260. McAtee and McGuire find that these results remain significant even after controlling for each judges’ policy preferences and ideological sympathy for the litigants.

⁷⁹⁰ See JENS MEIERHENRICH, *THE LEGACIES OF LAW: LONG-RUN CONSEQUENCES OF LEGAL DEVELOPMENT IN SOUTH AFRICA, 1652-2000* (2008), at 220.

⁷⁹¹ Karl E. Klare, “Legal Culture and Transformative Constitutionalism,” 14 S. AFR. J. OF HUMAN RTS. 146, 168-69 (1998).

⁷⁹² While Meierhenrich’s study offers a valuable survey of apartheid-era jurisprudence, only 3 percent of the cases he analyzes were decided after the 1996 Constitution.

novel questions before the Court.⁷⁹³ As such, we can anticipate Constitutional Court decisions on novel issues to more closely reflect aspects of this global judicial dialogue than the legacies of South African legal discourse.

a. Different Stage, Different Actors

In the examination of the diffusion process in a common law system below, the key actors endowed with the power to serve as the principal conduits and contributors of foreign law are judges. Judges on constitutional courts—such as the one created in South Africa fifteen years ago—are especially well-positioned to serve this facilitating role as they often rely on comparative constitutional jurisprudence to aid them in answering the constitutional questions before them.⁷⁹⁴ Claire L’Heureux-Dubé, a justice on the Supreme Court of Canada, noted as much during her tenure on the court: “More and more courts, particularly within the common law world, are looking to the judgments of other jurisdictions, particularly when making decisions on human rights issues.”⁷⁹⁵ British barrister Anthony Lester, discussing the “overseas trade” in U.S. constitutional jurisprudence, noted similarly that “the landmark judgments of the Supreme Court of the United States, giving fresh meaning to the principles of the Bill of Rights, are studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C., or the State of Washington, or Springfield, Illinois.”⁷⁹⁶

⁷⁹³ Interview, 8/26/2010.

⁷⁹⁴ This phenomenon occurred most recently in the U.S. Supreme Court decision of *Graham v. Florida*, No. 08-7412, slip op. at 29, 560 U.S. ____ (2010). In his majority opinion, Justice Kennedy noted that “in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over.”

⁷⁹⁵ Claire L’Heureux-Dubé, “The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court,” 34 *TULSA L.J.* 15 (1998).

⁷⁹⁶ See Anthony Lester, “The Overseas Trade in the American Bill of Rights,” 88 *COLUM. L. REV.* 537 (1988), at 541. This does not mean, however, that there is not a recursive relationship among these courts. Indeed, U.S. courts are frequently influenced by the effect of its jurisprudence abroad. See L’Heureux-Dubé, at 17 (1998) (noting that the “reception” of U.S. law is “turning into dialogue.”); see also

This trafficking in law is especially common when judges on constitutional courts face periods of decisional uncertainty created by novel legal issues or new challenges to deeply entrenched practices brought by innovative litigants. Such challenges are especially common in the wake of new constitutions or bills of rights, as seen in Canada since the passage of the Charter of Rights and Freedoms in 1982, in Hong Kong since the passage of the Bill of Rights Ordinance in 1991, in the United Kingdom since the passage of the Human Rights Act in 1998, and in South Africa since the passage of the Interim Constitution in 1993. In the absence of extensive domestic jurisprudence to provide meaning to the new legal protections afforded in these rights charters, judges pressed for time by a mounting court docket look for illumination in the jurisprudence of foreign constitutional courts. New Zealand faced a number of such novel interpretive questions after the introduction of its Bill of Rights Act in 1990. Amidst this uncertainty, New Zealand justices looked abroad to answer novel questions such as whether police officers should advise a person involved in a motor vehicle of his or her right to counsel before taking a blood sample.⁷⁹⁷ South African judges interpreting that country's new constitution—which Hassen Ebrahim has called the “birth certificate of a nation”⁷⁹⁸—have similarly turned to decisions of various foreign courts, including the Supreme Court of India, a country similarly struggling with the protection of rights amidst stark economic inequalities, to develop its own socio-economic jurisprudence,⁷⁹⁹ even go so far as to openly inquire during

Heinz Klug, “Model and Anti-Model: the United States Constitution and the “Rise of World Constitutionalism,” 2000 WISC. L. REV. 597 (2000).

⁷⁹⁷ See, e.g., *Police v. Smith & Herewini*, [1994] 2 N.Z.L.R. 306 (C.A.) (rejecting the Canadian approach).

⁷⁹⁸ See HASEN EBRAHIM, *THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA* (1998), at 251.

⁷⁹⁹ See, e.g., *Union of Refugee Women v. Director*, 2007 (4) BLCR 339 (CC); *Mashava v. President of the RSA*, 2004 (12) BCLR (CC); *S. v. Lubisi*, 2003 (9) BCLR 1041 (T).

oral arguments how foreign jurisdictions handle the same problem.⁸⁰⁰

As litigants around the world bring more and more novel issues before the court, judges are using foreign law, as they have throughout history, as a tool of interpretation “deployed where it sheds new light on an issue.”⁸⁰¹ In recent years, there has been an increase in the search abroad for legal innovations as courts face novel legal questions raised by new technologies (e.g. the regulation of the electronic communication and advancements in biotechnology). Indeed, courts are now more than ever dealing with novel legal questions, rendering them increasingly open to persuasive legal arguments from abroad. In the face of such uncertainty, litigants themselves often stand as the principal sources of novel arguments drawn from foreign law.⁸⁰²

In addition to grappling with novel questions of law, judges have also faced innovative challenges to entrenched cultural practices. As Heinz Klug notes, courts around the globe are engaging in an “interactive discussion through which longstanding assumptions about traditional constitutional values are being rethought in order to understand their role in the construction and maintenance of different constitutional orders.”⁸⁰³ This transnational push against old practices has, for example, produced substantial challenges to old case law governing aboriginal rights, especially in the courtrooms of Canada, Australia, and New Zealand.⁸⁰⁴ Courts in these

⁸⁰⁰ Interview, 8/17/2010.

⁸⁰¹ See Devika Hovell & George Williams, “A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa,” 29 MELB. U. L. REV. 95 (2005), at 128. The increase in the amount of novel issues before the court may explain why the U.S. Supreme Court decisions most often cited by foreign courts are not the oldest, but rather the landmark decisions from the second half of the twentieth century. See also L’Heureux-Dubé, at 20.

⁸⁰² Id.

⁸⁰³ See Klug, at 612.

⁸⁰⁴ See L’Heureux-Dubé, at 23 (citing *Wik Peoples v. State of Queensland* [1996] 141 A.L.R. 129 (Austl.); *Mabo v. Queensland* [175] C.L.R. 1 (Austl.); *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (Can.); *R. v. Van der Peet* [1996] 2 S.C.R. 507

countries have thus proved remarkably open to novel framing of these entrenched issues introduced by litigators and willing to cite approvingly to legal solutions developed in foreign jurisdictions.

Judges on constitutional courts are also introduced to these foreign and international legal solutions through a process of socialization within the informal settings of international conferences and member organizations—what Anne-Marie Slaughter calls “communities of judges.”⁸⁰⁵ The global socialization of judges is not unfamiliar to judges in South Africa.⁸⁰⁶ South African judges have participated in international legal conferences in jurisdictions as varied as Australia, Austria, Bosnia, Cambridge (U.S. and U.K.), Canada, Denmark, France, Germany, the Netherlands, and dozens of other countries. South Africa has even played the host to such events, including the Society of Constitutional Court Judges.⁸⁰⁷ Richard Goldstone, a former justice on the Constitutional Court of South Africa, even cited the work of Anne Marie Slaughter when he likened his experience of being a Constitutional Court justice to being a member of the “invisible college,” which Slaughter describes as the increasingly common meetings of judges from all over the world.⁸⁰⁸ Moreover, this judicial socialization does not only occur among English-speaking judicial actors. Justice Johann van der Westhuizen, one of the several members of the Court able to speak German, recalled participating in an international conference of high court justices and discussing with a German member of the “invisible college” a novel

(Can.); *Te Runanganui o Te Ika Whenua Society v. Attorney-General* [1994] 2 N.Z.L.R. 20 (C.A.)).

⁸⁰⁵ See Slaughter, 2003.

⁸⁰⁶ See Bentele, at 244.

⁸⁰⁷ Reflecting the subordinate role of academics in common law systems, legal scholars were not invited to the event. Interview, 8/18/2010.

⁸⁰⁸ Examples include, *inter alia*, the International Organization for Judicial Training, see <http://www.iojt.org/>; the International Bar Association, see: <http://www.ibanet.org>; and the International Judicial Training Program, see: <http://www.uga.edu/ruskcenter/ijtp.html>.

question of law posed by a case pending before the Constitutional Court of South Africa.⁸⁰⁹ This experience parallels L’Heureux-Dubé’s observation that “while until recently it was uncommon for judges on different continents to get to know each other, let alone communicate regularly about issues of mutual concern, close interactions are now becoming commonplace.”⁸¹⁰ Increasingly, South African justices are going abroad not only for international conferences, but also for entire periods of their education. Indeed, as many as one in three South African Constitutional Court justices received some form of legal education abroad. Upon their return, these cosmopolitan judges have then proved able and willing to refer to their foreign coursework for jurisprudential guidance in their written opinions.⁸¹¹

It should be noted that this “global community of courts”⁸¹² is not comprised solely of judges. The intermediary agents circulating foreign legal ideas may indeed be judges themselves, but it is also their clerks or eager litigators who, aware of the results of similar litigation abroad, introduce to judges the details of foreign precedent. A survey of briefs submitted to U.S. courts by attorneys suggests this practice of legal importation is not unique to judges from new constitutional courts.

As figure 5.1 illustrates, appellate attorneys arguing before the U.S. Supreme Court have over the past decade dramatically increased the frequency with which they appeal to judgments from international tribunals. Such references, which spiked dramatically in 2005 due to the number of briefs filed for the case of *Medellin v.*

⁸⁰⁹ See Bentele (2008), at 244.

⁸¹⁰ See L’Heureux-Dubé, at 26. Some U.S. Supreme Court justices themselves stand as notable participants. Justice Antony Kennedy, for example, has regularly taught a summer program for law students in Austria. This effort has come to be known as the “Marshall Plan of the Mind.” See JEFFERY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* (2008), at 183.

⁸¹¹ See L’Heureux-Dubé (citing Pnina Lahav, “American Influence on Israel’s Jurisprudence of Free Speech,” 9 HASTINGS CONST. L. Q. 21 (1981)).

⁸¹² See Anne-Marie Slaughter, “A Global Community of Courts,” 44 HARV. INT’L L.J. 191 (2003).

Dretke,⁸¹³ a case involving the question of whether federal courts are bound by a ruling announced by the International Court of Justice, expose justices to relevant foreign and international jurisprudence and provide them with new facts for analogical reasoning in the cases before them.

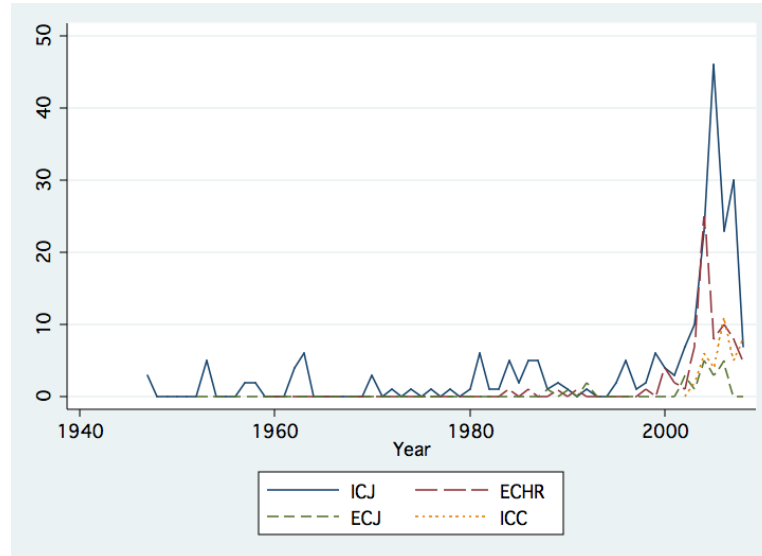


Figure 5.1. *Cites to International Authorities in Briefs to the U.S. Supreme Court*⁸¹⁴

The South African court system has institutionalized a mechanism to ensure that foreign law is made known to the Constitutional Court—foreign clerks.⁸¹⁵ These clerks, several interviewees noted, typically come from the United States, as each foreign clerk must supply his or her own funding for the term.⁸¹⁶ South African justices have cited these clerks as key conduits of foreign law when the Court encounters novel questions.⁸¹⁷ Foreign clerks, one former South African clerk noted,

⁸¹³ 544 U.S. 660 (2005).

⁸¹⁴ Source: U.S. Supreme Court Briefs Database.

⁸¹⁵ Initially, the Court accepted foreign aid to support the provision of South African law clerks. Since this program has since been taken over by the South African government, alongside two South African law clerks, Constitutional Court justices have the choice of up to five foreign law clerks.

⁸¹⁶ Interview, 8/18/2010.

⁸¹⁷ *Id.*

“brought with them their experiences from their home countries.”⁸¹⁸ Former Justice van der Westhuizen, for example, when faced with constitutional questions raised by a search of a gambling establishment by government inspectors in *Magajane v. Chairperson*, recalled the valuable explanations delivered by his American clerk from Harvard Law School on the history of U.S. Supreme Court jurisprudence on the constitutionality of administrative searches.⁸¹⁹ Former Justice Albie Sachs similarly recalled including in a judgment an argument drawn from U.S. feminist scholarship on critical race theory, a literature introduced to him by his American clerk.⁸²⁰ Other Justices, such as Laurie Ackermann, often retained German clerks, and so on several occasions drew on German law to support, if not supply, his argument.⁸²¹ A current foreign clerk describes her role similarly, noting that her work for the Court largely involves her training in American and public international law.⁸²² Indeed, foreign clerks proved so useful to the supply of foreign legal ideas that one Constitutional Court justice reportedly moved to extend their terms from six months to a full year.⁸²³

Foreign clerks, several interviewees noted, have proved especially useful—and influential—in supplying foreign law to the Court not only because fewer and fewer of the justices are themselves able to read or speak German or other continental languages, but also because the legal education of the South African clerks includes only a cursory survey of foreign and international law. Despite the South African Constitution itself requiring the consideration of international law and permitting the extensive use of foreign law when adjudicating matters under the Bill of Rights, the

⁸¹⁸ Interview, 8/23/2010.

⁸¹⁹ See Benetle, at 244 (citing *Magajane v. Chairperson*, N.W. Gambling Bd. 2006 (5) SA 250 (CC)).

⁸²⁰ Interview, 8/26/2010.

⁸²¹ Interview, 8/23/2010.

⁸²² Interview, 8/18/2010.

⁸²³ Interview, 8/17/2010.

director of the University of Witwatersrand Law School, a prestigious law school in Johannesburg, noted that the training of South African law students in international and comparative law is limited primarily to their brief coursework in constitutional law.⁸²⁴ As another constitutional scholar and professor explained, South African law students are likely to get training in the process of comparative law only if they have an especially good lecturer who explains to students how a particular law is actually “the distillation of a comparative process.”⁸²⁵ For those South African law students that go on to be clerks at the Constitutional Court, the research and application of foreign law is thus a “trial by fire,”⁸²⁶ leaving them particularly open to the research and legal arguments of foreign clerks, litigants, amicus briefs, and the judges themselves.⁸²⁷ One former Constitutional Court clerk, recalling her training in comparative law upon joining the Court, remembered receiving only a short orientation on how to search for foreign law through electronic media.⁸²⁸ Foreign clerks, by contrast, were typically more experienced in navigating such databases as well as more familiar with many of the foreign law sources shelved in the Scandinavian-funded library of the Constitutional Court.⁸²⁹

To supplement the knowledge of the domestic and foreign clerks, several clerks each year are tasked as serving as liaisons with the global judicial dialogue

⁸²⁴ Interview, 8/19/2010.

⁸²⁵ Interview, 8/25/2010.

⁸²⁶ Interview, 8/20/2010.

⁸²⁷ This is not to say that American law students receive superb training in comparative law. Indeed, they receive it only if they elect to do so. The important difference, though, is that the South African Constitution expressly provides for the consideration of law from other free and open societies, and thus judges and clerks face foreign law regularly, if not “in every case,” as one Justice put it.

⁸²⁸ Interview, 8/23/2010.

⁸²⁹ In addition to the considerable assistance of the Scandinavian countries in filling the shelves of the library of the Constitutional Court, the library is also a product of Richard Goldstone, an early justice on the Constitutional Court bench and one of the most active international human rights lawyers working today. Interview, 8/25/2010.

facilitated by the Venice Commission. This judicial body arranges the publication and sharing of summaries of key constitutional decisions of member states so that judicial actors can learn of—and possibly adopt—novel solutions to similar legal issues. One clerk described the effect of this forum on South African law in a recent case involving a common law rule allowing the government to detain persons suspected of fleeing the country to evade debt repayment. The Court’s review of this law, which had not been tested in the post-apartheid constitutional era, triggered a search for foreign solutions. The Court ultimately adopted the position of foreign jurisdictions and abrogated the law.⁸³⁰

To say, though, that South African clerks at the Constitutional Court do not assume their positions on the Court as ready conduits of foreign law does not mean that they do not develop into such conduits over time. As one former clerk and current attorney before the Constitutional Court observed, there is now “a whole generation” of former clerks who, after their term at the Court ended, went abroad to the United States or the United Kingdom for graduate training in law. These former clerks, she noted, “are steeped in foreign law” and capably use it in their advocacy before South African courts.⁸³¹ Such transnational engagement, she observed, stands as an important “nonlegal reason for why so much foreign law appears before the bench.”⁸³² This boomerang-like pattern of clerks going abroad for graduate work in law has continued, with roughly half (at least six of thirteen) of the Constitutional Court clerks from the 2008-09 term going abroad for advanced foreign legal education immediately following the completion of their clerkship.⁸³³ It is unknown how many of the remaining clerks pursue graduate work abroad at a later date, but at least one former

⁸³⁰ Interview, 8/18/2010.

⁸³¹ Interview, 8/23/2010.

⁸³² Id.

⁸³³ Interview, 8/25/2010.

clerk observed that an overwhelming number do ultimately pursue further legal education overseas.⁸³⁴

Upon receiving advanced degrees and experience in foreign and international law, these clerks return to South Africa to serve as litigators. Litigators, most respondents noted, have become a principal source of foreign law that appears in South African jurisprudence.⁸³⁵ As one former justice noted, the ability of litigators to serve as conduits of foreign law is especially powerful at lower-level courts because those courts have no clerk system.⁸³⁶ One South African litigator, who retained an LLM from NYU and litigated for eight years in the United States, observed that foreign law appears in her legal briefs to lower courts “all the time.”⁸³⁷ Many of her colleagues, moreover, are members of the bar in both South Africa as well as a bar overseas, most commonly the United Kingdom, and they too draw extensively from foreign law in their work before the courts.⁸³⁸ When presented with a hypothetical wherein a U.S. court considers a novel argument concerning the expansion of civil remedies for domestic gender violence, one South African attorney said such an argument would “absolutely” appear in any capable attorney’s brief to the South African court, even if the U.S. court had ultimately rejected the argument.⁸³⁹

A comparison of two subsections of a legal brief recently submitted to the Constitutional Court in a case concerning the freedom of expression reveals the extent to which South African litigators raise foreign legal arguments before South African

⁸³⁴ Interview, 8/23/2010.

⁸³⁵ Former Justice Sachs noted that litigators provide the first selection of foreign law a judge would receive in a case. This is then supplemented by the judge’s own research. Interview, 8/26/2010.

⁸³⁶ Interview, 8/26/2010.

⁸³⁷ Interview, 8/26/2010.

⁸³⁸ Id. The respondent is herself a licensed attorney in both South Africa and New York.

⁸³⁹ Id.

courts. Indeed, the brief downplays South African jurisprudence concerning the issue, citing only three domestic precedents. In a section titled “International and Foreign Law,” by contrast, the attorneys cite as many as seven, including even a case from the Texas Supreme Court.⁸⁴⁰ This reliance on foreign legal arguments by litigators was confirmed further during their oral arguments before the Court, when more than half of the cases cited during their opening statement were from abroad.⁸⁴¹

In addition to their formal education in foreign law, several South African litigators reported learning of foreign law in international law conferences. One such respondent noted her exposure to Colombian socio-economic rights jurisprudence during a recent comparative law conference convened by David Kennedy at Harvard Law School. As she described, ones exposure and openness to foreign law “absolutely” relates to ones exposure to it.⁸⁴²

In addition to the influence of law clerks and litigators on judicial decision-making, legal scholars can also play a supporting role. In South Africa, scholars try to influence outcomes through their participation in the South African Law Commission, a statutory advisory body involved in the development of law and recommendations of legal reforms.⁸⁴³ In addition, some constitutional scholars on occasion participate in the drafting of so-called rights charters, which, if adopted by the legislature, must be considered by the courts when adjudicating a matter related to a particular right.⁸⁴⁴ Nonetheless, these scholars are less essential to the direct diffusion of foreign law than they are in many civil law systems because the Constitutional Court itself stands as the

⁸⁴⁰ See *Le Roux v. Dey*, Applicant’s Written Argument, Case No. 45/10.

⁸⁴¹ Observation, 8/26/2010.

⁸⁴² Interview, 8/26/2010.

⁸⁴³ See LOURENS DU PLESSIS, *AN INTRODUCTION TO LAW* (3d ed. 1999).

⁸⁴⁴ One such transnationally active respondent, a constitutional law scholar and drafter of the South African Constitution, is currently consulting with Brigham Young University law scholars regarding the drafting of a rights charter concerning religious freedom in South Africa. Interview, 8/25/2010.

most powerful body in the shaping of South African common law and in the process of constitutional review. Unlike their civil law counterparts, however, scholars rarely play a direct role in the diffusion of law on their own, instead preferring to act as a sort of “fourth or fifth estate.”⁸⁴⁵

The most important role of these scholars comes in the form serving as an advocate before the bench through law clinics housed in prestigious law schools, or by acting in a coalition with local and transnational NGOs submitting amicus briefs to the Court.⁸⁴⁶ Amicus briefs submitted by NGOs, which generally rely on substantial transnational financial and research support, have proved a fertile resource of foreign law in various important South African cases.⁸⁴⁷ Their usefulness and influence on the Court, one interviewee noted, stems from the fact that they are required to present “something novel” in terms of legal argument.

Amicus briefs, moreover, generally draw extensively from comparative jurisprudence, and are even on occasion solicited by the Court to provide a survey exclusively on foreign law.⁸⁴⁸ In addition, these briefs can have a powerful effect as amici rules at the South African Constitutional Court are such that there is often only one per case. Foreign advocates have made important inroads through such briefs, often allying with local NGOs to make their arguments before the Court. On occasion, these transnational actors even apply directly to the Court, most recently in the case of a Harvard Law School clinic moving to submit an amicus brief regarding the issue of apartheid reparations.⁸⁴⁹

In common law states, the influence of legal scholars is often most pronounced in times of constitutional framing in transitional states. The role of the legal scholar

⁸⁴⁵ Interview, 8/18/2010.

⁸⁴⁶ Interview, 8/23/2010.

⁸⁴⁷ Interview, 8/17/2010.

⁸⁴⁸ Interview, 8/26/2010.

⁸⁴⁹ Interview, 8/19/2010.

qua legal conduit during these times can range from delivering completed versions of constitutions, to merely commenting on drafts.⁸⁵⁰ Legal scholars certainly served as able conduits of foreign legal norms during the drafting of South African constitution. The notable influence of the Canadian Charter of Rights and Freedoms on the South African Constitution,⁸⁵¹ for example, stems in part from the presence in South Africa of David Beatty, a Canadian visiting professor at the University of Cape Town.⁸⁵² Beatty's mark is most apparent on the Charter of Social Justice, an influential draft of the Bill of Rights circulated by eight prominent South African attorneys and consulted extensively by the constitutional drafters.⁸⁵³ This serendipitous Canadian influence was supplemented by a similarly indirect U.S. influence at a later stage, which owed much to the intervention of Halton Cheadle. Cheadle, who was then South Africa's

⁸⁵⁰ See John C. Reitz, "Export of the Rule of Law," 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 429 (2003). One of the largest private agent of legal reform is a project of the American Bar Association directed at Eastern European states from the former Soviet Union. The ABA's Central European and Eurasia Institute (CEELI), maintains a list of thousands of U.S. volunteers willing to comment on drafts in particular subject areas. CEELI stands as the largest voluntary association of lawyers in the United States and continues to provide technical assistance through more than twenty liaison offices it maintains in the region.

⁸⁵¹ See *CAN. CONST.* (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms).

⁸⁵² Interview, 8/18/2010. See also David Beatty, "The Rule (and Role) of Law in New South Africa: Some Lessons Learned from Abroad," 109 *S. AFR. L.J.* 408 (1992); Jeremy Sarkin, "The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions," 1 *U. PA. J. CONST. L.* 176 (1998).

⁸⁵³ See DENNIS DAVIS, *DEMOCRACY AND DELIBERATION: TRANSFORMATION AND THE SOUTH AFRICAN LEGAL ORDER* (1999), at 3. Canada also served as a useful starting point because its structure, unlike the U.S. Constitution, is very much modeled on the various international human rights instruments of the twentieth century. Some consider the U.S. Constitution by some as too concise, leaving courts with too much power to construe later on. See Klug. On the international human rights instruments such as the International Convention on Civil and Political Rights and the International Convention on Economic and Social Rights as the common ancestor of the South African Constitution, see J. Kentridge, at 245-46.

most eminent labor lawyer, had just returned from a year at Harvard Law School.⁸⁵⁴ Upon arrival, he introduced a novel conceptualization of judicial scrutiny by drafting a provision guaranteeing that certain rights could be constitutionally limited if the limitation was both reasonable and necessary.⁸⁵⁵ South African jurists have similarly noted a German influence via the presence of various German legal scholars in South African law schools, including Francois Venter and Gerhard Erasmus at the prestigious Stellenbosch University.⁸⁵⁶ In the sections that follow, I will attempt to describe the influence of these foreign players to better understand the relationships among the socialization of judicial actors, the domestic discursive context, and the influence of foreign law.

II. *Case Selection*

The selection of South Africa as a common-law counterpart to the analysis of legal development in the PRC attempts to address an oversight in the expanding literature concerning legal diffusion. While much has been written on the growing global judicial community and the socialization of judges, many contributors to this field of study give short shrift to notions of controlled comparison and case selection.⁸⁵⁷ To remedy this, the study below incorporates a “most different cases” case logic.⁸⁵⁸ Under this approach, it is necessary to select cases with characteristics

⁸⁵⁴ Davis, at 187.

⁸⁵⁵ Davis, at 187. In a similar fashion, German property law successfully entered the 1993 Interim Constitution. See Matthew Chaskalson, “Stumbling Towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution,” 11 S. AFR. J. HUM. RTS. 222 (1995).

⁸⁵⁶ See Ackermann (2005), at 180.

⁸⁵⁷ See Hirschl, at 132.

⁸⁵⁸ See Sidney Tarrow, “Bridging the Quantitative-Qualitative Divide in Political Science” in Henry E. Brady and David Collier, eds. *RETHINKING SOCIAL INQUIRY: DIVERSE TOOLS, SHARED STANDARDS* (Rowman and Littlefield Publishers, Lanham, MD: 2004); ADAM PRZEWORSKI & HENRI TEUNE, *THE LOGIC OF SOCIAL INQUIRY*

that vary on variables not central to the study. This method of selection serves to emphasize the ability of the key independent variable in explaining similar outcomes. In this way, South Africa, which possesses a constitutional court rooted in a common law system of English origin, stands as a useful test case of conclusions drawn from the analysis of legal diffusion to the civil law system of the PRC in Chapters 3 and 4.

Beyond serving as an appropriate setting to supplement the study of criminal procedure reform in China, South Africa's post-apartheid legal development also presents a useful setting to test alternative explanations of legal diffusion more broadly. As described in Chapter 1 and illustrated in Chapters 3 and 4, scholars have proposed various explanations for why countries recognize or resist foreign legal innovations. The dominant explanation of diffusion in international relations maintains that the legal rules to which states commit themselves reflect the distribution of material power in the international system. Accordingly, states import the so-called best practices of the international system when the overall power structure compels them to do so. Such power-based explanations of legal development in South Africa maintain that foreign influences of post-apartheid legal reforms reflect patterns of international economic aid. According to this reasoning, scholars maintain that the appearance of Canadian and German constitutional doctrines in the 1996 Constitution of South Africa suggests that diffusion is not a product of persuasion, but material resources.⁸⁵⁹ Rationalist explanations that look internally to domestic distributions of power similarly attribute legal outcomes to forces apart from persuasion. By such logic, court decisions in South Africa reflect not the reasoned judgment of the court, but rather the result of "pressure from small but politically powerful interest groups

(1982); Arend Lijphart, "Comparative Politics and Comparative Method," 65 *AM. POL. SCI. REV.* 682 (1971).

⁸⁵⁹ See Du Bois, at 631.

opposed to certain rights.”⁸⁶⁰

In addition to providing a testing ground for these common rational-choice explanations, South Africa, with its extensive body of customary and common law, serves as a useful setting to examine two additional explanations of legal diffusion—norm localization and legal family. Norm localization theorists of international relations maintain that foreign legal norms and practices transplant from one body politic to another only in the presence of proximate local discourse upon which foreign legal advocates can graft the candidate reform. A related theory developed in comparative legal studies maintains that the legal family from which a national legal system determines the source of foreign law. This explanation is familiar to comparative scholars of South African law. As they explain, the targets of comparative research conducted by South African jurists “have been either jurisdictions from which South Africa received large chunks of mostly statutory law, notably England, or those on the continent of Europe with which it shares part of its legal history.”⁸⁶¹

a. South Africa & the Common Law Legal Family

Before proceeding with an analysis of South African legal discourse, it is necessary to first establish that South African legal institutions are appropriate for such a comparative study. Common-law systems are comprised of several basic attributes: a case-based system of law administered through analogical reasoning; doctrine of *stare decisis*;⁸⁶² sources of law that include both statutes and cases; typical

⁸⁶⁰ Mitra Ebadolahi, “Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa,” 83 N.Y.U. L. REV. 1565 (2008), at 1596.

⁸⁶¹ See du Bois & Visser, at 645; see also du Bois, “Introduction: History, System, and Sources,” in INTRODUCTION TO THE LAW OF SOUTH AFRICA (C.G. van der Merwe & Jacques E. du Plessis, eds., 2004).

⁸⁶² South African courts apply the doctrine of *stare decisis et non quieta movere* (to stand by decisions and to not disturb what has been settled), under which judges have

legal institutions such as trust, tort law and agency; improvisatory legal style; and no substantive public/private law distinction.⁸⁶³ In this way, South Africa's legal system fulfills the essential structural requirements of a common law system.⁸⁶⁴ South African law is comprised of a mixture of Roman-Dutch and English common law elements, with institutions and legal procedures characteristic of England's common law grafted onto substantive laws rooted in continental pre-Napoleonic Code civil law.⁸⁶⁵ Moreover, the model of the British legal profession structured the constitutive "imagining and understanding" of the South African lawyers in the early state-making period.⁸⁶⁶

As discussed in Chapter 2, although legal family categorizations such as "common law" and "civil law" usefully capture broad structural differences between and among the various legal systems of the world, specific attributes of legal systems within a single legal family may differ. These differences have led some scholars to debate the utility of such classifications.⁸⁶⁷ The long, complicated colonial history of South Africa leaves it open to such categorical debates. Most notably, while most political scientists and comparative law scholars—and South African justices themselves⁸⁶⁸—consider South Africa a common law system,⁸⁶⁹ Vernon Palmer

a duty to follow the legal rulings announced in previous judicial decisions. *See* WILLE'S PRINCIPLES OF SOUTH AFRICAN LAW (9th ed. 2007).

⁸⁶³ *See* PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* (3d ed. 2007), at 103-04.

⁸⁶⁴ *See generally* WILLE'S PRINCIPLES OF SOUTH AFRICAN LAW (9th ed. 2007); LOURENS DU PLESSIS, *AN INTRODUCTION TO LAW* (3d ed. 1999), at 75.

⁸⁶⁵ *See* du Bois & Visser; O.D. SCHREINER, *THE CONTRIBUTION OF ENGLISH LAW TO SOUTH AFRICAN LAW* (1967).

⁸⁶⁶ *See* CHANOCK (2001), at 239.

⁸⁶⁷ *See* KONRAD ZWEIGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* (Tony Weir, trans., 1998); William Ewald, "Comparative Jurisprudence (I): What was it like to Try a Rat?," 143 U. Pa. L. Rev. 1889 (arguing that "it would be more accurate to speak, not of the civil law simpliciter, but of the civil law systems.").

⁸⁶⁸ *See generally* WILLE'S PRINCIPLES OF SOUTH AFRICAN LAW (9th ed. 2007); LOURENS DU PLESSIS, *AN INTRODUCTION TO LAW* (3d ed. 1999), at 75; du Bois &

recently suggested that while most jurisdictions of the world fall into either the civil or common law tradition, South Africa arguably belongs to a “third legal family”—i.e. a mixed jurisdiction.⁸⁷⁰

Palmer’s important contribution to the legal family literature, however, is of only passing importance to the study below. He maintains that the distinctive legal characteristics of mixed jurisdictions lie mainly in their isolation from members of the other two legal families. “[M]ixed jurisdictions,” he argues, “up until relatively recently, have lived their entire existence in a kind of physical and intellectual isolation, cut off from family members around the world.”⁸⁷¹ This category, however, is more a matter of degree than of kind, and reflects long-running debates about the extent to which the substantive laws of any state are truly derived from common or civil law.

More important for this study is the overall institutional structure, not substance, of the legal system. In terms of such an institutional structure, South Africa ancestry in the English common law legal family is unquestioned. Dutch settlers were the first to impose substantive law in South Africa, but British settlers were quick to erect English practices of adjudication in the colony. In colonial tribunals established in the late-seventeenth century, faced with the question of whether the colonial courts had jurisdiction over the indigenous population and, if so, what law applied, the Dutch reasoned from supposed principles of natural law that the local populace was subject

Visser; O.D. SCHREINER, *THE CONTRIBUTION OF ENGLISH LAW TO SOUTH AFRICAN LAW* (1967)

⁸⁶⁹ R. La Porta, F. Lopez-de-Silanes, A. Shleifer, & R.W. Vishny, “Legal Determinants of External Finance,” 52 *J. OF FINANCE* 1131 (1997), at 1138; *CIA World Factbook*, available at: <https://www.cia.gov/library/publications/the-world-factbook/>; [more cites].

⁸⁷⁰ See VERNON VALENTINE PALMER, *MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY* (2001).

⁸⁷¹ See Vernon Valentine Palmer, “Two Rival Theories of Mixed Legal Systems,” 12 *ELEC. J. COMP. L.* 1 (2008), at 2.

to the application of Dutch law. The English, arriving in the late 1700s, did not impose substantive English law on the territory. Rather, they “impose[d] English public law and procedure (including a judicial system based on the English model)” on top of what the Dutch had put in place.⁸⁷² In this way, the “natural dominating tendency of English law,” including the decisions of English courts, English constitutional and procedural rules, English statutes, English texts and English-trained lawyers, had “enormous influence” on South Africa’s legal system.⁸⁷³ In addition, the English colonial experience in South Africa Anglicized the judiciary and the legal profession. François du Bois and Daniel Visser, both preeminent South African jurists, observed that, “[t]he introduction of English-style courts and adjectival [i.e. procedural] law was accompanied by the restriction of judicial appointments and membership of the legal profession to those trained and permitted to practice in Britain, and the importation of British judges.”⁸⁷⁴ After independence from British rule, the legal system did not fundamentally change except for the passage of laws to further institutionalize the system of racial exclusion begun under British rule. Occasional periods of anti-English legal reform did occur among nationalist Afrikaners, but their efforts were primarily limited to the area of private law.⁸⁷⁵

The contemporary South African legal system remains similarly tethered to common law rather than civil law traditions, most especially because many important

⁸⁷² See Christopher J. Roederer, “Working the Common Law Pure: Developing the Law of Delict (Torts) in Light of the Spirit, Purport, and Objects of South Africa’s Bill of Rights,” 26 *ARIZ. J. INT’L & COMP. L.* 427 (2009), at 436. It is worth noting that while certain aspects of southern African customary law did survive the colonial experience, one must be cautious that this law is described by many legal anthropologists as “an invented tradition.” See DAVID NELKEN & JOHANNES FEEST, *ADAPTING LEGAL CULTURES* (2001); Frank K. Upham, “Weak Legal Consciousness as Invented Tradition,” in *MIRROR OF MODERNITY: INVENTED TRADITIONS OF MODERN JAPAN* (S. Vlastos, ed., 1998).

⁸⁷³ See CHANOCK (2001), at 158.

⁸⁷⁴ See du Bois & Visser, at 611.

⁸⁷⁵ See Visser (2003); Roederer, at 446.

laws are not codified by a legislature. As du Bois and Daniel Visser note, “In South Africa, as in Britain and other common law jurisdictions, the basic framework of legal principles is today found in a combination of judicial precedents established by decisions of the superior courts and legislation with a relatively narrow compass, the latter often merely adding further detail and elaboration to the former.”⁸⁷⁶ Moreover, just as post-Mao legal reconstruction in China has left the fundamental structure of China’s civil law legal system in place, the legal revolution of the post-apartheid era has not revolutionized the common-law attributes of South African adjudicative procedure,⁸⁷⁷ or its system of strong judicial review.⁸⁷⁸ Indeed, as Arthur Chaskalson, former President of the Constitutional Court of South Africa, observed in *In re Ex Parte President of the Republic of South Africa*: “There are not two systems of law, ...each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the constitution and is subject to constitutional control.”⁸⁷⁹

b. Legal Construction & Reconstruction in Post-Apartheid South Africa

In addition to serving as a valuable common-law counterpoint to China’s civil law system, South Africa is usefully similar to China in both the scale of its ongoing project of legal reconstruction as well as its location within an active and well-resourced transnational legal advocacy campaign. Indeed, after subjecting its black

⁸⁷⁶ See du Bois & Visser, at 610.

⁸⁷⁷ See Laurie W.H. Ackermann, “Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Jörg Fedtke, 80 TUL. L. REV. 169 (2005).

⁸⁷⁸ Section 167 of the Constitution provides that the Constitutional Court is “the highest court in all constitutional matters,” defined as “any issue involving the interpretation, protection or enforcement of the Constitution.” See S. AFR. CONST. CHAP. 8 § 167, cl. 7.

⁸⁷⁹ 2000 (2) SA 674 (CC).

citizens to half a century of brutally inhumane treatment under apartheid, South Africa has, since efforts to promulgate a new constitution began in 1991, drawn extensively from comparative constitutional jurisprudence to develop what is arguably “the most admirable constitution in the history of the world.”⁸⁸⁰

The creation of this landmark document could not have occurred without the constant and courageous sacrifices of the South African people. Nonetheless, this domestic struggle drew frequently from various international, transnational, and foreign notions of legal rights such as those codified in the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973 and the Universal Declaration of Human Rights of 1948. This engagement with foreign and international law by South Africa’s freedom fighters was not a wholly modern phenomenon in South Africa. Victor Sampson, an attorney-general of the Cape Colony, wrote in 1887 that, “To say that there is not a book of law in the whole civilized world which may not possibly be an authority in the...[South African] Courts, is not to go beyond the truth.”⁸⁸¹ Within such a syncretist legal setting, Martin Chanock observes, “judges were the primary agents” of laying down foreign law in South African courts despite nativist resistance.⁸⁸² A crucial characteristic in the contemporary era, moreover, is that references to foreign and international law are more voluntary. That is, “the *consultation* of foreign law in South Africa’s process of strengthening the rule of law and supporting multiparty democracy is symbolic of its final liberation from a past marked by the *imposition* of foreign law.”⁸⁸³

⁸⁸⁰ See CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* (2001), at 261.

⁸⁸¹ See Victor Sampson, “Sources of Cape Law,” 4 *CAPE L.J.* 109 (1887) (quoted in François du Bois & Daniel Visser, “The Influence of Foreign Law in South Africa,” 13 *TRANSNAT’L L. & CONTEMP. PROBS.* 593 (2003).

⁸⁸² CHANOCK (2001), at 159.

⁸⁸³ See du Bois, at 658 (emphasis added).

The project of drafting South Africa’s post-apartheid constitution began in 1991 with the establishment of the Convention for a Democratic South Africa (CODESA).⁸⁸⁴ These negotiations, which began amidst both domestic and international pressure, and only a year following the lifting of legal restrictions on political opponents of President F.W. De Klerk, quickly unraveled as periods of government repression and street demonstrations—the so-called “rolling mass action” organized by the African National Congress (ANC)—quickly disrupted the initial progress made under the auspices of CODESA.⁸⁸⁵ When stability returned, the collective efforts of various South African interest groups reconvened as the Multi-Party Negotiating Process in 1993. This reconstituted body delegated the drafting of an enumerated bill of rights to a technical committee of South African justices, attorneys, and constitutional scholars.⁸⁸⁶

Unlike the experience of the Constitutional Framers in the United States, who were strongly divided over the creation of the Bill of Rights,⁸⁸⁷ the creation of such a charter was not controversial in the South African political climate. With South Africa’s long history of rights violations and the prospect of a distrusted white minority losing political control, the prospect of introducing strong countermajoritarian constitutional protections did not derail the constitutional convention. The greatest challenge was a temporal one, as the National Party, the political party responsible for the imposition of apartheid in 1948 and soon to be out of power in the new South Africa, hoped to ensure such protections as soon as

⁸⁸⁴ See Willem de Klerk, “The Process of Political Negotiation: 1990-1993” in *BIRTH OF A CONSTITUTION* (Bertus de Villiers, ed., 1994), at 3.

⁸⁸⁵ See LOURENS DU PLESSIS & HUGH CORDER, *UNDERSTANDING SOUTH AFRICA’S TRANSITIONAL BILL OF RIGHTS*, at 7; HASSEN EBRAHIM, *THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA* (1998).

⁸⁸⁶ See Ebrahim (1998).

⁸⁸⁷ See Terence Ball, “Introduction,” in *THE FEDERALIST WITH LETTERS OF “BRUTUS”* (2003), at xxix.

possible so as not to lose them once the new legislature voted on the draft charter.⁸⁸⁸

Ultimately, negotiations over constitutional rights occurred in two phases. In the initial phase, CODESA adopted an Interim Constitution compiled by the technical advisors.⁸⁸⁹ Once adopted, the Constitutional Court was formally established and parliamentary elections were held in 1994. This first parliament functioned as a Constitutional Congress with the task of ratifying within two years a new constitution that conformed to thirty-four constitutional principles agreed to by CODESA.⁸⁹⁰ All thirty-four of these principles survived the codification process with only minor revisions.⁸⁹¹ To ensure the final document best reflected the interests of society, this draft was then presented to and accepted by the South African public.⁸⁹² To achieve this, the Constitutional Assembly distributed materials via the internet and delegated “theme committees” to incorporate public opinion.⁸⁹³ Finally, the Constitutional Court subsequently ruled that the Constitution complied with the thirty-four Constitutional Principles agreed to by the CODESA negotiations.⁸⁹⁴

To contextualize the analysis of South African judicial opinions below and to describe still further the process of South Africa’s legal reconstruction, it is also worth noting the role of foreign advisors during this period of constitutional transition and legal reconstruction. In the actual drafting process, foreign experts were formally

⁸⁸⁸ See Ebrahim (1998).

⁸⁸⁹ Act 200 of 1993.

⁸⁹⁰ See CONSTITUTIONAL PRINCIPLES, SCHEDULE 4 OF THE INTERIM CONSTITUTION, Act 200 of 1993.

⁸⁹¹ See CONSTITUTIONAL ASSEMBLY, EXPLANATORY MEMORANDUM ON THE DRAFT OF THE BILL OF RIGHTS (Oct. 9, 1995).

⁸⁹² See EBRAHIM (1998), at 240.

⁸⁹³ See Vijayashri Sripati, “Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective,” 16 TUL. J. INT’L & COMP. L. 49 (2007), at 84.

⁸⁹⁴ The CC declined certification of the first constitution presented to the court, citing a failure of the document to effectively entrench certain rights provisions. See *In re Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1253 (CC).

excluded from the process.⁸⁹⁵ This purposeful exclusion emerged in large part from the salient anti-foreign discourse that developed from South Africa's exposure to the post-colonial experiences of other sub-Saharan African states. Vijayashri Sripati, quoting Bereket Habte Selassie, who helped draft the 1997 constitution of Eritrea, notes that "in the 1950s, Europeans summoned African leaders from twenty-five to thirty countries to capitals like London, Paris, and Brussels and shoved constitutions down their throats." He continues, "The lingering memory of this illegitimate, postcolonial, constitution-making practice may well explain the South African ban on foreign advisors."⁸⁹⁶

Though formally excluded, however, there were numerous foreign hands involved in the drafting of South Africa's constitutional document. The formal ban meant merely that the voices of foreign advocates were heard at "hearings" before the Constitutional Assembly rather than during the more formal "drafting sessions."⁸⁹⁷ In addition to participating in foreign fact-finding tours, members of the Assembly acknowledged direct support from the governments of Australia, Britain, Holland, France, Germany, and the United States in the form of sponsorship of workshops and provision of experts. Indeed, observers report numerous "indirect, and nuanced (but persuasive) modes of interaction" with foreign advocates during this period,⁸⁹⁸ including a dramatic expansion of official links between South African and foreign law schools from the United States, Holland, Canada, Belgium, and both England and

⁸⁹⁵ See Louis Aucoin, "The Role of International Experts in Constitution-Making: Myth and Reality," 5 *GEO. J. INT'L AFF.* 89 (2004).

⁸⁹⁶ Sripati, at 89.

⁸⁹⁷ Unfortunately, as with the discussions surrounding the drafting of the 1997 Criminal Procedure Law in China, the internal debates of South Africa's drafters and the development of their negotiating positions are not part of the public record. See du Bois, at 626.

⁸⁹⁸ See Sripati, at 89; see also HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION* (2000), at 69.

Scotland.⁸⁹⁹ One additional lasting influence was the relationship of several key South African reformers with transnational advocates such as Jack Greenberg, the former counsel of the NAACP Legal Defense Fund involved in such landmark U.S. civil rights cases as *Brown v. Board of Education*. Mr. Greenberg's influence, channeled through his friendship with former South African Chief Justice Arthur Chaskalson, proved essential in shaping the Legal Resources Centre (LRC), now a leading South African advocacy group, modeled after the NAACP.⁹⁰⁰ The LRC, former Justice Albie Sachs described, "trained a new generation of lawyers"⁹⁰¹ and has grown to become a powerful legal advocate in the country, deeply engaged transnationally with organizations like the Legal Assistance Trust as well as dozens of other foreign funding sources, including the Australian High Commission, the Ford Foundation, Open Society, and Oxfam.

III. *Judicial Discourse in South African Case Law*

Before conducting a more rigorous content analysis of South African judicial decision-making in the following Chapter, it is worth first conducting a plausibility probe through a manual survey of South African judicial discourse to see if the two-tailed model of diffusion supplies any analytical leverage outside of the Chinese context. Indeed, South Africa is an ideal setting to test such a theory. Like China, South Africa is immersed in an active national discourse concerning its national identity while simultaneously challenged by novel legal questions raised by its new constitution. This transition presents justices with, as Justice O'Regan described it, "a

⁸⁹⁹ Daniel Visser, "Into the New Millennium, 1990-2004," in *THE UNIVERSITY OF CAPE TOWN LAW FACULTY, A HISTORY: 1859-2004* (Denis Cowen & Daniel Visser, eds., 2004), at 110.

⁹⁰⁰ Interview, 8/19/2010.

⁹⁰¹ Interview, 8/26/2010.

shift of *grundnorm*, a change in the founding legal principle that animates the state.”⁹⁰²

The following survey of judicial opinions, ranging from matters as diverse as torts, equal protection, executive authority, and capital punishment, suggests South Africa has, like China, imported norms with respect to certain issues more than others. As one South African lawyer described it, when South African jurisprudence is “deficient in language and law,” foreign law and the novel framing it provides offer “cognitive focal points” for political actors. When those actors lack any cognitive script to resist that framing, foreign law proves harder to defend against. Novel legal jurisprudence, and the articulation of arguments in support of it, thus proves attractive to judicial advocates hoping to develop domestic law in a particular direction. As one lawyer active in the South African judiciary noted, the structure of the Constitution permits judges to import “innovative” legal arguments in support of their positions and “when there is nothing in South Africa to support [their] argument, [some justices] have looked abroad.”⁹⁰³ Similarly, another attorney and former clerk at the Constitutional Court observed that in controversial cases, a novel framing in foreign law can provide a “bulwark” against local opposition. Otherwise, she continued, “it’s too difficult to draw from South African culture; it’s too divisive.”⁹⁰⁴

a. Points of Concern in South African Law

Despite the fertile atmosphere that characterized South Africa’s post-apartheid moment, many jurists expected little normative movement in the South African judicial system. Others, such as the foreign-trained Justice Edwin Cameron, noted that “The survival of law and legal regulation [in post-apartheid South Africa] can by no

⁹⁰² See Kate O’Regan, “Human Rights and Democracy—A New Global Debate: Reflections on the First Ten Years of South Africa’s Constitutional Court,” 32 INT’L J. LEGAL INFO. 200 (2004).

⁹⁰³ Interview, 8/20/2010.

⁹⁰⁴ Interview, 8/23/2010.

means simply be assumed.”⁹⁰⁵ One leading South African legal scholar speculated during the transitional period that “one should expect a large measure of continuity with the past, not radical alteration of substantive law or applicable legal philosophy. [In addition], cases pre-dating any legislative alteration of the law will retain their validity as precedents for common law.”⁹⁰⁶ In this way, while the Constitution marked a radical socio-political break with the past, there was no formal legal break.⁹⁰⁷

Demonstrating the tension between extant discourse and the importation of new rights, the Constitutional Court, in one of its first actions as a judicial body, ruled that the Bill of Rights ultimately codified by the Constitutional Assembly should account for South African culture. In its words, the Constitution was permitted to “supplement the universally accepted fundamental rights [imported into the text] with others not universally accepted.”⁹⁰⁸ In another early decision of the Constitutional Court, after surveying the global landscape of separation of powers jurisprudence, the Court announced the development of a “distinctly South African model” that would take into account salient South African concerns.⁹⁰⁹

This awareness of points of concern and their salience in South African society is consistently evident in the language of judicial opinions published by the South African justices. Justice Johann Kriegler, for example, contrasting South African law with U.S. jurisprudence on freedom of expression warned, “[c]omparative study is

⁹⁰⁵ See Edwin Cameron, “Our Legal System—Precious and Precarious,” 177 S. AFR. L.J. 372 (2000).

⁹⁰⁶ See Peter Kutner, “Tort Cases in the South African Appellate Division: A Top Ten of the Eighties,” 6 TEMP. INT’L & COMP. L.J. 311 (1992); see also Christopher Roederer, “The Transformation of South African Private Law After Ten Years of Democracy: The Role of Torts (Delict) in the Consolidation of Democracy,” 37 COLUM. HUM. RTS. L. REV. 447 (2006).

⁹⁰⁷ See LOURENS DU PLESSIS & HUGH CORDER, UNDERSTANDING SOUTH AFRICA’S TRANSITIONAL BILL OF RIGHTS (1994), at 20.

⁹⁰⁸ In re: Certification of the Constitution of the Republic of South Africa Constitution Act, 1996 (10) BLCR (CC).

⁹⁰⁹ See *S v. Dodo* 2001 (3) SA 382 (CC).

always useful, particularly where Courts in exemplary jurisdictions have grappled with universal issues confronting us....But that is a far cry from the blithe adoption of alien concepts or inappropriate precedents.”⁹¹⁰ Justice Chaskalson similarly observed that the role of justices on the South African Constitutional Court is “to construe the South African Constitution...with due regard to our legal system, our history and circumstances.”⁹¹¹ Justice Sydney Kentridge similarly observed, “Foreign comparisons may inform a national court of possible solutions to the problem before it and equally of the difficulties which might attend any solution.”⁹¹² He noted elsewhere, however, reflecting the importance of “points of concern” on the ability of those foreign comparisons to persuade him, that “regard must be paid to the legal history, traditions, and usages of the country concerned.”⁹¹³ Justice Laurie Ackermann similarly noted that, “Constitutional law in the twentieth century...is not a wholly nationalistic and exclusively historical enterprise, but embodies a certain *universally* normative minimum core, or at least aspires thereto. There are, of course, limits to the impact of rationality and ethical persuasion that make further discourse impossible.”⁹¹⁴ Judge Dennis Davis framed the matter rather simply, noting that South Africa’s “indigenous history of the country plays a vital role in the interrogation of constitutional concepts of the nation state and, accordingly, in the development thereof.”⁹¹⁵ The following

⁹¹⁰ See *Bernstein v. Bester*, 1996 (2) SALR 751 (CC).

⁹¹¹ See *S. v. Makwanyane*, 1995 (3) SALR 391 (CC).

⁹¹² See Sydney Kentridge, “Comparative Law in Constitutional Adjudication: The South African Experience,” 80 TUL. L. REV. 245 (2005).

⁹¹³ See *State v. Zuma*, 1995 (2) SALR 642 (CC). In *Zuma*, the court faced a challenge of a statutory presumption that a written confession to a magistrate was voluntarily made. Such a presumption shifts the burden of proof from the state to the accused to prove it was made under duress. The court examined legal solutions to this question from the United States, Canada, and the European Court of Human Rights to conclude that the burden shift unreasonably interfered with the principle that the prosecution must prove the guilt of the defendant beyond a reasonable doubt.

⁹¹⁴ See Ackermann, at 181 (emphasis added).

⁹¹⁵ See Ackermann, at 195.

subsections highlight judicial discourse concerning two policy areas especially salient in post-apartheid South Africa—equality and separation of powers.

i. Equality

South African jurist Etienne Mureinik has noted that the increasingly cosmopolitan jurists of the South African judiciary have transformed South Africa into “a community based on persuasion not coercion.”⁹¹⁶ This observation, though, ignores the differences that have emerged across policy areas. Indeed, many salient policies *qua* points of concern sit uncomfortably on the “frontiers” between global and local legal discourses, and thus stand as points of contestation.⁹¹⁷ According to a survey of South African case law, as well as the observations of most respondents, this rift has proved especially divisive with respect to legal questions concerning equal protection. Given South Africa’s experience with law as a tool of oppression over the previous century, laws and constitutional provisions designed to address matters of equality have been a point of concern and contestation in the post-apartheid era. Judges are especially sensitive to these discourses given that judges were frequent targets of anti-apartheid activists.⁹¹⁸ As a leading scholar of South African legal culture described, “[i]n the state built after 1902 law and order were secured by the creation of a paramilitary force which was to combine the roles of policing and internal occupation.”⁹¹⁹ As early as 1923, the ANC responded to this subjugation by publishing in protest against the white regime the so-called African Bill of Rights. Upon assuming control in 1948, the National Party stacked the courts with judges sympathetic to the project of apartheid and passed comprehensive legislation to bar

⁹¹⁶ See CHANOCK (2001), at 512.

⁹¹⁷ See CHANOCK (2001), at 525.

⁹¹⁸ See CHANOCK (2001), at 517.

⁹¹⁹ See CHANOCK (2001), at 514.

courts from reviewing executive action in matters of domestic security.⁹²⁰ In 1955, the ANC, along with its allies in the South African Indian Congress, responded again, this time with the Freedom Charter. By the 1980s, as opposition to the National Party grew, the apartheid government instituted a variety of measures to secure executive authority outside the scope of the judiciary.⁹²¹ The courts in turn shaped doctrine in order to provide the executive branch with the greatest possible latitude to act outside judicial review.⁹²²

South African jurist Dennis Davis, describing the influence of this contentious history on contemporary South Africa, notes that, “the concept of equality lies at the center of the South African constitutional idea.”⁹²³ Indeed, equality rights were listed first in order to stress their primary significance in the constitutional agenda and their position as the “spirit, purport and object” of the South African Bill of Rights.⁹²⁴ In the post-apartheid era, however, the extant discourse concerning equality has divided political actors, thus making adjudicating questions of equality “complex, problematic, and contentious” and leaving justices open to criticisms similar in discursive content to those made during the apartheid era.⁹²⁵ In this way, Constitutional Court justices facing contentious legal questions concerning equality have in cases such as *New National Party* “refus[ed] to engage in a fair comparison” in order to reach their

⁹²⁰ See D.M. Davis, “Constitutional Borrowing and the Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience,” 1 INT’L J. CONST. L. 181 (2003), at 182.

⁹²¹ See STEPHEN ELLMAN, IN A TIME OF TROUBLE: LAW AND LIBERTY IN SOUTH AFRICA’S STATE OF EMERGENCY (1992).

⁹²² See Nicholas Haysom & Clive Plasket, “The War Against Law: Judicial Activism and the Appellate Division,” 4 S. AFR. J. HUM. RTS. 303 (1988).

⁹²³ Davis, 1999, at 3.

⁹²⁴ See DU PLESSIS & CORDER (1999), at 139; G.E. DEVENISH, A COMMENTARY ON THE SOUTH AFRICAN CONSTITUTION (1998), at 48. The 1996 Constitution contains two explicit provisions for equality. Section 9(1) provides for a positive right to be treated equally before the law. Sections 9(3)-(4) provide for a negative right to preclude discrimination by the state and private actors.

⁹²⁵ DEVENISH (1998), at 48.

desired political outcome. In some instances, Davis notes, the Court's avoidance of certain issues and poor reasoning "tested the most talented of lateral jurisprudential thinkers."⁹²⁶

Equality jurisprudence in the domain of socio-economic rights has proved especially contentious in post-apartheid South Africa. Indeed, as the director of SERI, a leading public interest law firm, contends, equality rights with respect to socio-economic issues are "THE case" in which the Court is reluctant to accept foreign laws.⁹²⁷ In these cases, amicus interventions in equality cases that bring in international and foreign law have been largely unsuccessful.⁹²⁸ It is no surprise, then, that one former Justice remarked that "foreign [equality] jurisprudence was more baffling than helpful."⁹²⁹

The matter of how to establish equality in post-apartheid South Africa was heavily contested during the drafting of the new Constitution. As Richard Spitz and Matthew Chaskalson observe, "the equality clause was as much a focus of arguments as any other clause, not because of disagreement over the principle of equality itself, but because of differences between parties over the way best to promote equality."⁹³⁰ Each party participating in the negotiations presented competing versions of the equality provision, with stark differences emerging as to protections or proscriptions of affirmative action. While most other provisions of the Bill of Rights were "agreed to without undue difficulty," disputes concerning equality emerged quickly, drawing readily from preexisting libertarian and liberationist discourses.⁹³¹ Libertarians,

⁹²⁶ Davis, 1999, at 84.

⁹²⁷ Correspondence, 8/17/2010 [emphasis in original].

⁹²⁸ Id.

⁹²⁹ Interview, 8/26/2010.

⁹³⁰ SPITZ & CHASKALSON (2000), at 301.

⁹³¹ Lourens du Plessis, "A Background to Drafting the Chapter on Fundamental Rights," in BIRTH OF A CONSTITUTION (Bertus de Villies, ed., 1994), at 91-92.

supported mainly by whites writing actively about rights issues since the 1970s,⁹³² pushed for rights premised on individual liberty, not equality.⁹³³ Put simply, their supporters seek the security of a libertarian, noninterventionist Constitution that leaves undisturbed their financial gains made under apartheid. Liberationists, by contrast, who emerged in black South African discourse from the ranks of the anti-apartheid ANC, contended that South Africa required an interventionist state to ensure equal distribution of means and protection under the law.⁹³⁴ These competing discursive positions of formal versus substantive equality thus provided the vocabulary by which both groups could later challenge legal questions concerning equality presented to the court. In fact, the very language of the interim Constitution, which provided for the limitation of rights justifiable in “an open and democratic society” based on both “*freedom and equality*,” ensured the competing discourses would continue to be raised in opposition to one another in South African courtrooms. These competing discourses thus continue to breathe life into long-running courtroom debates about what distinguishes “fair” and “unfair” discrimination.⁹³⁵

In this historical context, Justice Kate O’Regan, surveying a variety of foreign laws dealing with matters of equality, noted, “The different approaches adopted in the different national jurisdictions arise not only from different textual provisions and from different historical circumstances, but also from different jurisprudential and philosophical understandings of equality.” She continued: “Our history is of particular relevance to the concept of equality....The deep scars of [apartheid] are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed

⁹³² DU PLESSIS & CORDER (1999), at 25.

⁹³³ DU PLESSIS & CORDER (1994), at 23.

⁹³⁴ Lourens du Plessis, “A Background to Drafting the Chapter on Fundamental Rights,” in BIRTH OF A CONSTITUTION (Bertus de Villies, ed., 1994), at 91-92.

⁹³⁵ See MARK S. KENDE, CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES (2009), at 162.

that the equality clause needs to be interpreted.”⁹³⁶ Justice Moseneke similarly cautioned that when considering foreign case law concerning remedies for discrimination, an especially salient matter for South African jurists:

Our respective histories, social context, constitutional design differ markedly.... We must therefore exercise great caution not to import, through this route, inapt foreign equality jurisprudence which may inflict on our nascent equality jurisprudence American notions of ‘suspect categories of State action’ and of ‘strict scrutiny.’ The Afrikaans equivalent ‘*restellende aksie*’ is perhaps more consonant with the remedial or restitutionary component of our equality jurisprudence.⁹³⁷

Such attention to and contention over extant “points of concern” has been similarly apparent in cases concerning the political rights of members of the successor to the party most closely associated with the system apartheid, the National Party.⁹³⁸ In addition, cases concerning socio-economic equality have proved especially contested in South African courts. Indeed, every interviewee asked noted that this field of law was one in which foreign law was especially resisted. One active attorney experienced in litigating such rights recalled that she could only think of “one case or so” in which the court was persuaded by and drew upon foreign jurisprudence.⁹³⁹

ii. Separation of Powers & Federalism

Legal questions involving the separation of powers and checks on state

⁹³⁶ See *Brink v. Kitshoff*, 1996 4 SALR 197.

⁹³⁷ See *Minister of Finance v. Van Heerden*, 2004 (6) SA 121 (CC). On the influences of German Constitutional Law on the SA Const, see Kentridge, at 246, comparing the Grundgesetz für die Bundesrepublik Deutschland, art. 1 with S. Afr. Const. 1996, ch. 1 §10.

⁹³⁸ See generally JOANNE DUFFY, *POLITICS OF ETHNIC NATIONALISM: AFRIKANER UNITY, THE NATIONAL PARTY, AND THE RADICAL RIGHT IN STELLENBOSCH, 1934-1948* (2006).

⁹³⁹ Interview, 8/23/2010.

coercion have proved as heavily contested as equality jurisprudence.⁹⁴⁰ Indeed, one participant in the constitutional negotiations observed that “[i]n the debates leading up to the new Constitution few, if any, topics were as hotly debated as the creation of provinces with constitutionally guaranteed powers.”⁹⁴¹ This is not surprising given the frequent failures of apartheid-era courts to restrict the oppressive policies of the executive branch. As famed Constitutional Justice Albie Sachs noted during apartheid, the “reputation [of judges] for tempering harsh legislation, moderating inequitable executive action, and restraining irregular police conduct” was frequently tarnished by aligning too closely with and mollifying the Nationalist Party regime.⁹⁴² Indeed, this discourse, which extended to discussions of federalism and other institutional mechanisms used to check state power, triggered the first breakdown of CODESA negotiations of the interim Constitution in 1992.⁹⁴³ In CODESA’s first report, representatives noted that questions concerning the separation of powers and federalism constituted the “core issue in the negotiations.”⁹⁴⁴ The Inkatha Freedom Party (IFP), founded by former members of the ANC, and drawing from language suggested to them by their American legal advisor, stated that it would reject any transitional constitution that did not provide for federalism and the “ground-up democracy building sub-processes.”⁹⁴⁵ The IFP’s position drew support from other groups such as the KwaZulu and Bophuthatswana representatives. Talks resumed only

⁹⁴⁰ Interview, 8/18/2010.

⁹⁴¹ See Bertus de Villiers, *Introduction*, in Bertus de Villiers ed., *REVIEW OF PROVINCES AND LOCAL GOVERNMENTS IN SOUTH AFRICA: CONSTITUTIONAL FOUNDATIONS AND PRACTICE* (2008), at 1.

⁹⁴² See ALBIE SACHS, *JUSTICE IN SOUTH AFRICA* (1973), at 245.

⁹⁴³ See SIRI GLOPPEN, *SOUTH AFRICA: THE BATTLE OVER THE CONSTITUTION* (1997), at 201.

⁹⁴⁴ See RICHARD SPITZ & MATTHEW CHASKALSON, *THE POLITICS OF TRANSITION: A HIDDEN HISTORY OF SOUTH AFRICA’S NEGOTIATED SETTLEMENT* (2000), at 9.

⁹⁴⁵ See SPITZ & CHASKALSON (2000), at 129 (citing “Regions in South Africa: Constitutional Options and their Implications for Good Governance and a Sound Economy,” Consultative Business Movement Report, March 1993, at 33).

after a compromise was pieced together from amendments designed to secure the power of provinces, the possibility of a *volkstaat*,⁹⁴⁶ and a Constitutional role for a Zulu monarch.⁹⁴⁷ This compromise, which established five additional provincial-status territories,⁹⁴⁸ was necessary to avoid a complete breakdown in the negotiations.⁹⁴⁹ The Technical Committee tasked with drafting materials for the provision of constitutional rights reported that this ultimate political solution “offer[ed] a compromise between the two conflicting positions on a basis which seems to be both reasonable and rational in the circumstances which exist in South Africa.”⁹⁵⁰

The heated debate over the extent to which federalism and legal guards against state power should be incorporated into the Constitution dates back to the formation of the Union of South Africa in 1910 and has become one of the “most critical and intractable problem which faces any constitutional dispensation in South Africa.”⁹⁵¹ A leading participant in the Constitutional drafting process recalls that a constitutional solution was only brokered when, during a winter holiday during the CODESA negotiations, the German government flew the relevant drafting committee to Germany and presented them with a new framing of the issue at hand. As a result of this trip, the drafters returned home and adopted several German principles.⁹⁵² The debate over the separation of state powers in South African society, however, did not end with the drafting of the Constitution, and indeed picked up again as soon as the

⁹⁴⁶ The *volkstaat* proposal requests the establishment of a federal or independent territory for the Afrikaner minority. See Stephen Ellman, “The New South African Constitution and Ethnic Division,” 26 COLUM. HUM. RTS. L. REV. 5 (1994).

⁹⁴⁷ See ACCORD ON AFRIKANER SELF-DETERMINATION, 23 April 1994.

⁹⁴⁸ See ZIYAD MOTALA & CYRIL RAMAPHOSA, CONSTITUTIONAL LAW: ANALYSIS AND CASES (2002).

⁹⁴⁹ See *In re: Certification of the Constitution of the Republic of South Africa, 1996* (10) BCLR 1253 (CC).

⁹⁵⁰ See SPITZ & CHASKALASON (2000), at 142.

⁹⁵¹ See DU PLESSIS & CORDER (1994), at 20.

⁹⁵² Interview, 8/25/2010.

issue was raised before the Court. The debate continues in Constitutional jurisprudence in which “principle appears to make way for pragmatism.” In some separation of powers cases, the court notably applied “highly questionable”⁹⁵³ judicial reasoning to reach the politically favored result of reducing the degree of judicial scrutiny applied to presidential pardoning power. As recently as 2008, the majority party moved to amend the Constitution with a view to instate their desired arrangement of governmental power.

b. Novel & Entrenched Practices in South African Case Law

In this way, South Africa’s Constitutional Court has given “a friendly but cautious welcome to international law.”⁹⁵⁴ Nonetheless, in many cases it has been foreign jurists and advocates, not South African history, that have supplied the discourse with which South African attorneys and judges approached certain jurisprudential questions. The South African Law Commission, for example, introduced to the Court the German concept of *drittwirkung*, a theory involving the appropriateness of a horizontal application of the Bill of Rights as opposed to a vertical one which applies such rights primarily in cases involving state action.

This new way of framing constitutional questions, which South Africa ultimately adopted, is the German formulation of the question and as such has “provided the vocabulary in terms of which this question has been discussed and conceptualized ever since.”⁹⁵⁵ Similarly, in many early cases difficult and controversial issues were resolved by the importation of the “Oakes test,” a Canadian doctrine to assess the constitutionality of state infringements on individual rights.⁹⁵⁶ In the uncharted legal terrain of cyberlaw, the United States has served as the main, if not

⁹⁵³ See Davis (1999), at 80.

⁹⁵⁴ See Erika de Wet, at 1564.

⁹⁵⁵ See du Bois & Visser, at 635.

⁹⁵⁶ Interview, 8/19/2010.

only, source of guidance.⁹⁵⁷ In addition, in the case of *Fourie v. Minister of Home Affairs*, it was also the novel formulation by Massachusetts judge Marshall of the same-sex marriage issue that supplied much of the compelling language for the opinion.⁹⁵⁸ In this way, foreign law is often used not only to identify a “trend” in the international community. Rather, advocates often use foreign law to supply novel arguments for their cause.⁹⁵⁹

i. Tort Law

In matters of tort law, the Constitutional Court has demonstrated an openness to new challenges to long-entrenched South African law, even when those challenges conflicted with established common law and, in the Court’s own words, “even when those rules have been invested with the highest stature of pre-constitutional judicial authority.”⁹⁶⁰ This proved especially true in cases raising the issue of the ability of the Court to enforce socio-economic rights, a role which many similar courts are reluctant to assume.⁹⁶¹ In another area in which justices have demonstrated an openness to foreign insights, South Africa has radically altered its customary jurisprudence with respect to government liability for the actions of its agents. Traditionally, under South African common law, the tort liability of government agents was nullified by the application of administrative law protections for most government action. Under South African administrative law, any statute that grants the executive discretion to act

⁹⁵⁷ Interview, 8/25/2010.

⁹⁵⁸ Interview, 8/18/2010. Chief Justice Marshall’s language came to the attention of South African advocates not only because her landmark opinion was the first of any high court to rule so unequivocally in favor of same-sex marriage, but also because Marshall is herself a South African émigré who herself cites the role of foreign experiences on her understanding of U.S. law. See “Margaret Marshall, Author of Mass. Gay Marriage Decision, to Retire,” BOSTON GLOBE, July 21, 2010

⁹⁵⁹ Interview, 8/26/2010.

⁹⁶⁰ See *Holomisa v. Argus Newspapers Ltd.* 1996 (2) SA 588 (CC).

⁹⁶¹ See Mark S. Kende, “The South African Constitutional Court’s Embrace of Socio-Economic Rights: A Comparative Perspective,” 6 CHAP. L. REV. 137 (2003).

burdens the government with a duty of care only with respect to activity that “would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act.”

In *Carmichele v. Minister of Safety & Security*, in which a woman was severely injured by a man released by police officers who knew he had history of violence against women, the petitioner raised the question as to whether the state should be liable for harms resulting from the conduct of its agents.⁹⁶² As Christopher J. Roederer noted, the Court in *Carmichele* did not limit itself to the text of the South African Constitution in deciding if the police had a duty towards Ms. Carmichele. Instead, the court considered its international commitments under the Convention on the Elimination of all Forms of Discrimination Against Women, as well as the innovative solution that the establishment of such liability would provide to address the historically vulnerable place of South African women.⁹⁶³ The Constitutional Court, citing case law from Australia, Canada, England, the European Court of Human Rights, India, and the United States, ultimately chose to allow the new remedy to address such harms disregarding its common-law approach. Two years later, a South African court adopted a similar approach, noting that “the principle of accountability is intrinsic to...our transformed legal culture, it must follow that a remedy should be available to a person wishing to hold an authority accountable for actions which he or she can show were negligent and satisfied the requirements of legal causation and damages.”⁹⁶⁴

ii. Defamation

A similarly forceful challenge of entrenched common-law practices appeared

⁹⁶² 2001 (10) BCLR 995 (CC).

⁹⁶³ See *Carmichele* (4) SA at 965 n.67.

⁹⁶⁴ See *Faircape Prop. Developers Ltd. v. Premier, Western Cape*, 2000 (2) SA 54 (C); see also *K. v. Minister of Safety & Security*, 2005 (6) SA 419 (CC) (raising the issue of vicarious liability of the State after police officers raped a woman).

in *Khumalo & Others v. Holomisa*.⁹⁶⁵ In the years prior to constitutional reform, South African common law did not require plaintiffs in defamation suits to prove the falsity of the alleged defamatory statements made by the defendant. Rather, it was for the defense to show the truth of the statement. The case of *Holomisa* involved the permissibility of a defamation suit brought by a South African politician. The plaintiff filed suit seeking redress for injury caused by a newspaper article claiming he was under investigation for his involvement with a gang of bank robbers. In its opinion, the court quoted extensively from Justice Brennan in *New York Times Co. v. Sullivan*, but also noted the many jurisdictions that rejected the U.S. approach, including Germany, Australia, Canada, and the United Kingdom. The court ultimately revised the common law rule, holding that any defamatory statement relating to “free and fair political activity is constitutionally protected, even if false, unless the plaintiff shows that, in all the circumstances of the publication, it was unreasonably made.”⁹⁶⁶ The court chose a middle-of-the-road approach inspired by the solutions of various countries. The foreign-trained Justice O’Regan, writing for the Court, articulated a rejection of South Africa’s common-law approach and the introduction of a novel solution to remedy the persistent problems of South African society. She declared, “The value of dignity in our Constitutional framework cannot . . . be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings.”⁹⁶⁷

This openness to foreign law in matters of defamation were on display again in the most recent defamation case faced by the Court. As described above, the heads of argument submitted by the appellant cited more than twice as often foreign law as

⁹⁶⁵ See 2002 (5) SA 401 (CC).

⁹⁶⁶ See 2002 (5) SA 401 (CC); see also du Bois & Visser, at 647.

⁹⁶⁷ See 2002 (5) SA 401 (CC).

domestic law in the paragraphs concerning legal support. In their opening argument, moreover, the appellant again appealed to arguments from foreign law more than twice as often.⁹⁶⁸

iii. Capital Punishment

In perhaps its most controversial ruling thus far, the Court proved similarly open to novel arguments in a case challenging the constitutionality of the death penalty. Capital punishment in South Africa dates at least to the seventeenth century with the arrival of the Dutch East India Company.⁹⁶⁹ The unanimous decision of the Court to abolish the practice occurred despite rising levels of crime and entrenched popular support for the long-practiced punishment.⁹⁷⁰ In addition, the Court abolished the practice without being required to do so by the Constitutional Framers, who had intentionally left the question open to a subsequent judicial decision. By including a general “right to life” but no explicit provision regarding capital punishment, the codified Bill of Rights developed by CODESA left the matter of its constitutionality open to judicial interpretation. The novel “right to life” provision, and its obvious intrusion on the entrenched practice of capital punishment, is considered “one of the curious outcomes of the Multi-Party Negotiation Process.”⁹⁷¹ Participants in the discussions noted that, “the right to life was the subject of surprisingly little dispute during the multi-party talks” and the drafting committee “took little time to decide that the right to life should be unqualified.”⁹⁷² This stemmed in large part to the fact that the drafters simply could not decide on whether South Africa should abolish the

⁹⁶⁸ Observation, 8/27/2010.

⁹⁶⁹ See MARK S. KENDE, *CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES* (2009), at 55.

⁹⁷⁰ While there were several concurring opinions, nearly every opinion ruled on the grounds that the practice constituted a cruel, inhuman, and degrading form of punishment.

⁹⁷¹ See DU PLESSIS & CORDER (1999), at 148.

⁹⁷² See SPITZ & CHASKALASON (2000), at 332.

practice.⁹⁷³

The ambiguity as to what a “right to life” meant for the constitutionality of the death penalty left the court with the task of hearing legal arguments from both sides. The Court could easily have allowed the entrenched practice to continue, especially given the Court’s previous jurisprudence which allowed for reasonable infringements on basic constitutional rights. Moreover, the Court explicitly noted that in nearly all states where capital punishment was abolished, it was almost always done so by the legislature, not a high court. The outcome of the Court’s decision was thus not bound by any clear intent of the Constitutional Framers, nor was their much prior domestic case law on the subject. Nonetheless, the young and politically weak court, relying on novel jurisprudence from Canada interpreting that country’s constitutional charter, risked its public legitimacy by voting in accordance with the mass of international human rights instruments and transnational advocates.⁹⁷⁴

The Court’s decision flew in the face of a high rate of violent crime and the opinions of “the vast majority of South Africans, including the ANC’s political support base, [who] favored the retention of the death penalty.”⁹⁷⁵ The Court’s opinion framed the matter as a novel issue of constitutional interpretation of the general limitations provision provided in §39, rather than as a cultural issue steeped in South Africa’s contentious apartheid past. The “globe-trotting”⁹⁷⁶ Justice Chaskalson, whose persuasive efforts were essential to obtaining a unanimous decision among the justices, even though the decision “could have gone either way,”⁹⁷⁷ declared: “Public opinion may have some relevance to the inquiry, but in itself, it is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions

⁹⁷³ Interview, 8/18/2010.

⁹⁷⁴ See Makwanyane, 1995 (3) SA at 434.

⁹⁷⁵ See Roux, at 118.

⁹⁷⁶ Interview, 8/26/2010.

⁹⁷⁷ Interview, 8/18/2010; interview, 8/19/2010.

without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication.”⁹⁷⁸ Justice Ackermann even turned to the writings of American legal philosopher Ronald Dworkin to justify his moral reading of constitutional rights provisions. To offer a novel framing of the issue, the Court adopted Canadian jurisprudence (the Oakes test) on the general limitations provision.⁹⁷⁹ This succeeded in shifting the legal issue away from the death penalty itself to the then less-contested elements of the general limitations doctrine.⁹⁸⁰ As Mark Kende points out, the Court’s behavior resembles that of U.S. justices in the seminal case *Marbury v. Madison*, in which the U.S. Supreme Court turned to foreign law to address a significant constitutional issue left ambiguous by the framers of the U.S. constitution. Just as U.S. justices did in that early judgment, their South African counterparts analogized from foreign examples, surveying capital punishment jurisprudence from diverse foreign courts, including Botswana, Canada, the European Court of Human Rights, Hungary, India, and others in order to discern what direction South African law should take.⁹⁸¹

It should be noted that the importation of the Canadian jurisprudence on how to interpret South Africa’s new general limitations clause opened the door to other landmark human rights advances such as South Africa’s admirable case law concerning LGBT rights, which otherwise, like the death penalty case, was an issue that “could have gone either way.”⁹⁸² In both matters, the compelling Canadian case law elicited unanimous opinions that overturned deeply entrenched cultural practices

⁹⁷⁸ See Makwanyane, 1995 (3) SA.

⁹⁷⁹ See *R. v. Oakes*, 1986 1 S.C.R. 103.

⁹⁸⁰ To ensure these elements were not elaborated conservatively by the Constitutional Court, the drafters of the final constitution explicitly enumerated the elements established in Canadian case law. See §36. Interview, 8/18/2010.

⁹⁸¹ See Makwanyane, 1995 (3) SA.

⁹⁸² Interview, 8/20/2010.

and overcame “huge conservative elements of society.”⁹⁸³ Indeed, in the case of *Fourie v. Minister of Home Affairs*, which legalized same-sex marriage, one justice involved in the decision recalls being presented with “a mass” of foreign law by advocates.⁹⁸⁴ A similar transnational effort succeeded during the CODESA negotiations, during which political parties unexpectedly agreed to a provision—the first in the world—that expressly prohibited discrimination based on sexual orientation. This “surprising” achievement, Dennis Davis and Michelle le Roux note, occurred in large part from the “carefully argued and erudite memorandum of Edwin Cameron and Kevin Botha” that expertly drew from foreign law on equal protection.⁹⁸⁵ Davis and le Roux also recount a telling episode of how opponents to the proposed constitutional protections, faced with a novel framing of the issue, stumbled in their efforts to resist the provisions. As they describe:

There is also an illuminating story of late-night negotiations concerning the inclusion of sexual orientation as a ground of discrimination.... Late into the night, [Kobie Coetzee, the then Minister of Justice in the apartheid government]...was obscurely objecting to the inclusion of this provision in the anti-discrimination clause. Finally, the ANC negotiators realized that the objection was based on the argument that a clause which outlawed discrimination against sexual orientation would allow for a constitutional attack on the crime of bestiality. One of the ANC negotiators the put it to Mr. Coetzee that, while he might be worried about the sexual activities of some of his voters, the ANC had no such problems. A roar of laughter broke the tension and the deadlock.⁹⁸⁶

⁹⁸³ Id.

⁹⁸⁴ Interview, 8/26/2010.

⁹⁸⁵ See DENNIS DAVIS & MICHELLE LE ROUX, PRECEDENT AND POSSIBILITY: THE (AB)USE OF LAW IN SOUTH AFRICA (2009), at 181.

⁹⁸⁶ See id.

Minister Coetzee's hastily formulated articulation of why the provision should not be included proved unable to draw upon a salient oppositional frame and thus was the last serious objection to the provision raised during the negotiations.

IV. *The Way Ahead*

As anticipated by the two-tailed model of diffusion, the descriptive analysis in the sections above of the types of discourse—both foreign and domestic—employed by South African justices suggests that the Court proved open to foreign and international law when presented with legal issues that were the most novel or challenged deeply entrenched practices. Those legal questions that evoked the preestablished cognitive scripts and discursive vocabulary of extant political adversaries, by contrast, were less affected by the legal solutions and reasoning offered by foreign jurists. Put another way, when the legal questions before the court involved equality, federalism, or checks on state power, domestic opponents were able to successfully thwart the adoption of certain transnational legal reforms. When the court faced less salient issues, about which less domestic discourse existed, domestic opponents were less well-equipped to protest and foreign jurisprudence diffused more easily into South African courts.

In the next Chapter, I explore the judicial opinions of South African Constitutional Court justices more systematically via a computer-aided content analysis of judicial opinions related to criminal procedure law. This analysis will show that in South Africa's increasingly open judicial system, domestic and transnational advocates have been able to introduce various foreign-inspired jurisprudence into judicial discourse via the transnational socialization of Constitutional Court justices. Moreover, it will show that the presence an extant domestic discourse affected the whether a proposed policy was viewed favorably or unfavorably by the Court.

CHAPTER 6

POLYJURAL JUSTICE: A CONTENT ANALYSIS OF SOUTH AFRICAN JUDICIAL OPINIONS

Arthur Chaskalson, the former Chief Justice of the South African Constitutional Court, describes the history of South Africa's apartheid regime as a "contested terrain."⁹⁸⁷ One heavily contested point on this historical landscape, and one that "hangs heavily over the courts,"⁹⁸⁸ is especially salient for judges such as Chaskalson—the use of law to enforce apartheid.⁹⁸⁹ Jurists in the post-apartheid era now enjoy greater political freedom to debate the legacy of injustice under apartheid, openly discussing issues such as the development of South African legal culture,⁹⁹⁰ the purposes and functions of the legal system,⁹⁹¹ and the court's role in securing the "recognition of human rights, democracy, and peaceful coexistence."⁹⁹² More specifically, justices such as Chaskalson and Albie Sachs are now free to discuss openly "how fully to achieve these principles and how to ensure that within the overall

⁹⁸⁷ See Arthur Chaskalson, "The Vision of the South African Constitution," *speech at the inauguration of the New Building for the Constitutional Court of South Africa* (2004), at 2.

⁹⁸⁸ See *id.*, at 4.

⁹⁸⁹ To say the legacy of the South African judiciary is tarnished by its role in enforcing the laws of the apartheid regime is not to say there is not also a competing history of judicial action that served to check many of the more egregious abuses of coercive state power. These contrasting legacies stem in part from splits between the judgments of higher and lower courts. See ALBIE SACHS, *JUSTICE IN SOUTH AFRICA* (1973), at 200. The more progressive judgments of the higher courts, though, managed to sustain an overall public "confidence in the instrumental value of law." See JENS MEIERHENRICH, *THE LEGACIES OF LAW: LONG-RUN CONSEQUENCES OF LEGAL DEVELOPMENT IN SOUTH AFRICA, 1652-2000* (2008).

⁹⁹⁰ See *Dikoko v. Mokhatla*, 2007 (1) BCLR (CC), at 93, 120.

⁹⁹¹ See *Ferreira v. Levin*, 1996 (1) BCLR 1 (CC) (emphasizing that "the focus of the Constitutional Court's activity should not lie in the realm of general public policy but in the inherent domain of the judiciary as the guardian of the justice system.").

⁹⁹² See SOUTH AFRICAN INTERIM CONSTITUTION (1993).

democratic scheme, the cultural diversity of the country is accommodated and the individual rights of citizens is respected.”⁹⁹³

This Chapter explores the dynamics of this ongoing discussion among South African judicial actors in two stages: 1.) a citation analysis of the foreign jurisprudence cited by South African judges; and 2.) a computer-aided content analysis of the language of South African judicial opinions. In the first stage, a statistical analysis of citations to foreign law casts doubt on several alternative explanations of legal diffusion, most especially the claim that material resources affect the flow and direction of law in the transnational exchange of law. In the second stage, a content analysis of judicial opinions concerning a variety of legal issues suggests the salience of a particular discourse as well as the foreign and international legal experiences of a judge can determine whether foreign legal norms succeed or fail to diffuse into a new legal system. This analysis introduces a new measure of international socialization of judicial actors—the “cosmopolity score.” This index, which serves as a measure of a judge’s involvement in the global judicial community, will demonstrate the importance of the transjudicial epistemic community, the power of extant discursive language, as well as the usefulness of the two-tailed model of legal diffusion.

I. *Data & Methodology*

An analysis of norm diffusion in judicial decision-making, much like the study of Chinese legal discourse in Chapters 3 and 4, requires a strategy of methodological eclecticism that includes a content analysis of political texts. The study of the ability of legal advocates to revise the constitutive or cognitive commitments of high court

⁹⁹³ See Albie Sachs, “Towards a Bill of Rights for a Democratic South Africa,” 35 J. OF AFRICAN LAW, 1 (1991), at 21.

justices raises difficult methodological challenges highlighted recently by Rawi Abdelal and others.⁹⁹⁴ Collective identities, they note, consist of two dimensions—content and contestation. Content includes the more entrenched elements of identity, including constitutive norms, shared social purposes, relational comparisons, and extant worldviews. Contestation, by contrast, consists of salient points of disagreement within a group, or what has been described throughout this project as “points of concern.”⁹⁹⁵ To understand the diffusion of new constitutive norms, it follows that one must study political language because, as Abdelal et al. note, “much of identity discourse is the working out of the meaning of a particular collective identity through the contestation of its members.”⁹⁹⁶ Content analysis provides the analytical tools necessary to understand this contestation.⁹⁹⁷

a. Software

Content analysis has been used widely in various corners of political science,⁹⁹⁸ and its applicability to the study of judicial opinions has not been lost on legal scholars.⁹⁹⁹ As explained in Chapter 4, content analysis software such as Yoshikoder offers useful tools to examine and understand the dimensions of identity “crucially

⁹⁹⁴ See Rawi Abdelal, Yoshiko M. Herrera, Alastair Iain Johnston, and Rose McDermott, “Identity as a Variable,” 4 PERSPECTIVES ON POLITICS 695 (2006), at 696.

⁹⁹⁵ Abdelal at 696. Abdelal et al. cite as a useful example of the unsteady relationship between content and contestation the controversy triggered by the claims made by Samuel Huntington in *Who Are We? The Challenges to America’s National Identity* (2004).

⁹⁹⁶ Abdelal et al., at 700.

⁹⁹⁷ Abdelal et al., at 700.

⁹⁹⁸ S.C. Taber, “POLI: An Expert System Model of U.S. Foreign Policy Belief Systems,” 86 AMERICAN POLITICAL SCIENCE REVIEW 888 (1992); OLE HOLSTI, CONTENT ANALYSIS FOR THE SOCIAL SCIENCE AND HUMANITY (1969); Philip L. Steward et al., “Political Mobility and the Soviet Political Process: A Partial Test of Two Models,” 66 AMERICAN POLITICAL SCIENCE REVIEW 1269 (1972).

⁹⁹⁹ See, e.g., John B. Gates & Glenn A. Phelps, “Intentionalism in Constitutional Opinions,” 49 POLITICAL RESEARCH QUARTERLY 245 (1996); McGuire & Vanberg (2005); see also Mark A. Hall & Ronald F. Wright, “Systematic Content Analysis of Judicial Opinions,” 96 CAL. L. REV. 63 (2008).

important for understanding contemporary life.”¹⁰⁰⁰ These tools in turn supply a valuable “research technique for making replicable and valid inferences from texts (or other meaningful matter) to the contexts of their use.”¹⁰⁰¹

In addition to Yoshikoder, this Chapter also takes advantage of another innovative content analysis tool—Wordscore. This computerized coding tool generates useful spatial information about the content of political texts.¹⁰⁰² As the developers of Wordscore explain, the software applies the *a priori* known dimensions of reference texts to locate the position of so-called “virgin” texts: “Essentially, each word scored in a virgin text gives us a small amount of information about which of the reference texts the virgin text most closely resembles.”¹⁰⁰³ The conceptual distance between and among texts is thus located by knowing the position of two specified reference texts. Reference text one, for example, may make numerous references to “global,” whereas reference text two, by contrast, may place a similar emphasis on “local.” The comparative frequency of either word in a virgin text, as identified by Wordscore, thus contributes to a Wordscore closer to or further from one of the reference texts. This Bayesian method to locate texts along a discursive scale allows us to rigorously test the various influences on judicial decision-making.

A recent test of Wordscore’s accuracy in spatially locating the content of legal

¹⁰⁰⁰ Abdelal at 695, 704 (citing Yoshikoder as an example of the substantial improvements in content analysis made in recent years).

¹⁰⁰¹ See KLAUS KRIPPENDORFF, *CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY* (2d ed. 2004), at 18. For foundational works on content analysis, see THOMAS F. CARNEY, *CONTENT ANALYSIS: A TECHNIQUE FOR SYSTEMATIC INFERENCE FROM COMMUNICATIONS* (1972); William A. Scott, “Reliability of Content Analysis: The Case of Nominal Scale Coding,” 19 *PUBLIC OPINION QUARTERLY* 321 (1955).

¹⁰⁰² See Michael Laver, Kenneth Benoit, & John Garry, “Extracting Policy Positions from Political Texts Using Words as Data,” 97 *AMERICAN POLITICAL SCIENCE REVIEW* 311 (2003).

¹⁰⁰³ See Laver et al. (2003), at 313. It should be noted that this raw score is then transformed so that it has the same dispersion metric as the reference text. Thus, to more reliably interpret the results of the content analysis, the wordscores listed below reports the texts transformed rather than raw score.

texts conducted by Michael Evans et al. provides a useful example of how Wordscore works.¹⁰⁰⁴ As they explain, to extract the relative policy position of political texts researchers must first select reference texts to which they have manually assigned a score according to theoretically grounded classification based on a particular research question. In their case, the researchers were interested in determining the pro- or anti-affirmative action positions of certain political texts. As such, they selected as reference texts the litigant briefs submitted to the U.S. Supreme Court in a landmark affirmative action case, *Regents of the University of California v. Bakke*.¹⁰⁰⁵ Each of the two reference texts thus advocates a position that directly conflicts with the position of the other.

To test the ability of Wordscore to extract reliable information about other texts, Evans et al. then examined the Wordscores of *amici* briefs submitted to the Court in support of one of the two parties before the Court. Through a Wordscore analysis of the lexical usage of an *amicus* brief, they were able to reliably specify the relative distance of that brief from the reference texts and to thereby predict the party supported by the author of that brief almost nine times out of ten.¹⁰⁰⁶ The success of Wordscore stemmed from its ability to distinguish lexical differences between and among the texts. *Amici* briefs submitted in opposition to affirmative action, for instance, had far greater occurrences of words such as “benign,” “amorphous,” and “race-based,” whereas those briefs submitted in support of affirmative action policies tended to include greater frequencies of words such as “desegregation,” “community,”

¹⁰⁰⁴ See Michael Evans, Wayne McIntosh, Jimmy Lin, & Cynthia L. Cates, “Recounting the Courts? Applying Automated Content Analysis to Enhance Empirical Legal Research,” available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=914126.

¹⁰⁰⁵ 438 U.S. 265.

¹⁰⁰⁶ Wordscore successfully predicted the policy position 86.6% of the time. See *id.*, at 11.

and “race-conscious.”¹⁰⁰⁷ The following section describes the data that will be employed for a similar Wordscore analysis of South African judicial opinions.

b. Data

Matters of case selection present a great challenge to scholars of political phenomena.¹⁰⁰⁸ In this case study, I examine the content of judicial opinions, which, like any political text, are the by-product of contested political activity that reveal important information about the identity of their authors.¹⁰⁰⁹ Legal practitioners typically consult judicial opinions as a resource to discern a court’s holding, the reasoning of justices, and the order of the court. The legal authorities referred to in a judge’s opinion are also of interest to attorneys trying to distinguish or align the facts of a future case, but only rarely have political scientists examined such citations.¹⁰¹⁰ Citation analyses by political scientists and other social scientists have instead tended to focus more on knowledge communities and the influence of certain scholars and journals within their respective fields.¹⁰¹¹

¹⁰⁰⁷ See *id.*, at 23.

¹⁰⁰⁸ Harry Eckstein, “Case Studies in Theory and Political Science”; Arend Lijphart, “Comparative Politics and the Comparative Method,” 65 *AMERICAN POLITICAL SCIENCE REVIEW* 682 (1971).

¹⁰⁰⁹ See Laver et al. (2003), at 311.

¹⁰¹⁰ Legal scholars have not overlooked the usefulness of judicial citation practices. See, e.g., Robert J. Hume, “The Impact of Judicial Opinion Language on the Transmission of Federal Circuit Court Precedents,” 43 *LAW & SOC’Y REV.* 127 (2009); William M. Landes, Lawrence Lessig, Michael E. Solimine, “Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges,” 27 *J. LEGAL STUD.* 271 (1998); William M. Lessig, “Appendix to Evaluation of the United States Court of Appeals for the Seventh Circuit,” 43 *DEPAUL L. REV.* 825 (1994); Richard A. Posner, “The Learned Hand Biography and the Question of Judicial Greatness,” 104 *YALE L.J.* 511 (1994); RICHARD A. POSNER, *CARDOZO: A STUDY OF REPUTATION* (1990).

¹⁰¹¹ See, e.g., Hendrik P. van Dalen & Kéne Henkens, “How Influential are Demography Journals,” 25 *POP. AND DEV. REVIEW* 229 (1999); James N. Druckman, et al., “The Growth and Development of Experimental Research in Political Science,” 100 *AMERICAN POLITICAL SCIENCE REVIEW* 627 (2006); Robert E. Goodin, “The State of the Discipline,” in *THE OXFORD HANDBOOK OF POLITICAL SCIENCE* (Robert E. Goodin ed. 2009), at 17.

Beyond the legal citations contained in judicial opinions, there remains another variable of interest left under-examined in these political texts—discourse. As Kevin McGuire and Georg Vanberg observe, studies of courts by political scientists “typically do not concern themselves with the substantive content of written opinions.”¹⁰¹² Not surprisingly, legal scholars have applied content analysis to judicial opinions far more often than have political scientists. As early as the 1960s and 1970s, scholars such as Karl Llewellyn and Richard Posner applied content analysis to judicial decision-making in both trial and appellate court writing.¹⁰¹³ Nonetheless, much of the content analysis performed in legal scholarship focuses on purely descriptive, frequency-count analysis. While important, and applied below, it is both necessary and useful to also consider the substantive content of opinion writing, including its discursive content.¹⁰¹⁴ Wordscore facilitates just such an analysis.

i. Wordscore

Wordscore presents an especially useful statistical tool to examine the discursive content of political texts in South Africa. To generate confident results, Wordscore requires that the selected reference texts draw from the same lexicon as the virgin texts to be studied. This means one cannot easily compare the content of a political speech to the content of a legal statute. Such a restriction is not surprising given the different manners of speech employed in manifestos, constitutions, and political speeches. Moreover, legal lexicons themselves are often described as an

¹⁰¹² See Kevin T. McGuire & Georg Vanberg, “Mapping the Policies of the U.S. Supreme Court: Data, Opinions, and Constitutional Law,” paper prepared for the American Political Science Association Annual Conference, Sept. 1-5, 2005 (Washington, D.C.).

¹⁰¹³ See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960); Richard A. Posner, “A Theory of Negligence,” 1 *J. LEGAL STUD.* 29 (1972).

¹⁰¹⁴ Hall & Wright, at 96.

especially distinct language.¹⁰¹⁵ In a civil law country, where legal scholarship and the law itself often draw from different lexical traditions, one cannot reliably compare legal scholarship or commentary to the language of arcane statutory code. In the same way, one cannot compare the language of contemporary legal scholarship to the types of judicial opinions published in civil law countries such as France, where, as John Dawson observes, “the format of the 1790’s continues unchanged.”¹⁰¹⁶ Being a common law country with a strong emphasis on legal precedents laid down by case law, South African law and legal commentary are often interwoven in the text of judicial opinions. It is thus possible through the use of judicial opinions as reference texts in Wordscore to simultaneously examine the language of a justice’s reasoning as well as the language of the law itself.¹⁰¹⁷

A key issue raised by Wordscore developers Laver, Benoit and Garry is the selection of appropriate reference texts.¹⁰¹⁸ Researchers employing Wordscore must be mindful of selecting reference texts that differ with respect to the variable of interest. When trying to extract the degree to which a judicial opinion is conservative or liberal, a researcher need merely select texts from known conservative or liberal justices. Here, though, the spectrum of interest is not the ideology of justices but rather the legal issue presented before the court and whether it evokes an extant political or legal discourse. More specifically, we are interested in determining the conceptual openness

¹⁰¹⁵ See H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* (2007), at 154.

¹⁰¹⁶ JOHN P. DAWSON, *THE ORACLES OF THE LAW* (1968), at 431 (quoted in Mitchel de S.-O.-I’E Lasser, “Judicial (Self-) Portraits: Judicial Discourse in the French Legal System,” 104 *YALE L.J.* 1325 (1995), at 1332).

¹⁰¹⁷ To measure the effect of transnational legal discourse I considered for this study the use of foreign texts as reference texts. However, given the notable inter-country differences in judicial discourse, such texts would violate the assumption that the reference texts are drawn from the same legal lexicon. On the national differences of legal argumentation, see Mitchel de S.-O.-I’E Lasser (1995).

¹⁰¹⁸ Laver, Benoit & Garry, at 314.

of a judge to foreign legal reasoning.

Selecting reference texts along this spectrum presents a difficult challenge, but a careful examination of South Africa's relatively short judicial history offers two useful cases to serve as reference texts. Two such cases are *National Coalition for Gay and Lesbian Equality v. Minister of Justice* and *New National Party of South Africa v. Government of the RSA*.¹⁰¹⁹ These two cases, which were published within six months of each other, and so control for the composition of the court,¹⁰²⁰ provide a useful spectrum of judicial openness in the face of legal challenge. In the former, not a single justice voiced a dissenting opinion in a case that settled the unconstitutionality of prohibitions of sodomy, despite an extensive legacy of strict prohibitions against sodomy in South Africa.¹⁰²¹ The justices examined foreign jurisprudence and discussed at length what it meant for South Africa's "new constitutional order" and the challenge it posed to the "entrench[ed] stigma" and "entrench[ed] inequality" of South Africa's gays and lesbians. In that case, as well as in the process of drafting the 1996 Constitutional provision discriminating on the basis of sexual orientation, the leading advocate had been Oxford-educated South African jurist Edwin Cameron. Justice Cameron, who himself is openly gay and HIV-positive, and an active member of the transnational gay-rights movement, drew extensively from various foreign and international jurisprudence to present novel challenges to the entrenched prohibitions of homosexuality.¹⁰²² Reflective of his service as a conduit of ideas from this transnational movement, the various opinions in the case refer to sexuality

¹⁰¹⁹ 1998 (12) BCLR 1517 (CC), Oct. 9, 1998; 1999 (5) BCLR 489 (CC), Apr. 13, 1999.

¹⁰²⁰ Both cases shared the same line-up of justices, except for Justice Kentridge, who was not involved in the *New National Party* decision.

¹⁰²¹ MARK S. KENDE, *CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES* (2009), at 135.

¹⁰²² See EDWIN CAMERON, *WITNESS TO AIDS* (2005).

jurisprudence from Canada, the European Court of Human Rights, as well as feminist scholarship from the United States and even Michel Foucault.

The Court's subsequent decision *New National Party of South Africa* just five months later presents a useful counterpoint to this reference text. In that case, the New National Party, the successor party to the apartheid regime, raised a challenge to the Electoral Act, which required citizens who wanted to register to vote in the national election to be in possession of a particular form of identification. The Court, in the face of extensive foreign case law to the contrary, ruled against the apartheid successors by holding the identification requirements were constitutional and not an infringement on the free exercise of the right to vote. Tellingly, the majority opinion failed to engage in its customary practice of citing and distinguishing any foreign law. In her dissenting opinion, Justice O'Regan admonishes the majority for succumbing to the dominant discourse and perpetuating the racial tension of South Africa's "long struggle." She adds that the majority, by giving in to popular will, fails to "establish a culture of participation" or overcome "South Africa's chequered history." In this way, *New National Party* stands as a useful case to serve as a "point of concern" reference text.¹⁰²³

The selection of reference texts from outside the domain of criminal procedure as reference texts is useful here because the Wordscore is derived only from the words that they share with the selected reference texts. With reference texts that share little in common with the relatively arcane matters of criminal procedure, the words of interest

¹⁰²³ After selecting and calculating the relative frequency of each word for each of the reference texts, I assigned *National Coalition for Gay and Lesbian Equality* a score of 1 and *New National Party of South Africa* a score of -1. This range allows me to score all other judicial opinions issued by the Constitutional Court of South Africa relative to these two discursive extremes. That is, the more the discursive content of a particular text resembles that of the reference text, the closer its Wordscore will be to that reference text.

against which the virgin cases will be measured are those integral to the judicial reasoning of reference texts rather than the substantive law at issue. These reference texts are thus useful to determine the positions of virgin texts because their contrasting reasoning (one emphasizing the “new global context...profoundly shap[ing] the constitutional framework”¹⁰²⁴ of South Africa and the challenge to entrenched cultural practices, the other engaging in technical statutory interpretation in order to publish a judgment supportive of the dominant discourse in society) leads them to both use significantly different words or at least similar words with significantly different frequencies.¹⁰²⁵

ii. Sampling of South African Case Law

For legal scholars, especially for scholars of judicial systems as young as post-Apartheid South Africa, the total sampling frame is typically small enough to manage in a single data set.¹⁰²⁶ Many policy-specific legal questions, moreover, can be answered with analysis of a relatively small universe of cases, thus obviating the need for statistical analysis because there is no need to determine the probability that a sample case reflects reality in the overall population.¹⁰²⁷ The methodological approach here, however, requires the careful selection of texts for Wordscore analysis. More specifically, it is necessary to standardize the legal topic addressed by the court in order to maximize the degree to which the cases draw from the same legal lexicon but differ with respect to legal reasoning. That is, if all the cases deal with the general topic of criminal procedure, the observable linguistic differences among the texts detected by Wordscore will be due to syntactical differences related to the author’s reasoning rather than topical differences. Moreover, cases selected from a narrow set

¹⁰²⁴ CHANOCK (2001), at 511.

¹⁰²⁵ McGuire & Vanberg, at 11.

¹⁰²⁶ See Hall & Wright, at 102.

¹⁰²⁷ See Hall & Wright, at 118.

of legal issues improve the reliability of the subsequent regression analysis.¹⁰²⁸ For these reasons, as well as for analytical consistency with Chapters 3 and 4, the analysis below again examines the role of discourse in the matter of criminal procedure law.

The distribution of the Wordscores of virgin texts (n=382) is depicted in figure 6.1. While almost normal, the distribution of Wordscores suggests a lightly tailed distribution (i.e. a low kurtosis measure, 2.23), but not far outside the range of normality. As such, the models below include the robust option to determine the same R^2 , b 's, and betas, but with standard errors that do not assume normality of the dependent variable.

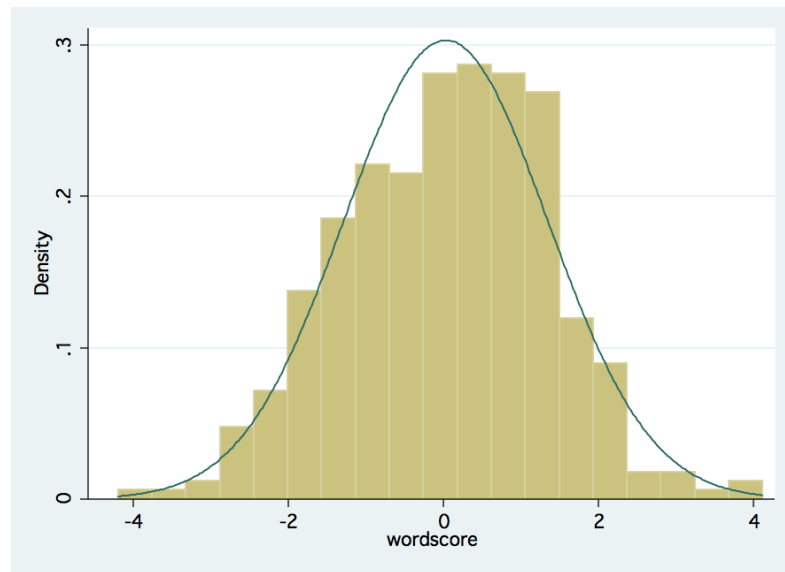


Figure 6.1. *Distribution of the Dependent Variable*

In addition to addressing methodological concerns and supplying analytical consistency, an analysis of constitutional decisions concerning criminal procedure law serves to further our understanding of what some scholars identify as a global trend toward “the emergence, in national, regional, and international courts, in common law,

¹⁰²⁸ *Id.* at 119.

civil law, and mixed systems, of a shared, a constitutional, criminal procedure.”¹⁰²⁹

This observed trend is worthy of further study for at least two reasons. Firstly, the expansion of rights supplied to defendants challenges normative assumptions about rights considered constitutive of civil society in a variety of cultural domains.¹⁰³⁰

Secondly, rules governing criminal procedure relate closely to matters of national security and the coercive capacity of a state, and thus the observed success of any transnational or international group to affect reform in such matters challenges assumptions about sovereignty and the role of the state in the international system. As anticipated by the two-tailed model of norm diffusion, however, the convergence of criminal procedural rights has been neither monotonic nor without regional variation. Indeed, Diane Marie Amann has noted that in countries as varied as China, Islamic states, France, and the United States, “adherence to sovereignty and national tradition may prevent a full embrace of a global standard.”¹⁰³¹ The following subsections examine whether the same is true in South Africa.

To ensure I selected for the Wordscore analysis only those judicial opinions dealing with matters of criminal procedure, I had to overcome the additional challenge of coding the hundreds of opinions published by the Constitutional Court. As Mark Hall and Ronald Wright observe, a simple textual search for a particular term is rarely refined enough to narrow a sample to the relevant cases.¹⁰³² To apply a more discriminating eye to the content of each case, I reviewed the descriptive headnotes of every case published by the Constitutional Court of South Africa. These headnotes, written and edited by South African attorneys highly knowledgeable of the issues

¹⁰²⁹ Diane Marie Amann, “Harmonic Convergence? Constitutional Criminal Procedure in an International Context,” 75 *IND. L.J.* 809 (2000) (citing as an example the arrival of cross-examination in courts as different as Cambodia and the Hague).

¹⁰³⁰ Amann, at 814.

¹⁰³¹ Amann, at 811.

¹⁰³² Hall & Wright, at 106.

raised before the Court and of how the justices resolved them, provide an insightful explanation of each judicial opinion.¹⁰³³ I coded each opinion according to this description supplied by the South African attorney reviewing the case (see table 6.1). Together, the 380 cases published by the Court fall into roughly 8 categories.¹⁰³⁴

Table 6.1. *Coding South African Court Opinions*

1. Criminal Procedure
2. Equal Protection
3. Customary Law
4. Standing
5. Appeal Process
6. Separation of Powers
7. Torts/Private Law
99. Other

An additional concern raised by the application of Wordscore to judicial opinions from a common law state is that the similarity of language among and between cases may be the result of time, as common law jurisdictions cases build upon prior case law and thus often refer to the language of previous cases.¹⁰³⁵ This can be addressed by looking at a random sample of texts to see if Wordscores accumulate over time. As figure 6.2 below suggests, a random sample of Wordscores of criminal procedure cases do not appear to be chronological or a function of temporal relationships.¹⁰³⁶ This variability in Wordscores over time thus suggests precedential language is not a factor in determining the discursive tenor of South African justices.

¹⁰³³ Some of these highly trained editors have gone on to become justices on the Constitutional Court. *See Biography of Justice Kate O'Regan, available at: <http://www.constitutionalcourt.org.za/>* (last visited: 5/11/2010).

¹⁰³⁴ The sample includes all cases officially published by the court in Butterworths South Africa Constitutional Court Reporter.

¹⁰³⁵ McGuire & Vanberg, at 23.

¹⁰³⁶ I drew a random sample of twenty-five percent of cases selected by applying the *sample* command in Stata.

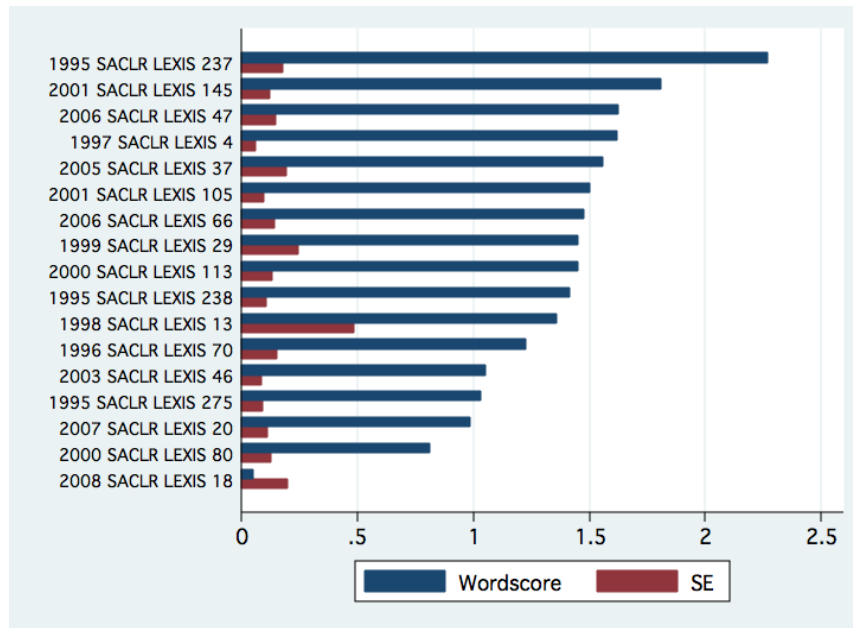


Figure 6.2. *Random Sample of Wordscore Data*¹⁰³⁷

Finally, for any analysis of judicial opinions, it is also necessary to compile a sample of cases from the type of court most conducive to answering the research question at hand. As a guideline, several scholars recommend surveying all decisions from throughout the entire legal system when mapping the overall political landscape of a legal system, but narrowing on appellate decisions when examining more specific political questions.¹⁰³⁸ As such, the following analysis of citation practices of South African judges examines all cases concerning criminal procedure law from all South African courts, whereas the subsequent content analysis is limited only to opinions published by the Constitutional Court of South Africa on matters of criminal procedure.

The consideration of courts and cases described above also takes into account the political context in which the court in question sits. As several scholars have noted,

¹⁰³⁷ The value of standard errors presents an additional concern for Wordscore analysis. Here, the overwhelming number of Wordscores are considerably greater than their respective standard errors, and so we can be confident that the scores reflect real and significant differences between the judicial opinions.

¹⁰³⁸ See Hall & Wright, at 103.

“judges in certain legal systems may vote strategically, especially in politically charged cases, in order not to diminish their chances for promotion.”¹⁰³⁹ In South Africa, this issue is especially relevant given that judges serve finite terms and so must consider their political futures beyond their tenure on the Court. To reduce this potentially biasing factor, the judicial opinions selected for the content analysis below are opinions announced only by the Constitutional Court of South Africa, where, due to age, such reputational concerns are less pronounced.

V. *Content Analysis*

a. **Citations to Foreign Law in the Era of Legal Reform**

Before examining the discursive practices of South African Constitutional Court justices, the following section examines several of the alternative explanations of legal diffusion in the context of South African legal development through an analysis of citations to foreign law in South African judicial opinions. This initial phase of the content analysis is designed to determine the influence of foreign and international law on South African justices as well as the salience of particular sources of foreign law. Such an analysis of foreign law in judicial opinions discussing criminal procedure law in South Africa will both shed light on the relative emphasis placed on those actors as a source of inspiration or—at the very least—a site of comparison, as well as contribute to our understanding of where foreign norms in South African law are coming from. (The substantive policy positions held by South African justices, and their engagement with extant domestic discourse, will be examined in the second step of the content analysis.) In order to determine the population of articles for analysis, I first collected every case that dealt with matters of criminal procedure published by all

¹⁰³⁹ In the Japanese context, see Mark Ramseyer & Eric Rasmusen, “Why are Japanese Judges So Conservative in Politically Charged Cases?,” 95 *AMERICAN POLITICAL SCIENCE REVIEW* 331 (2001).

South African courts between 1994 and 2008 (n=212) (See table 6.2 and figure 6.3.)

Table 6.2. *Number of Citations to Foreign States in Criminal Procedure Cases*¹⁰⁴⁰

	1995-99	2000-04	2005-08	Total
<i>Canada</i>	223 (0.111%)	118 (0.086%)	34 (0.053%)	375
<i>U.S.</i>	234 (0.117%)	100 (0.072%)	36 (0.055%)	370
<i>U.K.</i>	166 (0.083%)	56 (0.041%)	23 (0.036%)	245
<i>E.C.H.R.</i>	50 (0.025%)	19 (0.014%)	1 (0.001%)	70
<i>Australia</i>	21 (0.01%)	19 (0.013%)	0 (0)	40
<i>Germany</i>	30 (0.015%)	7 (0.005%)	0 (0)	37
<i>India</i>	3 (0.001%)	30 (0.022%)	0 (0)	33
<i>New Zealand</i>	13 (0.006%)	5 (0.004%)	4 (0.006%)	22
<i>Int'l Tribunal</i>	0 (0)	4 (0.003%)	12 (0.019%)	16
<i>Zimbabwe</i>	9 (0.004%)	4 (0.003%)	0 (0)	13
<i>Ireland</i>	8 (0.004%)	1 (0.001%)	0 (0)	9
<i>Namibia</i>	8 (0.004%)	0 (0)	0 (0)	8
<i>Botswana</i>	8 (0.004%)	0 (0)	0 (0)	8
<i>Guam</i>	0 (0)	3 (0.002%)	0 (0)	3
<i>Hong Kong</i>	0 (0)	2 (0.001%)	0 (0)	2
<i>Israel</i>	1 (0.001%)	0 (0)	0 (0)	1
<i>Gambia</i>	1 (0.001%)	0 (0)	0 (0)	1

¹⁰⁴⁰ These cases included a total of 1,253 citations to foreign or international law out of 4,017 case citations (roughly one in three). Numbers in parentheses represent the number of citations as a proportion of all citations in cases related to criminal procedure.

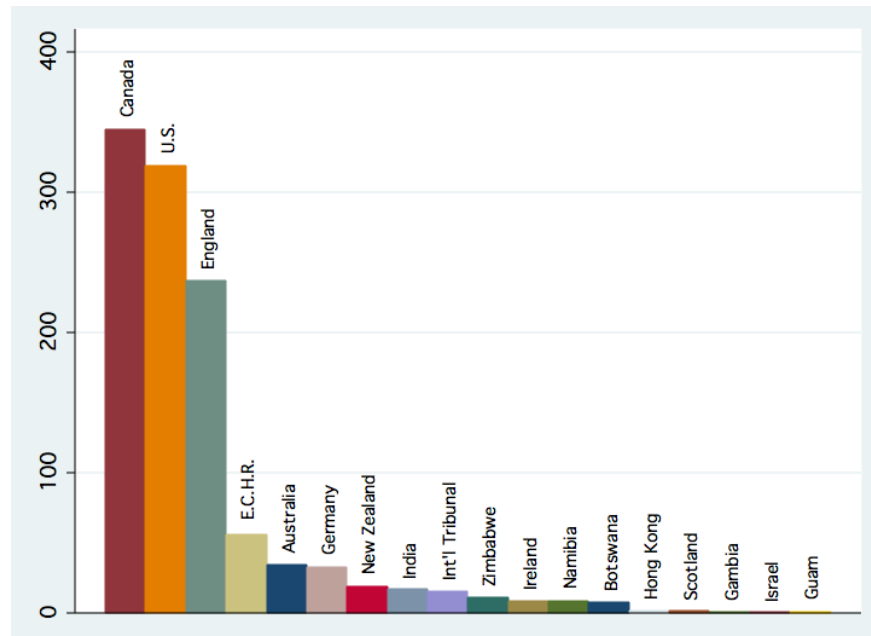


Figure 6.3. *Number of Citations to Foreign States in Criminal Procedure Cases*

This initial citation analysis does not distinguish between positive, negative, or distinguishing citations because the mere reference to foreign law by a judge is itself analytically significant. As one South African justice put it, “comparative human rights jurisprudence, carefully used, is at least informative, is often enriching and, at best, can be inspiring.”¹⁰⁴¹ Scholars of legal influence have similarly noted that any citation—critical or favorable—to a judicial opinion or source from outside of a court’s line of authority reflects the foreign authority’s judicial influence because the author, regardless of his or her agreement with the foreign source, nonetheless feels compelled to address it. Foreign legal doctrines are otherwise easily ignored or disregarded, and there is no requirement for a judge to articulate reasons for not following its reasoning. The appearance of a citation to a foreign ruling in a judicial opinion thus suggests at the very least a judge’s intent to address its persuasive (as

¹⁰⁴¹ See Kentridge (2005), at 251.

opposed to precedential) effect.¹⁰⁴²

South African judges are, in certain circumstances, mandated to conduct such a review of foreign law. The sources to which they turn thus provide useful insights for researchers. These insights are made especially clear in South African jurisprudence as the Constitution expressly provides for the consideration of foreign and international materials.¹⁰⁴³ Section 39(1) states:

When interpreting the Bill of Rights, a court, tribunal or forum—

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.

Accordingly, all South African judges, when faced with a question under the Bill of Rights, are required to take into account international law. At the same time, these judges are given discretion as to whether or not to consider foreign law.¹⁰⁴⁴ The degree to which a study of foreign law is optional, however, is debatable under subsection 39(1)(a), which requires courts to promote the “values that underlie open and democratic society.” Such a provision requires a court facing a question of individual constitutional rights to conduct a comparative study of democratic societies writ large before rendering a judgment.

Other sections of the Constitution similarly require a comparative approach,

¹⁰⁴² Landes, Lessig, & Solimine (1998), at 273.

¹⁰⁴³ South Africa’s formal provisions for monism distinguished the 1996 Constitution from the previous South African Constitutions of 1910, 1961, and 1983. *See* Erika de Wet, “The ‘Friendly but Cautious’ Reception of International Law in the Jurisprudence of the South African Constitutional Court: Some Critical Remarks,” 28 *FORDHAM INT’L L.J.* 1529 (2005).

¹⁰⁴⁴ *See* S. AFR. CONST. 1996 § 39(1).

though less directly. Section 36(1), for example, provides a limited derogation from the Bill of Rights: “To the extent...reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.” As such, despite the requirement to consider international law and ruling in early cases that the Constitution would serve as the “supreme” law of the land, the Court has since made “extensive” use of foreign law in its judgments.¹⁰⁴⁵ As noted in the previous Chapter, judges tend to engage more with foreign law and to avoid grappling with international law in part because the former comes with elaborated jurisprudence articulating novel arguments for particular outcomes, whereas the latter is largely just a body of rules.¹⁰⁴⁶ With such a Constitutional mandate, justices on the Constitutional Court have, since its creation, issued more than 300 opinions, more than half of which cited foreign law. This appeal to foreign sources is not limited to justices on the Constitutional Court. Indeed, as many as one in three case citations in all South African judicial opinions concerning criminal procedure law is to a foreign or international jurisdiction.

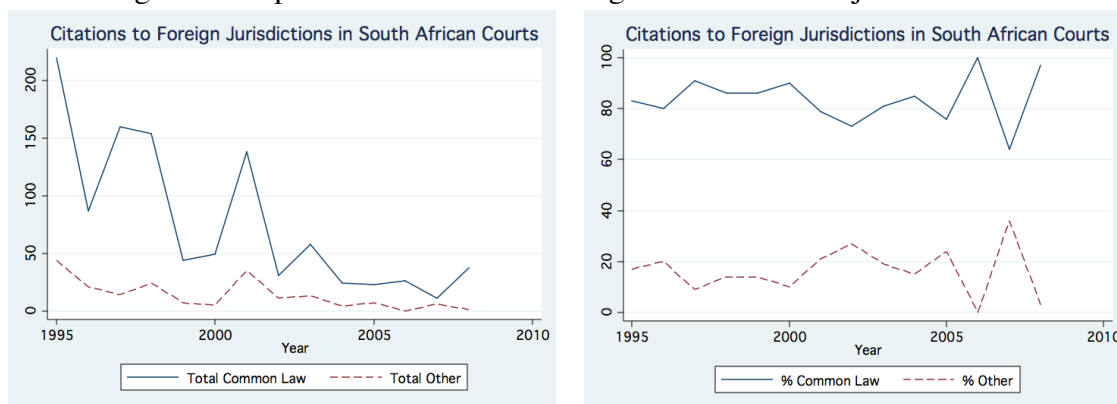


Figure 6.4. *Citations to Foreign Law in Constitutional Court Opinions*

While figure 6.4 suggests the relative proportion of citations to common and non-common-law countries has remained relatively stable over time, the rate of

¹⁰⁴⁵ Interview, 8/25/2010.

¹⁰⁴⁶ Interview, 8/18/2010; interview, 8/20/2010.

citation to foreign jurisprudence has declined, as many scholars and South African justices anticipated.¹⁰⁴⁷ Nonetheless, given the monist requirement in the Constitution providing for the consideration of international and foreign material, foreign law is likely to remain a substantial influence in the shaping of South African law. Scholars of India, which underwent a similarly extensive constitutional reform in 1955, made similar forecasts about the inevitable decline of citations to foreign law. However, even with the longest constitution in the world, with almost 400 articles and 83 amendments, India's continued citation to foreign law suggests there remain legal questions requiring the continued consideration of foreign solutions.¹⁰⁴⁸ Indeed, as suggested in figure 6.5, which illustrates South African citations to several of the most common sources of foreign law in South Africa, South African judges still frequently turn to foreign jurisdictions to supplement their legal reasoning.

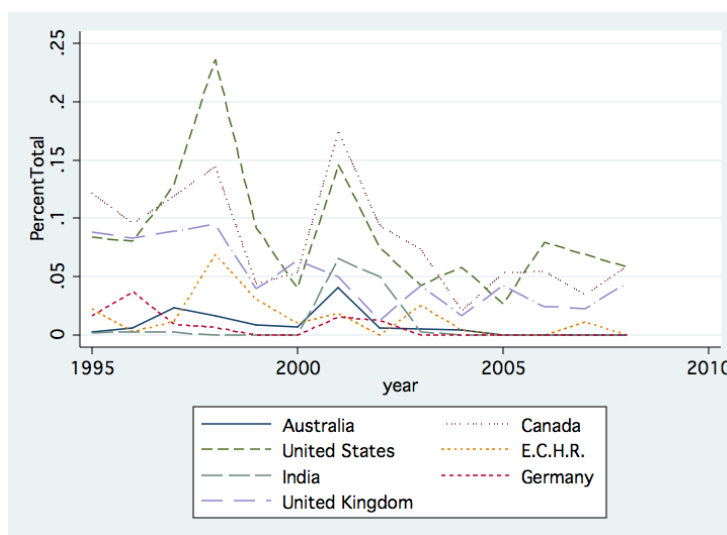


Figure 6.5. *Citations to Key Jurisdictions in Constitutional Court Opinions*

¹⁰⁴⁷ See Ursula Bentele, “Mining for Gold: The Constitutional Court of South Africa’s Experience with Comparative Constitutional Law,” 37 GA. J. INT’L & COMP. L. 219 (2009), at 229.

¹⁰⁴⁸ See Adam M. Smith, “Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence: The Indian Case,” 24 BERKELEY J. INT’L L. 218 (2006).

a. Statistical Analysis of South African Citations

While many scholars of legal diffusion identify power as a determinant of judicial citation practices, the analysis below suggests such variables may be only weakly associated with the judicial behavior of South African judicial officials.¹⁰⁴⁹ To analyze this hypotheses more rigorously, I conducted multiple tests of the frequency count data. The analysis of these hypotheses, however, presented several issues because the dependent variable—citation to a foreign or international source—is a rare event count.¹⁰⁵⁰ As discussed in Chapter 4, the most appropriate means to analyze such data is a negative binomial regression.

Table 6.3. *Negative Binomial Regression of Citations of Foreign Law in South African Case Law*

VARIABLE	COEFFICIENT
<i>Economic and Military Aid</i>	0.0021326 (0.0016524)
<i>Constitutional Maturity</i>	-0.1248917 *** (0.0235893)
<i>Legal Family</i>	2.178642*** (0.5019532)
<i>Wald chi square</i>	50.19***

Note: *** significant at the 1% level, p < 0.01.

As table 6.3 illustrates, the relationship between the frequency with which South African justices appeal to a particular foreign source of law bears no statistically significant relationship to the amount of aid received from that state. In 2008, for

¹⁰⁴⁹ See, e.g., WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964) (citing “persuasive rhetoric” as a key factor in improving the frequency with which subsequent judges cite to other judicial opinions).

¹⁰⁵⁰ See Gary King, “Event Count Models for International Relations: Generalizations and Applications,” 33 INT’L STUD. QUARTERLY 123 (1989).

example, South African justices cited Canadian case law as often as they did U.S. law (twelve times), even though Canadian aid to South Africa amounted to less than five percent of what the United States supplied that year.¹⁰⁵¹ Even more tellingly, in 2001 South African justices turned to the jurisprudence of India fifty percent more often than they did England, despite receiving millions of U.S. dollars in aid from the United Kingdom and none from India. Thus, as observed in the analysis of legal reform in the PRC, states do not appear coerced by more powerful states into importing law and legal norms. Nor do they appear compelled to signal at the domestic level a shared political commitment—the so-called second-image reversed phenomenon.¹⁰⁵² Such a finding lends support to skeptics of so-called rule of law programs,¹⁰⁵³ and is especially surprising given the substantial amount of aid funded into rule of law programs by certain states.¹⁰⁵⁴ Moreover, the decline in the number of citations has occurred during a period of increasing aid devoted to legal development in South Africa¹⁰⁵⁵—a period which has been dubbed by some the “Third Moment” of the Law and Development movement.¹⁰⁵⁶

¹⁰⁵¹ Figure based on OECD data on annual international development statistics. See OECD International Development Statistics, available at: <http://www.oecd.org/dataoecd/50/17/5037721.htm>.

¹⁰⁵² See C. Layne, “Kant or Cant: The Myth of the Democratic Peace,” 19 INTERNATIONAL SECURITY 5 (1994).

¹⁰⁵³ See, e.g., Stephen Holmes, “Can Foreign Aid Promote the Rule of Law?,” E. EUR. CONST. REV. (1999), at 68; BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW (ERIK G. JENSEN & THOMAS C. HELLER, eds., 2003); THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD (1999); Stephen J. Toope, “Legal and Judicial Reform through Development Assistance: Some Lessons,” 48 MCGILL L.J. (2003).

¹⁰⁵⁴ See generally CAROTHERS (1999); Hiram E. Chodosh, “Reforming Judicial Reform Inspired by U.S. Models,” 52 DEPAUL L. REV. 351 (2002).

¹⁰⁵⁵ Rosa Ehrenreich Brooks, “The New Imperialism: Violence, Norms, and the ‘Rule of Law,’” 101 MICH L. REV. 2275 (2003).

¹⁰⁵⁶ David M. Trubek & Alvaro Santos, in “An Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice,” in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David M. Trubek and Alvaro Santos, eds., 2006).

The analysis presented in table 6.3 also suggests, as anticipated, that as the South African constitution ages, the frequency with which judges feel compelled to appeal to foreign jurisdictions goes down. This finding alone, however, does not tell us much about their attitude to foreign law or legal doctrines. In South Africa's common law structure, once a foreign precedent is imported into South African case law, subsequent rulings need only cite to the foreign law by way of the South Africa case that imported it. Thus, the influence of a foreign legal norm persists, but its presence is more difficult to detect. It follows that a statistically significant finding that citations to foreign law decline as a constitution matures does not provide an accurate enough measure of foreign influence in the early significant constitutional decisions. This explanation was confirmed by several leading South African constitutional scholars and justices who noted, as one put it, that citation to foreign law is happening "less and less as [justices] develop their own jurisprudence."¹⁰⁵⁷ "Judges," he noted, "love to quote themselves" rather than cite again to some foreign authority.¹⁰⁵⁸

As discussed below, however, the decline in citations to foreign law relates also to the decreasing international experience of the Constitutional Court bench, which is increasingly comprised of justices that rose through the court system from initial appointments in the "provinces" and "heartland."¹⁰⁵⁹ This more parochial experience, one interviewee noted, "makes a difference" in their appreciation for foreign law. Courts of first instance, moreover, are less interested in resolving doctrinal questions than merely applying South African law.¹⁰⁶⁰ These judges, another respondent observed, are simply more inclined to apply a "perfect precedent"

¹⁰⁵⁷ Interview, 8/18/2010; interview, 8/19/2010.

¹⁰⁵⁸ Interview, 8/18/2010.

¹⁰⁵⁹ Interview, 8/20/2010.

¹⁰⁶⁰ Id.

approach, drawing exclusively from South African law and devoting little if any intellectual effort to the consideration of foreign law unless it is presented to them. Due to this changing composition of the Constitutional Court, she continued, it is now the “intellectually weakest” bench ever and overcome by a growing parochialism.¹⁰⁶¹

The frequency and nature of South Africa’s citation practices in the descriptive data present an additional challenge to the dominant explanations of legal diffusion. More specifically, the consistent consideration of judgments from outside purely common law systems undermines both legal family explanations and the observation of South African Justice Dikgang Moseneke that “we rarely go beyond what we know—common law jurisdictions.... Many, many years of association and historical links make it quite easy for one to be quite certain that one understands an English judgment. American judgments we understand—we read [them] all the time.”¹⁰⁶² While table 6.3 indicates that legal family is statistically significant in determining what case law a judge is likely to turn to when drafting a judicial opinion, figure 6.5 suggests the annual proportion of case law from outside of pure common law systems has been substantial and relatively steady over time, averaging roughly seventeen percent of foreign citations per year.¹⁰⁶³ Moreover, this sizeable amount of ideas from outside the common law does not include the many references in judicial opinions to foreign statutory law. The Constitutional Court has, for instance, reviewed legal solutions in France for questions such as prisoner disenfranchisement,¹⁰⁶⁴ accomplice liability,¹⁰⁶⁵ and the use of force during arrest.¹⁰⁶⁶ Indeed, most respondents noted that

¹⁰⁶¹ Interview, 8/26/2010.

¹⁰⁶² See Bentele, at 243.

¹⁰⁶³ The average annual proportion of foreign citations to pure common law systems is 83.64%.

¹⁰⁶⁴ See *Minister of Home Affairs v. National Institute for Crime Prevention and the Re-integration of Offenders*, 2004 (5) BCLR 445 (CC).

¹⁰⁶⁵ See *Thebus v. S.*, 2003 (10) BCLR 1100 (CC).

¹⁰⁶⁶ See *In Re: S. v. Walters*, 2002 (7) BCLR 663 (CC).

no bias toward common law exists in their comparative work, citing inspiration from sources as varied as Chile, Holland, Germany, and Colombia. Several also noted that there is no preference for a particular country's jurisprudence. Instead, they observed, it is the persuasiveness of the jurisprudence. It is for similar reasons, several respondents noted, that foreign law has been more popular in the South African courts than has international law, even though the Constitution requires consideration of international law and only permits the survey of law practiced in free and open democratic societies. As they describe, foreign law and the judicial opinions that underlie them come complete with an articulated justification around which South African judges and lawyers can build an argument. Similarly, several respondents noted that variation among and within countries as to the concision and clarity of their jurisprudence also affected the likelihood that those respondents would draw from it when compiling an argument. It is for this reason of "plain language clarity," one antitrust attorney noted, that U.S. competition law was imported by South Africa almost wholesale.¹⁰⁶⁷ The concision of a foreign legal argument applied to a novel legal matter that is otherwise devoid of precedent proves especially powerful before the Court, she observed. Former Justice Albie Sachs noted similarly that he was often taken by the arguments of U.S. Supreme Court Justices Brennan, Jackson, and Blackmun because they presented arguments "so well and so clearly," especially in matters of criminal procedure jurisprudence.¹⁰⁶⁸ International law, by contrast, typically exists in the form of statute-like rules without the supporting reasoning that case law provides. Thus, Justice Edwin Cameron, whom some South African judicial actors describe as especially "activist" has on occasion dismissed international law and appealed instead to the novel legal arguments applied by only one country in order to

¹⁰⁶⁷ Interview, 8/26/2010.

¹⁰⁶⁸ Interview, 8/26/2010.

shape the discourse of a particular legal debate before the Court.¹⁰⁶⁹

This preference for foreign law over international law was on display during oral arguments for a recent case involving freedom of expression and the rights of the child. Despite the fact that there is international law germane to issue before the court, it was not mentioned once during the appellant's opening argument.¹⁰⁷⁰ Foreign law, by contrast, constituted more than half of the cases presented to the Court.

Finally, a review of those citations to outside the common law reveals that jurisprudence from civil law states has supplied many of the most important elements of South Africa's constitutional doctrine. As mentioned above, South African courts have on many occasions sought legal solutions from how the Federal Constitutional Court of Germany construes its Basic Law.¹⁰⁷¹ In this way, it is the novelty of the foreign legal argument, not its authority, that is most important in a litigator's calculation to import a foreign legal idea.¹⁰⁷² As stated by one former Constitutional Court clerk, "foreign law can provide the basis for understanding the central concepts in S. African law -- particularly when those concepts are fairly novel issues for the Court and for the constitutional system more generally."¹⁰⁷³ According to many interviewees, no particular foreign court carried more weight than another. In former Justice Albie Sach's words, "It was not the case that one U.S. opinion equaled two from Canada, and that two from Canada equaled three from England."¹⁰⁷⁴ Rather, it

¹⁰⁶⁹ Interview, 8/18/2010.

¹⁰⁷⁰ Observation, 8/26/2010.

¹⁰⁷¹ Under the Constitutional Court's two-step doctrine of constitutional review, the court first establishes that the South African constitution recognize the fundamental right at issue in the case. Next, the court considers the degree to which that right may be lawfully infringed upon by the state or others for the benefit of society. Justice Kate O'Regan notes this doctrine as a reason South Africa does not rely on U.S. decisions concerning the strict exclusionary rule of evidence (including derivative evidence). *See* Bentele, at 246; *see also* Ferreira v. Levin & Others, 1996 (1) SA 984 (CC).

¹⁰⁷² *See* Justice Sach's argument in *S. v. Ferreira* (discussing *U.S. v. Morrison*).

¹⁰⁷³ Correspondence, 10/2/2010.

¹⁰⁷⁴ Interview, 8/26/2010.

was more a matter of whether the jurisprudence from that court could be used to supply novel solutions to legal questions before the court. Certain foreign jurisdictions, he continued, serve as a “constellation to guide you, but they do not draw you in.” Rather, they “took you out of the simplistic [domestic] political debates.”¹⁰⁷⁵ The consistent search for German solutions to novel questions of constitutional law, rather than solutions from the common law, is thus likely to continue.¹⁰⁷⁶

The steady rate and continued consideration of U.S. jurisprudence illustrated in figure 6.5 also undermines Justice Richard Goldstone’s observation that South African courts could no longer look to U.S. case law to help construe the South African constitution because of the U.S. treatment of detainees during the War on Terror.¹⁰⁷⁷ While figure 6.5 does suggest a decline in citations to the U.S. case law since 2001, the same is also true for foreign law in general. More importantly, figure 6.5 shows that during the War on Terror the United States even resumed its position as the most-cited source of law in South African judicial opinions.

The citation analysis in the section above provides useful tests of several of the most common explanations of legal diffusion. None, however, proved especially helpful in understanding when and what foreign laws appear in judicial reasoning. To answer this question, the next section examines the substantive content of judicial opinions as well as the international experiences of South African judges.

b. Opinion Extraction and Support for Foreign Law

For the purposes of assessing more than the mere citation to foreign law in a

¹⁰⁷⁵ *Id.*

¹⁰⁷⁶ *See* Kentridge, at 246 (comparing Grundgesetz für die Bundesrepublik Deutschland art. 1 (“Human dignity is inviolable. To respect and protect it is the duty of all state authority.”), with S. Afr. Const. 1996, ch. 1, §10 (“Everyone has inherent dignity and the right to have their dignity respected and protected.”)).

¹⁰⁷⁷ *See* Richard Goldstone, “Speech at the J. Byron McCormick Lecture: The Consequences of the United States Abdicating Its Moral and Political Leadership of the Free World,” 24 *ARIZ. J. INT’L & COMP. L.* 587 (2007).

domestic judicial opinion, it is essential to also investigate the author's discursive treatment of that law. Using statistical analysis with data derived from Yoshikoder and Wordscore software, the analysis below includes a content analysis of every judicial opinion concerning criminal procedure law published by the Constitutional Court of South Africa between 1995 and 2008.

In addition to the many advantages offered by computer-aided textual analysis software discussed in Chapter 4, Yoshikoder produces useful dictionary reports to measure the proportion of certain words contained in a text. To take advantage of this technique, and to develop a measure of the degree to which each opinion engaged with the global judicial discourse as opposed to a more parochial syntax, I created a dictionary of terms used by judges in discussions of national law and South African legal culture. To specify the terms that would capture such discussions, I conducted a manual review of both official and unofficial texts written by South African jurists during the post-apartheid period. To supplement this custom dictionary, I next examined a computer-generated wordlist of key words and phrases from the South African judicial opinions and generated a word frequency report of the number of times all words occurred in a systematic random sampling of the texts. I then added to the custom dictionary those words used in the South African legal lexicon used to invoke certain judicial concepts. In the next subsection, I describe how I examined the relationship between the use of this language with a judge's socialization in the international judicial community.

c. Cosmopolity Score

A common explanation of judicial decision-making among scholars of the U.S. Supreme Court is political ideology.¹⁰⁷⁸ Others have even suggested that judicial

¹⁰⁷⁸ See Jeffrey A. Segal & Albert D. Cover, "Ideological Values and the Votes of U.S. Supreme Court Justices," 83 *AMERICAN POLITICAL SCIENCE REVIEW* 557 (1989).

decision-making relates to whether a judge was a first- or second-born child.¹⁰⁷⁹

Whatever the preferred explanation, to understand the role of foreign and international law in the work of South African judges, one must, as former South African Justice Albie Sachs notes, “look beyond mere constitutional changes” that occurred in the transition out of apartheid.¹⁰⁸⁰ For the purposes of this study, it is necessary also to investigate the role of transnational norms and practices on judicial decision-making. To examine the claims that judges are the key socializing actors in the diffusion of law in common-law systems and that exposure to foreign and international law can affect judicial outcomes under certain circumstances, the analysis below includes a “cosmopolity score”—a measure of each justice’s international experience and demonstrated engagement with the global judicial community.

The “globalized judicial discourse”¹⁰⁸¹ among judges increasingly possesses a “cosmopolitan character,” with comparative jurisprudence assuming a central place in constitutional adjudication.¹⁰⁸² Like any epistemic community, the global legal epistemic community consists of a “network of knowledge-based experts” bound by a “shared belief or faith in the verity and the applicability of particular forms of knowledge.”¹⁰⁸³ This community does much to create contacts between and among judges from countries with vastly different legal norms and practices, and may even help narrow the gap between civil and common law systems.¹⁰⁸⁴ As observed by

¹⁰⁷⁹ See Kevin T. McGuire, “The Adapted Judicial Mind: The Psychological Origins of Legal Change on the U.S. Supreme Court” (unpublished manuscript), available at: <http://www.unc.edu/%7Ekmcguire/adapted.html> (last visited: May 21, 2010).

¹⁰⁸⁰ Interview, 8/26/2010.

¹⁰⁸¹ See Ran Hirschl, “The Question of Case Selection in Comparative Constitutional Law,” 53 AM. J. COMP. L. 125 (2005), at 128.

¹⁰⁸² See Sujit Choudhry, “Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation,” 74 IND. L. REV. 820 (1999), at 820.

¹⁰⁸³ See Peter M. Haas, “Introduction: Epistemic Communities and International Policy Coordination,” 46 INTERNATIONAL ORGANIZATION 1 (1992).

¹⁰⁸⁴ See THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD’S CASES (Daniel Terris, Cesare P.R. Romano, & Leigh

Daniel Terris et al., the community is “partly a matter of common patterns of education, partly a matter of common professional experiences in the world of law, academia, and diplomacy, and partly a matter of increased opportunities for meaningful dialogue among the various courts.”¹⁰⁸⁵ These shared characteristics among members of this cosmopolitan community lead them to see each other “not as servants or representatives of a particular polity, but instead as fellow professionals in a common judicial enterprise that transcends international borders.”¹⁰⁸⁶ Even among U.S. Supreme Court justices, these gatherings have developed into “regular contacts and established professional relationships with their judicial counterparts in other nations.” Indeed, analyses of judicial opinions written by these justices and off-bench statements reveal their support for a greater resort to foreign precedent.¹⁰⁸⁷ A similar relationship between overseas experience and use of foreign law is likewise observed in South Africa. As one former foreign clerk at the Constitutional Court observed, “many of the justices themselves have experiences abroad from education, teaching, or just traveling that influence their use of foreign law.”¹⁰⁸⁸ The cosmopolitan score described below thus offers a way to examine this relationship beyond the anecdotal and provides a useful way to determine whether the extent of a judge’s exposure to foreign law corresponds with his or her openness to normative challenges of novel or

Swigart, eds., 2007), at 224; *see also* JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION (Robert Badinter & Stephen G. Brever, eds., 2004).

¹⁰⁸⁵ Terris et al., at 223.

¹⁰⁸⁶ Terris et al., at 63.

¹⁰⁸⁷ Mark C. Rahdert, “Comparative Constitutional Advocacy,” 56 AM. U. L. REV., at 574 (citing ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 96 (2004) (noting the participation of Justices O’Connor, Breyer, Ginsburg, Kennedy, and Rehnquist in international exchange programs). *See also* Ron Brown, “Legal Exchange With China,” 1995 HAW. BAR J. 22 (1995); *ABA Central European and Eurasian Law Initiative*, <http://www.abanet.org/ceeli/>; Norman Dorsen, “Achieving International Cooperation: NYU’s Global Law School Program,” 51 J. LEGAL EDUC. 332 (2001); James G. Apple, “British, U.S. Judges and Lawyers Meet, Discuss Shared Judicial, Legal Concerns,” 2 INT’L JUD. OBSERVER (Jan. 1996).

¹⁰⁸⁸ Correspondence, 10/2/2010.

entrenched practices.

i. Coding Method

The question of the degree to which judicial attitudes to legal questions are shaped by exposure to foreign law and legal arguments resembles the attempts of political scientists to understand the effects of personal attributes on judicial decision-making. A problem that plagues this attitudinal research, however, is the difficulty in developing valid and reliable measures of political ideology. Some scholars attempt to address this problem by inferring political attitudes of judges by their voting behavior. To avoid the obvious endogeneity problems generated by such inferences, however, other scholars have developed indices of biographical attributes as a measure of a judge's likely ideology on a particular legal issue. The analytical contribution of such indices, of course, rests on the assumption that "pre-court life experiences play a prominent role in shaping the personal values and policy preferences of judges, and that such biographical factors can be useful in predicting judicial decisions."¹⁰⁸⁹ Based on the statements of interviewees, this assumption is justified in the South African context. Indeed, interviewees almost unanimously agreed with the observation that those judges who were more involved in the transnational community of judges were more likely to import and accept aspects of foreign law. Simply put, one respondent observed, "What the judge's experience is makes all the difference."¹⁰⁹⁰ As one active attorney before the Constitutional Court and a former Constitutional Court clerk observed, "what their experience was [abroad] formed their interest in comparative law."¹⁰⁹¹ Expressing a similar impression of Constitutional Court justices, one leading constitutional scholar observed that "the justices are the product of a process...the

¹⁰⁸⁹ See James J. Brudney & Corey Ditslear, "Designated Diffidence: District Court Judges on the Courts of Appeals," 35 *LAW & SOC. REV.* 565 (2001) at 570-71; see also Tate & Handberg, 1991; Tate, 1981.

¹⁰⁹⁰ Interview, 8/20/2010.

¹⁰⁹¹ Interview, 8/23/2010.

wider read they are, the wider their influences.”¹⁰⁹² This assumption was confirmed further by former Justice Albie Sachs, who easily recalled instances in which he was introduced to foreign jurisprudence at an international conference and then able to draw on the that jurisprudence in a subsequent decision for the South African Constitutional Court.¹⁰⁹³

Given that personal attributes serve as useful surrogates for variables otherwise too difficult to operationalize,¹⁰⁹⁴ these indices have proved a pragmatic and useful tool that has been successfully applied to studies of various national courts, including the United States, the Philippines, and Canada.¹⁰⁹⁵ These studies, which assume that “judicial decision-making is an activity in which experience and adult socialization counts,”¹⁰⁹⁶ have marshaled compelling evidence that judicial attitudes to questions of individual civil, political, and economic rights, is determined in part by attribute variables measuring certain characteristics of a judge’s birth, religion, socialization, geographic origin, and career.¹⁰⁹⁷ C. Neal Tate and Roger Handberg, for example, drawing on the political behavior literature of Seymour Lipset and Stein Rokkan,¹⁰⁹⁸ developed a seminal study of whether a U.S. Supreme Court justice’s party

¹⁰⁹² Interview, 8/25/2010.

¹⁰⁹³ Interview, 8/26/2010.

¹⁰⁹⁴ See Tate & Handberg (1991).

¹⁰⁹⁵ See Sheldon Goldman, “Voting Behavior on the U.S. Courts of Appeals Revisited,” 69 *AMERICAN POLITICAL SCIENCE REVIEW* 491 (1975); C. Neal Tate, “Personal Attribute Models of Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economic Decisions, 1946-1978,” 75 *AMERICAN POLITICAL SCIENCE REVIEW* 355 (1981); Tate & Handberg, 1991; Donald R. Songer & Susan W. Johnson, “Judicial Decision Making in the Supreme Court of Canada: Updating the Personal Attribute Model, 40 *CANADIAN JOURNAL OF POLITICAL SCIENCE* 911 (2007).

¹⁰⁹⁶ C. Neal Tate & Roger Handberg, “Time Bending and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916-88” 35 *AM. J. POL. SCI.* 460 (1991) at 464.

¹⁰⁹⁷ Tate & Handberg (1991), at 461.

¹⁰⁹⁸ See SEYMOUR M. LIPSET & STEIN ROKKAN, *PARTY SYSTEMS AND VOTER ALIGNMENTS: CROSS-NATIONAL PERSPECTIVES* (1967).

identification, southern roots, family social status, religion, and birth order affected a justice's willingness to sign on to a majority opinion.¹⁰⁹⁹

While instructive, the personal attribute literature concerning judges is not of direct value for this study because the research below is concerned less with the relative liberal or conservative ideology of a particular judge than it is with a judge's degree of exposure and openness to foreign legal norms. Thus, a new index is required. To address this need, the cosmopolitan score takes into account three types of personal attributes—legal education, professional experience, and transnational socialization. In this way, the cosmopolitan score attempts to capture foreign aspects of the South African “legal culture,” which Martin Chanock defines as “an interrelated set of discourses about law: some professional, some administrative, some political, some popular.”¹¹⁰⁰

In addition, the cosmopolitan score attempts to address the concern raised by Gary Goetz and others regarding “concept-measure consistency”—i.e. the faithfulness of a measure to its theory.¹¹⁰¹ Unfortunately, the data available is not amenable to a Guttman scale, a method that allows for aggregation of measures without having to assign weights to each component. Guttman scales are less useful in cases such as the cosmopolitan score, which measures actors according to a multidimensional scale.¹¹⁰² Given that the underlying theory of the score is of an additive concept, and not of necessary or sufficient conditions, a simple addition measure will suffice.

To measure the various factors identified by Chanock above, I first conducted

¹⁰⁹⁹ See Tate & Handberg, (1991).

¹¹⁰⁰ See CHANOCK (2001), at 23.

¹¹⁰¹ See GARY GOETZ, SOCIAL SCIENCE CONCEPTS: A USERS GUIDE (2006), at 95.

¹¹⁰² See Gerardo L. Munck & Jay Verkuilen, *Conceptualizing and Measuring Democracy: Evaluating Alternative Indices*, 35 COMPARATIVE POLITICAL STUDIES 5 (2002), at 23.

a content analysis of the extensive biographies of the justices. These biographies, which the justices use to explain their judicial qualifications to the South African public, offer a useful glimpse of a justice's self-reported engagement with the global judicial community.¹¹⁰³ It follows that the proportion of words a justice uses to describe their international legal work and memberships in international legal organizations serves as a useful gauge of that justice's international exposure. This content analysis thus captures the socializing experience of working in a transnational firm or participating in legal cases or controversies abroad. Iterative interactions with courts such as these serve to socialize attorneys in the structures of meaning constitutive of those courts.¹¹⁰⁴ For repeat players that participate in transnational legal work, foreign legal tribunals or proceedings serve as a system of production and reproduction of structures of meaning.¹¹⁰⁵ As such, professional legal work beyond the jurisdictional reaches of South African courts is likely to increase a judge's exposure to and knowledge of foreign legal materials. This work often includes participating in private commercial litigation with parties or disputes from outside South Africa, serving as an adjudicator in a foreign tribunal, or representing South African interests in the negotiation of an international treaty. Each of these experiences is likely to expose a judge to various foreign laws, lexicons, and practices.

To supplement this content analysis of judicial biographies, I also manually coded the international educational experiences of each justice. Legal education outside of South Africa, like a professional experience with a foreign court, is a key factor in increasing a judge's exposure to and knowledge of foreign legal materials. Indeed, legal education is arguably the "primary means by which a legal actor

¹¹⁰³ See Constitutional Court of South Africa, available at: <http://www.constitutionalcourt.org.za/>.

¹¹⁰⁴ See Langer (2004), at 12.

¹¹⁰⁵ See Phillips (2007), at 923.

internalizes a particular understanding of the shape and purpose of ‘the law.’”¹¹⁰⁶ As Máximo Langer notes, the socialization process that students of law experience leads to an “internalization of the procedural structures of interpretation and meaning.”¹¹⁰⁷ This exposure to alternative cognitive processes supplied by a foreign legal education equips transnational legal students with new tools of interpretation and understanding, a “constitutive polyjurality.”¹¹⁰⁸ This polyjural education thus enables jurists to contextualize and challenge their own “legal tradition,” which John Henry Merryman defines as “a set of deeply rooted, historically conditioned attitudes about the role of law in the society and the polity.”¹¹⁰⁹ I thus operationalize a justice’s legal education as follows:

- 1.00 = More than three foreign law-related degrees (e.g. B.A., J.D., or L.L.M.).
- 0.75 = Two foreign law-related degrees.
- 0.50 = One foreign law-related degree.
- 0.25 = Short-term legal training/certificate.
- 0.00 = No foreign legal training.

Another aspect of legal education worth including in any index capturing the international educational experiences of a judge includes publishing in an international journal dedicated to the study of international or comparative law. Many such publications seek expressly to “facilitate dialogue among international communities of scholars in law, politics, economics, anthropology, philosophy, and other disciplines with intersecting concerns bearing on new forms of global law.”¹¹¹⁰ It follows that publication in such a journal indicates a judge’s engagement with the international

¹¹⁰⁶ See Emma Phillips, “The War on Civil Law? The Common Law as a Proxy for the Global Ambition of Law and Economics,” 24 WISC. INT. LAW J. 923 (2007).

¹¹⁰⁷ See Langer (2004), at 12.

¹¹⁰⁸ See Roderick A. Macdonald & Jason MacLean, “Navigating the Transsystemic: No Toilets in Park,” 50 MCGILL L.J. 721 (2005).

¹¹⁰⁹ See JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE (2d ed. 1985), at 2.

¹¹¹⁰ See Alfred C. Aman, Jr., “Introduction,” 1 IND. J. GLOBAL LEGAL STUD. 1 (1993), at 2.

community of legal scholars and stands as a useful proxy for that judge's willingness to examine South African law in the context of other legal systems. I operationalize a justice's publication experience as follows:

- 1.00 = Ten or more publications in a foreign legal periodical.
- 0.75 = Seven or more publications in a foreign legal periodical.
- 0.50 = Three or more publications in a foreign legal periodical.
- 0.25 = One publication in a foreign legal periodical.
- 0.00 = No publications in any foreign legal periodicals.

In addition to the educational experiences of foreign legal training or publication of legal scholarship in internationally renowned law journals, the experience of teaching law in a foreign law school also introduces actors to new ways of legal reasoning and pedagogy. It follows that justices who have served as faculty members abroad and taught foreign law students have been challenged to articulate and defend their understanding of the law to audiences from outside their own legal community. I thus operationalize this educational experience as follows:

- 1.00 = Service as a full-time professor of law at a foreign legal institution.
- 0.75 = Service as a board member of a foreign legal institution.
- 0.50 = Service as a visiting professor of law.
- 0.25 = Service as a visiting lecturer or scholar at a foreign legal institution.
- 0.00 = No service at a foreign legal institution.

d. Results

i. Cosmopolity & Criminal Procedure

As illustrated in table 6.4 below, the international experiences of South African justices self-reported in their Constitutional Court biographies vary considerably. Justices such as Richard Goldstone and Yvonne Mokgoro have garnered impressive overseas experience, from serving as the chief prosecutor of the United Nations International Criminal Tribunals for both Rwanda and the former Yugoslavia to receiving a master's degree in law from the University of Pennsylvania. Others, such as Justice Chris Jafta, despite extensive legal experience as a prosecutor, magistrate,

and private attorney, have had comparatively fewer legal experiences abroad.

Table 6.4. *Summary of Judicial Data by Judge*

	Int'l Work	Int'l Degree	Int'l Pub.	Int'l Conf.	Int'l M'ship	Int'l Teach.
<i>Laurie Ackermann</i>	X	X	X	X	-	X
<i>Edwin Cameron</i>	X	X	X	X	X	X
<i>Arthur Chaskalson</i>	X	X	X	X	X	X
<i>John Didcott</i>	X	-	-	X	-	X
<i>Ben Du Plessis</i>	-	-	-	X	-	-
<i>Richard Goldstone</i>	X	X	X	X	X	X
<i>Chris Jafta</i>	-	-	-	-	-	-
<i>Sydney Kentridge</i>	X	X	X	X	X	X
<i>Johann Kriegler</i>	X	-	X	X	X	X
<i>Frank Kroon</i>	-	-	-	-	-	-
<i>Pius Langa</i>	X	X	X	X	X	X
<i>Tholie Madala</i>	-	-	-	X	-	-
<i>Mbuyisile Madlanga</i>	X	X	-	-	-	-
<i>Ismail Mahomed</i>	-	X	-	-	-	X
<i>Yvonne Mokgoro</i>	X	X	X	X	X	X
<i>Dikgang Moseneke</i>	X	-	X	X	X	X
<i>Lex Mpati</i>	X	-	-	-	-	-
<i>Mahomed Navsa</i>	-	-	-	-	-	-
<i>Sandile Ngcobo</i>	X	X	X	X	-	X
<i>Bess Nkabinde</i>	X	-	X	X	-	-
<i>Kate O'Regan</i>	X	X	X	-	-	-
<i>Albie Sachs</i>	X	X	X	X	X	X
<i>Thembile Skweyiya</i>	X	-	-	X	-	-
<i>Cecil Somyalo</i>	-	-	-	-	-	-
<i>Belinda van Heerden</i>	X	X	X	X	-	-
<i>Johann van der Westhuizen</i>	X	-	-	X	X	-
<i>Zak Yacoob</i>	-	-	-	X	-	-

While many of the justices appointed to the Court in recent years have been promoted through the national court system, thus beginning their careers in lower courts far from the metropolises of South Africa, many of the judges from the early years of the Court brought with them considerable transnational exposure, despite the difficult position of judges under apartheid. Rather than collaborate with the racist regime, many of the judges that assumed positions in the early years of the post-

apartheid court had instead chosen to serve as scholars. These scholars-turned-justices were able under apartheid to be far more active transnationally and engaged in global judicial conferences than were their counterparts on the bench.¹¹¹¹ One such important conference was convened in 1986 by John Dugard, a renowned international law scholar deeply engaged in the transnational judicial community and who was then head of the Centre for Applied Legal Studies, an important legal clinic at the University of Witwatersrand that to this day serves as a power source of foreign and international law for the court.¹¹¹²

To examine the degree to which such exposure to international and foreign law affects the likelihood that a justice would draw from and write a judicial opinion that evoked novel legal arguments or challenged entrenched local jurisprudence, the following analysis regresses the cosmopolitan score of every justice against the Wordscore of judicial opinions. The analysis below also takes into account alternative explanations of judicial decision-making by controlling for the age of the constitution and the amount of economic aid South Africa received in that year. Finally, to control for other possible factors that may bias the results, the analysis also includes control variables for the length of the judicial opinion and the length of the judicial career of the justice.

According to the two-tailed model of diffusion, we can anticipate the international experiences of a justice to be positively related to the Wordscore of cases related to criminal procedure. Put another way, a judge's participation in the increasingly global justice community should increase the likelihood that a judicial opinion employs foreign legal reasoning to engage with the legal question brought before the Court.

¹¹¹¹ Interview, 8/23/2010.

¹¹¹² See DAVIS & LE ROUX (2009), at 11.

Table 6.5 presents the cosmopolitan model of judicial decision-making in cases concerning criminal procedure law. These findings confirm that the socialization of justices within the global legal epistemic community affects the manner in which justices discuss the law. More specifically, the greater the exposure a justice has to foreign and international legal reasoning and discourses, the more likely that justice is to write a judicial opinion with a Wordscore reflective of novel concepts and foreign doctrine. This finding corresponds with the observations of various respondents, including attorneys, clerks, and legal scholars that the more involved a judge is with the transnational community of judicial officials, the more open to an awareness of foreign law they become. Such variation among the justices is similarly supported by the varying amounts of foreign citations observed among the different levels of South African courts. Lower court judges, who are less engaged with the international community, “care more about what South African law is,” and less about the direction in which it should go.¹¹¹³ For this reason, litigant briefs at lower courts devote less space to matters of foreign law. Litigants before the higher courts, by contrast, would have to be “stupid,” as one South African attorney put it, not to appeal to foreign arguments.¹¹¹⁴ One justice who is particularly active in the transnational community confirmed this impression, noting that he could not think of a single case at the Constitutional Court in which foreign law was not considered. A clerk for a less internationally active justice, however, noted that the justice to which she reports rarely takes foreign law into serious consideration. This variation among the justices was demonstrated most recently in the case of *Khosa*, wherein Chief Justice Ngcobo went against a majority opinion that rejected U.S. jurisprudence concerning the curtailment of certain rights. Ngcobo, who has clerked for a U.S. federal judge as well

¹¹¹³ Interview, 8/17/2010.

¹¹¹⁴ *Id.*

as studied and taught in the United States, found the American doctrine more compelling than did his less internationally engaged colleague in the majority.¹¹¹⁵

Table 6.5. *Cosmopolity and Judicial Decision-Making in Criminal Procedure Jurisprudence*¹¹¹⁶

VARIABLE	COEFFICIENT
<i>Economic Aid</i>	.0009852 (.0010258)
<i>Word Count</i>	-3.24e-06 (5.84e-06)
<i>National Discourse</i>	88.18236 (64.364)
<i>Years of Experience</i>	.0049169 (0.0070174)
<i>Cosmopolity Score</i>	.4526109*** (0.1541574)
<i>Constitutional Age</i>	-0.1106845** (0.0541815)

Once again, the amount of foreign assistance the country receives and the length of the justice’s judicial experience appears to bear no relationship to the manner in which justices decide the constitutional questions before them. This finding, which supports the results in the citation analysis above and the analysis of Chinese legal development in Chapters 3 and 4, further undermines any claim that material support determines the attractiveness of foreign law. More specifically, it refutes claims of a relationship between “funding and influence” in South Africa’s post-apartheid development.¹¹¹⁷

As uncovered in the frequency analysis above, the age of the constitution again

¹¹¹⁵ Interview, 8/19/2010.
¹¹¹⁶ ** significant at the 5% level, $p < 0.05$; *** significant at the 1% level, $p < 0.01$.
¹¹¹⁷ See du Bois & Visser (2003), at 632 (suggesting an indirect relationship between financial flows and normative influence in the cases of Germany and Canada).

appears to correspond with the amount of discussion of novel foreign legal doctrine. Once again, however, this finding alone does not tell us much about their attitude to foreign law because once a foreign legal doctrine is imported into South African case law, subsequent rulings will cite to the foreign law indirectly by way of South Africa case that imported it. Thus, the influence of a foreign legal norm persists, but its presence is more difficult to detect.

Table 6.6. *Cosmopolitanism and Judicial Decision-Making in Criminal Procedure Jurisprudence—Alternative Aggregation*¹¹¹⁸

VARIABLE	COEFFICIENT
<i>Economic Aid</i>	.0006411 (.0008778)
<i>Word Count</i>	-2.94e-06 (5.92e-06)
<i>National Discourse</i>	79.60216 (64.9121)
<i>Years of Experience</i>	.0032397 (.0078361)
<i>Cosmopolitanism Score</i>	.0041409*** (.0010483)
<i>Constitutional Age</i>	-.0653206 (.0537937)

Finally, the cosmopolitanism model provides a useful test of norm localization theory. Under norm localization theory, which explains diffusion by the presence of preexisting normative discourse, one would expect that a judicial opinion contradicting an established common law doctrine would include language attempting to graft the new practice on to national practices. The finding in table 6.6 suggests no such relationship exists. Instead, justices appear not to resort to terms such as “South African culture,” “South African history, or “national context” in opinions that draw

¹¹¹⁸ *** significant at the 1% level, $p < 0.01$.

from foreign sources.

To assess the concept-measure consistency of the analysis above, as well as to see whether the posited relationship among the data is compelling, it is worth also conducting an alternative aggregation of the data, including, as Gerardo Munck and Jay Verkuilen suggest, multiplying rather than merely adding the various additive measures. As anticipated, the cosmopolitan score remains a compelling measure of judicial openness to foreign and international law. Indeed, as table 6.6 illustrates, it remains strongly statistically significant ($p < 0.01$), while the other variables express no such relationship to judicial openness. Most importantly, national or localized discourse appears to have no significant relationship with judicial decision-making. This finding corroborates statements by many present at the founding of South Africa's new constitution that legal development should mirror universal, not local, notions of law. One former justice and a drafter of the Constitution, for example, once noted, to his own surprise, that "[a]fter decades of arguing for and believing in a law-in-context perspective,...I was surprised at the vehemence with which I pleaded for universal values."¹¹¹⁹

To examine still further the relationship between exposure to foreign legal discourses and the judicial decision-making of South African justices, it is also worth running corresponding models that examine judicial discourse in Constitutional Court cases that address points of concern in South African society. The following section applies the cosmopolitan model to two of the greatest points of concern in post-apartheid South Africa—equality and checks against state power. We can anticipate under the two-tailed model of diffusion that the transnational experiences of South African judges will have a less significant relationship with the judicial decisions concerning these issues. More specifically, we should see no relationship between the

¹¹¹⁹ See ALBIE SACHS, *THE SOFT VENGEANCE OF A FREEDOM FIGHTER* (2000), at 161.

Wordscore of an opinion and the author’s cosmopolitan score.

ii. Cosmopolitanism & Points of Concern

As discussed in Chapter 5, judicial decisions concerning equal protection and separation of powers have been targets of fierce contestation both during and after apartheid. These issues sit uncomfortably on the frontiers of global and local discourses of legal reform, and thus evoke extant opposing vocabularies. Under the two-tailed model of norm diffusion, we should expect no statistical relationship between a justice’s cosmopolitan score and the Wordscore of the judicial opinion authored by that justice. Instead, when faced with legal issues concerning salient matters such as equality and the checking of state power, a justice, even one with extensive overseas experience, will more likely turn to the extant domestic discourses and the “legacies of law” related to those issues rather than look abroad for solutions, as similarly shown in Jens Meierhenrich’s analysis of apartheid-era jurisprudence.

Table 6.7. *Cosmopolitanism and Judicial Decision-Making by Legal Issue*¹¹²⁰

SEPARATION OF POWERS JURISPRUDENCE		EQUAL PROTECTION JURISPRUDENCE	
VARIABLE		VARIABLE	
<i>Economic Aid</i>	0.0008509 (0.0007428)	<i>Economic Aid</i>	0.0009215 (0.0023648)
<i>Word Count</i>	-6.38e-06 (3.35e-06)	<i>Word Count</i>	0.0000393 (0.0000212)
<i>Years of Experience</i>	-0.0433074*** (0.0089243)	<i>Years of Experience</i>	0.0014788 (0.0118895)
<i>Cosmopolitan Score</i>	-0.12535 (0.1044817)	<i>Cosmopolitan Score</i>	0.1707901 (0.2093327)
<i>Constitutional Age</i>	-0.0039603 (0.0474063)	<i>Constitutional Age</i>	0.1916182 (0.1035647)

¹¹²⁰ *** significant at the 1% level, p < 0.01.

As anticipated, table 6.7 illustrates that no relationship exists between the exposure to foreign and international law and an opinion's Wordscore when the legal question before the court triggers the pre-established cognitive scripts of the justices and litigants involved.

This finding suggests that the more a legal question before the court evokes South Africa's history of violations of equal protection and abuses of executive authority, the less likely a justice will rely on the express language or reasoning of foreign legal discourses. It follows that transnational legal advocates will face greater domestic opposition to influence outcomes in these policy domains. Given that the length of a justice's domestic legal career appears negatively associated with the Wordscore of his or her judicial opinions, this opposition to transnational advocacy on certain policies appears to grow even more recalcitrant over time. Finally, the alternative model confirms still further the absence of any relationship between normative influence and the flow of aid or material resources.

VI. *Conclusion*

The analysis above lends support to the findings in Chapter 4 that domestic legal discourse can shape the debate about legal issues presented before the court by referring to a preexisting discursive vocabulary. This ability to shape the debate, in turn, can affect the outcomes of those judicial decisions. In so doing, domestic opponents—legal nationalist rebels—can obstruct the importation of foreign rules and reforms. It is thus not surprising that the judicial opinions least likely invoke transnational legal discourses and novel legal solutions were those that concerned preexisting “points of concern” in society. Novel legal issues, or those that challenged entrenched domestic practices about which little discourse existed, drew far less resistance in the judicial discourse of South Africa's Constitutional Court. In this way,

jurisprudence concerning criminal procedure proved open to transnational influences, whereas equality and separation of powers doctrine remained circumscribed by the legacies of South African history.

CHAPTER 7

CONCLUSION: THE TWO-TAILED THEORY OF NORM DIFFUSION

Legal reform often occurs under conditions of limited time and limited resources. In this frenetic atmosphere, actors whose interests are implicated often invoke shopworn discourses to challenge proposed reforms. As reform agendas are subsequently drawn and redrawn by the participants, the presence or absence of such discourses can determine whether or not a reform is successful. When unavailable, as is the case when an actor is presented with a novel legal innovation or a challenge to a long-entrenched cultural truism that lacks any articulated justification, opponents struggle to formulate a rebuttal to a proposed reform. When available, such discourses can prove formidable to any campaign to affect legal change.

The above depiction of transnational legal reform, whereby legal norms diffuse not via a process of localization with a domestic discourse but rather when such discourse is most minimal, is best described as a two-tailed model of norm diffusion. This heuristic model, as illustrated in the Chapters above, provides useful insights for campaigners of human rights reform. More specifically, it suggests that transnational legal advocates, constrained by limited budgetary resources, need not emphasize a norm localization strategy that prioritizes those legal reforms that can most easily graft onto an extant domestic discourse. Counterintuitively, such a strategy may prove unsuccessful due to the presence of domestic opponents already equipped with the discursive tools necessary to articulate a defense. Legal advocates should instead remain hopeful that their efforts can successfully transform long-entrenched legal practices of the target state. As illustrated by an analysis of legal development in states

as different as South Africa and the People's Republic of China, the two-tailed model of diffusion suggests that legal advocates can wield significant influence even in matters as fundamental to the coercive power of the state as criminal procedure law.

In this concluding Chapter, I revisit and expand upon the theoretical, conceptual, and applicable implications of the model of diffusion presented in the Chapters above. The discussion is divided into three parts, presenting in turn a review of the main findings, a discussion of possible future research, and a consideration of possible implications of this research.

I. *Two-Tailed Relationship between Diffusion and Domestic Discourse*

Proposed legal reforms often challenge constitutive components of a political community. If not constitutive of that society, the laws targeted for reform may nonetheless be essential tools furthering the interests of certain powerful constituent groups. Either way, legal reform becomes a heavily contested process in which domestic actors are activated in support or defense of the proposed changes. In the political contest that follows such a campaign for legal change, the outcome often turns on whether opponents have discursive tools already available to them to counter the proposed reforms. As hypothesized by the two-tailed model of diffusion, when opponents are essentially “at a loss for words”—i.e. have no pre-established cognitive scripts to deploy—they are often less likely to succeed in their efforts to obstruct legal reform. The failure of domestic opponents to discursively resist legal reform is thus most pronounced when the legal reforms proposed offer novel legal solutions or challenge entrenched cultural truisms about which actors “have had little motivation or practice in developing supporting arguments to bolster [them] or in preparing refutations for the unsuspected counterarguments.”¹¹²¹

¹¹²¹ See McGuire & Papegeorgis (1961), at 327.

This political contest over legal reform is shaped further by the domestic structure of the state in which the political contest occurs. National legal systems, which can vary in important ways such as the location of key decision makers and the binding authority of judicial opinions, can affect the points at which transnational legal advocates find their targets—e.g. judges in courtrooms or legal drafters in legislatures and universities. In civil law countries, for example, legislators and their support staff, when tasked with revising a complex national statutory code, are often so pressed for time and lacking experience in the area of law in question that transnational legal advocates can “so dominate the agenda of the drafting committee that it greatly influences the importing country’s legislation.”¹¹²² In common law states, by contrast, foreign law often travels through judicial officials similarly pressed for time. These judges, magistrates, and law clerks, burdened by a mounting court docket, on occasion face a lack of legal precedent while being at the same time presented with solutions from foreign law either through a litigant’s brief or through socialization amidst the expanding global community of cosmopolitan judges. If the opposing litigant or the judge herself lacks the discursive vocabulary to counter the persuasive force of the candidate foreign legal norm, such norms can penetrate the unique legal *habitus* of a political community.¹¹²³

The Chapters above offer an analysis of the role of discourse in the diffusion of law and the intervening role played by legal family through an examination of criminal procedure reform in post-Mao China and post-apartheid South Africa. These two states, which together represent a civil and a common law system, are both situated within a dense network of transnational legal advocates campaigning for the adoption of various emergent international legal principles concerning criminal

¹¹²² See John C. Reitz, *Export of the Rule of Law*, 13 *TRANSNAT’L L. & CONTEMP. PROBS.* 429, 454 (2003).

¹¹²³ See Bourdieu (1986), at 807.

procedure. In the end, some of these procedural reforms have been adopted by the targeted legal actors, while others have been shunned. An analysis of this variation of policy adoption suggests the presence of discourse in each state played a role in determining the content of reform.

As illustrated in these two case studies, the variation in policy adoption cannot be explained by the several explanations of diffusion common in international relations literature. Firstly, and in contrast to realist scholarship, the variation does not correspond with aid flows, as the sources of foreign law did not correlate with the sources of material assistance. In the experiences of both China and South Africa, flows of foreign aid bore no statistically significant relationship to the content of reform. Indeed, in the case of China, the coefficient was even negative (though not statistically significant). It follows that the pace and direction of legal reform is not a direct function of the distribution of material power in the international system.

In addition, the variation in policy reform cannot be explained by norm localization, as legal actors were shown to be more likely to invoke international and foreign law in support of a proposed legal reform than they were domestic conditions, cultures, and contexts. Contrary to norm localization theorists, legal actors did not appeal to local norms or discourse to make candidate reforms more palatable for domestic audiences. More tellingly, those domestic conditions, cultures, and contexts were more likely to appear in the writings of Chinese legal observers who opposed legal reforms that invoked points of concern with society. Similarly, those South African justices that displayed an extensive engagement with the international community were more likely to import foreign law than were their less cosmopolitan counterparts. In addition, the variation among policies does not appear fully attributable to shared legal family, a variant of norm localization theory. As the review of citation practices in both China and South Africa suggests, the salient sources of

law from outside each state's legal family were not statistically significant in all cases. Moreover, ontologically opposed legal norms and practices from the two systems— e.g. adversarial and inquisitorial procedures—did not prove impervious to influence from one another.

Finally, the variation cannot be fully explained by the constellation of domestic interests within a state. As described in Chapter 4, legal reforms resisted by domestic actors were not necessarily those that involved a more complex overlapping of domestic interests or bureaucratic portfolios. In many instances, the reforms that failed to be adopted were, like those that survived the drafting process, specific to one bureaucratic actor and applied at the trial court level. It is thus not necessarily the case that the variation in the reforms adopted resulted from the inability of drafters to negotiate a zero-sum game between bureaucratic actors jealously guarding their political authority. Moreover, the variation cannot be fully explained by the state's unwillingness to forfeit a coercive tool of the state, as the candidate reforms could all be avoided at the implementation stage. Indeed, like the successful reforms, many of the failed candidate reforms were resisted despite being easy for reluctant officials to circumvent during a criminal trial. For example, just as the right to an attorney can be readily infringed upon by reluctant state actors, so too could the right to object to the submission of evidence unlawfully obtained be avoided by the court through the application of numerous exceptions or balancing tests. Nonetheless, the former right was strengthened by the 1997 CPL reform whereas the latter remained weak. Instead of these many possible explanations, the examination of legal reform in the preceding Chapters suggest the reforms that were resisted by state actors were often those that invoked an extant discourse to which opponents could appeal.

While the Chapters above examine the applicability of the two-tailed discourse model of diffusion in the contexts of legislative drafting in civil law countries and the

development of jurisprudence in their common law counterparts, the model also extends to other domestic legal contests, including the development of new constitutional charters. In a dynamic similar to the one described in the Chapters above, established constitutions such as the U.S. Constitution, and the rights embedded therein, often serve as both a “model” and an “anti-model” in global constitutional development, as time-pressed constitutional drafters in transitional states are faced with questions of whether to adopt or reject certain legal norms.¹¹²⁴ As South African Judge D.M. Davis described the experience of South Africa’s Constitutional Congress, “Faced with stringent deadlines and having limited practical knowledge of the workings of a bill of rights, it was understandable that members of the technical committee would make extensive use of...previous work [such as the Canadian Charter of Rights and Freedoms].”¹¹²⁵ Judges Spitz and Chaskalson describe a similar openness to foreign ideas born from mere inexperience in constitutional drafting: “The drafting process was very much a hit-and-miss affair. The simple fact was that South African lawyers had had no real experience of sovereign bills of rights prior to the Interim Constitution. With respect to the members of the Technical Committee, it had been difficult to find any five South African ‘technical experts’ who actually had the knowledge and expertise to draft a Bill of Rights in the short period required by the [Constitutional drafting process].”¹¹²⁶ In this vacuum, foreign law presented novel solutions to constitutional governance, challenged entrenched domestic legal norms, and provoked extant domestic discourses. The following section briefly illustrates how insights gleaned from the two-tailed model can extend in future research beyond such domestic political contests to the domain of international law.

¹¹²⁴ See Heinz Klug, *Model and Anti-Model: The United States Constitution and the ‘Rise of World Constitutionalism,’* 2000 WISC. L. REV. 597 (2000).

¹¹²⁵ See Davis (2003), at 187.

¹¹²⁶ *Id.*

II. Discourse and Diffusion: Future Research

a. Two-Tailed Model of Diffusion and the Development of an International Treaty

The Chapters above provide useful theoretical and empirical tools to examine the diffusion of foreign law into domestic legal systems. As illustrated through a content analysis of legal periodicals and constitutional case law, the presence or absence of a domestic discourse can determine whether and how quickly a state targeted for reform will adopt a candidate legal norm. Moreover, as illustrated through the introduction of a so-called “cosmopolity score,” one can also see how the socialization of legal actors at the international level affects how those actors become domestic conduits of global law familiar with alternative legal doctrines and foreign legal norms. In the case of South Africa, this cosmopolity score shed useful light on the process by which legal norms diffused into common law systems via cosmopolitan judges socialized in a growing transnational network of legal knowledge.

In future research, it is worth examining this phenomenon further and without the intervening variable of domestic legal system. More specifically, it is worth examining whether the two-tailed model of legal diffusion applies among legal actors involved in the negotiation of an international treaty. If discourse proves as important a factor in determining whether a particular provision is agreed to by participating sovereign states, then the applicability of the two-tailed model, which already supplies useful insights for international relations theory, will extend beyond the domain of comparative legal studies and into the realm of international law. In this way, it will demonstrate how the two-tailed discourse model of norm diffusion might serve to answer the call from Kenneth Abbott, Anne-Marie Slaughter, and others, for

interdisciplinary legal scholarship that incorporates international relations theory, comparative politics, and international legal studies.¹¹²⁷ While not necessarily satisfying Abbott's goal of establishing a new "joint discipline" of politics and law, it may nonetheless serve as a small step in a long, collaborative journey.

A plausibility probe of the negotiation of the 1993 Hague Convention on Intercountry Adoption suggests the model indeed possesses intellectual purchase beyond the confines of domestic legal systems. For several reasons, China's ratification of the 1993 Hague Convention on Intercountry Adoption stands as another useful case to examine the dynamics of legal norm diffusion.¹¹²⁸ Firstly, like criminal procedure, family law is a sensitive matter of domestic law often "resistant to change of any kind, including transplants,"¹¹²⁹ and thus presenting a "hard case" to test the proposed model.¹¹³⁰ Secondly, China has generally been a reluctant participant of the Hague Conference on Private International Law, the body responsible for the convention. Indeed, China has become a party to only four conventions enacted by the institution.¹¹³¹ For the sake of comparison, the United States is a party to ten, the United Kingdom to thirteen, Australia to eleven, and Japan to seven. Finally, at the time of the Convention's drafting, China lacked a comprehensive domestic legal regime governing adoption, let alone intercountry adoption. China's first national

¹¹²⁷ See Anne-Marie Slaughter, Andrew S. Tulumello, and Stephan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367 (1998); Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989).

¹¹²⁸ Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, adopted May 29, 1993, 1870 U.N.T.S. 181.

¹¹²⁹ ALAN WATSON, *LEGAL TRANSPLANTS* 98 (2d ed. 1993).

¹¹³⁰ On "hard cases" in social science research, see generally STEPHEN VAN EVERA, *GUIDE TO METHODOLOGY FOR STUDENTS OF POLITICAL SCIENCE* (1996) (noting that "hard cases" are those where the prior probability of a theory being a correct explanation is low).

¹¹³¹ See Hague Conference on Private International Law: Status Charts, *available at*: <http://www.hcch.net/upload/charts.htm>.

adoption law was not promulgated until 1992. This not only makes any change in the legal regime governing the practice readily observable, it provides a useful test of the hypothesis that the less the domestic discourse related to a practice, the greater a state's susceptibility to foreign persuasion.

The Hague Convention had four ambitious aims: 1.) to promulgate legally binding standards governing adoption across international borders; 2.) to establish a system of supervision of those standards; 3.) to create channels of communication between authorities in both sending and receiving countries; and 4.) to cultivate a working relationship among the authorities involved.¹¹³² As Richard Carlson describes, it was “receiving nations such as the United States [that] tended to be the most eager to endorse intercountry adoption and facilitate the adoption process.”¹¹³³ The United States, which at the time accounted for approximately one-third of all intercountry adoptions, lobbied extensively for a pro-receiving-state agreement.¹¹³⁴ U.S. representatives thus resisted efforts by the Special Commission at the Hague to mollify sending countries in early drafts with the borrowing of language from a prior United Nations Resolution declaring an absolute preference for placement in a child's birth country.¹¹³⁵ Ratification by the PRC, a participating member of the Hague Conference, was thus not inevitable.

Future research likely shows, however, that China's ultimate ratification can be

¹¹³² See Bethany G. Parsons, *Intercountry Adoption: China's New Laws Under the 1993 Hague Convention*, 15 NEW ENG. J. INT'L & COMP. L. 63, 74 (2009).

¹¹³³ See Richard Carlson, *The Emerging Law of Intercountry Adoptions: An Analysis of the Hague Conference on Intercountry Adoption*, 30 TULSA L.J. 243, 256 (1994).

¹¹³⁴ See *id.* at 263.

¹¹³⁵ See *id.* at 259–69; see also Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, G.A. Res. 41/85, U.N. GAOR, 41st Sess. (1986), Arts. 13–24; Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 61st plen. mtg., U.N. Doc. a/44/25 (1989), reprinted in 28 I.L.M. 1148 (1989), Arts. 20–21.

explained by the two-tailed model of diffusion. Tellingly, the final version of the convention, which ultimately favors the interests of receiving countries,¹¹³⁶ obligated the PRC to an international regime that concerned a novel and unfamiliar area of private law.¹¹³⁷ Indeed, adoptions that did occur in China in prior to the Hague Convention occurred largely in a legal vacuum. Traditionally, codified law in China prohibited all adoptions outside of surname lines and permitted adoption only for the purpose of providing an heir.¹¹³⁸ Formal adoption of foundlings, moreover, was both technically illegal and uncommon.¹¹³⁹ Efforts to change China's adoption laws through the convention, however, proved largely successful. Prior to the Hague Convention, the PRC did not officially recognize intercountry adoption as a viable solution to parentless children.¹¹⁴⁰ Officials in Beijing instead took the position that the Chinese government itself should take care of its children.¹¹⁴¹ In the period since its participation in the Convention, however, the PRC rose from being the country with the lowest number of reported intercountry adoptions of any sending state to the

¹¹³⁶ See Carlson, *The Emerging Law of Intercountry Adoptions*, at 292.

¹¹³⁷ See Nili Luo & David Smolin, *Intercountry Adoption and China: Emerging Questions and Developing Chinese Perspectives*, 35 CUMB. L. REV. 597, 602 (2004); Curtis Kleem, *Airplane Trips and Organ Banks: Random Events and the Hague Convention on Intercountry Adoptions*, 28 GA. J. INT'L & COMP. L. 319, 320–21 (2000).

¹¹³⁸ See Kay Johnson, Huang Banghan, & Wang Liyao, *Infant Abandonment and Adoption in China*, 24 POPULATION AND DEVELOPMENT REVIEW 469, 483 (1998); Jihong Liu, Ulla Larsen, & Grace Wyshak, *Factors Affecting Adoption in China, 1950–87*, 58 POPULATION STUDIES 21, 22 (2004).

¹¹³⁹ See Johnson, Huang, & Wang, *Infant Abandonment and Adoption in China*, at 470; see also Nancy Riley, *American Adoptions of Chinese Girls: The Socio-political Matrices of Individual Decisions*, 20 WOMEN'S STUDIES INTERNATIONAL FORUM 87 (1997); Anne Thurston, *In a Chinese Orphanage*, 27 ATLANTIC MONTHLY 28 (1996); and DEATH BY DEFAULT: A POLICY OF FATAL NEGLECT IN CHINA'S STATE ORPHANAGES (Human Rights Watch eds., 1995).

¹¹⁴⁰ See Crystal J. Gates, *China's Newly Enacted Intercountry Adoption Law: Friend or Foe*, 7 IND. J. GLOBAL LEGAL STUD. 369, 385 (1999).

¹¹⁴¹ See Luo & Smolin, *Intercountry Adoption and China: Emerging Questions and Developing Chinese Perspectives*, at 602.

United States, to the largest sending state in the world.¹¹⁴² (See figure 7.1) Moreover, around the time of the Conference, advocates succeeded in convincing the National People's Congress to pass its first Adoption Law, which in its first iteration went so far as to treat foreigners the same as any Chinese citizen wishing to adopt.¹¹⁴³



Figure 7.1: *Intercountry Adoptions in the PRC*

To say foreign legal advocates succeeded in shaping the construction of China's adoption law is not to say China's legal reform was not strategic. Indeed, the success in reforming China's laws governing adoption may have been due not to the normative persuasion of transnational advocates but rather the strategic need of the Chinese state to deal with the mounting problems associated with caring for parentless children. Nonetheless, the two-tailed model of diffusion suggests opponents to the terms ultimately agreed to by PRC representatives at the Hague Convention lacked the discursive tools necessary to construct a timely, coherent rebuttal to the proposed

¹¹⁴² See Office of Children Issues, U.S. Department of State, available at: <http://adoption.state.gov/news/notices.html>.

¹¹⁴³ See Kleem, *Airplane Trips and Organ Banks: Random Events and the Hague Convention on Intercountry Adoptions*, at 321.

agreement. A preliminary survey of Chinese language publications concerning law and politics reveals that the discussion of laws governing adoption was very limited in the years prior to the Hague Convention.¹¹⁴⁴ Indeed, less than one percent of articles related to law included extensive discussions of adoption law.¹¹⁴⁵ Since the adoption of the Convention governing intercountry adoption, the proportion of legal articles concerning adoption law (收养法) has increased by more than two-hundred percent. This disparity between the level of discussion before and after the Hague Convention suggests domestic opponents, initially ill-equipped to raise discursive challenges to the proposed legal reforms have, over the course of time, acquired the tools necessary to raise such challenges. China's subsequent restrictions on persons eligible for intercountry adoption and the decline in rank as a sending state further suggest such opposition has developed a successful discursive framing to counter China's participation in the Convention.

As anticipated by the two-tailed model, an initial study of the negotiation of the Hague Convention suggests the ability of transnational legal advocates to draw additional support for the treaty proved less successful among countries within which adoption was already a more salient point of concern at the domestic level. More specifically, the final list of countries that ratified the agreement governing intercountry adoption reveals less support for the Hague Convention among predominantly Muslim states. As explained in an explanatory report prepared by staff of the Hague Conference on Private International Law, negotiations regarding the Convention met some of its stiffest resistance from such states because Islam

¹¹⁴⁴ As in Chapters 3 and 4, the following survey of publications was conducting using the China Academic Journals database.

¹¹⁴⁵ Articles with thorough discussions of death penalty procedures, a more contested point of concern among Chinese legal scholars, outnumbered adoption law more than forty-four to one.

expressly prohibits legal adoption.¹¹⁴⁶ Islamic law expressly provides that the legal parentage of a child cannot be modified and so adoption is forbidden. Opponents of the Hague Convention in these countries were thus able to readily invoke discourse from the Koran explaining their position.¹¹⁴⁷ Although comprising less than ten percent of the countries that participated in the negotiation of the treaty, predominantly Muslim countries accounted for roughly forty percent of the non-signatory participants.¹¹⁴⁸

b. Discourse and Diffusion Over Time

In addition to extending the examination of the relationship between discourse and diffusion to another level of analysis—i.e. international law—it is also worth extending the analysis over time to examine the dynamics of discourse employed by domestic supporters and opponents after a law has been successfully diffused to a target state. Such a consideration of the temporal effects of legal development would address several concerns. Firstly, the study of how a law is ultimately implemented by a state would provide useful detail for the broad theoretical outline described by Thomas Risse and Kathryn Sikkink wherein reluctant state actors become ensnared within a transnational discursive spiral, positioned uncomfortably between: a.) legal reforms they strategically adopted with no intention to implement; and b.) the domestic advocates eager to appeal to those legal reforms.¹¹⁴⁹ The two-tailed model of diffusion presented above applies merely to the antecedent adoption of the law, wherein a reform is adopted because reluctant state actors or domestic opposition

¹¹⁴⁶ See G. Parra-Aranguren, *Explanatory Report on the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption* (n.d.).

¹¹⁴⁷ See Surat ul Ahzab 33:4-5 (revealing the position of the Prophet Muhammad that “nor has He made those whom you assert to be your sons your real sons.”).

¹¹⁴⁸ Five of the thirteen countries that participated in the Hague Conference but did not ratify the Convention were predominantly Muslim states—Egypt, Indonesia, Lebanon, Malaysia, and Senegal.

¹¹⁴⁹ Risse & Sikkink (1999), at 11.

groups lack an extant discourse to oppose a proposed legal reform. The model can thus be improved by a closer examination of the discursive exchanges that occur after a law is adopted strategically by a state actor.

In addition to shedding light on how domestic supporters use imported legal discourse to ensnare reluctant state actors after the adoption of foreign legal norms, an extension of the study over time will also shed light on how domestic opponents, initially lacking the discursive vocabulary to oppose a legal norm, can reframe a debate to fit an existing discursive framework in an effort to have the imported legal norm repealed, revised, or reduced. Such an examination of how conservative elements of society adapt to the novel framing of transnationally engaged advocates may help explain South Africa's shift away from its progressive jurisprudence aiming to develop substantive socio-economic equality in post-apartheid South Africa toward a more conservative formal equality jurisprudence.¹¹⁵⁰ That is, it can shed light on how opponents of South Africa's more progressive decisions were able to return the discourse back to the perennial tension in South Africa between libertarianism and liberationism after some initial gains by human rights advocates.

An initial study of the development of China's adoption law over time further reveals the value of such a study. In the wake of China's adoption of the Hague Convention on Intercountry Adoption, opponents of the agreement have since managed to see China's commitments under the agreement narrowed considerably through a successful reframing of issue. Such reforms include the introduction of limitations on single-parent and non-married adoption, a restriction pushed for in part by opponents concerned by the number of gay and lesbian individuals adopting under the policy.¹¹⁵¹ This retrenchment of China's adoption policy mirrors a similar process

¹¹⁵⁰ Interview, 8/17/2010.

¹¹⁵¹ See Luo & Smolin (2004), at 607; Office of Children Issues, U.S. State Department, International Adoption in China, *available at*: [http:// travel.state.gov/](http://travel.state.gov/)

observed in Andrew Mertha's study of domestic opposition to China's hydropower policy. As he notes, variation in the ability of opponents to affect change related to the ability (and inability) of those actors to find a salient issue frame, such as when opponents affected by the government's hydropower policy successfully appealed to salient notions of "cultural heritage."¹¹⁵² Moreover, it mirrors similar retrenchment in other sending countries such as Brazil, a country which likewise adopted conservative policies following a media reframing of the issue.¹¹⁵³

Finally, the extension of the study over time will shed further light on the manner by which points of concern are themselves ultimately reformed. While the two-tailed model currently offers useful insights on how novel legal reforms and challenges to entrenched practices can counterintuitively diffuse relatively quickly through the international system, and why so-called points of concern prove more difficult for transnational actors to influence, it does not uncover the processes by which those points of concern ultimately do change. An initial look at the dynamics by which such reforms ultimately do come about suggests such reforms do relate to sustained transnational pressure, but also to exogenous triggering events in the target state that pose challenges to a particular discursive frame. In the Chinese case, for example, recent years have witnessed gradual changes to several points of concern, including detention policy,¹¹⁵⁴ procedures governing the review of death sentences,¹¹⁵⁵

adoption_china.html (quoting the China Center for Adoption Affairs declaration that "[a]doption applications from homosexual families are not acceptable.").

¹¹⁵² See Andrew Mertha (2009), at 1005.

¹¹⁵³ See Claudia Fonseca, *Transnational Influences in the Social Production of Adoptable Children*, 26 INT'L J. OF SOC. & SOC. POL'Y 154 (2006), at 158.

¹¹⁵⁴ See Keith Hand, "Using the Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China," 45 COLUM. J. TRANS. L. 1, 114 (2006).

¹¹⁵⁵ See 最高人民法院关于复核死刑案件若干问题的规定, available at: <http://rmfyb.chinacourt.org/public/detail.php?id=106249>.

and exclusionary rules concerning evidence unlawfully obtained.¹¹⁵⁶ Each of these incremental reforms has occurred after the eruption of domestic disapproval in the wake of administrative and judicial abuses that introduced compelling empirical evidence into the discursive exchange regarding the policies. In the case of administrative detention, for example, it is worth noting that although China's detention practices remain largely in effect, the death of internal migrant worker Sun Zhigang as a result of torture while held in administrative detention sparked an unprecedented citizen-led legal challenge that ultimately brought about a dissolution of China's "custody and repatriation" laws.¹¹⁵⁷ The gradual reform of rules concerning the administration of capital punishment and laws of evidence has been similarly motivated by popular reactions to exposed abuses by the state,¹¹⁵⁸ including a series of wrongful convictions that resulted in harsh punishments—including the death penalty—such as the She Xianglin case, the Zhang Xinliang case, and the Sun Wangang case.¹¹⁵⁹ These triggering events provide compelling evidence for legal advocates engaged in a discursive exchange with opponents to reform, enabling them to overcome domestic resistance to a proposed legal change. An extension of the two-tailed model to the implementation phase of legal development would thus further our understanding of how legal development ultimately does occur between the two tails. That is, it will shed light on how sustained transnational and domestic legal pressure, thwarted by extant opposing discourse, can succeed in the presence of episodic catalysts.

¹¹⁵⁶ 关于办理死刑案件审查判断证据若干问题的规定, available at: <http://baike.baidu.com/view/3691408.html>.

¹¹⁵⁷ See Hand (2006).

¹¹⁵⁸ Interview, 9/10/2010.

¹¹⁵⁹ 赵作海案中案警方曾拒认尸, 新京报 (June 4, 2010), available at: <http://epaper.bjnews.com.cn/images/2010-06/04/A17/A17604C.pdf>.

c. Possible Limitations

While an initial inquiry suggests that the two-tailed model of diffusion may yield useful insights into the development of international treaties or the development of legal reform over time, the model developed in the chapters above may be conditional. That is, the model may be limited by the fact that proposed laws vary not only in terms of their attendant discourse, they vary also by the type of interests implicated by any proposed reform. This consideration is likely to be especially salient in the domain of contemporary Chinese economic and commercial law, a field of law with a rich discourse derived from socialist thought. A useful example of this is the recently promulgated Property Law, which did much to propel China's economic legal framework towards a more capitalist model and away from its longstanding property relationships rooted in a socialist discourse. Indeed, the property law is described by many as "an important step away from communist collective ownership and towards a market economy."¹¹⁶⁰

To say economic laws may interact differently with extant domestic discourse is not to say discourse played no role in the ultimate content of the adopted reform. Rather, due to the central role of the concept of property in Marxist discourse, public opponents had a ready vocabulary from which to draw. As Andrew Mertha found in the debates surrounding the drafting of the new law, the active discourse surrounding the concept of property included at least three distinct and contested positions.¹¹⁶¹ In total, as many as 181,000 citizens published online comments, including one especially influential letter from Beijing University professor Gong Xiantian. Drawing from traditional Marxist language on the role of the state in property relationships, Gong and his supporters effectively stalled the law for a year, forcing the NPC to

¹¹⁶⁰ See China Passes New Law on Property, BBC News (Mar. 16, 2007).

¹¹⁶¹ See Andrew Mertha, *From 'Rustless Screws' to 'Nail Houses': The Evolution of Property Rights in China*, ORBIS 233 (2009), at 237.

remove the bill from its agenda and hold a series of symposia to investigate the legality of the law under the PRC Constitution. The influence of this band of so-called “New Left” scholars, while not enough to kill the bill, did compel the NPCSC chairman, Wu Bangguo, to release rare statements defending the constitutionality of the law and to note the subsequent amendments made to provide greater protections of state property.

Another example of the possible importance commercial interests may play in the discursive process of legal reform is the most recent Labor Contract Law, announced in 2007. This law, like the Property Law reform, was the product of a lengthy internal contest within the CCP and generated as many as thirteen internal drafts before being released for public comment in 2006.¹¹⁶² Once available for public comment, the draft received nearly 200,000 comments in the course of one month.¹¹⁶³ Despite these similarities, in contrast to the Property Law, which constituted a considerable step toward a capitalist ordering of Chinese society and failed to address many of the concerns of China’s 780 million farmers, the final version of the Labor Contract Law is viewed as largely pro-worker and rooted in an anti-capitalist, socialist discourse, “the unanimous verdict” being that the law dramatically increases labor costs and elevates the rights of workers.¹¹⁶⁴ By its employee-friendly requirements—which include open-ended rather than fixed contracts, severance pay, and limitations on restrictive covenants, which would otherwise allow companies to prevent employees from quitting and immediately taking employment with a competitor¹¹⁶⁵—it is considered by some as “hostile”¹¹⁶⁶ to foreign investors and domestic business alike,

¹¹⁶² See *The New Labor Contract Law*, 34 THE CHINA BUSINESS REVIEW 42 (2007).

¹¹⁶³ See Wang (2008).

¹¹⁶⁴ See *China Regulations: New Labor Law*, EIU, July 5, 2007.

¹¹⁶⁵ See Lesli Ligorner, *The Human Face of M&A Deals*, 34 THE CHINA BUSINESS REVIEW 24 (2007).

¹¹⁶⁶ See Liana Cafalla, *The Costs of China’s Labour*, 14 CHINA STAFF 8 (2008).

and a significant step back to the “iron rice bowl” era of the Maoist period of Chinese political economy.¹¹⁶⁷ Unlike in the case of the Property Law, the Labor Contract Law appears more effectively influenced by domestic opponents who convincingly employed socialist discourse supportive of labor. As several foreign labor lawyers in China have observed, the comments on the draft of the law released to the public had a “huge effect”¹¹⁶⁸ on the final product and were “revolutionary” in their tone. This public campaign in effect left “management...squeezed out of its autonomy in how to run a business.”¹¹⁶⁹

III. Conclusion

This dissertation introduces a new model of norm diffusion that hopefully offers useful observations for political scientists, legal advocates, and scholars of law. For the former, it presents novel methodologies and conducts innovative tests of various explanations of diffusion. Together, these two elements offer a novel discourse-based model of legal diffusion in the international system. Moreover, it meets the challenges posed by any attempt to understand the role of norms in political behavior by applying pioneering software such as Yoshikoder and Wordscore to the discursive practices of legal actors. These software tools provide new ways to examine how states acquire new interests or abandon long-held beliefs in the absence of or in opposition to clear material incentives to behave otherwise. This study, I hope, furthers the understanding in political science of how ideas spread. For legal advocates and observers of global human rights protections, it also helps anticipate instances

¹¹⁶⁷ See Union of the State: China’s New Labour Law, 385 *The Economist* (Dec. 8, 2007), at 67.

¹¹⁶⁸ See Andrew Batson and Mei Fong, *China Toils over New Labor Law*, WALL STREET JOURNAL (May 7, 2007).

¹¹⁶⁹ See *China: New Labour Law Increases Employee Rights and Gives Party Influence over FIEs*, ASIALAW (Sep. 2007), at 1.

under which foreign advocacy succeeds. This insight, I hope, offers helpful insights into what campaigns might succeed and how the discursive framing of such campaigns can contribute to their success. Finally, for scholars of law, this study demonstrates how methodological eclecticism can serve to join legal scholarship with political science. Through its rigorous review of texts intimately familiar to legal scholars (law journals and case law), I hope this study stands as an example of how legal scholars can generate valuable contributions to political science from material that, on its own, has been of limited interest to political scientists.

APPENDIX

CHINESE JOURNALS SELECTED FOR CONTENT ANALYSIS

The following national, regional, and institutional journals comprise the universe of publications included in the full sample of journals published in the China Academic Journal database that concern issues related to law, public security, military affairs, and politics. Together, these journals supply a broad range of institutional positions, including executive and legislative publications, judicial publications, CCP publications, and non-governmental publications. Moreover, they consist of journals from twenty-nine of China's thirty-one provinces, municipalities, and autonomous regions.

Chinese Title: 八桂侨刊
English Title: Overseas Chinese Journal
of Bagui
1987 - 2008

Chinese Title: 北京党史
English Title: History of the CCP
in Beijing
1994 - 2008

Chinese Title: 北京观察
English Title: Beijing Observation
1994 - 2008

Chinese Title: 北京人民警察学院学报
English Title: Journal of Beijing People's Police
College
1994 - 2008

Chinese Title: 北京政法职业学院学报
English Title: Journal of Beijing College of Politics
and Law
1994 - 2008

Chinese Title: 比较法研究

English Title: Journal of Comparative Law
1987 – 2008

Chinese Title: 兵团党校学报
English Title: Journal of the Party School of XPCC
of C.P.C
1994 -2008

Chinese Title: 兵团工运
English Title: Military Labor Movement
1994 – 2008

Chinese Title: 长江论坛
English Title: Yangtze Tribune
1984 – 2008

Chinese Title: 长白学刊
English Title: Changbai Journal
1985 – 2008

Chinese Title: 重庆市人民政府公报
English Title: Gazette of Chongqing Municipal
People's Government
1950 - 2008

Chinese Title: 传承
English Title: Inheritance & Innovtion
1994 – 2008

Chinese Title: 创造
English Title: Creation
1958 – 2008

Chinese Title: 春秋
English Title: Chunqiu Birmonthly
1994 - 2008

Chinese Title: 楚天主人
English Title: Chutian Zhuren
1995 – 2008

Chinese Title: 大连干部学刊
English Title: Journal of Dalian Official
1994 – 2008

Chinese Title: 党建研究
English Title: Party Development
1994 – 2008

Chinese Title: 当代法学
English Title: Contemporary Law Review
1987 – 2008

Chinese Title: 当代海军
English Title: Modern Navy
1994 – 2007

Chinese Title: 当代青年研究
English Title: Contemporary Youth Research
1983 – 2008

Chinese Title: 当代世界
English Title: The Contemporary World
1994 – 2008

Chinese Title: 当代世界社会主义问题
English Title: Issues of Contemporary World
Socialism
1983 - 2008

Chinese Title: 当代世界与社会主义
English Title: Contemporary World & Socialism
1981 - 2008

Chinese Title: 当代思潮
English Title: Present Ideological Trends
1994 - 2008

Chinese Title: 当代亚太
English Title: Contemporary Asia-Pacific Studies
1992 - 2008

Chinese Title: 党的建设
English Title: Party Development
1994 - 2008

Chinese Title: 党的生活
English Title: Party Life
1979 - 2008

Chinese Title: 党的文献
English Title: Literature of Chinese Communist
Party
1994 - 2008

Chinese Title: 党风与廉政
English Title: Honest Party
1994 - 2008

Chinese Title: 党建
English Title: Party Building
1994 - 2008

Chinese Title: 党建与人才
English Title: Party Building and Talent
1994 - 2008

Chinese Title: 东南亚研究
English Title: Southeast Asian Studies
1957 - 2008

Chinese Title: 东南亚纵横
English Title: Around Southeast Asia
1980 - 2008

Chinese Title: 党史博采(纪实)
English Title: Extensive Collection of the Party
History
1994 - 2008

Chinese Title: 党史研究与教学
English Title: Party History Research & Teaching
1979 - 2008

Chinese Title: 党史纵横
English Title: Over the Party History
1988 – 2008

Chinese Title: 党史纵览
English Title: Party History Overview
1994 – 2008

Chinese Title: 党政干部论坛
English Title: Cadres Tribune
1994 – 2008

Chinese Title: 党政干部学刊
English Title: Journal for Party and Administrative
Cadres
1994 – 2008

Chinese Title: 党政论坛
English Title: Party & Government Forum
1985 – 2008

Chinese Title: 党史博采(理论)
English Title: Extensive Collection of The Party
History
1994 – 2005

Chinese Title: 德国研究
English Title: Deutschland-studien
1994 – 2008

Chinese Title: 地方政府管理
English Title: Local Government Management
1992 – 2008

Chinese Title: 东北亚论坛
English Title: Northeast Asia Forum
1992 - 2008

Chinese Title: 俄罗斯研究
English Title: Russian Studies
1983 - 2008

Chinese Title: 法律适用
English Title: Journal of Law Application
1986 – 2008

Chinese Title: 法国研究
English Title: Etudes Francaises
1983 – 2008

Chinese Title: 法律科学(西北政法大学学报)
English Title: Science of Law (Journal of Northwest
University of Political Science and Law)
1983 - 2008

Chinese Title: 法律与生活
English Title: Law & Life
1994 - 2008

Chinese Title: 犯罪研究
English Title: Criminal Research
1994 - 2008

Chinese Title: 法商研究
English Title: Studies in Law and Business
1994 - 2008

Chinese Title: 法学
English Title: Legal Science
1982 - 2008

Chinese Title: 法学论坛
English Title: Legal Forum
1986 - 2008

Chinese Title: 法学评论
English Title: Law Review
1980 - 2008

Chinese Title: 法学天地
English Title: Jurisprudence Universe
1994 - 2008

Chinese Title: 法学研究
English Title: Chinese Journal of Law
1994 - 2008

Chinese Title: 法学杂志
English Title: Law Science Magazine
1980 - 2008

Chinese Title: 法学家
English Title: Jurists Review
1986 - 2008

Chinese Title: 发展论坛
English Title: Development Tribune
1994 - 2003

Chinese Title: 法治论丛
English Title: The Rule of Law Forum (Journal of
Shanghai University of Political Science & Law)
1989 - 2008

Chinese Title: 法制现代化研究
English Title: The Study on Legal System
Modernization
1995 - 2008

Chinese Title: 法制与经济
English Title: Legal & Economy
1995 - 2008

Chinese Title: 法制与社会发展
English Title: Law and Social Development
1995 - 2008

Chinese Title: 福州党校学报
English Title: Journal of the Party School of Fuzhou
1994 - 2008

Chinese Title: 福建党史月刊
English Title: Fujian History Monthly
1985 - 2008

Chinese Title: 福建理论学习
English Title: Fujian Theoretical Study
1997 – 2008

Chinese Title: 福建省社会主义学院学报
English Title: Journal of Fujian Institute of
Socialism
1994 – 2008

Chinese Title: 妇女研究论丛
English Title: Collection of Women's Studies
1992 – 2008

Chinese Title: 甘肃政报
English Title: Gansu Administrative Reporter
1950 – 2008

Chinese Title: 甘肃政法学院学报
English Title: Journal of Gansu Political Science and
Law Institute
1986 – 2008

Chinese Title: 公安教育
English Title: Police Education and Training
1994 – 2008

Chinese Title: 公安月刊
English Title: Police Magazine
1994 - 2008

Chinese Title: 共产党人
English Title: Communists
1994 - 2008

Chinese Title: 工会理论研究
(上海工会管理职业学院学报)
English Title: Labour Union Studies
1994 - 2008

Chinese Title: 广东公安科技

English Title: Guangdong Science & Technology of Security
1994 - 2008

Chinese Title: 广东青年干部学院学报
English Title: Journal of Guangdong Youth Leaders College
1994 - 2008

Chinese Title: 广东行政学院学报
English Title: Journal of Guangdong Institute of Public Administration
1989 - 2008

Chinese Title: 国防
English Title: National Defense
1994 - 2008

Chinese Title: 广西青年干部学院学报
English Title: Journal of Guangxi Youth Leaders College
1994 - 2008

Chinese Title: 广西社会主义学院学报
English Title: Journal of Guangxi Institute of Socialism
1996 - 2008

Chinese Title: 广西政法管理干部学院学报
English Title: Journal of Guangxi Administrative Cadre Institute of Politics and Law
1994 - 2008

Chinese Title: 广西壮族自治区人民政府公报
English Title: Guangxi Zhuang Autonomous Region People's Government Gazette
1985 - 2008

Chinese Title: 广州政报
English Title: Guangzhou Reporter
1985 - 2008

Chinese Title: 桂海论丛

English Title: Guihai Tribune
1994 - 2008

Chinese Title: 贵州警官职业学院学报
English Title: Journal of Guizhou Police Officer
Vocational College
1988 - 2008

Chinese Title: 贵州省人民政府公报
English Title: Gazette of Guizhou Provincial
People' s Government
1996 - 2008

Chinese Title: 国际观察
English Title: International Review
1980 - 2008

Chinese Title: 国际关系学院学报
English Title: Journal of University of International
Relations
1994 - 2008

Chinese Title: 国际问题研究
English Title: International Studies
1959 - 2008

Chinese Title: 国际展望
English Title: World Outlook
1981 - 2007

Chinese Title: 国际政治研究
English Title: International Politics Quarterly
1980 - 2008

Chinese Title: 国际资料信息
English Title: International Data Information
1994 - 2008

Chinese Title: 国家检察官学院学报
English Title: Journal of National Prosecutors
College
1993 - 2008

Chinese Title: 国外理论动态
English Title: Foreign Theoretical Trends
1993 - 2008

Chinese Title: International Understanding
English Title: 国际交流(英文版)
1994 - 2008

Chinese Title: 海内与海外
English Title: At Home & Overseas
1994 - 2008

Chinese Title: 河北法学
English Title: Hebei Law Science
1983 - 2008

Chinese Title: 黑龙江政报
English Title: Heilongjiang Government Reporter
1950 - 2008

Chinese Title: 河南公安高等专科学校学报
English Title: Journal of Henan Public Security
Academy
1991 - 2008

Chinese Title: 河南省人民政府公报
English Title: Gazette of the People's Government
of Henan Province
1950 - 2008

Chinese Title: 河南省政法管理干部学院学报
English Title: Journal of Henan Administrative
Institute of Politics and Law
1995 - 2008

Chinese Title: 和平与发展
English Title: Peace and Development
1994 - 2008

Chinese Title: 红旗文稿
English Title: Red Flag Manuscript

1994 – 2008

Chinese Title: 红岩春秋
English Title: Annals of Red Rock
1994 – 2008

Chinese Title: 华东政法大学学报
English Title: Journal of East China University of
Political Science and Law
1994 - 2008

Chinese Title: 黄埔
English Title: Huang Pu
1994 - 2008

Chinese Title: 环球法律评论
English Title: Global Law Review
1994 - 2008

Chinese Title: 华人时刊
English Title: Chinese Times
1994 - 2008

Chinese Title: 湖北省社会主义学院学报
English Title: Journal of Hubei Institute of Socialism
1997 - 2008

Chinese Title: 湖南政报
English Title: Hunan Government Reporter
1949 - 2008

Chinese Title: 湖湘论坛
English Title: Huxiang Forum
1990 - 2008

Chinese Title: 检察风云
English Title: Prosecutorial View
1994 – 2008

Chinese Title: 江苏警官学院学报
English Title: Journal of Jiangsu Police Officer
College

1994 - 2008

Chinese Title: 江苏政协

English Title: Political Consultative Conference of Jiangsu

1996 - 2008

Chinese Title: 吉林公安高等专科学校学报

English Title: Journal of Jilin Public Security Academy

1986 - 2008

Chinese Title: 吉林人大

English Title: Jilin People's Congress

1997 - 2008

Chinese Title: 吉林政报

English Title: Gazette of the People's Government of Jilin Province

1950 - 2008

Chinese Title: 警察技术

English Title: Police Technology

1994 - 2008

Chinese Title: 警察天地

English Title: Police World

1994 - 2008

Chinese Title: 军事历史研究

English Title: Military Historical Research

1986 - 2008

Chinese Title: 军队政工理论研究

English Title: Theoretical Studies on PLA Political Work

1994 - 2008

Chinese Title: 军事经济学院学报

English Title: Journal of Military Economics Academy

1994 - 2008

Chinese Title: 军事经济研究
English Title: Military Economic Research
1987 - 2008

Chinese Title: 军事历史
English Title: Military History
1983 - 2008

Chinese Title: 军事运筹与系统工程
English Title: Military Operations Research and
Systems Engineering
1994 - 2008

Chinese Title: 刊授党校
English Title: Party School Magazine
1994 - 2008

Chinese Title: 科技与法律
English Title: Science-Technology and Law
1991 - 2008

Chinese Title: 科学社会主义
English Title: Scientific Socialism
1984 - 2008

Chinese Title: 拉丁美洲研究
English Title: Journal of Latin American Studies
1986 - 2008

Chinese Title: 两岸关系
English Title: Cross-Strait Relations
1997 - 2008

Chinese Title: 廉政大视野
English Title: Honest Governance
1994 - 2003

Chinese Title: 廉政瞭望

English Title: Honesty Outlook
1995 - 2008

Chinese Title: 瞭望
English Title: Outlook
1984 - 2008

Chinese Title: 理论导刊
English Title: Journal of Socialist Theory Guide
1985 - 2008

Chinese Title: 理论建设
English Title: Theory Research
1981 - 2008

Chinese Title: 理论界
English Title: Theory Horizon
1994 - 2008

Chinese Title: 理论前沿
English Title: Theory Front
1987 - 2008

Chinese Title: 理论视野
English Title: Theoretical Horizon
1993 - 2008

Chinese Title: 理论探索
English Title: Theoretical Exploration
1984 - 2008

Chinese Title: 理论探讨
English Title: Theoretical Investigation
1984 - 2008

Chinese Title: 理论学刊
English Title: Theory Journal
1984 - 2008

Chinese Title: 理论学习
English Title: Theoretical Study
1994 - 2008

Chinese Title: 理论学习与探索
English Title: Theory Studying and Exploration
1994 - 2008

Chinese Title: 理论研究
English Title: Theoretical Research
1984 - 2008

Chinese Title: 理论与当代
English Title: Theory and Contemporary
1994 - 2008

Chinese Title: 理论与改革
English Title: Theory and Reform
1994 - 2008

Chinese Title: 领导科学
English Title: Leadership Science
1985 - 2008

Chinese Title: 领导文萃
English Title: Leadership Culture Collection
1993 - 2008

Chinese Title: 领导之友
English Title: The Friend of Leaders
1985 - 2008

Chinese Title: 岭南学刊
English Title: Lingnan Journal
1994 - 2008

Chinese Title: 律师世界
English Title: Lawyer World
1994 - 2003

Chinese Title: 马克思主义研究
English Title: Studies on Marxism
1983 - 2008

Chinese Title: 马克思主义与现实
English Title: Marxism & Reality
1990 - 2008

Chinese Title: 毛泽东邓小平理论研究
English Title: Studies on Mao Zedong and Deng
Xiaoping Theories
1994 - 2008

Chinese Title: 毛泽东思想论坛
English Title: Mao Zedong Thought Forum
1994 - 1997

Chinese Title: 毛泽东思想研究
English Title: Mao Zedong Thought Study
1983 - 2008

Chinese Title: 美国研究
English Title: American Studies Quarterly
1987 - 2008

Chinese Title: 民主
English Title: Democracy Monthly
1996 - 2008

Chinese Title: 民主与科学
English Title: Democracy & Science
1989 - 2008

Chinese Title: 南风窗
English Title: South Wind Window
1985 - 2008

Chinese Title: 南京政治学院学报
English Title: Journal of PLA Nanjing Institute of
Politics
1987 - 2008

Chinese Title: 南亚研究季刊
English Title: South Asian Studies Quarterly
1985 - 2008

Chinese Title: 南洋问题研究
English Title: Southeast Asian Affairs
1974 - 2008

Chinese Title: 南洋资料译丛
English Title: Southeast Asian Studies

1957 – 2008

Chinese Title: 欧洲研究

English Title: Chinese Journal of European Studies

1994 – 2008

Chinese Title: 攀登

English Title: Ascent

1994 - 2008

Chinese Title: 前进

English Title: Advance

1994 – 2008

Chinese Title: 前进论坛

English Title: Forum For Advancement

1994 – 2008

Chinese Title: 前线

English Title: Frontline

1958 – 2008

Chinese Title: 侨园

English Title: China Overseas

1994 – 2008

Chinese Title: 青少年犯罪问题

English Title: Issues on Juvenile Crimes and
Delinquency

1994 – 2008

Chinese Title: 青年探索

English Title: Youth Studies

1983 - 2008

Chinese Title: 青少年研究(山东省团校学报)

English Title: Youth & Juvenile Research

1993 – 2008

Chinese Title: 求实

English Title: Truth Seeking

1980 – 2008

Chinese Title: 求是
English Title: Qiushi
1994 – 2008

Chinese Title: 群众
English Title: Masses
1994 - 2008

Chinese Title: 群言
English Title: Popular Tribune
1986 - 2008

Chinese Title: 人民检察
English Title: People's Procuratorial Semimonthly
1994 – 2008

Chinese Title: 人大建设
English Title: National People's Congress
Development
1996 – 2008

Chinese Title: 人大研究
English Title: People's Congress Studying
1992 – 2008

Chinese Title: 人民公安
English Title: People's Police
1994 – 2008

Chinese Title: 人民论坛
English Title: People's Tribune
1994 – 2008

Chinese Title: 人民司法
English Title: People's Judicature
1958 – 2007

Chinese Title: 人民调解
English Title: People's Mediations
1994 – 2008

Chinese Title: 人民之声
English Title: People's Voice

1994 – 2008

Chinese Title: 日本问题研究
English Title: Japanese Study
1994 – 2008

Chinese Title: 日本学刊
English Title: Japanese Studies
1985 – 2008

Chinese Title: 日本研究
English Title: Japan Studies
1985 – 2008

Chinese Title: 山西政报
English Title: Shanxi Government Reporter
1950 - 2008

Chinese Title: 山东警察学院学报
English Title: Journal of Shandong Police College
1994 – 2008

Chinese Title: 山东审判
English Title: Shandong Justice
1995 – 2008

Chinese Title: 山东政报
English Title: Shandong Government Reporter
1949 - 2008

Chinese Title: 上海党史与党建
English Title: Shanghai History and Party Building
1994 – 2008

Chinese Title: 上海公安高等专科学校学报
English Title: Journal of Shanghai Police College
1997 – 2008

Chinese Title:
上海市人民代表大会常务委员会公报
English Title: Shanghai Municipal People's
Congress Standing Committee Bulletin

1987 – 2007

Chinese Title: 山西警官高等专科学校学报
English Title: Journal of Shanxi Police Academy
1993 - 2008

Chinese Title: 陕西社会主义学院学报
English Title: Journal of Shaanxi Institute of
Socialism
1994 - 2008

Chinese Title: 陕西省人民政府公报
English Title: Shaanxi Provincial People's
Government Gazette
1950 – 2008

Chinese Title: 社会主义研究
English Title: Socialism Studies
1979 – 2008

Chinese Title: 时代潮
English Title: Chinese Times
1994 – 2008

Chinese Title: 世纪桥
English Title: Bridge of Century
1994 – 2008

Chinese Title: 实践(思想理论版)
English Title: Practice (Ideological and Theoretical
Edition)
1994 – 2008

Chinese Title: 世界知识
English Title: World Affairs
1932 – 2008

Chinese Title: 世纪行
English Title: Cross Century
1994 – 2008

Chinese Title: 实事求是

English Title: Seek Truth From Facts
1978 – 2008

Chinese Title: 疏导
English Title: Persuasion
1994 – 2008

Chinese Title: 四川党的建设城市版
English Title: Sichuan CCP Urban Development
Edition
1994 – 2008

Chinese Title: 四川党史
English Title: History of CCP in Sichuan
1994 – 2008

Chinese Title: 四川省社会主义学院学报
English Title: Journal of Sichuan Provincial Institute
of Socialism
1996 – 2008

Chinese Title: 四川政报
English Title: Sichuan Government Reporter
1985 – 2003

Chinese Title: 思想工作
English Title: Ideological Work
1994 – 2008

Chinese Title: 思想战线
English Title: Thinking
1975 – 2008

Chinese Title: 思想政治工作研究
English Title: Ideological and Political Work
Research
1983 – 2008

Chinese Title: 太平洋学报
English Title: Pacific Journal
1994 – 2008

Chinese Title: 台声

English Title: Tai Sheng
1993 – 2008

Chinese Title: 台湾研究
English Title: Taiwan Studies
1983 – 2008

Chinese Title: 台湾研究集刊
English Title: Taiwan Research Quarterly
1983 – 2008

Chinese Title: 探求
English Title: Academic Search for Truth and
Reality
1994 – 2008

Chinese Title: 探索
English Title: Probe
1985 – 2008

Chinese Title: 探索与求是
English Title: Exploration and Seeking Truth
1994 – 2003

Chinese Title: 特区实践与理论
English Title: Practice and Theory of Sezs
1994 – 2008

Chinese Title: 天津市工会管理干部学院学报
English Title: Journal of Tianjin Trade Union
Administrators' College
1994 – 2008

Chinese Title: 统一论坛
English Title: Reunification Forum
1994 – 2008

Chinese Title: 团结
English Title: Unity
1994 - 2008

Chinese Title: 外国问题研究
English Title: Journal of Foreign Studies

1978 – 2008

Chinese Title: 外交评论(外交学院学报)

English Title: Foreign Affairs Review

1984 – 2008

Chinese Title: 唯实

English Title: Reality Only

1982 – 2008

Chinese Title: 文明与宣传

English Title: Market Economic Journal

1994 – 2008

Chinese Title: 武大国际法评论

English Title: International Law Review of Wuhan University

1974 – 2008

Chinese Title: 武钢政工

English Title: Wisco Ideology & Politics

1994 – 2008

Chinese Title: 武警工程学院学报

English Title: Journal of Engineering College of Armed Police Force

1994 – 2007

Chinese Title: 武警学院学报

English Title: Journal of Chinese People' s Armed Police Force Academy

1994 – 2008

Chinese Title: 现代国际关系(英文版)

English Title: Contemporary International Relations

1992 – 2008

Chinese Title: 现代法学

English Title: Modern Law Science

1988 – 2008

Chinese Title: 现代妇女

English Title: Modern Women
1994 – 2008

Chinese Title: 现代国际关系
English Title: Contemporary International Relations
1981 – 2008

Chinese Title: 现代军事
English Title: Modern Military Affairs
1994 – 2007

Chinese Title: 先锋队
English Title: Vanguard
1994 – 2008

Chinese Title: 湘潮
English Title: Monthly Magazine
1984 – 2008

Chinese Title: 新长征
English Title: The New Long March
1994 - 2008

Chinese Title: 新视野
English Title: Expanding Horizons
1985 – 2008

Chinese Title: 西南民兵杂志
English Title: Journal of the Southwest Militia
1994 – 2007

Chinese Title: 新法规月刊
English Title: New Law and Regulations Monthly
1994 – 2008

Chinese Title: 行政论坛
English Title: Administrative Tribune
1994 – 2008

Chinese Title: 刑事技术
English Title: Forensic Science and Technology
1993 – 2008

Chinese Title: 行政法学研究
English Title: Administrative Law Review
1993 – 2008

Chinese Title: 行政与法
English Title: Public Administration & Law
1994 – 2008

Chinese Title: 新疆警官高等专科学校学报
English Title: Journal of Xinjiang Police Officers'
Academy
1994 – 2008

Chinese Title: 新疆人大(汉文)
English Title: Xinjiang People's Congress
1995 – 2008

Chinese Title: 新湘评论
English Title: Xin-Xiang comment
1994 – 2008

Chinese Title: 西亚非洲
English Title: West Asia and Africa
1980 – 2008

Chinese Title: 学习论坛
English Title: Tribune of Study
1994 – 2008

Chinese Title: 学习月刊
English Title: Study Monthly
1994 – 2008

Chinese Title: 学校党建与思想教育
English Title: School Party and Ideological
Education
1985 - 2008

Chinese Title: 友声 (英文版)
English Title: Voice of Friendship
1994 – 2008

Chinese Title: 亚非纵横

English Title: Asia & Africa Review
1994 – 2008

Chinese Title: 延边党校学报
English Title: Journal of Yanbian Party School
1994 – 2008

Chinese Title: 云南大学学报(法学版)
English Title: Journal of Yunnan University(Law
Edition)
1994 - 2008

Chinese Title: 云南警官学院学报
English Title: Journal of Yunnan Police Officer
Academy
1997 – 2008

Chinese Title: 云南政报
English Title: Yunnan Government Reporter
1950 – 2008

Chinese Title: 中国妇女(英文版)
English Title: Women of China
1994 – 2008

Chinese Title: 浙江工商大学学报
English Title: Journal of Zhejiang Gongshang
University
1992 – 2008

Chinese Title: 政法论丛
English Title: Journal of Political Science and Law
1994 – 2008

Chinese Title: 政法论坛
English Title: Tribune of Political Science and Law
1985 – 2008

Chinese Title: 政法学刊
English Title: Journal of Political Science and Law
1984 – 2008

Chinese Title: 政府法制
English Title: Government Legality
1994 – 2008

Chinese Title: 证据科学
English Title: Evidence Science
1994 – 2008

Chinese Title: 正气
English Title: Healthy Atmosphere
1996 – 2008

Chinese Title: 政治与法律
English Title: Political Science and Law
1982 – 2008

Chinese Title: 政治学研究
English Title: Cass Journal of Political Science
1985 - 2008

Chinese Title: 郑州市人民政府公报
English Title: Gazette of Zhengzhou Municipal
People's Government
1985 – 2008

Chinese Title: 真理的追求
English Title: Pursuing the Truth
1994 – 2001

Chinese Title: 知识产权
English Title: Intellectual Property
1991 – 2008

Chinese Title: 中共福建省委党校学报
English Title: Journal of Fujian Provincial
Committee Party School of CPC
1989 – 2008

Chinese Title: 中共贵州省委党校学报
English Title: Journal of Guizhou Provincial
Committee Party's School of C.P.C
1994 – 2008

Chinese Title: 中共宁波市委党校学报
English Title: Journal of the Party School of Cpc
Ningbo Municipal Committee
1994 – 2008

Chinese Title: 中共山西省委党校学报
English Title: Academic Journal of Shanxi
Provincial Committee Party School of C.P.C
1978 - 2008

Chinese Title: 中共四川省委省级机关党校学报
English Title: Journal of the Party School of
Province-level of Sichuan Province Committee of
CCP
1994 – 2008

Chinese Title: 中共天津市委党校学报
English Title: Journal of the party School of Tianjin
Committee of the CPC
1994 – 2008

Chinese Title: 中共乌鲁木齐市委党校学报
English Title: Journal of the Party School of CPC
Urumqi Municipal Committee
1994 – 2008

Chinese Title: 中共浙江省委党校学报
English Title: Journal of Zhejiang Provincial Party
School
1994 - 2008

Chinese Title: 中共中央党校学报
English Title: Journal of the Party School of the
Central Committee of the C.P.C
1997 – 2008

Chinese Title: 中国保安
English Title: China Security Service
1994 – 2008

Chinese Title: 中国残疾人
English Title: Disability in China
1994 – 2008

Chinese Title: 中国党政干部论坛
English Title: Chinese Cadres Tribune
1988 – 2008

Chinese Title: 中国法学
English Title: China Legal Science
1984 – 2008

Chinese Title: 中国法医学杂志
English Title: Chinese Journal of Forensic Medicine
1986 - 2008

Chinese Title: 中国妇运
English Title: Chinese Women's Movement
1994 – 2008

Chinese Title: 中国工会财会
English Title: Trade Union Financial Affairs of
China
1994 – 2008

Chinese Title: 中国公务员
English Title: Chinese Public Servant
1994 – 2003

Chinese Title: 中国工运
English Title: Chinese Workers' Movement
1994 – 2008

Chinese Title: 中国国防科技信息
English Title: China's National Defense Science and
Technology News
1994 – 1998

Chinese Title: 中国海商法年刊
English Title: Annual of China Maritime Law
1990 – 2007

Chinese Title: 中国监察
English Title: Supervision in China
1994 – 2008

Chinese Title: 中国机关后勤

English Title: Chinese Authorities Logistics
1996 – 2003

Chinese Title: 中国劳动关系学院学报
English Title: Journal of China Institute of Industrial
Relations
1987 – 2008

Chinese Title: 中国律师
English Title: Chinese Lawyer
1994 - 2007

Chinese Title: 中国民兵
English Title: Chinese Militia
1984 – 2008

Chinese Title: 中国民政
English Title: China Civil Affairs
1994 – 2008

Chinese Title: 中国女性(中文海外版)
English Title: Women of China
1994 – 2008

Chinese Title: 中国青年研究
English Title: China Youth Study
1989 – 2008

Chinese Title: 中国青年政治学院学报
English Title: Journal of China Youth University for
Political Sciences
1982 – 2008

Chinese Title: 中国人大
English Title: China's National People's Congress
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Security University (Social Sciences Edition)
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Chinese Title: 中国特色社会主义研究
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