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# **THE BO XILAI TRIAL AND CHINA'S STRUGGLE WITH THE RULE OF LAW**

## **INTRODUCTION**

This Note will examine the trial of former Chinese politician Bo Xilai and assess whether his trial (the Bo trial) is indicative of a strengthening commitment of China towards some form of the rule of law. Although Bo received more legal protections in his trial than many defendants ordinarily receive in criminal trials, this Note will argue that his case is not indicative of a larger victory for the rule of law in China for two reasons. First, the trial itself was full of a number of procedural irregularities that suggest Bo was deprived of the full protections he was entitled to under Chinese law. Second, even viewing the Bo case optimistically, the case was likely an outlier in terms of Chinese criminal trials generally, as indicated by recent government crackdowns on perceived political dissenters. In analyzing the Bo trial, this Note will attempt to divorce its rule of law analysis from political conceptions that underlie a “thick” version of the rule of law and instead focus only on whether it may be said the Bo trial signals progress towards a “thin” version of the rule of law, a distinction that will be discussed in greater detail in Part III.

Part I provides a brief background of the Bo case starting with Bo's removal from power in March 2012 and ending with the rejection of Bo's appeal in October 2013. Part II provides an overview of Bo's political career and the circumstances leading to his fall, so as to indicate the significance of the Bo trial in Chinese politics. Part III discusses the general meaning of rule of law, while Part IV assesses such meaning specifically in the Chinese context. Part V provides a brief overview of the Chinese criminal process with a focus on aspects relevant to Bo's trial. Part VI looks at ways in which the procedures of the Bo trial were consistent and inconsistent with Chinese law. Part VII concludes by assessing what the facts in Part VI might suggest about the status of the rule of law in China, and ultimately, what the Bo trial might mean for the Chinese criminal process as a whole.

## I. THE BO XILAI TRIAL

On March 15, 2012, Bo Xilai, Secretary of the Chongqing Branch of the Chinese Communist Party (“CPC”)<sup>1</sup> and member of the Communist Party Central Committee Political Bureau (“Politburo”),<sup>2</sup> was stripped of his position of power as head of the Chongqing Branch of the CPC by senior Chinese Communist Party officials.<sup>3</sup> Bo was subsequently removed from his position on the Politburo on April 10, 2012.<sup>4</sup> On September 28, 2012, Chinese authorities expelled Bo from the Communist Party and removed his case to the judiciary for investigation.<sup>5</sup>

Bo’s case was eventually passed onto the Jinan People’s Procuratorate,<sup>6</sup> which indicted Bo on charges of bribery, embezzlement, and abuse of power on July 25, 2013.<sup>7</sup> The trial began on August 22, 2013

1. The Party Secretary of different administrative regions in China is responsible for formulating the direction of policy within that region. Although China does not have a federal system, Party Secretaries have broad leeway in formulating policies that boost economic growth so long as such policies do not conflict with national laws. Susan Lawrence & Michael Martin, *Understanding China’s Political System*, CONGRESSIONAL RESEARCH SERVICE 8, 10, 17–18, Mar. 20, 2013, <http://www.fas.org/sgp/crs/row/R41007.pdf>.

2. The Political Bureau (“Politburo”) of the Central Committee of the Communist Party of China is a twenty-five-member group responsible for overseeing the Communist Party of China. The Politburo’s nine-member Standing Committee effectively functions as China’s top governing body. TONY SAICH, *GOVERNANCE AND POLITICS OF CHINA* 100–02 (Vincent Wright & Palgrave Macmillan eds., 2004) (2001).

3. *Bo Xilai Scandal: Timeline*, BBC, Nov. 11, 2013, <http://www.bbc.co.uk/news/world-asia-china-17673505>. State media initially made little mention of the reasons for Bo’s removal from office. Samuel Wade, *Bo Xilai Replaced as Chongqing Party Chief (Update)*, CHINA DIGITAL TIMES, Mar. 14, 2012, <http://chinadigitaltimes.net/2012/03/bo-xilai-replaced-as-chongqing-party-chief/>. Xinhua, China’s official press agency, released only this brief statement: “In recent days, the Central Committee of the Chinese Communist Party has decided that Comrade Zhang Dejiang is to serve as CPC Chongqing Municipal Committee member, standing committee member and secretary; Comrade Bo Xilai will no longer hold these positions.” *Id.*

4. *Bo Xilai Scandal: Timeline*, *supra* note 3.

5. *Id.* The official decision was published online at [http://news.xinhuanet.com/legal/2012-09/28/c\\_113248574.htm](http://news.xinhuanet.com/legal/2012-09/28/c_113248574.htm). A translated version of the announcement and the bases for the announcement can be found online at [http://news.xinhuanet.com/english/china/2012-09/28/c\\_131880079.htm](http://news.xinhuanet.com/english/china/2012-09/28/c_131880079.htm). Government sources cited numerous bases for the decision including Bo’s handling of the Wang Lijun incident and the murder of Neil Heywood, Bo’s abuse of power while in office, corruption, and violations of various other disciplinary rules. *Bo Xilai Expelled from CPC, Public Office*, XINHUA, Sept. 28, 2012, [http://news.xinhuanet.com/english/china/2012-09/28/c\\_131880079.htm](http://news.xinhuanet.com/english/china/2012-09/28/c_131880079.htm).

6. Jinan is the capital city of Shandong province on China’s eastern coast. Steven Jiang, *China leaves nothing to chance for Bo Xilai ‘trial of the century’*, CNN, Aug. 22, 2013, <http://www.cnn.com/2013/08/21/world/asia/china-bo-xilai-trial-jinan-jiang/>. Jinan was a notable destination for the Bo Xilai trial given that Jinan is roughly 800 miles away from the city of Chongqing where Bo Xilai was mostly influential. *Id.* Additionally, the presiding judge in Jinan has been described to be a “tested and reliable” pro-Beijing figure by some. *Id.*

7. *Trial of Bo Xilai: Evidence, Charges and Defense*, CHINA DAILY, Aug. 28, 2013, [http://usa.chinadaily.com.cn/epaper/2013-08/29/content\\_16929449.htm](http://usa.chinadaily.com.cn/epaper/2013-08/29/content_16929449.htm). Bo was alleged specifically to

and concluded on August 26, 2013.<sup>8</sup> Bo was eventually found guilty on all counts on September 22, 2013 and sentenced to life in prison.<sup>9</sup> Bo appealed the court's decision to the Shandong Higher People's Court.<sup>10</sup> The Shandong Higher People's Court agreed to hear Bo's appeal on October 9, 2013.<sup>11</sup> The court subsequently rejected his appeal on October 25, 2013.<sup>12</sup>

## II. THE POLITICAL BACKGROUND OF BO XILAI'S TRIAL

Bo Xilai is the son of Bo Yibo, a prominent former Communist Party member who helped usher in China's market reforms that began in the 1980s, and who would later help jumpstart Bo Xilai's political career.<sup>13</sup> Bo made his own entry into politics following university graduation when he decided to join the CPC.<sup>14</sup> Bo rose to political significance after being

have received more than twenty million yuan in bribes, to have embezzled an additional five million yuan, and to have abused his power as secretary of the Chongqing Branch of the Chinese Communist Party in violation of several provisions of the Criminal Law of the People's Republic of China. *Id.* Bo was alleged specifically to have violated Clause 1 of Article 385, Article 386, Clause 1 of Article 382, the first entry of Clause 1 and Clause 2 of Article 383, and Clause 1 of Article 397 of the Criminal Law of the People's Republic of China. *Id.*

8. *Id.*

9. Bo Xilai Scandal: Timeline, *supra* note 3. Bo was sentenced to life in prison for bribery, fifteen years in prison for embezzlement, and seven years in prison for abuse of power. *Bo Xilai: The Charges and Penalties*, WALL ST. J., Sept. 22, 2013, <http://blogs.wsj.com/chinarealtime/2013/09/22/bo-xilai-the-charges/>. Authorities also confiscated one million yuan from Bo. *Id.*

10. *Bo Xilai appeals against guilty verdict and life imprisonment*, THE GUARDIAN, Sept. 24, 2013, <http://www.theguardian.com/world/2013/sep/24/chinese-politician-bo-xilai-appeals-guilty-verdict>.

11. Bo Xilai Scandal: Timeline, *supra* note 3.

12. *Id.* Bo raised eleven issues on appeal including that his confession used at trial was coerced. An Baijie, *Court Upholds Verdict on Bo Xilai*, CHINA DAILY, Oct. 26, 2013, [http://usa.chinadaily.com.cn/china/2013-10/26/content\\_17059678.htm](http://usa.chinadaily.com.cn/china/2013-10/26/content_17059678.htm). The Shandong Higher People's court rejected Bo's appeal after finding that "the evidence was substantial and sufficient and legitimate trial procedures were followed." *Id.* Bo maintains the right to submit a complaint to the Supreme People's Court in Beijing, though the Court is unlikely to follow through with such a complaint and order a new trial. *Chinese court rejects Bo Xilai appeal and upholds life sentence*, BBC, Oct. 25, 2013, <http://www.bbc.co.uk/news/world-asia-china-24652525>. A majority of complaints sent to the Supreme People's Court are rejected and do not result in another trial. *Id.*

13. Joseph Kahn, *Bo Yibo, leader who helped reshape China's economy, dies*, N.Y. TIMES, Jan. 16, 2007, <http://www.nytimes.com/2007/01/16/world/asia/16iht-obits.4228059.html>. Bo Yibo was one of the Eight Immortals, a group of senior Communist Party leaders who steered China through a politically volatile shift from Maoism to today's market-oriented economic boom." *Id.* Although a proponent of economic reform, Bo Yibo was also a force for political conservatism. *Id.* Bo Yibo supported the purge of Hu Yaobang, a prominent party official who advocated for political reform, and defended the decision of Deng Xiaoping to use force in suppressing pro-democracy protestors at Tiananmen Square in 1989. *Id.* As his power waned, Bo Yibo allegedly shifted his attention to "cut[ting] political deals to help his son ascend the [CPC party] hierarchy." *Id.*

14. *Profile: Bo Xilai*, BBC, Sept. 21, 2013, <http://www.bbc.co.uk/news/world-asia-china-19709555>. Bo joined the party in 1980 while earning a master's degree at the Chinese Academy of Social Sciences. *Id.* Following graduation, Bo worked at a research institute in the CPC Politburo

appointed mayor of the city of Dalian and turning the city into a major metropolis.<sup>15</sup> Bo was later appointed governor of Liaoning province and eventually became China's Commerce Minister.<sup>16</sup> In 2007, Bo was given a seat on the Politburo and was seen by many as having ambitions of being appointed to the Politburo Standing Committee.<sup>17</sup> Bo's ambitions were temporarily cut short when he was appointed party secretary of Chongqing in the same year.<sup>18</sup>

As party chief of Chongqing, Bo instituted a unique style of governance that became known as the Chongqing Model.<sup>19</sup> On an economic front, Bo used state resources to stimulate economic growth.<sup>20</sup>

Secretariat and served as a staff member at the General Office of the CPC Central Committee before being appointed to head a small county in Liaoning Province. *See generally* Cheng Li, *China's Northeast: From Largest Rust Belt to Fourth Economic Engine?* BROOKINGS INSTITUTE 9 (2014), [http://media.hoover.org/sites/default/files/documents/clm9\\_lc.pdf](http://media.hoover.org/sites/default/files/documents/clm9_lc.pdf). Bo would go on to hold several positions in the local government of Dalian city in Liaoning province before finally being appointed mayor of Dalian in 1993. *China Vitae: Biography of Bo Xilai*, CHINA VITAE, [http://www.chinavitae.com/biography/Bo\\_Xilai/career](http://www.chinavitae.com/biography/Bo_Xilai/career) (last visited Feb. 16, 2014).

15. *Profile: Bo Xilai*, *supra* note 14. Bo's initial rise through the party hierarchy was complicated by the fact that Bo Yibo had been purged from senior posts during the Cultural Revolution, and Bo himself may have been active in the *liaodong*, an infamous Red Guard organization, during the Cultural Revolution. *Id.*; *Li*, *supra* note 14, at 9. The political position of the Bo family changed as Bo's father regained political influence in the 1980s. *Profile: Bo Xilai*, *supra* note 14; *See supra* note 13 for a fuller description of Bo Yibo's role in the Communist Party.

16. *Profile: Bo Xilai*, *supra* note 14.

17. *Id.* The activist measures of different Bo administrations were seen by many as overt attempts to lobby higher authorities for promotion. Describing Bo's Chongqing Tenure, one commentator observed, "[n]ever has the country witnessed such extraordinarily open political lobbying by a Politburo member as that being engaged in by Chongqing Party Secretary Bo Xilai, whose aggressive self-promotion campaign is known for its two idiosyncratic initiatives: 'Striking black triads and singing red songs.'" Cheng Li, *China's Midterm Jockeying: Gearing Up for 2012*, BROOKINGS INSTITUTE, <http://media.hoover.org/sites/default/files/documents/CLM35CL.pdf> (last visited Feb. 16, 2014).

18. *Profile: Bo Xilai*, *supra* note 14. Bo's political fortunes likely turned when Bo Yibo passed away in 2007. *Id.*

19. *Id.* One commentator describes the innovation of the Chongqing model by observing:

The debate in China is usually framed as a choice between export-led investment and consumption, or state and people. But in Chongqing, the municipal government appears to have found a third way by deploying public policy and public funds to improve people's quality of life. This unorthodox model did not encourage individual consumption at the cost of investment, but rather used state resources to stimulate collective consumption. The model focuses on funding investment in areas where living standards could be immediately improved.

Kevin Lu, *The Chongqing Model Worked*, FOREIGN POLICY, Aug. 8, 2012, [http://www.foreignpolicy.com/articles/2012/08/08/the\\_chongqing\\_model\\_worked](http://www.foreignpolicy.com/articles/2012/08/08/the_chongqing_model_worked).

20. Lu, *supra* note 19. State-owned enterprises accounted for more than ninety percent of total assets and eighty-five percent of revenues in 2011. *Id.* This market dominance has led state-owned enterprises to have strong financial success. *Id.* State-owned banks, for example, posted record profits of \$161 billion dollars in 2011. *Id.* The Chongqing model under Bo was notable for drawing the profits of these state owned enterprises back into local government, which were then used for investment in infrastructure and social programs. *Id.* Local state-owned enterprises in Chongqing contributed fifteen

Bo invested money in public infrastructure and public housing projects while courting foreign investment.<sup>21</sup> Under Bo's leadership, Chongqing developed rapidly.<sup>22</sup> Bo's policies also conferred significant benefits on China's working poor.<sup>23</sup>

On a social front, Bo was known for waging an aggressive war against organized crime called the "smash black" campaign.<sup>24</sup> Although this campaign garnered the respect of many Chinese citizens, it aroused the concerns of some who accused the police of torture and other legal violations.<sup>25</sup> Bo was also known for a campaign urging for a return to

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to twenty percent of their profits to the government during Bo's governance, the highest rate of any city in China. *Id.* Chongqing Mayor Huang Qifan has sought to raise that rate to thirty percent by 2015. *Id.*

21. *Id.* Not all projects initiated during the Bo government were universally acclaimed. One particularly controversial project was a 100 million yuan project to remove fig trees and replace them with ginkgo trees. Wang Fan, *Taxpayer Money Squandered on 'Forest Cities'*, CHINA NEWS SERVICE, June 18, 2012, <http://www.ecns.cn/2012/06-18/17551.shtml>. Several of the ginkgo trees reportedly died or had to be replaced after their initial installation. *Id.* The Chongqing project is not unique as many Chinese cities vie for the official designation of "forest cities." *Id.* One scholar characterized the reforestation efforts as absurd, noting:

China's land resources are limited, and it is a colossal waste to transform farmland and wetlands into greenbelts and forests, because it will damage the ecological balance. Moreover, there are differences in geographical conditions and climates across the country, but the standards for national garden cities or forest cities impose uniformity in an unscientific way.

*Id.*

22. Lu, *supra* note 19. Chongqing's GDP grew during Bo's tenure at an average rate of 15.8%, a rate significantly higher than the 10.5% rate for China as a whole. *Id.* One writer has observed that "[u]ntil the late 1990s, Chongqing was as an economic backwater . . . It was the policy innovations under the administration Bo, the party secretary, and Mayor Huang Qifan that fundamentally transformed the city." *Id.*

23. Over thirteen million square meters of public housing were built by 2011 (with plans for an additional 40 million square meters to be built) and over three million *hukous* issued to rural migrant workers during Bo's tenure. *Id.* The *hukou* system is a form of household registration that ties Chinese citizens to either urban or rural locations and limits their access to basic governmental services, such as health care, education, and social security, to the location associated with their *hukou*. Bob David & Tom Orlik, *China Seeks to Give Migrants Perks of City Life*, WALL ST. J., Mar. 5, 2013, <http://online.wsj.com/article/SB10001424127887324178904578341801930539778.html>. The system has largely existed to limit internal migration. *Id.* Although migrants who move to cities not associated with their *hukou* face significant discrimination, the higher wages of many major Chinese cities still entice migration. *Id.* Around 200 million migrant workers do not have *hukous* to live in the city in which they work. *Id.*

24. Sharon LaFraniere & Jonathan Ansfield, *Crime Crackdown Adds to Scandal Surrounding Chinese Official*, N.Y. TIMES, Mar. 26, 2012, [http://www.nytimes.com/2012/03/27/world/asia/bo-xilais-china-crime-crackdown-adds-to-scandal.html?\\_r=1&hpw](http://www.nytimes.com/2012/03/27/world/asia/bo-xilais-china-crime-crackdown-adds-to-scandal.html?_r=1&hpw). As part of the smash black campaign, Chongqing police arrested nearly 5,000 individuals accused of supporting organized crime and executed thirteen individuals. *Id.* In one notable case, Chongqing's top justice official was found to have buried three million dollars beneath a fish pond and was subsequently executed. *Id.*

25. *Id.* A number of criticisms have been leveled at the strike black campaign, including that it involved "framing victims, extracting confessions through torture, extorting business empires and visiting retribution on the political rivals of Mr. Bo and his friends while protecting those with better

Maoist values, including the public singing of “red songs.”<sup>26</sup> Bo’s style of governance was championed by many on the Chinese political left and was seen by some commentators as an alternative to the more free market-oriented Guangdong model of governance.<sup>27</sup>

Throughout Bo’s tenure, and until today, China has been confronted by the problem of endemic corruption. The exact causes and extent of corruption have been debated, though most estimates suggest that corruption is fairly widespread.<sup>28</sup> For example, between 1979 and 2000, some 700,000 cases were filed for investigation by criminal prosecutors; this number likely underrepresents the extent of official corruption.<sup>29</sup> Bo

connections.” *Id.* In one notable instance, Li Zhuang, a defense lawyer, was sentenced to an 18-month prison sentence after the tortured defendant he represented alleged Li induced him to commit perjury. *Id.* In the wake of Bo Xilai’s fall, several victims of Bo’s purges have been compensated by the Chinese government, though many still remain imprisoned. *China pays back millions of pounds to Bo Xilai’s victims-but keeps them in jail*, THE TELEGRAPH, Nov. 18, 2013, <http://www.telegraph.co.uk/news/worldnews/asia/china/10457357/China-pays-back-millions-of-pounds-to-Bo-Xilais-victims-but-keeps-them-in-jail.html>.

26. Profile: Bo Xilai, *supra* note 14. The “Red Culture Movement,” as it was known, involved city officials pushing a number of initiatives to remind citizens of China’s Maoist past. Tania Branigan, *Red Songs Ring Out in Chinese City’s New Cultural Revolution*, THE GUARDIAN, Apr. 22, 2011, <http://www.theguardian.com/world/2011/apr/22/red-songs-chinese-cultural-revolution>. As part of the movement, officials ordered Chongqing television stations to drop popular soap operas and sitcoms in favor of classic dramas and red song shows. *Id.* Additionally, urban students were sent to work in the countryside, and Bo himself reportedly sent text messages to associates containing Maoist passages. *Id.*

27. *Governing China: The Guangdong Model*, THE ECONOMIST, Nov. 26, 2011, <http://www.economist.com/node/21540285>. The Guangdong Model, championed by Bo’s political rival and former Communist Party Secretary of Guangdong, Wang Yang, tends to place a greater emphasis on private enterprise, political openness, and a greater role for civil society organizations. *Id.* The Guangdong model, like the Chongqing model, has been met with criticism. *Id.* Some have alleged that Guangdong, under Wang, struggled to incorporate rural migrants into the city. *Id.* Protests in Guangdong are fairly common, with one notable riot in Dadun village having reached such a point that authorities reportedly offered a 10,000 yuan bounty to anyone who turned in another person associated with the incident. *Id.* Furthermore, the limitations of political participation in Guangdong have also been criticized given the limited capacity of locals to vote for local candidates. *Id.*

28. MELANIE MANION, CORRUPTION BY DESIGN: BUILDING CLEAN GOVERNMENT IN MAINLAND CHINA AND HONG KONG 85–93 (2004). The causes of Chinese corruption have been debated in academia and elsewhere. For example, Manion, without attributing China’s current battles with corruption exclusively to post-Mao reforms, argues corruption “is the unintended consequence of the policies of reform, mainly economic reform, adopted by communist party leaders in the 1980s and 1990s.” *Id.* at 93. For an example of a more organizational approach to corruption, see XIAOBO LÜ, CADRES AND CORRUPTION: THE ORGANIZATIONAL INVOLUTION OF THE CHINESE COMMUNIST PARTY (2000). Most analysts argue that corruption is fairly widespread, with one prominent estimate noting that around thirty to forty billion dollars in state revenue, roughly four percent of China’s GDP, was lost to corruption in the latter half of the 1990s. Manion, *supra*, at 86.

29. Manion, *supra* note 28, at 87. Seven hundred thousand represents only the number of cases filed for investigation. *Id.* This figure likely underrepresents the extent of official corruption for a few reasons. First, much corruption goes unreported due to various factors such as ignorance and fear of retaliation. *Id.* Second, these figures only account for criminally-investigated corruption and do not take into account cases investigated by CPC agencies and punished with disciplinary action. *Id.* at 89.

Xilai was, like many Chinese politicians, complicit in corruption. Bo reportedly took over twenty million yuan<sup>30</sup> in bribes throughout his career.<sup>31</sup> Many of these bribes were paid by an entrepreneur named Xu Ming, who reportedly went so far as to buy the Bo family a \$3.5 million villa on the French Riviera in order to garner their favor.<sup>32</sup>

Although Bo's involvement in corruption would eventually serve as the basis for the charges leveled against him, Bo was not officially removed from power until the scandal that erupted when Chongqing's police chief, Wang Lijun, fled to the United States Consulate in Chongqing in February of 2012 seeking asylum.<sup>33</sup> Wang reportedly had information linking Bo's wife, Gu Kailai, to the murder of a British businessman named Neil Heywood.<sup>34</sup> Heywood was initially believed to have died of alcohol poisoning, but had actually been poisoned by Gu Kailai after Heywood made threatening remarks towards Ms. Gu's son.<sup>35</sup> In the series of events that followed, Bo was purged from the Communist Party and indicted on charges pertaining to Heywood's murder and official corruption.<sup>36</sup> Although Mr. Bo's fall was precipitated by the Wang Lijun incident, some analysts have suggested that Bo's fall may have been initiated in part as a way of securing a stable leadership transition for China's top leaders.<sup>37</sup> Several top Chinese politicians, including Communist Party leader Hu Jintao, were replaced at the 18th National Congress of the Communist

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Finally, many government actions which violate government regulations are treated as improprieties or irregularities, rather than crimes, and thus go unreported. *Id.* at 90.

30. Roughly \$3.25 million dollars. *XE Currency Converter*, XE.COM <http://www.xe.com/currencyconverter/convert/?Amount=20000000&From=CNY&To=USD>.

31. Trial of Bo Xilai: Evidence, Charges and Defense, *supra* note 7.

32. David Barboza, *China Boss's Fall Puts Focus on a Business Ally*, N.Y. TIMES, Aug. 21, 2013, [http://www.nytimes.com/2013/08/22/world/asia/china-bosss-fall-puts-focus-on-business-ally.html?\\_r=0](http://www.nytimes.com/2013/08/22/world/asia/china-bosss-fall-puts-focus-on-business-ally.html?_r=0). Relationships such as the one formed between Xu Ming and Bo Xilai are not atypical in China. For example, Xu Ming also had personal relationships with members of former Premier Wen Jiabao's family and engaged in business ventures with several members of Wen's family. *Id.*

33. Profile: Bo Xilai, *supra* note 14.

34. *Id.*

35. Andrew Jacobs, *China Defers Death Penalty for Gu Kailai*, N.Y. TIMES, Aug. 20, 2012, <http://www.nytimes.com/2012/08/21/world/asia/china-defers-death-penalty-for-gu-kailai.html>. After receiving a threatening email from Heywood, Gu invited Heywood to a hotel where she got him drunk by providing him whiskey and tea. *Id.* After Heywood began to vomit, Gu and an associate dripped poison into Heywood's mouth. *Id.* Gu then scattered pills around the room to give the appearance Heywood suffered a drug overdose. *Id.* After discovering the Heywood body, police quickly cremated it and declared the death the result of excessive drinking. *Id.*

36. Trial of Bo Xilai: Evidence, Charges and Defense, *supra* note 7.

37. See, e.g., Tania Branigan, *Bo Xilai, The Insider Brought Down by his Tendency to Break Rules*, THE GUARDIAN, Sept. 21, 2013, <http://www.theguardian.com/world/2013/sep/22/bo-xilai-insider-break-rules> ("Bo's tactics were, perhaps, even more alarming to those at the top of the party, who had spent the post-Mao years seeking to operate by consensus and ensure that a new strongman could not emerge by appealing to the masses over the heads of his peers").



Party.<sup>38</sup> Some saw Bo's self-aggrandizing nature as a potential threat to the transition from Hu Jintao to current president Xi Jinping.<sup>39</sup> Alice Miller has described Bo's fall at that time as the "remov[al of] an irritant to the top leadership at an important moment of transition."<sup>40</sup>

### III. OVERVIEW OF THE RULE OF LAW AND ITS POSSIBLE MEANINGS

The term "rule of law" is often used in both academic and popular discussions, but lacks a commonly accepted meaning.<sup>41</sup> A basic distinction can be drawn between the concepts of rule of man, rule of law, and rule by law.<sup>42</sup> Rule of law may be seen as a system in which the "actions of government authorities are . . . subject to the control of the written law."<sup>43</sup> Rule of man is "a system in which government authorities sit outside the control of the law, and . . . govern . . . through [their own] discretion."<sup>44</sup>

38. Jason Ng, *Changing of the Guards*, S. CHINA MORNING POST, Nov. 13, 2012, <http://www.scmp.com/comment/blogs/article/1088982/changing-guards>. The National Congress is a group of 2270 delegates of the Communist Party who meet every five years to elect and promote new leaders. *Id.* The National Congress elects the Central Committee who in turn elects the Politburo. *Id.* The Politburo elects the Politburo Standing Committee, which is effectively China's highest executive authority. *Id.* The 18th National Congress was notable for seeing the promotion of Xi Jinping, who replaced Hu Jintao, to the position of Party leader. *Id.*

39. Branigan, *supra* note 37.

Bo was obviously a powerful advocate for whatever he was advocating; he was charismatic and was very definitely—in the post-Deng Xiaoping era—behaving contrary to the normal way . . . I think it's quite possible that Bo Xilai would have taken advantage of any splits in politburo standing committee views to edge Xi aside.

*Id.* Notably, in the aftermath of Bo's fall, Zhou Yongkang, a former member of the Politburo Standing Committee and supporter of Bo, was put under investigation for corruption. *China Focusing Graft Inquiry on Ex-Official*, N.Y. TIMES, Dec. 15, 2013, <http://www.nytimes.com/2013/12/16/world/asia/china-presses-corruption-inquiry-of-powerful-former-security-official.html?pagewanted=1>. Such a move is fairly unprecedented and potentially indicative of a larger purge of potential dissenters by the new Xi administration. *Id.*

40. Alice Miller, *The Bo Xilai Affair in Central Leadership Politics* at 1, <http://media.hoover.org/sites/default/files/documents/CLM38AM.pdf> (last visited Feb. 16, 2014). Miller argues that Bo's fall was essentially political and that the charges against Bo were the result of the party using legal processes to expel a high ranking and potentially politically dangerous party member. *Id.* Miller compares Bo's case to the cases of Chen Liangyu, former Shanghai party boss, and Chen Xitong, former Beijing party boss, to conclude that Bo's case was just another in a stream of cases in which the party has used standard party procedures and legal mechanisms to expel unfavorable elements. *Id.* at 5.

41. See, e.g., JOHN HEAD, CHINA'S LEGAL SOUL 107 (2009) ("Even a quick perusal of literature relating to the rule of law reveals a smorgasbord of formulations").

42. *Id.* at 110-11. The basic distinctions and relative merits of the rule of law (*fazhi*) as opposed to the rule of man (*renzhi*) were debated by Chinese philosophers as far back as two millennia ago. *Id.*

43. HEAD, *supra* note 41, at 113.

44. *Id.*

Rule by law represents a hybrid of the two systems wherein government officials apply rules but are not themselves bound by such rules.<sup>45</sup>

One popular way of conceiving of rule of law as a concept uses a framework built on the writings of Randall Peerenboom and Lon Fuller.<sup>46</sup> In *The Morality of Law*, Fuller argues that, for any legal system to be properly considered a legal system, the system must adhere to seven basic principles of legality: (1) the rules must be expressed in general terms, (2) the rules must be publicly promulgated, (3) the rules must be (for the most part) prospective in effect, (4) the rules must be expressed in understandable terms, (5) the rules must be consistent with one another, (6) the rules must not require conduct beyond the powers of the affected parties, and (7) the rules must be administered in a manner consistent with their wording.<sup>47</sup>

Peerenboom's work, building on Fuller's principles of legality, distinguishes between thick and thin conceptions of the rule of law.<sup>48</sup> According to Peerenboom, a thin conception of the rule of law "stresses the formal or instrumental aspects of rule of law—those features that any legal system allegedly must possess to function effectively as a system of laws."<sup>49</sup> In contrast, thick conceptions of the rule of law "begin with the basic elements of a thin conception but then incorporate elements of

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45. *Id.* at 113–14. Rule by law has also been described as instrumentalism. Pitman Potter elaborates on the concept of instrumentalism with reference to China by noting:

The Chinese government's approach to law is fundamentally instrumentalist. This means that laws and regulations are intended to be instruments of policy enforcement. Legislative and regulatory enactments are not intended as expressions of immutable general norms that apply consistently in a variety of human endeavors, and neither are they constrained by such norms. Rather, laws and regulations are enacted explicitly to achieve the immediate policy objectives of the regime. Law is not a limit on state power; rather, it is a mechanism by which state power is exercised, as the legal forms and institutions that comprise the Chinese legal system are established and operate to protect the Party/state's political power.

PITMAN POTTER, *THE CHINESE LEGAL SYSTEM: GLOBALIZATION AND LOCAL LEGAL CULTURE* 10 (2001).

46. *See, e.g.*, HEAD, *supra* note 41, at 129 ("I have quoted from Peerenboom at length because I find that his conceptual framework offers a powerful way of organizing our thoughts on the rule of law in China").

47. LON FULLER, *THE MORALITY OF LAW* 39 (1969). Such basic principles of legality are necessary according to Fuller because, without such principles, law cannot effectively guide human behavior. *Id.* Fuller observes:

Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible, or was contradicted by another rule of the same system, or commanded the impossible, or changed every minute.

*Id.* According to Fuller, "a total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all." *Id.*

48. RANDALL PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW* 3 (2002).

49. *Id.*

political morality such as particular economic arrangements (free-market capitalism, central planning, etc.), forms of government (democratic, single party socialism, etc.), or conceptions of human rights (liberal, communitarian, collectivist, ‘Asian values,’ etc.).”<sup>50</sup>

Putting the frameworks of Peerenboom and Fuller together, it may be said that rule of law, at a minimum, “refers to a system in which law is able to impose meaningful restraints on the state and individual members of the ruling elite.”<sup>51</sup> The laws in such a system may have the general characteristics outlined by Fuller as being “general, public, prospective, clear, consistent, capable of being followed, stable, and enforced.”<sup>52</sup>

#### IV. CHINA AND THE RULE OF LAW

The debate over the applicability of the rule of law to China is neither new nor Western in origin.<sup>53</sup> In the modern context, there has been significant academic debate about what form of the rule of law, if any, the current Chinese government aspires to implement.<sup>54</sup> A basic pledge to adhere to the rule of law is found in Amendment 3 of China’s Constitution.<sup>55</sup> This provision, although only implemented in 1999, has ideological precedents in the actions of earlier Communist Party officials.<sup>56</sup> For example, Deng Xiaoping once remarked, “there must be

50. *Id.*

51. Randall Peerenboom, *The X-Files: Past and Present Portrayals of China’s Alien “Legal System”*, 2 WASH. U. GLOBAL STUD. L. REV. 37, 58 (2003).

52. Peerenboom, *supra* note 48, at 3. This general sketch of what a thin rule of law might look like is not authoritative but is rather one in which there is some common ground. *Id.* “Although proponents of thin interpretations of rule of law define it in slightly different ways, there is considerable common ground, with many building on or modifying Lon Fuller’s influential account.” *Id.*

53. See Karen Turner et al., *The Limits of the Rule of Law in China* vii-xii (2000). As early as the Warring States period, different Chinese philosophical schools debated the merits of the rule of law as opposed to the rule of man. *Id.* at vii. For example, Legalist philosophers argued for strict legal procedures and hoped that, through strict application of the laws, official abuses could be curbed and uniform results could be produced in the administration of justice. *Id.* at viii. In contrast, Confucian philosophers argued that law was only one norm and that, when law conflicted with higher norms, law should not be adhered to. *Id.* Confucian reasoning later came to dominate in China. *Id.* at viii. Despite the enduring legacy of Confucianism, debates over the validity of the rule of law became a hot issue in Chinese academia again with the importation of the Western term and China’s commencement of economic reforms in the late 1970s. Peerenboom, *supra* note 48, at 1.

54. See, e.g., Head, *supra* note 41, at 147 (“[D]isagreements also exists as to just what version of a ‘thick’ rule of law, if any, China aspires to today”).

55. *Id.*

56. en Li, *Legal Reform Versus the Power of the Party and State in the People’s Republic of China: Rule of Law or Rule by Law?* 21–29 (2008). Communist Party leaders as far back as Deng Xiaoping expressed thinking on legal issues that reflects rule of law concerns. *Id.* at 21. Deng believed law was something that could help curb official abuse and strengthen economic reform. *Id.* at 22–23.

laws for people to follow, these laws must be observed, their enforcement must be strict and law breakers must be dealt with.”<sup>57</sup> Many commentators have asserted, based on these statements as well as similar statements, that the Chinese government at least strives to obtain a thin version of the rule of law, which does not substantially limit party power.<sup>58</sup>

The notion that China may, at least in practice, be moving towards some thin version of the rule of law is supported by some of the significant legal developments China has made since the late 1970s. China has seen a significant increase in the number of laws drafted since the 1970s.<sup>59</sup> This increase in the number of laws has been accompanied by increases in both litigation and the number of lawyers registered to practice in China.<sup>60</sup> China's movement towards some notion of the rule of law is not without challenge. For example, senior party members are often subject to party discipline rather than legal action when they commit wrongdoing.<sup>61</sup> Nonetheless, these broad developments suggest that China may be making progress in establishing a country under some form of the rule of law.<sup>62</sup>

While most commentators suggest that the Chinese government does strive to obtain at least some “thin” version of the rule of law, there is

However, Deng also primarily saw law “as a means to regulari[z]e the state and government and society in order to prevent something like the Cultural Revolution from repeating.” *Id.* at 23. Jiang Zemin built on Deng's basic formulations while arguing that Western liberal democratic principles, such as the separation of powers and multiparty politics, are incompatible with China's conception of the rule of law. *Id.* at 24–27. Hu Jintao's regime would also later build on rule of law principles in order to promote “build[ing] a harmonious society.” *Id.* at 28–29.

57. *Communique of the Third Plenary Session of the 11th CPC Central Committee*, Beijing Review, Oct. 10, 2008, [http://www.bjreview.com.cn/special/third\\_plenum\\_17thcpc/txt/2008-10/10/content\\_156226\\_4.htm](http://www.bjreview.com.cn/special/third_plenum_17thcpc/txt/2008-10/10/content_156226_4.htm).

58. *See, e.g.*, Head, *supra* note 41, at 143 (“[T]here appears to be little consensus in terms of aspirations about rule of law in China, beyond the aim to achieve the rule of law in its ‘thin’ form”).

59. “Between 1976 and 1998, the National People's Congress . . . and its Standing Committee . . . passed more than 337 laws,” while local governments passed more than 6,000 regulations. Peerenboom, *supra* note 48, at 6. This number stands in stark contrast to the 134 laws that were passed between 1949 and 1978. *Id.* “[O]f the 134 laws passed between 1949 and 1978, 111 were subsequently declared invalid” and many others were amended beginning in the late 1970s. *Id.*

60. China currently has over 200,000 lawyers and more than 17,000 registered law firms. *Number of China's Licensed Lawyers Reaches 200,000*, People's Daily, Oct. 19, 2011, <http://english.peopledaily.com.cn/90882/7620752.html>. This stands in contrast to the only 5,500 lawyers and 1,465 registered law firms that existed in 1981. Peerenboom, *supra* note 48, at 7. Litigation was virtually non-existent prior to 1979. *Id.* China has since reported having handled nearly sixteen million cases between 2006 and 2010. *Number of China's Licensed Lawyers Reaches 200,000*, *supra*.

61. Peerenboom, *supra* note 48, at 8. *See infra* notes 95–98 for a discussion of this system, known as *shuanggui*, and some of its criticisms.

62. This observation is not entirely without contention. *See, e.g.*, Peerenboom, *supra* note 48, at 8 (“While there is considerable evidence that China is in the midst of a transformation to some form of rule of law, there is at the same time some evidence to support the view that the legal system remains a type of rule by law rather than a form of rule of law”).

significant academic debate about what sort of “thick” version of the rule of law Chinese officials might be seeking to obtain.<sup>63</sup> Many commentators have asserted that the Chinese government does not aspire to a Western liberal democratic “thick” version of the rule of law that would ultimately incorporate, for example, free market capitalism, multiparty democracy, and a liberal interpretation of human rights.<sup>64</sup> Various theories have been advanced by Chinese and Western academics on what form of the rule of law the Chinese government actually does aspire to obtain.<sup>65</sup> One categorization of these theories has been put forward by Randall Peerenboom. He has outlined four conceptions of the rule of law which he sees as being in competition in contemporary China: Liberal Democratic, State Socialist, Neo-authoritarian, and Communitarian.<sup>66</sup> Ultimately, the direction of China’s march towards the rule of law remains a subject of debate.<sup>67</sup>

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63. Head, *supra* note 41, at 147.

64. *See, e.g., id.* at 143.

65. *See, e.g.,* Head, *supra* note 41, at 134–43. There is considerable diversity amongst Chinese academics on the issue of what China under a rule of law system should look like. Chinese scholars have debated the applicability of ideas like participatory democracy and international standards to the Chinese legal system without reaching any widespread agreement. *Id.* at 135, 140.

66. Peerenboom, *supra* note 51, at 95 n. 76. Peerenboom summarizes the four views as follows:

[T]he Liberal Democratic version of rule of law incorporates free market capitalism (subject to qualifications that would allow various degrees of “legitimate” government regulation of the market), multiparty democracy in which citizens may choose their representatives at all levels of government, and a liberal interpretation of human rights that gives priority to civil and political rights over economic, social, cultural, and collective or group rights.

Statist Socialists endorse a state-centered socialist rule of law defined by, *inter alia*, a socialist form of economy (which in today’s China means an increasingly market-based economy but one in which public ownership still plays a somewhat larger role than in other market economies); a non-democratic system in which the Party plays a leading role; and an interpretation of rights that emphasizes stability, collective rights over individual rights, and subsistence as the basic right rather than civil and political rights. . . . [T] here is some support for a democratic but non-liberal (New Confucian) Communitarian variant built on market capitalism, perhaps with a somewhat greater degree of government intervention than in the liberal version; some genuine form of multiparty democracy in which citizens choose their representatives at all levels of government; plus a communitarian or collectivist interpretation of rights that attaches relatively greater weight to the interests of the majority and collective rights as opposed to the civil and political rights of individuals.

Another variant is a Neo-authoritarian or Soft Authoritarian form of rule of law that, like the Communitarian version, rejects a liberal interpretation of rights, but unlike its Communitarian cousin, also rejects democracy. Whereas Communitarians adopt a genuine multiparty democracy in which citizens choose their representatives at all levels of government, Neo-authoritarians permit democracy only at lower levels of government or not at all.

*Id.*

67. *See supra* note 65.

## V. ELEMENTS OF THE CHINESE CRIMINAL PROCESS RELEVANT TO THE BO TRIAL

China is a civil law country<sup>68</sup> with one set of criminal laws and one set of criminal procedure laws that govern all Chinese citizens, as opposed to other countries where different laws prevail at different levels of government.<sup>69</sup> The Chinese criminal process operates on certain assumptions not found in the jurisprudence of other nations, specifically that of the United States.<sup>70</sup> For example, Chinese law generally assumes that “whether or not someone has committed a crime is a matter of ascertainable fact.”<sup>71</sup> The criminal process is thus a means to uncover necessary facts, and any rule that inhibits this process is generally discouraged.<sup>72</sup>

The Chinese criminal process itself is divided into three stages: the investigation, the prosecution, and the trial.<sup>73</sup> The investigation stage

68. Ira Belkin, *China's Criminal Justice System: A Work in Progress*, WASH. J. MOD. CHINA 61, 4 (2000), available at [http://www.law.yale.edu/documents/pdf/Chinas\\_Criminal\\_Justice\\_System.pdf](http://www.law.yale.edu/documents/pdf/Chinas_Criminal_Justice_System.pdf).

69. *Id.* at 2.

70. *Id.* at 9.

71. *Id.* This approach can be contrasted to the American jurisprudential approach which:

[A]cknowledges the inherent weakness of human beings to ascertain objective truth. The goal of our system is to create a set of rules that help us come as close as possible to determining the truth, but we acknowledge that some measure of uncertainty is inevitable. Thus, we have determined that all reasonable doubt should be resolved in favor of the accused.

*Id.* at 9–10.

72. *Id.* at 10. This approach can again be contrasted with the American approach, described as follows:

There is a difference between factual guilt or innocence and legal guilt or innocence. Someone may be factually guilty of an offense but, unless twelve jurors unanimously agree that the prosecution has proven guilt beyond a reasonable doubt, the defendant is not guilty under the law. In some cases, the evidence may seem as plain as a videotape, but we leave it to a properly instructed jury to decide what facts have been proven.

*Id.*

73. Peter Zhu, *China Criminal Procedure Overview*, CHINA LAWYER BLOG, Mar. 24, 2012, <http://www.chinalawblog.org/law-topics/criminal-defense/164-china-criminal-procedure-overview>.

This process is laid out specifically in Article 3 of China's Criminal Procedure Law, which specifies:

The public security organs shall be responsible for investigation, detention, execution of arrests and preliminary inquiry in criminal cases. The People's Procuratorates shall be responsible for procuratorial work, authorizing approval of arrests, conducting investigation and initiating public prosecution of cases directly accepted by the procuratorial organs. The People's Courts shall be responsible for adjudication. Except as otherwise provided by law, no other organs, organizations or individuals shall have the authority to exercise such powers.

Zhonghua Renmin Gongheguo Xingshi Susong Fa (中华人民共和国刑事诉讼法) [People's Republic of China Criminal Procedure Law] (promulgated by Nat'l People's Cong., July 1, 1979), effective Jan. 1, 1997, translated in Cong.-Exec. Commission on China, *Criminal Procedure Law of the People's Republic of China* (Feb. 26, 2006), <http://www.cecc.gov/resources/legal-provisions/criminal-procedure-law-of-the-peoples-republic-of-china> [hereinafter People's Republic of China Criminal Procedure Law].

begins after the police file a criminal report and consists of the police gathering evidence.<sup>74</sup> During the investigation stage, the police may make use of various methods to gather information including the detention and interrogation of criminal suspects.<sup>75</sup> Chinese law requires criminal suspects to answer questions truthfully during investigation and does not confer a right to remain silent.<sup>76</sup> The role of lawyers during the investigation stage is limited.<sup>77</sup>

The prosecution stage follows the investigation stage. During the prosecution stage, investigators submit evidence to the Procuratorate,<sup>78</sup> China's agency responsible for the prosecution of criminal cases,<sup>79</sup> which then determines "whether the facts and circumstances of the crime are clear, whether the evidence is reliable and sufficient[,] and whether the charge and the nature of the crime has been correctly determined."<sup>80</sup> During this stage, criminal defendants are entitled to a lawyer, although Chinese law ultimately limits the right of criminal defendants to lawyers if they are unable to afford one.<sup>81</sup>

74. Belkin, *supra* note 68, at 10–11. For a discussion of the mechanics of case filing, *see id.* Articles 89 and 90 of China's Criminal Procedure Law lay out the general process of the investigation stage. People's Republic of China Criminal Procedure Law, *supra* note 73, arts. 89–90. Article 89 provides that:

With respect to a criminal case which has been filed, the public security organ shall carry out investigation, collecting and obtaining evidence to prove the criminal suspect guilty or innocent or to prove the crime to be minor or grave. Active criminals or major suspects may be detained first according to law, and criminal suspects who meet the conditions for arrest shall be arrested according to law.

*Id.* at art. 89. Article 90 provides that "[a]fter investigation, the public security organ shall start preliminary inquiry into a case for which there is evidence that supports the facts of the crime, in order to verify the evidence which has been collected and obtained." *Id.* art. 90.

75. Belkin, *supra* note 68, at 11–12. The Chinese Criminal Procedure Law authorizes a number of coercive measures that enable police to restrain the freedom of action of a criminal suspect, including coercive summons, criminal detention, arrest, residential surveillance, and "taking a guarantee and awaiting trial." ELISA NESOSSI, CHINA'S PRE-TRIAL JUSTICE 48–49 (2012). For a fuller discussion of these methods, *see id.* at 45–59.

76. Belkin, *supra* note 68, at 16.

77. Zhu, *supra* note 73. During the investigation stage, lawyers may provide their clients "legal consultation, lodge petitions and complaints, and apply for bail on their clients [sic] behalf." *Id.*

78. *Id.* Article 136 of China's Criminal Procedure Law provides specifically that "[a]ll cases requiring initiation of a public prosecution shall be examined for decision by the People's Procuratorates." People's Republic of China Criminal Procedure Law, *supra* note 73, art. 136.

79. Belkin, *supra* note 68, at 2. The Procuratorate is one of five branches of the Chinese government and is responsible for prosecuting criminal cases, as well as holding other branches of government accountable. *Id.* The Procuratorate is organized as a hierarchy, with the Supreme People's Procuratorate at the top. *Id.* at 3. The Supreme People's Procuratorate acts as a policymaking body and also publishes non-binding interpretations of law. *Id.* at 3–4. For a fuller overview of the Procuratorate's function, *see id.* at 2–5.

80. People's Republic of China Criminal Procedure Law, *supra* note 73, art. 137(1).

81. Zhu, *supra* note 73.

Once a procurator decides that the appropriate burden of proof is met and initiates prosecution, the case goes to trial.<sup>82</sup> A case must go to trial, “even if the defendant has plead guilty.”<sup>83</sup> Pre-trial discovery is limited.<sup>84</sup> Trials are usually conducted before a panel of three decision makers who, after hearing all evidence presented, decide by a majority vote<sup>85</sup> whether “the facts of a case are clear, [and] the evidence is reliable and sufficient.”<sup>86</sup> Chinese courts have the right to subpoena witnesses to be questioned, although actual live testimony from witnesses is fairly rare.<sup>87</sup> Chinese courts may seek the opinion of other judicial officials.<sup>88</sup> Chinese judges may also adjourn a trial and conduct their own investigation into the case.<sup>89</sup>

Both the Chinese Constitution and Criminal Procedure Law confer various other rights on criminal defendants. All criminal defendants have

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82. *Id.* Article 141 of the Criminal Procedure Law provides specifically that:

When a People's Procuratorate considers that the facts of a criminal suspect's crime have been ascertained, that the evidence is reliable and sufficient and that criminal responsibility should be investigated according to law, it shall make a decision to initiate a prosecution and shall, in accordance with the provisions for trial jurisdiction, initiate a public prosecution in a People's Court.

People's Republic of China Criminal Procedure Law, *supra* note 73, art. 141.

83. Zhu, *supra* note 73.

84. BELKIN, *supra* note 68, at 18.

85. *Id.* at 19.

86. People's Republic of China Criminal Procedure Law, *supra* note 73, art. 162. The standard of proof in a criminal case is laid out in Article 162 of China's Criminal Procedure Law. *Id.* Article 162 provides that a judge may render the following verdicts in an initial case:

- (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;
- (2) If the defendant is found innocent in accordance with law, he shall be pronounced innocent accordingly;
- (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.

*Id.*

87. Zhu, *supra* note 73. Article 47 of China's Criminal Procedure Law specifically provides that:

The testimony of a witness may be used as a basis in deciding a case only after the witness has been questioned and cross-examined in the courtroom by both sides, that is, the public prosecutor and victim as well as the defendant and defenders, and after the testimonies of the witnesses on all sides have been heard and verified.

People's Republic of China Criminal Procedure Law, *supra* note 73, art. 47. However, as noted below, live testimony is not required by the current criminal procedure law, with the effect that live testimony is fairly rare in Chinese criminal trials. *See infra* notes 92–94 and accompanying text.

88. Belkin, *supra* note 68, at 21.

89. *Id.*



the right to be represented by a lawyer in a criminal proceeding.<sup>90</sup> If the accused does not call a lawyer, a court may choose to appoint one.<sup>91</sup> Article 125 of China's Constitution provides that all cases are to be heard in public.<sup>92</sup> Although all courts are theoretically open to the public, no uniform code exists to facilitate the observation of trials, and observance of trials is, in practice, fairly limited.<sup>93</sup> Finally, Chinese courts are supposed to exercise judicial power independently of outside influence.<sup>94</sup>

One of the more controversial aspects of China's criminal process is a system known as *shuanggui*. *Shuanggui* is a form of Party-based investigative detention.<sup>95</sup> Under this system, officials suspected of

90. People's Republic of China Criminal Procedure Law, *supra* note 73, at art. 32. Article 32 of China's Criminal Procedure Law provides that:

In addition to exercising the right to defend himself, a criminal suspect or a defendant may entrust one or two persons as his defenders. The following persons may be entrusted as defenders:

- (1) lawyers;
- (2) persons recommended by a public organization or the unit to which the criminal suspect or the defendant belongs; and
- (3) guardians or relatives and friends of the criminal suspect or the defendant.

Persons who are under criminal punishment or whose personal freedom is deprived of or restricted according to law shall not serve as defenders.

*Id.*

91. People's Republic of China Criminal Procedure Law, *supra* note 73, art. 34. Article 34 of the Criminal Procedure Law provides:

If a case is to be brought in court by a public prosecutor and the defendant involved has not entrusted anyone to be his defender due to financial difficulties or other reasons, the People's Court may designate a lawyer that is obligated to provide legal aid to serve as a defender.

If the defendant is blind, deaf or mute, or if he is a minor, and thus has not entrusted anyone to be his defender, the People's Court shall designate a lawyer that is obligated to provide legal aid to serve as a defender.

If there is the possibility that the defendant may be sentenced to death and yet he has not entrusted anyone to be his defender, the People's Court shall designate a lawyer that is obligated to provide legal aid to serve as a defender.

*Id.*

92. XIANFA Dec. 4, 1982, art. 125 (China). Article 125 of the Chinese Constitution provides that "[a]ll cases handled by the people's courts, except for those involving special circumstances as specified by law, shall be heard in public. The accused has the right of [defense]." *Id.*

93. Tong Zhiwei, *Institutionalize the Practice of Open Trial in the Case of Bo Xilai*, CHINA US FOCUS, Sept. 4, 2013, <http://www.chinausfocus.com/political-social-development/institutionalize-the-practice-of-open-trial-in-the-case-of-bo-xilai/>.

94. XIANFA Dec. 4, 1982, art. 126 (China). Article 126 of the Chinese Constitution provides that, "[t]he people's courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals." *Id.*

95. Donald Clarke, *The Bo Xilai Trial and China's 'Rule of Law': Same Old, Same Old*, THE ATLANTIC, Aug. 21, 2013, <http://www.theatlantic.com/china/archive/2013/08/the-bo-xilai-trial-and-chinas-rule-of-law-same-old-same-old/278868/>. *Shuanggui* is not the only system of involuntary detention China has employed. Until recently, Chinese officials made regular use of a process known as "reeducation through labor." Belkin, *supra* note 68, at 6. Reeducation through labor was an administrative process by which the police had discretion to send individuals to labor camps for up to

violating party rules are held in isolated locations and subjected to harsh interrogation methods with the goal of making them confess.<sup>96</sup> More than 880,000 party members were moved through the system between 2003 and 2008.<sup>97</sup> The system lacks any apparent legal basis, though proponents argue that it is a necessary anti-corruption tool.<sup>98</sup>

## VI. ASSESSING THE IMPORTANCE OF LAW TO THE BO TRIAL

Several aspects of the Bo Xilai trial merit positive attention from a rule of law perspective. During the trial, several prosecution witnesses appeared in court and were subjected to cross-examination by the defense.<sup>99</sup> Bo was also allowed to state that he wanted to retract a confession he made while in the *shuanggui* system, which is fairly unprecedented.<sup>100</sup> During the trial, edited court transcripts were posted on a prominent Chinese micro-blogging website.<sup>101</sup> This break from the practice of holding relatively opaque trials led one Chinese commentator to proclaim, “Bo Xilai’s trial has set a model for Chinese courts to hear

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three years, without first affording them any judicial process. *Id.* Faced with immense criticism, the Chinese Government began the process of eliminating the program in November of 2013. Hannah Beech, *China to Close Notorious Re-education Through-Labor Camps*, TIME, Nov. 16, 2012, <http://world.time.com/2013/11/16/china-to-close-notorious-re-education-through-labor-camps/>.

96. Andrew Jacobs, *Accused Chinese Party Members Face Harsh Discipline*, N.Y. TIMES, June 14, 2012, [http://www.nytimes.com/2012/06/15/world/asia/accused-chinese-party-members-face-harsh-discipline.html?pagewanted=1&\\_r=1](http://www.nytimes.com/2012/06/15/world/asia/accused-chinese-party-members-face-harsh-discipline.html?pagewanted=1&_r=1). Routine torture has been reported in *Shanggui* systems. *Id.* In one notable instance, a propaganda bureau official from Zhejiang Province was beaten and kept awake for twelve days until finally agreeing to the charges leveled against him. *Id.*

97. *Id.*

98. Routine torture has been reported in *Shanggui* systems. *Id.*

99. Edward Wong, *China Debates Effect of Trial’s Rare Transparency*, N.Y. TIMES, Sept. 2, 2013, <http://www.nytimes.com/2013/09/03/world/asia/china-debates-effect-on-law-of-bo-xilais-trial.html?pagewanted=all&R=3&>.

100. *Id.* The government has undertaken various measures to crackdown on the use of forced confessions. Nicholas Bequelin, *Dispatches: China Bans Confessions Obtained Under Torture (Again)*, HUMAN RIGHTS WATCH, Nov. 21, 2013, <http://www.hrw.org/news/2013/11/21/dispatches-china-bans-confessions-obtained-under-torture-again>. Most recently, the Supreme People’s Court banned “[t]he use of cold, hunger, drying, scorching, fatigue and other illegal methods to obtain confessions.” *Id.* However, there are still notable obstacles to challenging the use of forced confessions in court. Article 306 of China’s Criminal Law allows prosecutors to target defenders who “coerce[] the witness or entices him into changing his testimony in defiance of the facts or give false testimony.” PEOPLE’S REPUBLIC OF CHINA CRIMINAL LAW art. 306. This law means that lawyers can be prosecuted for challenging coerced confessions. Bequelin, *supra*.

101. Wong, *supra* note 99. The court’s postings were on Sina Weibo, a popular micro-blogging website. The court’s micro-blog can be found at <http://e.weibo.com/jinanzhongyuan>. Translated versions of the court’s micro-blog can be found at <http://www.bbc.co.uk/news/world-asia-china-23777038>.

cases in public.”<sup>102</sup> Additionally, the trial, though it lasted only four days, was longer than similar corruption trials.<sup>103</sup> It is also notable that Bo exercised his right to appeal, which is fairly unique in a country where authorities view appealing as “a brazen challenge to the state, an unnecessary drain on its resources and a condemnation of the police, prosecutors and judges who handled the case.”<sup>104</sup>

Finally, the Bo trial arguably represents a significant shift in the attitude of the Chinese government towards the rule of law.<sup>105</sup> Rebecca Liao asserted that “the Party is showing a subtle but hugely consequential shift in its mindset towards the ‘rule of law.’”<sup>106</sup> According to Liao, the Chinese have traditionally believed that the law’s main function is to “codify the right and just outcome.”<sup>107</sup> Liao asserts, though, that state-affiliated news sources have been consistent in affirming the adherence to and importance of procedure in Bo’s case.<sup>108</sup> This leads Liao to observe that, “if the Chinese government now views the law as something to be navigated and not simply ignored, then it has already overcome a significant ideological obstacle.”<sup>109</sup>

Conversely, there are several aspects of the Bo trial that merit negative attention. Bo was deprived of his choice of lawyer without any clear legal basis.<sup>110</sup> More significantly, Bo’s confession that came out during trial was

102. Tong, *supra* note 93. He Weifang, a law professor at Peking University, similarly observed that the degree of transparency was “unprecedented in terms of similar cases.” Nathan Gardels, *He Weifang: Bo Xilai Trial Was a Satire—But Advanced the Rule of Law in China*, HUFFINGTON POST, Aug. 28, 2013, [http://www.huffingtonpost.com/nathan-gardels/he-weifang-bo-xilai-trial\\_b\\_3829849.html](http://www.huffingtonpost.com/nathan-gardels/he-weifang-bo-xilai-trial_b_3829849.html). See *supra* notes 93–94 and accompanying text for further reference to the problems of judicial transparency in China.

103. WONG, *supra* note 99.

104. Jerome A. Cohen, *Jerome A. Cohen: For China’s Leaders, the Bo Xilai Problem Has Not Gone Away (SCMP)*, US-ASIA LAW INSTITUTE, Oct. 1, 2013, <http://usali.org/media-entities/jerome-a-cohen-for-chinas-leaders-the-bo-xilai-problem-has-not-gone-away-scmp/>. According to Cohen, appeal, under traditional Chinese communist thinking, “only further demonstrates the failure of an accused to atone for his guilt.” *Id.* Authorities often resort to various means to discourage the appeals process, including promising more lenient punishment to the accused if the accused chooses to forego appeal and threatening the accused and the accused’s family. *Id.* Neither Wang Lijun nor Gu Kailai attempted to appeal their sentences. *Id.*

105. See Rebecca Liao, *Why Bo Xilai’s Trial is a Victory for the Rule of Law in China*, THE ATLANTIC, Aug. 7, 2013, <http://www.theatlantic.com/china/archive/2013/08/why-bo-xilais-trial-is-a-victory-for-the-rule-of-law-in-china/278448/>.

106. *Id.*

107. *Id.* Liao cites Bo’s own crackdown on Chongqing’s gangs and his political opponents as an example of this phenomenon. *Id.*

108. *Id.* To support this proposition, Liao cites Xinhua’s declaration that Bo had “‘been informed of his legal rights and interviewed by prosecutors. His defending counsel [had] delivered its opinion.’” *Id.*

109. *Id.*

110. Clarke, *supra* note 95.

extracted during his time in the *shuanggui* system.<sup>111</sup> As addressed previously, the *shuanggui* system lacks any apparent legal basis and amounts, according to one commentator, to the “criminal offense of unlawful detention.”<sup>112</sup> Additionally, there seems to be a fairly broad consensus that Chinese leaders dictated in advance the procedure and outcome of the trial.<sup>113</sup>

Some commentators have contested the extent to which the Bo case really demonstrates a changing attitude of the Chinese government towards the rule of law.<sup>114</sup> Donald Clarke, reflecting on the Politburo’s September 28, 2012 decision to “transfer” Bo’s case to judicial organs, argues that the decision manifests hostility towards the rule of law.<sup>115</sup> According to Clarke, “[t]he very concept of ‘transferring’ a case to judicial organs implies that a case can be located elsewhere than in the judicial organs and outside of their jurisdiction until an external decision maker—here, the Party—decides to pass it on to them.”<sup>116</sup>

Finally, it is notable that there were several aspects of the trial that, though not explicitly illegal, were nonetheless less desirable than they could have been. Although court transcripts were regularly posted on the court’s micro-blog, admission to the trial itself was fairly restricted.<sup>117</sup> Additionally, it has been alleged that the judges and prosecutors at the trial did not fully investigate all relevant issues.<sup>118</sup> Another issue was that not

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111. Wong, *supra* note 99.

112. *Id.* See *supra* notes 95–98 and accompanying text for a discussion of *shuanggui*.

113. Clarke, *supra* note 95 (“Nobody believes that China’s top political leaders haven’t dictated the procedure and outcome of the trial. (Rebecca Liao’s piece seems to acknowledge this at the end by pointing to Xi’s ‘challenge of being China’s chief jurist.’)”).

114. *Id.*

115. *Id.* Clarke writes that “September 28, 2012 represents (approximately) the date *from which* the political leadership of China decided that statutory legal procedures should be followed. The corollary, of course, is that it represents the date *prior to which* the political leadership paid no attention to legal requirements.”

116. *Id.* This leads Clarke to the related conclusion that “the fact that the Party *could* change the law to legalize *shuanggui* but has never done so suggests a defiant declaration of its intent never to subject itself to legal constraints.” *Id.*

117. Alexis Lai, *Was Bo Xilai’s Trial in China Truly Transparent?*, CNN, Aug. 27, 2013, <http://www.cnn.com/2013/08/26/world/asia/china-bo-xilai-trial-transparency/>. Admission to the trial was restricted to “Bo’s family, government officials, and a handful of pre-approved journalists.” *Id.* Meanwhile, “foreign media were relegated to a hotel across the street.” *Id.* As observed previously, the Chinese Constitution guarantees a right to open trials. See *supra* note 92 and accompanying text. However, as also addressed, no uniform code currently exists to facilitate the observation of trials so it may not be explicitly illegal for government authorities to restrict access to the trial. See *supra* notes 93–94 and accompanying text.

118. Gardels, *supra* note 102. Professor He cites two instances wherein the prosecutor and judge did not fully investigate the facts as they should have. *Id.* In the first instance, an allegation was raised, which was not followed up on, that the falling out between Neil Heywood and the Bo family was related to a commission Heywood was allegedly entitled to for a project unrelated to the Bo family

all witnesses appeared in court, and the witnesses who did appear in court were all witnesses called by the prosecution.<sup>119</sup> Furthermore, none of the admitted written evidence was favorable to Bo.<sup>120</sup> It is also notable that the length of trial, though longer than similar trials,<sup>121</sup> was probably too short for a case as complex as Bo's case.<sup>122</sup>

#### VII. WHAT THE LEGAL PROCESS OF THE BO CASE MEANS FOR CHINA'S LARGER STRUGGLE WITH THE RULE OF LAW

Bo's case ultimately was not indicative of any large victory for the rule of law in China. Even viewing the procedures of the Bo trial optimistically, the case was likely an outlier in terms of Chinese criminal trials generally. Bo's situation is accurately characterized by one commentator, who wrote, "Given Mr. Bo's popularity among ordinary Chinese, which he bolstered by pushing neo-socialist policies in Chongqing, and his revolutionary family's standing within the party, leaders no doubt felt compelled to allow Mr. Bo his say, within narrow parameters."<sup>123</sup> The limited significance of Bo's case for China's larger rule of law struggle is evidenced by the procedure of Bo's trial and by other recent cases in which the Chinese government has manipulated the legal process to punish those perceived as political dissenters.

house in France. *Id.* According to Professor He, "[t]his is a tremendously important clue that may involve the Bo family's other financial crimes (what kind of a transaction could generate such an enormous amount in commission!), and may even involve the true motives behind Gu Kailai's murder of Neil Heywood." *Id.* In the second instance, Bo alleged an improper relationship existed between Gu Kailai and Wang Lijun but the court did not follow up on this revelation. *Id.*

119. *Id.* Notable witnesses that did appear included Wang Lijun, Xu Ming, and Wang Zhenggang, a former employee of Bo Xilai. Jerome A. Cohen, *Jerome A. Cohen: Bo Xilai's Trial Underlies Need for Cross-Examination in Court (SCMP)*, US-ASIA LAW INSTITUTE, Aug. 27, 2013, <http://usali.org/media-entities/jerome-a-cohen-bo-xilais-trial-underlines-need-for-cross-examination-in-court/>. A video was submitted in lieu of Gu Kailai's live testimony. *Id.*

120. Gardels, *supra* note 102.

121. *See supra* note 103.

122. Gardels, *supra* note 102 ("[C]ompared to the complexity of circumstances involved in this case, the duration of the entire trial is still too brief").

123. Wong, *supra* note 99. Wong notes that:

Legal scholars say the Bo trial is unlikely to be replicated wholesale across the justice system, even if the party leader, Xi Jinping, has pledged to bring down "tigers and flies" in an anti-corruption drive. Since the investigation into Mr. Bo, there have been notable inquiries into other so-called tigers accused of corruption . . . [b]ut none of those figures have a grip on the public imagination like Mr. Bo does, and their cases, if they went to trial, would not necessarily demand as many trappings of legal legitimacy.

*Id.*

Bo's case, as previously discussed, was legally problematic in a number of ways.<sup>124</sup> The most glaring issues are that Bo was deprived of his choice of lawyer in violation of positive law, and that Bo was put through the *shuanggui* system.<sup>125</sup> These practices violate several basic rule of law principles discussed previously, including the requirements that laws be enforced and publicly promulgated.<sup>126</sup> Although certain aspects of Bo's trial were lauded for allegedly providing Bo more of his statutory and constitutional rights, some of these features do not in fact suggest China has taken major positive steps towards adopting a rule of law system. For example, one of the most lauded aspects of the Bo trial was that trial transcripts were uploaded to the court's micro-blogging website.<sup>127</sup> Although such transparency is fairly rare for such a high profile trial, the right to transparent trials, as discussed previously, is enshrined in China's constitution.<sup>128</sup> By granting the public access to Bo's trial transcripts but not full access to the trial itself, the government was not in full compliance with its own constitutional requirements.<sup>129</sup> This practice again falls short of the basic rule of law requirement that laws be enforced or, at least, consistent.<sup>130</sup> Ultimately, the trial displays, at most, that the Chinese government has an ambivalent attitude towards the regular enforcement of law and legal procedures.

More significantly, even viewing the trial procedures in the Bo case in their most positive light, the trial was likely an outlier in Chinese criminal trials, as evidenced by other recent criminal trials in which the government displayed strong indifference towards legal norms. For example, Chen Kegui, the nephew of activist Chen Guangcheng,<sup>131</sup> was held in detention

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124. See *supra* notes 110–14 and accompanying text.

125. See *supra* notes 110–12 and accompanying text.

126. See *supra* notes 46–52 and accompanying text for more discussion on the basic requirements of a rule of law system.

127. See *supra* notes 101–03 and accompanying text.

128. See *supra* note 92 and accompanying text.

129. As noted previously, though, no system currently is in place to facilitate the observation of trials, so it may not be entirely accurate to characterize the lack of transparency as explicitly illegal. See *supra* note 117.

130. See *supra* notes 46–52 and accompanying text for more discussion on the basic requirements of a system that could be characterized as a rule of law system. As discussed previously, open trials are constitutionally required, though no formal system exists to facilitate the observation of trials. See *supra* note 117. Failure to abide by this constitutional mandate then may not be a problem of enforcement so much as it is a problem of an inconsistent legal process, namely that trials are constitutionally required to be open to the public but are, in practice, frequently closed to the public.

131. Chen Guangcheng is a self-taught lawyer who came to notoriety for “organizing young women who had been the victims of forced abortions and encouraging them to file suit against local officials.” Max Fisher, *Prominent Law Professor Disputes NYU ‘booted’ Chinese Dissident Chen Guangcheng*, WASH. POST, June 13, 2013, <http://www.washingtonpost.com/blogs/worldviews/wp/>

for several months before being put on trial in November 2012 for allegedly wounding three officials who broke into Kegui's house to retaliate for the escape of Chen Guangcheng.<sup>132</sup> Kegui was brought to trial with four hours notice, denied his choice of lawyer, prevented from introducing any witnesses in his own defense, and had subsequent efforts by his parents and lawyers to seek appeal met with threats of increased punishment and even death.<sup>133</sup> Kegui's trial raises basic rule of law concerns in that Kegui was seemingly not afforded all of the rights owed him under the law, and it is doubtful that the statute criminalizing Kegui's actions was generally intended to criminalize his behavior.<sup>134</sup>

Although Kegui's trial predates Bo's, recent criminal trials suggest rule of law protections remain an ideal, rather than a reality, for many criminal defendants.<sup>135</sup> For example, Xu Zhiyong, a prominent activist associated with the New Citizens Movement,<sup>136</sup> was held in detention and

2013/06/13/prominent-law-professor-disputes-nyu-booted-chinese-dissident-chen-guangcheng/. Chen was kept under house arrest for years in response to his activities before eventually escaping to the U.S. Embassy in Beijing. *Id.* Chen was eventually granted leave to study in the United States, and his family members reportedly suffered harassment in response to Chen's escape. *Id.*

132. Jerome A. Cohen, *Criminal Justice in China: From the Gang of Four to Bo Xilai*, HUMAN RIGHTS WATCH, July 25, 2013, <http://www.hrw.org/news/2013/07/25/criminal-justice-china-gang-four-bo-xilai>. Over thirty police and local officials broke into the farmhouse where Kegui and his family lived. *Id.* Kegui allegedly used a kitchen knife to ward off the attackers and wounded three. *Id.* Kegui was subsequently arrested and held in confinement from April 2012 until his trial began in November 2012. *Id.*

133. *Id.* After being arrested, Kegui's case was eventually turned over to the procuracy with the recommendation that he be indicted for the crime of "intentional wounding." *Id.* After several months, in which Kegui was denied the right to speak with his lawyer, Kegui was brought to trial on November 30. *Id.* Several of Kegui's family members were excluded from the trial on the grounds that they were "witnesses to the incident." *Id.* Kegui did not contest his guilt at trial and allegedly promised to both compensate the "victim" and to not appeal his conviction. *Id.* Kegui was later sentenced to three years and three months in prison. *Id.*

134. *See supra* notes 46–52 for discussion of general rule of law issues.

135. It must be noted that, although China faces particular challenges in improving its criminal justice system, not all criminal defendants in China are necessarily subject to the abuses this note focuses on. Jerome Cohen, for example, has observed that:

[T]here are many other instances in a system [like the Chinese criminal justice system] that processes roughly a million criminal cases a year that are dealt with in routine, unobjectionable fashion and that, apart from death penalty cases, often result in sentences far lighter than comparable cases in the highly-punitive American system.

Cohen, *supra* note 132.

136. The New Citizens Movement is a loose-knit association of Chinese political and social activists. *See* Chris Buckley, *Case Against Activist Xu Zhiyong to Focus on Public Protests*, N.Y. TIMES, Dec. 16, 2013, [http://sinosphere.blogs.nytimes.com/2013/12/16/case-against-activist-xu-zhiyong-to-focus-on-public-protests/?\\_r=0](http://sinosphere.blogs.nytimes.com/2013/12/16/case-against-activist-xu-zhiyong-to-focus-on-public-protests/?_r=0). Xu Zhiyong described the primary goal of the New Citizens' Movement as "a free China ruled by democracy and law, a just and happy civil society with 'freedom, righteousness, love' as the new national spirit." Mengyu Dong, *Xu Zhiyong: New Citizens' Movement*, CHINA DIGITAL TIMES, July 13, 2012, <http://chinadigitaltimes.net/2012/07/xu-zhiyong-new-citizens-movement/>. The group has drawn ire from state officials. *China Alarm Over "New Citizens" Activist*

subsequently indicted in 2013 for promoting greater financial transparency amongst Chinese officials.<sup>137</sup> Xu was recently sentenced to four years in prison after a trial that met criticism from legal experts and human rights advocates.<sup>138</sup> Xu's trial again demonstrates that the application of legal protections is subject to considerable variance.

More problematic than either case is the fact that, as one commentator observes, "there are thousands of criminal defendants in China whose cases, despite the internet and social media, never come to public attention, even though they suffer . . . arbitrary treatment from local Party, police and judicial officials."<sup>139</sup> This phenomenon and the aforementioned cases suggest that rule of law remains an ideal for many in China.

If Bo's case means anything for China's legal system, it is a model from which future reformers can strive to build. For example, Tong Zhiwei has suggested that the Bo case might be useful as a model to develop rules for open trials.<sup>140</sup> Tong suggests that China could now, with an eye towards the Bo trial, take legislative measures to implement a system ensuring "free attendance by the public as observers, freedom of media coverage, and total disclosure of information by courts."<sup>141</sup>

The Bo case may also highlight the importance of cross-examination as a trial technique going forward. Although cross-examination has been authorized under China's Criminal Procedure Law since 1996, live testimony is fairly rare, with witnesses appearing in fewer than five percent of criminal cases since 1996.<sup>142</sup> According to some commentary, the Bo case demonstrated the potential efficacy of cross-examination in

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*Movement*, MANILA TIMES, Dec. 6, 2013, <http://www.manilatimes.net/china-alarm-over-new-citizens-activist-movement/58364/>.

137. Andrew Jacobs, *Rights Advocate is Indicted in China Over Role in Campaign Against Corruption*, N.Y. TIMES, Dec. 13, 2013, [http://www.nytimes.com/2013/12/14/world/asia/prominent-rights-advocate-is-indicted-in-china.html?\\_r=0](http://www.nytimes.com/2013/12/14/world/asia/prominent-rights-advocate-is-indicted-in-china.html?_r=0). Xu was arrested for participating in street rallies calling on Chinese leaders to publicly disclose their wealth. *Id.*

138. Andrew Jacobs & Chris Buckley, *China Sentences Xu Zhiyong, Legal Activist, to 4 Years in Prison*, N.Y. TIMES, Jan. 26, 2013, [http://www.nytimes.com/2014/01/27/world/asia/china-sentences-xu-zhiyong-to-4-years-for-role-in-protests.html?\\_r=0](http://www.nytimes.com/2014/01/27/world/asia/china-sentences-xu-zhiyong-to-4-years-for-role-in-protests.html?_r=0). The trial has been criticized on the grounds that "[Xu's] lawyers were not allowed to cross-examine prosecution witnesses, whose testimony was submitted in writing only so they did not appear in court. Nor were the defense lawyers permitted to call in witnesses of their own." *Id.*

139. Cohen, *supra* note 132.

140. Tong, *supra* note 93 ("[I]t is absolutely necessary for China to take the opportunity of Bo's trial to systematize the experiences of public trial of cases and sublimate them into a rule governing the hearing of all cases by courts at all levels").

141. *Id.* Tong specifically urges the Supreme People's Court to look at the adoption of such a measure, although such a measure he argues should "only be counted as an interim step taken before the adoption of any legislative measures by the highest organ of state power to guarantee public enjoyment of this fundamental right." *Id.*

142. Cohen, *supra* note 119.



court.<sup>143</sup> Although Bo was not allowed to cross-examine Gu Kailai, he was allowed to cross-examine other key prosecution witnesses, including Xu Ming and Wang Lijun.<sup>144</sup> Bo's interrogation of these witnesses was successful enough that party officials reportedly told domestic media not to headline the incident.<sup>145</sup> Bo's successes could demonstrate the efficacy and importance of cross-examination to future litigators and judges.

Finally, the trial may stimulate more general calls for judicial reform. According to one commentator, there is growing consensus amongst the Chinese people about the necessity of a fairer judicial process, and "[t]he trial of Bo Xilai showed what it means when that occurs."<sup>146</sup> Future reformers may be able to build off the spirit of the Bo trial to push for general judicial reforms.

#### CONCLUSION

The Bo case was not a victory for the rule of law in China. The Bo case, though positive in certain aspects, was still deficient in terms of the legal processes involved. Moreover, even viewing the Bo case optimistically, it is unlikely most other criminal defendants will receive the same benefits Bo was accorded, as evidenced by recent criminal cases. The selective enforcement of established laws, at least in regard to the Bo case, suggests that even a thin version of the rule of law is something for which China must still strive. The future success of the rule of law in

143. *Id.*

Some of Bo's arguments were unpersuasive and, understandably, his cross-examination skills sometimes appeared modest. Nevertheless, their well-publicised display, even through the constricted lens of the court's increasingly censored microblogging, undoubtedly made a major impact on a public unaccustomed to the adversary system that China has taken steps towards introducing but seldom implemented.

*Id.*

144. *Id.*

145. *Id.* State media were reportedly told to ignore what were referred to as "the 20 questions." *Id.*

146. *Interview with Jerome Cohen on Bo Xilai's Trial in CFR*, US-ASIA LAW INSTITUTE, Aug. 31, 2013, <http://usali.org/media-entities/interview-with-jerome-cohen-on-bo-xilais-trial-in-cfr/>. Cohen writes that:

China is increasingly seething with a sense of injustice. As China has made economic, social, educational, and legal progress in the past three decades, more and more people have come to demand fairness. They want a right to be heard, they want a judiciary that demands integrity, they want to feel they can have somewhere to go to settle their disputes in a way that can inspire confidence, and this trial really showed them something. In the normal trial in China, you don't have witnesses come to court, you have no right to face your accusers, you have no right to cross-examine them.

*Id.*

China will depend on the ability of legislators and judicial officials to institute legal reform.

Although the Bo case may not be emblematic of the current success of the rule of law in China, it may impact the future of legal reform. As discussed previously, several commentators have suggested ways in which legislators and judicial officials can build on the strengths and spirit of the Bo trial to improve the Chinese criminal process. The successes of such efforts will again depend on the ability of officials to institute systematic legal change.

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