

Criminal Justice in China: From the Gang of Four to Bo Xilai

By Jerome A. Cohen

The Chinese government's prosecutions of Bo Xilai, deposed Politburo leader, and Gu Kailai, his allegedly murderous wife, have again brought China's criminal justice system to world attention. As a citizen's most important protection against a government's arbitrary exercise of power over his person, criminal justice is perhaps the most telling indication of a government's adherence to human rights standards. What can be said about the administration of criminal justice in the People's Republic of China (PRC) 64 years after its establishment?

As Bo's trial approaches, I reflect on my experience in China watching a broadcast of part of the Gang of Four's 1980-81 trial, with hopes both raised and dashed by the proceedings. While there have since been significant improvements in China's system of justice, it is sobering to note how little today's essentials have changed in comparison with the Gang of Four trial or even the unsophisticated pre-Cultural Revolution system depicted in [my 1968 book](#) on the criminal process.¹

With new leadership recently installed by the Communist Party's 18th National Congress, this is a good time to reconsider the question of criminal justice, one of the gravest challenges confronting the Party and the Chinese people.

Will the trial of Bo Xilai resemble that of the Gang of Four?

China's conservative leaders may take considerable time to reach any new consensus on the future of criminal justice. In the interim they face a variety of immediate problems illustrative of the contemporary system. Most imminently, how will they handle the prosecution of the just-indicted Bo Xilai? It presents the Party and the criminal justice system with their thorniest legal challenge since the trial of the Gang of Four marked China's transition from Chairman Mao's "Great Proletarian Cultural Revolution" to Deng Xiaoping's radical new policy of "Reform and Opening."

Will Bo be given a similar political "show" trial, as the most recent heir to a Communist legal tradition made infamous by Stalin's "purge trials" of the 1930s? How far has the PRC come in its march toward "a socialist rule of law with Chinese characteristics" in the more than three decades since the prosecution of its best-known political defendants, the Gang of Four, introduced the PRC's first codes of criminal law and procedure?

Developments to date suggest that the prosecution of Bo will fall short of the possibilities suggested by the Gang of Four trial. For some months after the announcement that Bo's wife, Gu

¹ Jerome A. Cohen, *The Criminal Process in the People's Republic of China, 1949-63: An Introduction* (Harvard University Press, 1968).

Kailai, was being investigated for the murder of her English business associate, Neil Heywood, it appeared that Bo might not be prosecuted at all, at least for involvement in the murder. Elaborate efforts seem to have been made to keep Bo's name out of Gu's murder trial—something that would not have been done, presumably, if a decision had been made to prosecute him for related misconduct. When the scandal originally broke, the then Prime Minister Wen Jiabao had promised that Bo's case would be handled “strictly according to law.” Nevertheless, for many months Bo, unlike his wife, was detained incommunicado not by the legal system but by the Party Discipline and Inspection Commission (DIC) in accordance with its own extra-legal procedures.

Because Bo retains support among some of the Party's civilian and military elite, as well as among many ordinary people, apparently the leadership initially decided to detain Bo indefinitely, but informally, in order to minimize popular disruption. This was to be done without prosecution or any legal authority, keeping Bo in relatively comfortable circumstances similar to those in which the late Party chief Zhao Ziyang was illegally confined for his last 16 years after the June 4, 1989 Tiananmen tragedy. As the 18th Party Congress approached in late 2012, however, a new political decision was made, for reasons as yet unknown, to bring a major prosecution against Bo, reportedly for a range of official misconduct including bribery, abuse of power, improper interference with the investigation of the Heywood murder, and illicit sexual affairs. Having detained Bo in March, 2012, not until late September did the Party DIC turn him over to the procuracy for criminal investigation and indictment.

The trial of the Gang of Four is instructive, although it was actually a misnomer since there were 10 major defendants tried before two separate chambers of the special tribunal that had been constituted for the occasion. The chamber dealing with Chairman Mao Zedong's widow, Jiang Qing, and her colleagues was the focus of attention. They had been arrested in October 1976, shortly after Mao's death. It took over four years to bring them to trial in a way that would assure the nation that the defendants, who were in effect saddled with principal responsibility for inflicting the Cultural Revolution, a decade of unspeakable harm, upon tens of millions of people, would be appropriately tried. This would have been an extraordinarily ambitious task for any government, but particularly for one that was just beginning to recover from an endless nightmare of lawlessness supposedly brought on in large part by the accused. Indeed, the attempt to dispense justice in such a politically-charged situation in a country whose legal institutions had long been shattered became the target of skepticism and ridicule both at home and abroad. The American comic strip *Doonesbury*, for example, claimed that the PRC had waited more than four years before bringing the accused to justice because it first had to put the tribunal's judges through law school!

The primary purpose of the trial was not only to vividly assign political responsibility for the nation's decade of disaster, but also to discredit and punish the accused as criminals. In addition

to many "counterrevolutionary" crimes, their alleged offenses included many common crimes, such as illegal searches and seizures, lawless detentions, torturing suspects to extort confessions, wounding and killing many people without legal procedures, and falsely convicting and punishing many others.

The trial was also obviously a golden opportunity to enhance the new Deng Xiaoping government's legitimacy by introducing the Chinese masses to the principles underlying the PRC's first codes of criminal law and criminal procedure. Those codes, which had begun to be drafted on the Soviet model in the mid-1950s but were shelved by two decades of political chaos, had just gone into effect on January 1, 1980, conveniently before the Gang of Four trial. In the words of the most famous of that trial's judges, the learned social anthropologist, Professor Fei Xiaotong, the trial was designed to allow people who had been brought up on a Cultural Revolution diet of "kangaroo courts" to "see for themselves what was meant by the rule of law and how trials are conducted." Also, [according to Fei](#), "[i]t showed that ransacking homes, beating up people, publicly humiliating people, making unfounded accusations and persecuting people were not 'normal,' nor 'revolutionary' actions, as they had once been taught."²

Instead of preventing public access to the trial on the ground that it involved "state secrets," China's new leaders boldly decided to give it maximum publicity. Over 600 people attended every session of the trial, with different groups representing diverse segments of the public at each of its many sessions. Although television had not yet penetrated most individual households, its already widespread availability to groups enabled tens of millions to view long excerpts of the proceedings. The trial saturated the newspapers nationwide, and radio brought much of it to the fascinated residents of every village.

Unfortunately, at least from the point of view of many Chinese legal specialists of that era, the trial, which dragged on for roughly two months, failed to prove a satisfactory instructional vehicle for introducing the new criminal procedure code. It did get off to a promising start, however. The 15 members of the tribunal appeared serious and dignified, and a few were well known. Professor Fei took part as a lay judge, apparently to give representation to the broader public.

For all those observers interested in resurrecting the status of lawyers, the high point came shortly after opening of the first session, when the avuncular court president asked Jiang Qing, who until that point had been playing the role of the helpless widow, whether she would like to be assisted by a defense lawyer. She asked, plaintively: "What is a defense lawyer?" Here was the first opportunity to educate the masses, and the court president, courteously looking down on the main defendant from the bench, gave her a brief but useful explanation of a criminal defense

² Fei Hsiao Tung (Contributor), *A Great Trial in Chinese History: The Trial of the Lin Biao and Jiang Qing Counter-Revolutionary Cliques, Nov. 1980 - Jan. 1981* (University Press of the Pacific, December 22, 2003)

lawyer's functions. But then Jiang Qing asked: "Can a defense lawyer take my place so I don't have to come to court?" When the court president responded that this would not be possible, Jiang snapped back: "Then I don't want one." Shortly thereafter, she had to be temporarily removed from the courtroom for obstreperous behavior, and the trial went downhill.

In fairness, Jiang was not solely responsible for the trial's failure to generate respect in legal circles. The ad hoc tribunal that had been assembled by the Communist Party also displayed some warts. Indeed, many observers and Jiang Qing herself challenged the legality of its existence, on the ground that the trial should have been conducted by the regular courts. Moreover, the trial seemed anything but fair. Although some prosecution witnesses appeared, their pre-trial testimony was merely read out in court. There was no opportunity for effective cross-examination by the well-known scholars and lawyers who served as defense counsel, and they were not permitted to introduce any defense witnesses at all. The judges' aggressive questioning of the defendants in an effort to link them to the horrors that had been perpetrated often made the prosecutors seem superfluous.

Since guilty verdicts were assured, the only real issue regarding the outcome concerned the sentences to be imposed. Before sentencing, while the trial was still proceeding, Lay Judge Fei took his role as a representative of the public to an extreme. He made a bizarre lecture tour of several Canadian and American law schools, where he discussed the case and even asked his audiences what they thought might be appropriate punishments. Judicial democracy in action! It is understandable why one [thoughtful foreign book](#) about the case called the trial "a classic showpiece of what totalitarian regimes regard as justice for their political enemies."³

Nevertheless, certain features of the Gang of Four trial merit a more generous assessment. For example, in 2012 the orchestrated, brief and circumscribed Gu Kailai trial and the quietly handled trials of her husband's all-knowing police chief, Wang Lijun, and his assistants make one appreciate the relative openness and broad publicity given to the Gang of Four trial. To be sure, this was not transparency for transparency's sake but was the product of the Party's desire to inflict maximum public opprobrium upon the accused in order to reinforce the legitimacy of the new Deng Xiaoping government. Moreover, overall, the evidence produced and discussed in that complex and sometimes chaotic circus, although sometimes not clearly linked to the defendants, seemed credible to the public, leaving it with fewer questions than Madame Gu's trial did. Although the courtroom witnesses against Jiang Qing and company were carefully prepared, their humanity and hatred of the defendants shone through during many unscripted exchanges with both the judges and the accused. And there certainly was no repentant confession from Madame Jiang, who bitterly defended herself throughout the court hearings and in a final speech of almost two hours, understandably seeking to place much of the blame for the offenses charged on Chairman Mao.

³ David Bonavia, *Verdict in Peking: The Trial of the Gang of Four*. (New York: Putnam, 1984).

Furthermore, the Gang of Four trial drove home a major lesson that deserves amplification in today's China, where police and other officials, who should be preoccupied with enforcing new and improved criminal procedures designed to protect suspects, often instead engage in lawless search and seizure, beating, kidnapping, detention in "black jails," "residential surveillance" in "safe houses," and torture. As Professor Fei noted in his [introduction to a book](#) published in Beijing about the trial immediately after its conclusion, similar misconduct "took place despite the Constitution of 1954 specifically guaranteeing that the freedom of the person was inviolable and the homes of citizens of the People's Republic of China were also inviolable." He emphasized that: "During those ten years of the 'cultural revolution' the Constitution was ignored and the country's laws and decrees were blithely discarded and people were detained and tortured and their homes sacked."⁴ Sadly, even at present, China's police have in practice often failed to absorb Professor Fei's wisdom, and further legislative reform and training, as well as the political will to implement legislation as written, are required to improve the situation.

The trial of Bo Xilai is by no means likely to be as lengthy, transparent, or chaotic as that of the Gang of Four. It will probably resemble the trial of Gu Kailai in its procedures if by that time the famously feisty accused has been reliably subdued, by physical or psychological torture or other means, and can be counted on to mechanically confess and regret the offenses charged, as his wife did. Bo may have struck a deal with his accusers. That would mean a brief, perhaps only one-day, exercise in which no significant witnesses are summoned to appear and be subject to cross-examination. The script for the reading out of pre-trial testimony in court would be drafted to reveal only the type and amount of information the Party thinks useful to be made known. The defendant, it should be noted, has been permitted to appoint lawyers of his choice, as required by law, but, until very recently, they were not once allowed to meet him.

Presumably care will be taken to have the evidence offer a more plausible and consistent, even if limited, story than that presented in the Gu case. In these circumstances, the trial, despite dealing with sensitive matters of state, will be declared "public," ostensibly "open" to all. Admission to the courtroom, however, as so often happens, will in reality be strictly regulated to guarantee no untoward behavior or unfavorable reporting by those selected for attendance.

If, on the other hand, Bo's courtroom conduct still cannot be assured, the trial can be deemed to be "closed" on the ground that state secrets are involved and perhaps also to protect the privacy, reputations and even safety of witnesses or others said to be implicated. A closed trial would diminish the persuasiveness of the proceedings among the people and the world. Yet, even if the trial is said to be "open," it is surely not going to be televised or otherwise disseminated to the extent to which the Gang of Four trial was. Until recently, Bo reportedly proved to be an

⁴ Fei Hsiao Tung (Contributor), *A Great Trial in Chinese History: The Trial of the Lin Biao and Jiang Qing Counter-Revolutionary Cliques*, Nov. 1980 - Jan. 1981 (University Press of the Pacific, December 22, 2003)

uncooperative accused, refusing to agree with his interrogators, occasionally going on hunger strikes and growing a beard in protest.

The communist party's changing role in criminal justice

Although the Party prefers to resort to more subtle and conciliatory methods, it will probably continue to rely heavily on repression to cope with the country's rising tide of social, economic and political discontent, endemic government and Party corruption and the common crimes that plague every society. The criminal process, broadly construed to include all the related government instruments for restricting physical freedom of the person, is the principal weapon of repression, and the abuses that have marked its use in China have themselves contributed to popular dissatisfaction. How will the new Party leaders respond to this situation? Will they endorse new policies, norms, structures, institutions, procedures, practices and personnel to substantially improve the processes for meting out punishment, or will they decide to “muddle through” with merely minor modifications of the existing system?

The most serious structural challenge facing Party leaders concerned with criminal justice is whether and how to alter the Party's relationship to those who determine punishments on behalf of Party and government. To be sure, the Party dominates the entire legal system, not only the criminal process. Yet in Chinese law today, as in the past, the criminal process is preeminent, despite the fact that there are many more civil and other cases than criminal ones. This is why the Party has just selected as the new head of its central “Political-Legal Commission” (PLC), which controls all government legal institutions, the recent Minister of Public Security, Mr. Meng Jianzhu, rather than a leading judge, prosecutor, lawyer, law professor or administrative legal expert. The recently retired PLC chief, the controversial Mr. Zhou Yongkang, had also served as Minister of Public Security—the nation's chief police officer—before assuming the more powerful, full-time Party post of PLC chief. The vast power amassed and asserted by Zhou and his close links to Bo Xilai reportedly aroused considerable concern among the Party's highest leaders.

The leadership's unsettling experience with Mr. Zhou, who for the past five years served as a member of the Politburo Standing Committee (PBSC), the apex of political power in China, apparently led it to the conclusion that his successor should not become a PBSC member but only one of the 25 members of the Politburo. In order to smoothly accomplish this important structural change, the number of Standing Committee members was reduced from nine to seven, ostensibly to promote the highest leaders' more efficient operation. The absence of the PLC chief from their deliberations will have the more than incidental effect of leaving the PBSC with greater freedom to discuss and decide how to deal with the country's burgeoning and worrisome internal security system, whose annual budget now exceeds that for national defense, as well as with the perceived anti-social conduct that the internal security system is designed to suppress.

This significant Party reform requires the PBSC, which ordinarily assigns each of its members to supervise different aspects of government as well as Party institutions, to designate one of its members to keep tabs on the activities of the PLC. Until now at least, the PLC has controlled the courts, the procuracy, the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice, which regulates the legal profession. It also has a dominant lobbying influence over the legislative process relating to criminal justice.

From the point of view of formal Party/government organization, the task of overseeing the PLC on behalf of the PBSC might logically fall to Mr. Zhang Dejiang, ranked number three in the new Party hierarchy, as part of his assigned responsibility for leading the National People's Congress (NPC). Theoretically the NPC is the supreme organ of government, and under the Chinese Constitution the judiciary and the procuracy as well as the State Council, which embraces all executive agencies including the ministries of public security, state security and justice, must report to it. This would be similar to the situation that existed in the mid-1990s when Qiao Shi, the member of the PBSC who then led the NPC, was in charge of the not yet so powerful PLC, whose chief at that time was not even an ordinary member of the Politburo.

Yet, functionally, it would appear to make more sense for Mr. Wang Qishan, ranked number six in the new Party hierarchy, to supervise the PLC because of his responsibilities for supervising the closely-related Party Discipline and Inspection Commission. To what extent, how and by whom this PBSC oversight of the PLC will be carried out remains to be seen.

Even less transparent are further restrictions of the PLC's power and prestige that may be taking place. Some Chinese legal experts seem confident that the PLC and its subsidiary units, which operate at every level of the Party parallel to the government, have lost the power to interfere with and dictate the decisions of the procuracy and the courts in concrete criminal and other sensitive cases. Such an expansion of judicial autonomy was mandated by the highest Party circles in the late 1980s before the downfall of Party General Secretary Zhao Ziyang in the Tiananmen crisis that led to the June 4, 1989 tragedy, but that reform was short-lived, a victim of the intense post-Tiananmen repression. Some informed "insiders" flatly declare that the current PLC, under Meng Jianzhu, who is said to be more legally sophisticated and moderate than his predecessor, will no longer decide any concrete court cases.

Of course, even if lower level political-legal committees do stop interfering in individual cases, this would not end other PLC influence over legal institutions, including their policies and ideology. In any event it would not affect intra-institutional Party control of individual case decisions within the procuracy and courts since most prosecutors and judges are Party members, and their official legal careers are subject to appointment, promotion, removal, and control by the Party organization within their institution.

Moreover, it will probably remain feasible for individual Party leaders to continue to influence concrete outcomes via informal channels. In any event, whatever progress is made in expanding the collective independence of the procuracy and the courts vis-a-vis the Party's political-legal committees and leaders, expanding the independence of individual judicial officials, especially judges, vis-a-vis their own unit's Party and professional leaders would require another series of giant steps forward that are not yet even on the horizon .

Less controversial for the PLC than surrendering its control over concrete cases is a reform, apparently already in place, designed to eliminate the domination of the local public security bureau chief over the other members of the local PLC. Until recently, although the chiefs of the local procuracy, justice bureau and court took part in local PLC deliberations and held a government rank equal to that of the public security chief, in most of the Party's more than 3,000 local PLCs it was the public security chief who exerted the greatest influence, because he was designated leader of the group and held a higher Party rank than the others. That situation seems now to have been changed. In many places the local Party committee in charge of all matters in the area has begun to choose one of its deputy secretaries who is not serving in the police or elsewhere in government law enforcement to lead its PLC. This is likely to become the prevailing practice, although in some places there have been experiments with other methods.

A more radical, and therefore more remote, possibility for reform would limit the PLC to governing both the ordinary and secret police as well as the Ministry of Justice, but no longer extend its power to the courts, and possibly the procuracy, even for policy making and ideological purposes.

Of course, even if all external and internal Party controls over judicial institutions and their personnel should be eliminated, if those institutions are to gain integrity and public confidence, much stronger measures will have to be taken to curb corruption and unauthorized interference by local government officials, legislators, business executives and other influential individuals. Hardest to restrain will be the impact of "guanxi"—the personal relationships that exist in all societies but that in China often exercise greater influence upon legal officials than the law does.

Is criminal justice improving in action as well as in legislation?

Popular “rights consciousness” and a sense of injustice appear to be expanding in China, increasing demands for a fairer and more respected legal system in daily life. Thus, wholly apart from spectacular “show” trials, a much greater and more enduring challenge for Party leaders will be how to implement criminal justice in ordinary cases, whether they involve the many apolitical crimes or the broad range of politically-triggered offenses that do not attract public attention.

The 1979 codes of criminal law and procedure, their revisions in 1996-97, and their more recent

amendments have symbolized and articulated an improving system of criminal justice, one that is staffed by increasingly educated and trained judges, prosecutors, police and defense lawyers and that features impressive legal institutions, procedures and even buildings. [Torture is banned in principle, time limits purport to govern every stage of the criminal process, lawyers are now often allowed](#) to advise and defend accused in the investigation stage of a case as well as at trial, important witnesses are generally supposed to participate in contested trials and be subject to cross-examination, and only a court can determine criminal guilt. Judges now wear Western-style judicial robes and even wield gavels in the courtroom.

Yet criminal justice remains the weakest link in China's legal system if one focuses not on laws and appearances, but on implementation and practice. As mentioned earlier in this essay, it is sobering to note how little the essentials have changed in comparison with the less sophisticated pre-Cultural Revolution system. The administration of criminal justice is still dominated by the police and the Party. The police still have enormous, virtually unfettered discretion in dealing with what they deem to be anti-social elements of all types. Some of the measures they impose are totally without legal foundation and often violate constitutional and legislative norms. Human rights activists, dissidents, protesters, petitioners, and their lawyers and families are frequent targets of illegal intimidation, threats, house arrest, kidnapping, beating, “black jails” and temporary internal exile, as suggested above. During the reign of PLC chief Zhou Yongkang (2007-2012), increasing emphasis on developing “social management” techniques to anticipate who in the community might someday engage in antisocial behavior led to frequent official resort to what can only be described as legally-Unauthorized preventive detention of various types.

The police also have a panoply of legally-authorized instruments at their command. They still detain millions of people every year—some repeatedly—for up to 15 days for each alleged violation of a very broad range of minor offenses against public order. They confine minor drug and prostitution recidivists for up to two years of rehabilitation. They continue to have the power to impose upon the more recalcitrant of such offenders, as well as a variety of dissidents, petitioners, democratic or religious activists and others deemed “troublemakers,” up to three years in a labor camp, with the possibility of a fourth year, under the notorious “Re-education Through Labor” regime that is currently undergoing revision. Many others are commanded to undergo periods of “legal education” in less rigorous circumstances. Since none of these restrictions on personal freedom is deemed to constitute “criminal punishment,” the police are not required to comply with the increasing protections provided by amendments to the formal criminal process, and rarely does court review or scrutiny by the procuracy provide relief against arbitrary police misuse of such “administrative” measures.

The formal criminal process offers the police additional options. For up to one year they can prevent a suspect from leaving his locality by subjecting him to a type of bail arrangement. For

six months they can subject him to very restricted house arrest, and this “residential surveillance” is sometimes the pretext for confining the suspect incommunicado outside his own home for up to six months before deciding whether to release him or move him through the formal criminal process of detention, arrest, indictment, trial, judgment, sentencing and possibly appeal. Unless the hapless detainee can muster unusually good political connections or can benefit from large-scale protests, he has no effective means to challenge these coercive bail and residential surveillance measures, either via the procuracy, the courts, the local PLC or local legislators or officials. The internationally famous artist/activist Ai Weiwei was able to obtain release from 81 days of illegal residential surveillance outside his home in 2011 only because he had the strong support of both domestic and foreign constituencies.

The formal criminal process is often blatantly distorted if that is deemed politically desirable. The case of Chen Guangcheng's nephew, Chen Kegui, offers a current illustration. Shortly after learning that Kegui's uncle, the famous blind "barefoot lawyer," had escaped from their illegal home imprisonment of him and his family, over 30 police, thugs and local officials staged a lawless after-midnight break-in of the farmhouse where Kegui, his parents and his wife and child lived. In apparently attempting to defend himself and his family against the infuriated invaders' brutal beating, Kegui, having been wounded himself, used a kitchen knife to wound three of the attackers.

Kegui was held incommunicado in the county detention center from late April 2012 until put on trial on November 30. No family, friends, or lawyers of his choice were permitted to see him. After almost six months of interrogation, investigation and re-investigation, the police turned the case over to the procuracy with a recommendation to indict Kegui for “intentional wounding.” The prosecutors mulled the case over for several weeks without allowing the defendant's chosen counsel or family to discuss it with them or to contact him. Suddenly on the morning of November 30 the officially-appointed local lawyers who had been forced upon Kegui notified his parents, who live in a village far from the county courthouse, that his trial for “intentional wounding” would begin four hours later.

Neither the parents, nor their chosen counsel, nor anyone else other than the officially-appointed lawyers, had been informed that an indictment had apparently been issued some days before. Although Kegui's parents made it to the trial on time, they were both excluded from attending it on a preposterous ground. They were told that, since they were witnesses to the incident, they could not attend the trial, even though it was clear that they would never be allowed to testify. The last minute notice of the trial was obviously timed to preclude any other friendly family, neighbors or witnesses, or any non-controlled media, from attending. Nevertheless, the court declared the trial to be open to the public as required by law. Only another uncle of Kegui, who works at the county school for training Party members, was able to observe the trial as one of the officials invited to fill up the courtroom.

The trial, of course, was a farce and quickly concluded. The locally-controlled defense lawyers introduced no witnesses, and it does not appear that the prosecution introduced its own live witnesses, thereby avoiding even the remote possibility of their cross-examination by assigned defense counsel or of questioning by the court. Kegui, apparently made compliant by over half a year of incommunicado confinement, reportedly did not contest his guilt and even, most unusually, promised before sentencing that he would not appeal his conviction. He also said that, after his release from prison, he would compensate the main “victim,” the township chief who had led the illegal raid on Kegui's house. After he received a sentence of three years and three months, the local lawyers who had been foisted on him would not even tell his parents, who had been detained in a police van outside the courthouse, what had taken place. Subsequent efforts by Kegui, his parents and their lawyers to revive his right to appeal or petition for extraordinary relief have been met with official obstruction, threats to increase his punishment to life imprisonment and even death threats. Kegui was dangerously denied hospital treatment for a long period despite persistent reports that he is suffering from appendicitis.

This case illustrates how law enforcement, while purporting to implement the law, unfairly twists it to the defendant's disadvantage. We know about this case because of the connection to Kegui's famous uncle. Yet 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 similar arbitrary treatment from local Party, police and judicial officials. Of course, there are many other instances in a 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.

Nevertheless, not long ago, when I asked one of China's most experienced criminal lawyers how typical was another blatantly unfair criminal conviction, he responded: “The only atypical thing about this case is that you know about it.”

At least until this year, even when a suspect has been allowed to select counsel of his choice and has had the financial means and contacts to do so, his counsel has only had very limited access to him during the investigation stage. Moreover, defense lawyers have generally been deterred from investigating cases on their own and have usually been denied case files and knowledge of the government's evidence until later in the process. The 2007 Lawyers Law was designed to improve this situation, but the police often claimed that that law did not govern their behavior. The Criminal Procedure Law (CPL) plainly governs the conduct of police, and an amended and expanded version of the CPL went into effect January 1, 2013. In principle it promises to eliminate some feeble police excuses and in most cases improve the situation for the accused and his lawyer. Some early reports on implementation of the new provisions indicate that the police have finally begun to allow lawyers freer access to detained suspects.

Yet, in this respect as in so many others, the new protections for the accused in the revised CPL are too often cloaked in ambiguities, uncertainties, inconsistencies and exceptions. Article 73 of the newly-revised law, which for the first time authorizes police resort to “residential surveillance” outside a suspect’s home for someone who maintains a residence in the area, is illustrative. It only permits use of this powerful sanction in three categories of cases: those said to involve investigation of terrorism, endangering national security and serious bribery. Thus any future attempt to detain a local resident under this rubric for investigation of tax liability, for example, as was done to Ai Weiwei, would now be clearly unlawful. It will be for the police to determine, however, what falls within the boundaries of “terrorism,” “endangering national security” and “serious bribery” for purposes of justifying up to six months of what promises to be incommunicado detention, and their record to date suggests that they can be expected to define these terms in very broad fashion.

This is also true of the new and progressive CPL requirement that, during the investigation stage of the ordinary criminal process, there be electronic recording—video or audio—of interrogations of suspects in cases of “serious” crimes. It is true as well of the welcome provisions endorsing earlier rules calling for the exclusion of “illegally-obtained evidence.” Moreover, although the revised CPL for the first time prohibits interrogators and judges from forcing a suspect to answer their questions, it does not endow him with the right to silence and retains the previous requirement that the suspect truthfully answer all relevant questions, leaving it to those charged with implementing the law to resolve the apparent conflict in practice.

Other new CPL efforts to increase the fairness of the criminal process suffer similar handicaps. For example, despite provisions in the previous CPL that, if interpreted in good faith, would have required most important witnesses to testify in court in contested cases and be subject to cross-examination, witnesses have rarely appeared at Chinese trials. Instead, their pre-trial statements are generally read out in court with little possibility for questioning their content. The new provisions are meant to reverse that result, but, again, criminal justice in every society involves highly technical issues, and live witness testimony tends to be less important in China and other civil law-oriented legal systems than in Anglo-American courts. Of course, “the devil is in the details,” which are not spelled out in this legislation. With the continuing acquiescence of politically weak judges, it is possible that necessary exceptions allowing witnesses to avoid in-court testimony will again become the basis for overly broad applications that emasculate the general rule.

To a considerable extent, the risks of bad faith application of vague norms can be reduced, but not eliminated, by detailed judicial interpretations and implementing rules drafted by the agencies charged with carrying out the legislators’ will. Five government agencies, in addition to the Communist Party, are ordinarily recognized as playing important roles in the administration

of the criminal laws—the Ministries of Public Security, State Security, and Justice, and the procuracy and the courts. After promulgation of the 1996 revisions of the CPL, all five departments, in addition to the Party, jointly issued what was to be the authoritative interpretation of that major document, apart from various relevant documents issued by individual agencies. More recently, although a joint interpretation of the five key agencies has been issued following promulgation of the newly-revised CPL, it does not appear to enjoy the prominence of its predecessor, and the lengthy, highly-detailed documents individually issued by the Supreme People's Court (SPC), the Supreme People's Procuracy (SPP) and the Ministry of Public Security (MPS) have become the main sources for putting flesh on the bare bones of the new CPL.

Chinese officials, judges, prosecutors, lawyers and scholars are now engaged in the laborious process of trying to understand and reconcile the many new documents, and Chinese legislators have undoubtedly more than a passing interest in learning what the departments in charge are making of their legislation. Experience suggests that the Ministry of State Security, which focuses on foreign-related espionage, acts secretly and is China's equivalent of its progenitor—the Soviet Union's KGB, will not make public its own interpretation of the new law.

Of course, experience has also taught us that we cannot assume that in practice police, prosecutors and judges will follow the published rules that are supposed to regulate their conduct. The MPS rules interpreting the 1996 CPL, for example, clearly prohibited police from imposing six months of incommunicado “residential surveillance” outside a suspect’s home on suspects who maintained a local residence. Yet this did not stop the police from doing precisely that in many cases, including the notorious incarceration of Ai Weiwei.

To be sure, if the protections that the CPL accords suspects or defendants should ever be consistently respected by the police or effectively enforced against them, so that criminal convictions become a bit more difficult to obtain, police can always resort to “Re-education Through Labor” (RETL) unless the Party finally succumbs to rising public pressure to end this arbitrary punishment. The Chinese press frequently publishes vivid reminders of RETL's convenience for the police and its challenge to the fair administration of criminal justice. For example, one recent case involved a protester against the conduct of Bo Xilai. In 2011, after failing to persuade the local procuracy that young Chongqing official Ren Jianyu's blogging criticism of Bo's pro-Cultural Revolution “sing Red” policy constituted the crime of subversion, the police sent Ren off to two years of RETL. Ren can thank Bo’s subsequent downfall for his release after 14 months of confinement. Many other RETL victims have not been so lucky.

Concluding thoughts

As indicated at the start of this essay, prospects for substantial improvements in China’s criminal process to better protect the rights of suspects and defendants are not especially bright. Despite

notable progress in criminal justice legislation, in practice the Communist Party continues to give a high priority to repression as an instrument of social control and is reluctant to accept meaningful restraints on its powers to punish.

Yet the 18th Party Congress has left in its wake considerable internal debate and dissatisfaction regarding the country's legal system and the failure to bring the police and the Party under the rule of law. Not only elite political and professional circles but also the broader community, including farmers, workers, students and even entrepreneurs, spurred by the Internet, social media, occasional newspaper editorials and daily demonstrations of the inadequacies of current criminal justice, appear to be gradually increasing demands for a more respected and effective system, one that will more efficiently suppress crime while more reliably assuring protection of criminal suspects. Persistent international scrutiny and the Chinese Government's desire to enhance its international reputation for “soft power” are helping to stimulate this ferment.

Those looking for signs of the direction in which China's new leaders might take the country's criminal justice system will want to note whether there is any movement toward ratifying the International Covenant on Civil and Political Rights that the People's Republic signed in 1998. One of the major obstacles to ratification is the existence of Re-Education Through Labor and other administrative punishments that require no judicial approval. Indeed, one litmus test for important reform will be whether the current debate over RETL, occasionally punctuated by vague official promises of its termination and local reports of its cessation, leads to its elimination or merely cosmetic or modest changes that do not significantly hamper the power of the police to detain people at their pleasure for long periods.

Given China's current repressive climate, perhaps piecemeal progress toward curbing RETL is the most one can expect at this time. Despite its impressive achievements concerning political democracy, rule of law and human rights during the past generation, Taiwan required almost two decades of piecemeal progress before finally eliminating its equivalent of RETL in 2009. Three decisions by its recently-energized constitutional court, spurred by newly vibrant lawyers, judges and non-governmental organizations, proved crucial to this long process. In the absence of similar developments in China, genuine elimination of RETL would be remarkable.

There will soon be other signals of the extent to which China's leaders wish to improve criminal justice in real life. Implementation of the new Criminal Procedure Law offers many opportunities. Will police continue to enjoy unchecked power to interpret the CPL as they see fit? Or will the Party permit the procuracy and the courts to play their legally-assigned roles so that unlawfully-detained suspects can find a remedy, coerced confessions can be consistently excluded from evidence, and major witnesses, including the police, appear in court in contested cases and are subject to cross-examination? Most important to the success of reforms, to what extent will the Party finally allow defense lawyers to vigorously challenge government actions at

every stage of the criminal process, courts and judges to act independently of political influence, and the media to freely critique progress toward the rule of law and the protection of civil and political rights?

The answers to these questions will tell us whether Chinese criminal justice has made significant progress since the trial of the Gang of Four.