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Vincent R. Johnson

St. Mary's University School of Law, vjohnson@stmarytx.edu

Stephen C. Loomis

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The rule of law in China and the prosecution of Li Zhuang

Vincent R. Johnson* and Stephen C. Loomis†

Abstract

The rule of law is a philosophic concept, an ideal against which any legal system can be measured. Whether China adheres to the rule of law is critical not only to people in China but also to other nations that look to China for leadership. Serious questions can be raised about whether the recent Chongqing da hei fell short of compliance with the rule of law in the criminal law field. This article considers the Li Zhuang case from a comparative perspective rooted in legal principles that resonate cross-culturally. The article recounts the recent development of a new Chinese legal profession, the obstacles faced by criminal defence lawyers, and the key facts of the Li Zhuang case. It concludes that, judged in terms of what the rule of law requires, there were many shortcomings in the Li Zhuang prosecution. The authors argue that the Li Zhuang case should be debated in Chinese law schools, discussed within the Chinese legal profession, and long remembered. A careful re-examination of the many issues that the case raises and of the demands of the rule of law can be the basis for improvements in the Chinese legal system.

Key words: Li Zhuang case; rule of law; criminal procedure; prosecutors; judges; prisoners

* Vincent R Johnson, BA, St. Vincent College; JD, University of Notre Dame; LLM, Yale University, Fulbright Senior Scholar, Renmin University, 1998; Professor of Law and Director of the Institute on Chinese Law and Business, St. Mary's University, San Antonio, TX.

† Stephen C Loomis, BA, University of Texas; JD, St. Mary's University; Member of the State Bar of Texas and Attorney, Texas Legislative Council, Austin, TX.

The rule of law in China: progress and concerns

In recent years, China has become a global leader due to its surging economy, which is now number two in the world¹ and positioned to become the largest in the next decade.² The fact that some people have mistakenly considered China to have already overtaken the USA economically is a testament to China's growing influence and prominence internationally.³ China's emergence on the world stage is all the more significant in that some observers believe that the USA and other major countries have a declining interest in, or ability for, serving as global leaders.⁴

The Chinese legal model

It seems likely that as China rises in strength and visibility, its legal system—a structure of recent invention—will begin to influence legal developments in other countries.⁵ Struggling nations seeking to replicate China's progress⁶ may logically assume that a legal infrastructure such as China's is not only conducive to economic success but also insulated from the perils of liberal democracy, including the dangers posed by vigorous internal dissent and shifting public opinion.⁷

However, the contours and implications of the Chinese legal model are far from clear. The Chinese legal system is complex, quickly changing, and, in many respects, incomplete.⁸ Indeed, it is unclear whether, even in areas as

¹ Peter Drysdale, 'China's Role in Running the World Economy' *East Asia Forum* (14 February 2011) <<http://www.eastasiaforum.org/2011/02/14/chinas-role-in-running-the-world-economy/>> accessed 18 October 2012.

² 'China Overtakes Japan as World's Second-Biggest Economy' *BBC* (14 February 2011) <<http://www.bbc.co.uk/news/business-12427321>> accessed 18 October 2012. See also Mark A Scott, 'China's Influence on the American Legal System Resulting from China's Rise to Power' (2008) 32 *Suffolk Transnat'l L Rev* 51, 52.

³ Peter Ford, 'Is China Really the World's Top Economy? Much of the World Thinks So' *Christian Science Monitor* (14 June 2012) <<http://www.csmonitor.com/World/Global-News/2012/0614/Is-China-really-the-world-s-top-economy-Much-of-the-world-thinks-so>> accessed 18 October 2012; Dexter Roberts, 'China Is No. 1 (Or So Many People Believe)' *Bloomberg Businessweek* (14 June 2012) <<http://www.businessweek.com/articles/2012-06-14/china-is-no-dot-1-or-so-many-people-believe>> accessed 18 October 2012.

⁴ Ian Bremmer, *Every Nation for Itself: Winners and Losers in a G-Zero World* (Portfolio/Penguin 2012) 3.

⁵ Scott (n 2) 52. See also Vincent R Johnson, 'Chinese Law and American Legal Education' (1999) 31 *St Mary's LJ* 1, 4.

⁶ Rowan Callick, 'The China Model' *The American* (November/December 2007) <<http://american.com/archive/2007/november-december-magazine-contents/the-china-model>> accessed 28 November 2012. See also Derek J Mitchell, 'China and the Developing World' in Joshua Eisenman, Eric Heginbotham and Derek Mitchell (eds), *The China Balance Sheet in 2007 and Beyond* (Center for Strategic and International Studies 2007) 109–24.

⁷ Vali Nasr, 'If the Arab Spring Turns Ugly' *New York Times* (27 August 2011) SR4.

⁸ Vincent R Johnson, 'Chinese Law on SARS by Chenglin Liu' (2006) 7 *Asian Pac L & Pol'y J* 32.

basic as tort law⁹ and criminal law,¹⁰ China will succeed in establishing a legal system that embodies the procedural safeguards, enforcement mechanisms, ethical standards, and respect for human dignity that are essential to any legal regime that is consistent with the rule of law.¹¹ Whether China adheres to the rule of law is critical not only to the roughly 1.3 billion people in China but also to persons in other nations, particularly underdeveloped countries.¹² This is true because, for better or worse, it is likely that China will 'greatly influence the destiny of the global community during the 21st century and beyond.'¹³

China has made great progress in crafting a new legal system from the wreckage of the Cultural Revolution and other initiatives that failed during the period of Communist isolation. However, China still faces challenges in making legal provisions effective as organizing principles, social constraints, and avenues for redress.

The long shadow of the Cultural Revolution

One example of the kinds of problems that threaten the modernization of the Chinese legal system is the recent prosecution and swift conviction of Li Zhuang, a prominent defence lawyer, which some said hearkened back to the lawlessness of an earlier era.¹⁴ During the catastrophic decade from 1966 to 1976, now known as the Chinese Cultural Revolution, 'the law schools were closed, the legal profession was obliterated, and there was no adherence to ... [the] Rule of Law.'¹⁵ As Fordham University professor George W. Conk notes, 'the contemporary history of Chinese law began only in 1978, when Deng Xiaoping instituted a policy of legal reform in the wake of the lawlessness of the Cultural Revolution.'¹⁶

Li's arrest after visiting his client, an alleged mob boss, shocked many Chinese legal professionals and academics because the two-and-a-half week rush from arrest to conviction sacrificed many of the procedural safeguards that are deemed basic in developed legal systems.¹⁷ Li was arrested for what

⁹ *Wultz v Bank of China Ltd* [2012] WL 5431013 (SDNY); Vincent R Johnson, 'Train Wreck Serves as Test for Chinese Law' *Houston Chronicle* (7 August 2011).

¹⁰ George Wang, 'Navigating Criminal Law in China' [November 2012] *Aspatore* 1.

¹¹ Vincent R Johnson, 'The Rule of Law and Enforcement of Chinese Tort Law' (2011) 34 *Thomas Jefferson L Rev* 43, 84; Frank Langfitt, 'Can China's Legal System Change?' *National Public Radio*, 4 November 2012.

¹² World Bank, 'Population, Total' <<http://data.worldbank.org/indicator/SP.POP.TOTL?cid=GPD.1>> accessed 18 October 2012.

¹³ Johnson (n 5) 5.

¹⁴ He Weifang, 'A Letter to the Legal Professionals in Chongqing' *Sina* (11 April 2011) <<http://blog.sina.com.cn/s/blog.4886632001017xy0.html>> accessed 11 October 2012.

¹⁵ Johnson (n 5) 2.

¹⁶ *Wultz v Bank of China Ltd* [2012] WL 5431013 (SDNY).

¹⁷ He (n 14).

numerous persons saw as simply performing his professional duties, namely representing a client who was charged with criminal conduct. In the eyes of many, Li's hurried and highly visible conviction was embarrassing and problematic. For example, He Weifang of Peking University lamented that Li Zhuang's conviction 'sets China's legal reform back thirty years.'¹⁸

This article will consider the *Li Zhuang* case from a comparative perspective rooted in legal principles that resonate cross-culturally. These principles are firmly established in many Western countries and are beginning to take hold in China. Li's prosecution—and the story of both what was done and omitted—offers instructive lessons. The article begins by recounting the recent development of the Chinese legal profession and the key facts of the *Li Zhuang* case. The discussion then considers what the rule of law demands in the context of criminal prosecutions. If media reports are accurate, the case of Li Zhuang demonstrates how the prosecutors and judiciary in Chongqing fell short of what the best traditions of the rule of law requires.

The case of Li Zhuang

The Chongqing gang trials

Chongqing, a major metropolis of 30 million people in southwest China,¹⁹ has been infamous in recent years for organized crime and corruption.²⁰ In response to the prominence of powerful gangs, local Communist party leader Bo Xilai undertook a series of feverish crackdowns on organized crime called the *da hei* or the smash back.²¹ Bo, the son of an esteemed revolutionary who once occupied a high office in the Chinese government,²² was able to create a national reputation from the *da hei*.²³ Bo had hoped that his maverick reputation would blossom into a position on the Politburo, China's multi-member ruling body.²⁴ However, a mixture of resistance and family scandals derailed this ambition.

During the course of the *da hei* from 2009 to 2011, 4,781 people were arrested, including gang members, police and governmental officials, judges,

¹⁸ Quoted in Sharon LaFraniere, 'Chinese Crackdown Adds to Scandal Surrounding Former Official' *New York Times* (26 March 2012) A4.

¹⁹ Ian Johnson, 'Trial in China Tests Limits of Legal System Reform' *New York Times* (19 April 2011) A4.

²⁰ 'China's Other Face: The Red and the Black' *The Economist* (1 October 2009).

²¹ LaFraniere (n 18); Tania Branigan, 'Chinese Lawyer Jailed for Defence of Alleged Mafia Boss' *The Guardian* (8 January 2010) <<http://www.guardian.co.uk/world/2010/jan/08/chinese-lawyer-jailed-defence-mafia>> accessed 10 October 2012.

²² John Garnaut, 'Children of the Revolution' *Sydney Morning Herald* (13 February 2010) <<http://www.smh.com.au/world/children-of-the-revolution-20100212-nxjh.html>> accessed 11 October 2012.

²³ LaFraniere (n 18); Brangian (n 21).

²⁴ LaFraniere (n 18). See also Garnaut (n 22).

and a former deputy police commissioner.²⁵ Although this crackdown proved effective against crime, many onlookers were troubled by the erosion of China's nascent efforts to establish the rule of law because the Chongqing legal proceedings ignored both Chinese procedural and substantive law.²⁶ An example of the extreme tactics that were used during the *da hei* was the prosecution of Fan Qihang, who was charged with numerous felonies, including the commission of murder.²⁷ In an interview before his death, Fan claimed that he had been held in a military camp for five months and was often shackled to an iron bar that left his toes barely touching a table.²⁸ In addition, 'his handcuffs cut so deeply that his guards once needed an hour to remove them.'²⁹ Faced with deplorable conditions, Fan attempted suicide by 'beating his head against a concrete wall and biting off the tip of his tongue.'³⁰ Fan was later convicted and executed despite determined assertions that his rights had been flagrantly violated.³¹ As one writer notes, 'Fan's execution, and ... [the Chongqing *da hei*'s] failure to address the allegations of torture, led to a public outcry.'³²

Obstacles faced by defence lawyers

The *da hei* worsened the environment for criminal defence attorneys in China, a country where, according to an article in the *New York Times*, 'imprisoning, deregistering, or beating lawyers for doing their jobs is becoming commonplace.'³³ Critics alleged that the Chinese courts were not independent and were subject to interference from administrative bodies.³⁴ True, China's criminal justice system is relatively new as the modern Chinese legal system is barely 30 years old.³⁵ Yet, there is evidence that criminal defence work in China 'is not only difficult but also dangerous' and that defence lawyers

²⁵ LaFraniere (n 18); Xuan Niu, Interview with Chu Zhaoxin, Journalist of the *Southern Weekly*, Guangzhou, China <<http://www.cardiff.ac.uk/jomec/resources/ChuZhaoxinInterview.pdf>> accessed 10 October 2012.

²⁶ LaFraniere (n 18). See also He (n 14).

²⁷ LaFraniere (n 18).

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.* Margaret K Lewis, 'Controlling Abuse to Maintain Control: The Exclusionary Rule in China' (2011) 43 *NYU J Int'l L & Pol* 629, 690; Jeremy Daum, 'Tortuous Progress: Early Cases under China's New Procedures for Excluding Evidence in Criminal Cases' (2001) 43 *NYU J Int'l L & Pol* 699, 702.

³² Hyeon-Ju Rho, 'The Exclusionary Rule in China and a Closer Look at the Dynamics of Reform' (2011) 43 *NYU J Int'l L & Pol* 729, 737.

³³ Garnaut (n 22). See also Mo Shoaping, 'China's Lawyers Confront Systematic Dangers,' Speech at Caijing's Forum on 'China's Lawyers at a Crossroads,' 10 July 2010 <<http://chinalawandpolicy.com/tag/article-306/>> accessed 11 October 2012.

³⁴ Mo (n 33).

³⁵ Wu Xiaofeng, 'An Analysis of Wrongful Convictions in China' (2011) 36 *Okla City UL Rev* 451, 451.

sometimes face 'obstruction, harassment, intimidation, and even physical abuse' at the hands of police.³⁶

Criminal defence attorneys must confront what are referred to as the three difficulties: the challenges of (1) meeting with their clients; (2) accessing case files; and (3) obtaining evidence.³⁷ In addition, defence lawyers risk the real possibility of criminal sanctions due to what is called 'Big Stick 306.' This term is a moniker for Article 306 of the *People's Republic of China (PRC) Criminal Law*, which subjects lawyers to imprisonment for up to seven years for persuading clients to testify falsely.³⁸ The danger for lawyers lies in the fact that Article 306 can be loosely interpreted. It potentially encompasses instructing a client to change his or her testimony from what was said earlier in a confession to the police, even when there are legitimate reasons for doing so.³⁹ Due to these various obstacles, providing effective criminal defence representation in China is extremely challenging. '[W]itnesses appear at trial in only 1 percent of cases,' a fact that undoubtedly contributes to China's 99 per cent conviction rate.⁴⁰

Lawyers in China: independent or subservient?

In China, there is considerable tension between the country's desire for stability and the need for lawyers to render legal services.⁴¹ It is said that the Chinese government fears lawyers who defend clients because they are seen as threatening social stability. However, the government also knows that lawyers play an indispensable role in modern China by drafting and implementing the laws, and engineering the commercial transactions, that foster economic growth.⁴² China has been accused by some critics of pursuing a policy of promoting the rights of lawyers on paper, while, in practice, ensuring that lawyers remain subservient to the state.⁴³ An example of this dichotomy between independence on paper and subservience in reality is China's promulgation of the 2007 *PRC Law on Lawyers*. This law seems to give the legal profession independence from the state and, thus, promotes the rule of law.⁴⁴ However, as seen in the Chongqing gang trials, the reality can be far different. Consequently, China has been accused of struggling to 'maintain a profession

³⁶ Li Enshen, 'The Li Zhuang Case: Examining the Challenges Facing Criminal Defense Lawyers in China' (2010) 24 *Colum J Asian L* 129, 130.

³⁷ Editorial, "Big Stick 306" and China's Contempt for the Law' *New York Times* (5 May 2011) A26; Li (n 36).

³⁸ *People's Republic of China Criminal Law*, Article 306 (China); Editorial (n 37); Li (n 36).

³⁹ Elizabeth M Lynch, 'China's Rule of Law Mirage: The Regression of the Legal Profession since the Adoption of the 2007 Lawyers Law' (2010) 42 *Geo Wash Int'l L Rev* 549. See also Branigan (n 21).

⁴⁰ Lynch (n 39) 546–47.

⁴¹ *Ibid* 537.

⁴² *Ibid* 536–39.

⁴³ *Ibid* 538.

⁴⁴ *People's Republic of China Law on Lawyers*, 2007, Articles 20, 29–31, 37; Lynch (n 39) 538.

so docile and beholden to the Chinese government that it will sacrifice any [real] commitment to...[the rule of law] in order to preserve its own existence.⁴⁵ A case that is emblematic of these problems is the prosecution of defence lawyer Li Zhuang. He was charged with fabricating evidence and instructing his client to lie.

Prosecution of a prominent defence lawyer

Li Zhuang was a criminal defence lawyer for a high-powered Beijing law firm.⁴⁶ Li gained a reputation as being a tough defence lawyer because he argued in a highly visible case that the prosecution had falsified evidence. Li examined more than 1,000 pages of documents to find proof that his client's testimony was fabricated under torture.⁴⁷ After being subsequently detained by the police for five hours, Li sued the security agency for false imprisonment,⁴⁸ which only enhanced Li's reputation. In 2009, the *Fayi* website ranked Li as the second-best lawyer in China.⁴⁹ As a result of his high professional standing, accused mob boss Gong Mogang hired Li to defend him in Chongqing.⁵⁰

During November 2009, Li was only allowed to meet with his client twice.⁵¹ At the first meeting, Gong told Li that he had been intermittently tortured for eight days.⁵² Li recounted Gong's descriptions:

They hung him from the ceiling, so he could touch a table with his toes, but he couldn't put his heels down... He was hanging for a long time, so he soiled himself. An interrogator took him down, and ordered him to clean up the mess with his hands, and wipe the floor with his shorts. Then they hung him up again naked.⁵³

When a senior policeman ordered Gong to get dressed, Gong was made to wear the same pair of shorts again.⁵⁴ Li used this evidence to argue that Gong's confession was coerced. Subsequently, Li was arrested in December 2009 on charges of fabricating evidence and instructing his client (Gong) to lie.⁵⁵ Gong was later convicted in 2010 and sentenced to life imprisonment.⁵⁶

⁴⁵ Lynch (n 39) 538.

⁴⁶ Garnaut (n 22).

⁴⁷ Li (n 36) 134; 'The Li Zhuang Case,' *Caixin Online* <<http://topics.english.caixin.com/2010/lizhuang/>> accessed 15 October 2012.

⁴⁸ Li (n 36) 134.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Lynch (n 39) 563.

⁵² Louisa Lim, 'Abuse Claims Follow Mafia Crackdown in Chinese City,' *National Public Radio*, 27 March 2012 <<http://www.npr.org/2012/03/27/149467544/in-chinas-crime-crackdown-claims-of-abuse>> accessed 12 October 2012.

⁵³ *Ibid.* See also Chris Buckley, 'Torture Marred Rule of Fallen Chinese Leader' *Reuters* (29 March 2012) <<http://www.reuters.com/article/2012/03/29/us-china-politics-chongqing-idUSBRE82S06520120329>> accessed 12 October 2012.

⁵⁴ Lim (n 52).

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

For three days and nights after his arrest, Li was allegedly confined to a 'tiger seat,' a chair screwed to the floor that featured braces, buckles, and a board across the lap to keep the prisoner awake.⁵⁷ During this time, the police conducted an interrogation that lasted 'dozens of hours,' according to the evidence, although Li was not beaten and was allowed toilet breaks.⁵⁸ Li's trial occurred a mere 18 days after his arrest, which Li claims was a record in China.⁵⁹ The prosecution's case centred on testimony from Gong and other unnamed sources, all of whom were unavailable for cross-examination and did not testify in person.⁶⁰ The presiding judge, Fu Mingjian, denied defence requests for the production of witnesses in court even though Fu had written a research paper in law school on the importance of the availability of witnesses for cross-examination.⁶¹ Judge Fu cited the witnesses' unwillingness to testify as the reason for his denial,⁶² despite the fact that this reason is implicitly forbidden according to the *PRC Criminal Procedure Law*.⁶³ The relevant parts of this law provide that witness testimony must be cross-examined and that all witnesses have a duty to testify unless they are unable to do so due to physical or mental impairment.⁶⁴ Further, Li Zhuang's assistant, who could have represented Li in court, was held at his home during the trial.⁶⁵ Li was convicted and sentenced to 30 months of imprisonment.⁶⁶

Confession, defiance, and disbarment

Between Li's conviction and his subsequent appeal, Li confessed his guilt in an about-face that surprised many Chinese legal scholars.⁶⁷ Not only was Li's confession littered with appeals for the necessity of the Socialist state,⁶⁸ but it also contained an acrostic—a recurring feature in writing that spells out a message—stating Li's retraction of the confession.⁶⁹ Li cleverly used each

⁵⁷ Buckley (n 53); Lim (n 52).

⁵⁸ Buckley (n 53).

⁵⁹ Lim (n 52). See also Li (n 36) 134; Lynch (n 39) 564.

⁶⁰ He (n 14).

⁶¹ *Ibid.*

⁶² Vivienna Bath, 'China, International Business, and the Criminal Law' (2011) 13 *Asian Pac L & Pol'y J* 1, 35.

⁶³ *People's Republic of China Criminal Procedure Law*, 1996, Articles 47–48 (China) <<http://www.lehmanlaw.com/resource-centre/laws-and-regulations/general/criminal-procedure-law-of-the-peoples-republic-of-china-1996.html>> accessed 12 October 2012 [*PRC Criminal Procedure Law*]; He (n 14).

⁶⁴ *PRC Criminal Procedure Law* (n 63) Articles 47–48.

⁶⁵ Lim (n 52).

⁶⁶ *Ibid.*; Li (n 36) 134; Lynch (n 39) 564.

⁶⁷ He (n 14).

⁶⁸ Li (n 36) 137.

⁶⁹ He Xin, 'Lawyer's Retraction Written into Plea Bargain' *Caixin Online* (10 February 2010) <<http://english.caixin.com/2010-02-10/100117225.html>> accessed 12 October 2012.

sentence's first and last characters to secretly assert: 'Forced into guilty plea and a reprieve, and will certainly appeal once I'm out (of custody).'⁷⁰ The inference that the confession was part of a plea bargain was strengthened when Li's sentence was reduced to eighteen months.⁷¹ After hearing the reduced sentence, Li angrily told the court observers that the government had broken its deal because the Chongqing officials had promised probation in exchange for the confession.⁷²

The value of Li's pseudo plea bargain was further weakened when the prosecutors attempted to levy additional charges against him based on allegations from former clients that Li had falsified evidence.⁷³ These new charges were brought more than a year into Li's sentence, and a new trial commenced 'less than two months before his jail term was set to conclude.'⁷⁴ For Li's new trial, many of China's most renowned legal scholars served on a defence consultation team, and a member of Li's defence team broadcast the proceedings on Sina Weibo, a popular Chinese social network.⁷⁵ Prosecutors eventually decided to withdraw these charges due to insufficient evidence after the defence presented contrary facts.⁷⁶ Li was released from prison after serving his eighteen-month sentence,⁷⁷ but the Beijing Justice Bureau had already disbarred him due to his sentencing protest.⁷⁸

Discouraging legal representation

Li later speculated that his imprisonment was intended to prevent legal interference with the *da hei* in Chongqing: 'It was a warning to all the lawyers in China. We're cracking down on the mafia here, no one should come here ... They were "killing the chicken to scare the monkeys." They made all [of] China's lawyers so scared [that] no one dared to speak out. It was extremely terrifying.'⁷⁹ After his arrest, the mainstream Chinese media portrayed Li as a rogue lawyer who was unethically attempting to free a mob boss.⁸⁰ At least one commentator noted that this 'character assassination' immediately

⁷⁰ Ibid; Qing Xue and Xiao Yan, 'Mystery of Li Zhuang's Guilty Plea Unraveled' *YouTube* (20 February 2012) <<http://www.youtube.com/watch?v=VwGJNELyBKQ>> accessed 15 November 2012.

⁷¹ Li (n 36) 134.

⁷² Heng He, 'Rule of Law on Trial in China: Defense Attorney Loses His Own Case in Chongqing' *The Epoch Times* (5 March 2010) <<http://www.theepochtimes.com/n2/china-news/rule-of-law-on-trial-in-china-30297.html>> accessed 15 October 2012. See also 'The Li Zhuang Case' *Caixin Online* <<http://topics.english.caixin.com/2010/lizhuang/>> accessed 15 October 2012.

⁷³ He Xin, 'Prosecutors Withdraw Charges against Li Zhuang' *Caixin Online* (22 April 2011) <<http://english.caixin.com/2011-04-22/100251500.html>> accessed 15 October 2012.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Lim (n 52).

⁷⁸ Heng (n 72).

⁷⁹ Lim (n 52).

⁸⁰ Li (n 36) 135–36.

after his arrest was unusual.⁸¹ As the events played out, Li's arrest became very successful in deterring other lawyers from undertaking any work that was related to the *da hei*.⁸²

Worldwide attention and implications

Li Zhuang's ordeal soon became national and international news. *Caixin*, a major Chinese magazine, created a special page on its website that was devoted to covering his story and published a cover story and editorial in its print edition.⁸³ One website even offered minute-by-minute coverage.⁸⁴ The initial reaction to Li's arrest produced contrasting narratives. State-controlled media outlets portrayed Li as an immoral attorney hoping to get a dangerous criminal back onto the streets.⁸⁵ However, Li's quick conviction, and the Chongqing legal system's abandonment of procedural safeguards, troubled many Chinese legal observers.⁸⁶

One of the most poignant critiques came from He Weifang, a Peking University professor, renowned Chinese legal scholar and activist, and member of Li's defence consultation team for the second round of charges.⁸⁷ Writing to the Chongqing legal professionals, He stated: 'I now have an urgent duty to express my uneasiness and voice my concerns.'⁸⁸ He recalled studying at the Southwest University of Political Science and Law in Chongqing and how the instructors and students alike had suffered through the 'lawless days' of the Cultural Revolution.⁸⁹ In fact, he explained that many professors 'could not hold back the tears,' as everyone yearned 'for the future of building [the] Rule of Law' and preventing the repetition of the lawlessness of the Cultural Revolution.⁹⁰ After hearing about the Chongqing *da hei* and, in particular, Li's prosecution, He lamented 'that time has been dial[l]ed back [thirty years], that the Cultural Revolution is being replayed, and that the ideal of [the] Rule of Law is now being lost.'⁹¹

He was specifically troubled with the participation of the legal profession in condoning the dismantling of the rule of law in Chongqing and the failure of legal education to prevent prosecutors from blatantly disregarding

⁸¹ Garnaut (n 22).

⁸² LaFraniere (n 18); Branigan (n 21).

⁸³ 'The Li Zhuang Case' *Caixin Online* <<http://topics.english.caixin.com/2010/lizhuang/>> accessed 15 October 2012. See also Johnson (n 19).

⁸⁴ 'Li Zhuang' *Feng* <<http://news.ifeng.com/society/special/lizhuang/content-2/list/0/0.shtml>> accessed 16 October 2012. See also Johnson (n 19).

⁸⁵ Li (n 36) 135–36.

⁸⁶ *Ibid* 136.

⁸⁷ He (n 14). See also He (n 73).

⁸⁸ He (n 14).

⁸⁹ *Ibid*.

⁹⁰ *Ibid*.

⁹¹ *Ibid*.

procedural rules.⁹² He wished that members of the Chinese legal academia had simply remained quiet rather than actively endorsing Li's prosecution and the disregard of legal rules.⁹³ The active participation of legal scholars in the Chongqing *da hei* directly contradicted their duty to uphold the rule of law:

As to this trampling on basic standards of [the] Rule of Law, you perhaps do not wish to voice your criticism, but you at least have the right to remain silent. The history of law in many countries shows that, in terms of protecting the basic standards of [the] Rule of Law, one important mission of scholars within the legal field is to provide theoretical support and reinforcement for professionals working in the field.⁹⁴

The demands of the rule of law

The rule of law is a philosophic concept, an ideal against which any legal system can be measured. Perhaps more concerned with the fairness of adjudicatory procedures and the reach of legal obligations, than with the substantive content of enforceable rights, the rule of law is a flexible standard. Very different legal regimes may each comport with the rule of law. However, the fact that there are different ways of complying with the rule of law cannot obscure the essential reality—the rule of law is demanding. As an intellectual construct, the rule of law sets goals that are difficult to achieve, and their attainment is never accidental. A legal system that falls short of the demands of the rule of law is inevitably deficient in important respects. If the shortcomings are widespread, it may mean that the legal system is corrupt or incompetent. However, even more isolated failures in complying with the rule of law indicate that a legal system is falling short of its potential.

Essential components

As with any philosophic concept, it is possible to debate the requirements of the rule of law. Some formulations of the rule of law are broad, whereas others are narrower.⁹⁵ This distinction does not mean that the concept lacks essential content but, rather, that there is room for some difference of opinion. In his cross-cultural study of the history, politics, and theory of the rule of law, Brian Z. Tamanaha found that there are three indispensable components of the rule of law. The first is the idea of 'government limited by law.'⁹⁶ The second is 'formal legality.'⁹⁷ And the third is the idea that no man is

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Michael Neumann, *The Rule of Law: Politicizing Ethics* (Ashgate 2002) 2–14.

⁹⁶ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge 2004) 114–19.

⁹⁷ Ibid 119–22.

above the law.⁹⁸ It is possible to articulate these requirements with somewhat greater detail. Thus, a study by Vincent Johnson, one of the authors of this article, concludes that the rule of law demands that a legal system:

- operate transparently and consistently based on neutral principles that manifest due concern for the correctness of decisions;
- provide fair notice of what the law requires and treat all persons equally;
- hold governmental actors and private individuals accountable for their misconduct; and
- merit public respect through practices that manifest an essential respect for human dignity.⁹⁹

Due process

In determining whether a legal system comports with the rule of law, perhaps nothing is more important than due process. In the most basic terms, due process entails both notice and hearing. Persons must have notice of what the law requires and, in defending against accusations, notice of the claims against them. Persons must also have a fair opportunity to state a legal claim or assert a defence, and this opportunity must occur before a decision is made by the adjudicatory authority. If a decision is reached before the arguments are heard and the evidence is considered, the purported observance of procedures is not compliant with the rule of law but is simply a mockery of justice.

To comport with the rule of law, legal decision making must be structured in a way that tends to ensure that results are reliable and that legal principles are applied consistently.¹⁰⁰ In part, this process means that parties, advocates, and decisional authorities must have sufficient time to gather and consider evidence, to consult with legal authorities, and to exercise good judgment with regard to legal matters that are often complex. Legal procedures that amount to little more than a hasty rush to judgment are a denial of due process and are thereby inconsistent with the rule of law.¹⁰¹

Legal and factual errors are an inevitable occurrence in the operation of any legal system. However, the rule of law demands that legal decision-making processes must be structured in a way that minimizes the chances that errors will occur¹⁰² and that provides a fair opportunity for correcting errors that nevertheless are made.¹⁰³ Consequently, fact-finding processes must ensure the reliability of evidentiary determinations and provide opportunities for

⁹⁸ Ibid 122–26.

⁹⁹ Johnson (n 11) 80.

¹⁰⁰ *McClesky v Kemp* 481 US 279, 339 (1987) (Brennan J dissenting); Johnson (n 11) 54.

¹⁰¹ See Johnson (n 11) 67. See also Haiting Zhang, 'Traditional Culture v. Westernization: On the Road to the Rule of Law in China' (2011) 25 *Temp Int'l & Comp LJ* 355, 357–58.

¹⁰² Johnson (n 11) 60. See also *Barclay v Florida* 463 US 939, 991 (1983) (Blackmun J dissenting).

¹⁰³ *South Carolina v Gathers* 490 US 805, 825 (1989) (Scalia J dissenting); Johnson (n 11) 61.

identifying and rectifying legal mistakes.¹⁰⁴ In part, this process means that the application of the law to the facts must be sufficiently transparent that errors can be identified.¹⁰⁵ In the usual case, such efforts mean that affected individuals are entitled to learn the evidence against them as well as the reasons for a court's decision,¹⁰⁶ and they must have a fair opportunity to challenge the errors on appeal.¹⁰⁷

During the past two decades, China has made great progress in codifying substantive legal principles.¹⁰⁸ Such action has meant that Chinese citizens have greater notice than before of what the law requires. However, there is a huge difference between the rules on paper and what the rule of law demands. No legal system has ever complied with the rule of law merely by enacting legislative provisions. It is fair to ask whether Li Zhuang was denied due process by the Chongqing *da hei*. The rush from arrest to conviction, the public vilification of the accused, and the denial of an opportunity for cross-examination raise troubling questions that suggest that the prosecution of Li falls short of what the rule of law requires.

Respect for human dignity

The rule of law demands that a legal system manifest an essential degree of respect for human dignity.¹⁰⁹ This understanding means that the concept of the rule of law has an important moral aspect. However, it is prudent to neither overstate nor understate this requirement. The rule of law does not require a legal system to embrace all of the provisions of the American Bill of Rights or the key features of the Anglo-American judicial tradition.¹¹⁰ However, it does require the system to do more than merely follow the rules. Michael Neumann of Trent University, Canada, probably offers too spare a view when he argues that '[t]he rule of law emerges, not as the quite different concepts of just rule or moral rule, but simply as rule according to law; law and order, where order is imposed, not by pushing people around, but through their understanding of the conditions imposed by legislation.'¹¹¹

While there is room for differences of opinion in regard to what respect for human dignity requires, cases in the extreme are clear. Any aspect of the legal process that constitutes torture, cruelty, or coercion violates the rule of law.¹¹²

¹⁰⁴ Johnson (n 11) 60–61.

¹⁰⁵ *Gannett Co v DePasquale* 443 US 368, 448 (1979) (Blackmun J concurring in part and dissenting in part).

¹⁰⁶ US Constitution, Amendment VI. See also Johnson (n 11) 65.

¹⁰⁷ *Romer v Evans* 517 US 620, 633 (1996).

¹⁰⁸ Zhang (n 101) 359–60.

¹⁰⁹ Johnson (n 11) 78–79. See also Berta Esperanza Hernandez-Truyol, 'The Rule of Law and Human Rights' (2004) 16 Fla J Int'l L 167, 169–70.

¹¹⁰ Johnson (n 11) 49. But see *Kepner v US* 195 US 100, 122–23 (1904).

¹¹¹ Neumann (n 95) 151.

¹¹² Cf *US v Belfast* 611 F 3d 783, 811 (11th Cir 2010).

Thus, it is not surprising that numerous countries have banned the use of coerced confessions in adjudicatory proceedings,¹¹³ held officials accountable for the torture of individuals,¹¹⁴ and prohibited capital punishment or other penalties that are cruel and unusual.¹¹⁵ Just as it is fair to ask whether the American use of water boarding at Guantanamo Bay was conduct that was inconsistent with the rule of law,¹¹⁶ it is also legitimate to question whether the confinement of Li Zhuang to a 'tiger seat' during his interrogation process was a failure on the part of the Chongqing *da hei* to accord an essential degree of respect for human dignity. Equally problematic is the fact that Li Zhuang was apparently coerced into confessing. Coerced confessions are not only unreliable,¹¹⁷ but their use manifests a failure to comply with the exacting standards of the rule of law.¹¹⁸

Confidence in the justice system

The rule of law is concerned not only with the handling of individual cases but also with the operation of the legal system as a whole. In particular, the rule of law calls for the institutional integrity of all legal processes.¹¹⁹ To comply with the rule of law, a legal system must operate in a way that merits the confidence of its citizenry.¹²⁰ In fact, law can only play an effective role in the resolution of disputes and the structuring of relations if it enjoys the confidence of the people.¹²¹ It is impossible for a legal system to enjoy public confidence if some persons are above the law and cannot be held accountable. The same is true if the legal system is operated in a corrupt manner,¹²² if the rules are changed without notice or applied inconsistently,¹²³ or if processes are so opaque that people cannot understand and evaluate the conduct of the decision makers.¹²⁴ To comply with the rule of law, a judicial system must

¹¹³ India Constitution, Article 20, s 3; *Police and Criminal Evidence Act 1984*, s 76(2); *Miranda v Arizona* 384 US 436 (1966).

¹¹⁴ Universal Declaration of Human Rights, GA Resolution 217A (III), UN Doc A/810 at 71 (1948), Article 30.

¹¹⁵ *Ibid* Article 5; US Constitution, Amendment VIII.

¹¹⁶ 'Holder: Close Guantanamo, Stop Waterboarding' *Newsmax* (15 January 2009) <<http://www.newsmax.com/InsideCover/holder-hearings/2009/01/15/id/327686>> accessed 16 November 2012.

¹¹⁷ *Dickerson v US*, 530 US 428, 432-33 (2000); *Miranda v Arizona*, 384 US 436, 519 (1966). See also *R v Warickshall* (1783) 168 Eng Rep 234, 235 (KB).

¹¹⁸ *Miranda v Arizona* 384 US 436, 439 (1966).

¹¹⁹ *United States v Williamson* 183 F 3d 458, 464 (5th Cir 1999).

¹²⁰ Johnson (n 11) 75-78.

¹²¹ *Ibid* 75.

¹²² *Rumsfeld v Padilla* 542 US 426, 465 (2004) (Stevens J dissenting). See also Ramsey Clark, 'Foreword' in Mimi S Gronlund, *Supreme Court Justice Tom C. Clark: A Life of Service* (University of Texas Press 2009) xiii.

¹²³ *McClesky v Kemp* 481 US 279, 339 (1987) (Brennan J dissenting).

¹²⁴ Johnson (n 11) 53-54.

operate transparently.¹²⁵ However, in China, ‘even seemingly innocuous information [about the legal system]—such as the number of judges, their education, and their pay structure—can at times be very difficult to obtain’¹²⁶ and challenging to interpret.¹²⁷

In particular, the rule of law demands that those who play a role in legal decision-making processes act in a way that demonstrates fidelity to the law and its requirements, not to partisan interests, political pressures, money, power, or personal relationships.¹²⁸ In a system devoted to the rule of law, judges are expected to step aside from an adjudicatory role, or be disqualified, if their impartiality in a case could reasonably be questioned.¹²⁹ In part, what this policy means is that a legal system must give serious attention to what can be called the ethical infrastructure of the rule of law. Judges must be selected based on merit,¹³⁰ adequately compensated,¹³¹ immunized from retribution based on their decisions,¹³² held to high ethical standards,¹³³ and insulated as far as possible from corrupting influences.¹³⁴ Prosecutors must have a duty to seek justice, not merely to convict.¹³⁵ Lawyers must be encouraged to ensure that all persons have meaningful access to the justice system,¹³⁶ privileged to vigorously represent their clients,¹³⁷ and protected from unjust criticism when they act within the bounds of the law.¹³⁸

At least three aspects of the *Li Zhuang* case are troubling when one considers the demands of the rule of law related to public confidence in the Chinese justice system. The first matter of concern is the asserted willingness of many in the Chinese legal education system to support violations of due process in the prosecution of Li Zhuang. He Weifang was right to lament this lack of moral leadership. The rule of law cannot survive in any country unless those individuals who are well educated and prominent call for its obligations to be observed, even in difficult cases.¹³⁹

¹²⁵ Erik G Jensen and Thomas C Heller, ‘Introduction’ in Erik G Jensen and Thomas C Heller (eds), *Beyond Common Knowledge: Empirical Approaches the Rule of Law* (Stanford University Press 2003) 3.

¹²⁶ Donald C Clarke, ‘Empirical Research into the Chinese Judicial System’ in Jensen and Heller (n 125) 180.

¹²⁷ *Ibid* 181.

¹²⁸ *Bush v Gore* 531 US 98, 128 (Stevens J dissenting), 157–58 (Breyer J dissenting) (2000).

¹²⁹ *Caperton v A.T. Massey Coal Co, Inc*, 556 US 868 (2009) [*Caperton*].

¹³⁰ Scott G Hawkins, ‘To Retrain or Not to Retrain—That Is the Question’ (2012) 86(4) Florida Bar J 4.

¹³¹ US Constitution, Article III, s 1.

¹³² Johnson (n 11) 77–78.

¹³³ American Bar Association, *Code of Judicial Conduct* (American Bar Association 2008).

¹³⁴ *Caperton* (n 129).

¹³⁵ American Bar Association, *Model Rules of Professional Conduct* (American Bar Association 2002) Rule 3.8.

¹³⁶ US Constitution, Amendment VI.

¹³⁷ *Upjohn Co v US* 449 US 383, 389 (1981).

¹³⁸ See also Johnson (n 11) 72–73.

¹³⁹ He (n 14).

Second, according to Li Zhuang, his prosecution was intended to frighten and discourage other lawyers from representing those people who were being targeted by the Chongqing *da hei*, and, in fact, it succeeded in achieving this result. Such conduct is inconsistent with the rule of law because it demands that persons be able to assert whatever rights the law provides so as to ensure that they are judged according to legal principles.¹⁴⁰ Intentional interference with one's access to legal counsel is abhorrent to the rule of law.¹⁴¹ According to news reports, not only did the responsible officials seek to ensure that other persons were denied legal representation in *da hei*-related cases, but they also interfered with Li Zhuang's representation by confining his assistant to his home during Li's trial.

The third troubling matter relates to confidence in the Chinese justice system, and this is a larger systemic issue. China has yet to develop the strong legal traditions, professional standards, and enforcement mechanisms that dependably protect the integrity of judicial decision making as well as the integrity of the prosecution and defence functions. For example, a recent study revealed that corruption distorts judicial decision making at all levels of the Chinese court system.¹⁴² While there has been progress in developing professional standards of conduct for Chinese judges, procurators, and lawyers during the past decade, what needs to emerge in China are detailed professional regimes.¹⁴³ These regimes must ensure, through widespread and consistent education and enforcement, that those individuals with a role in the administration of justice act in a manner that is consistent with their responsibility. Such programs will reduce the likelihood of abuses related to criminal prosecutions and increase the public's confidence in the Chinese justice system.

Conclusion: re-examination and improvement

Whether the prosecution of Li Zhuang is a serious step backward for the rule of law in China depends upon how the story of those events is used. If the correctness of the conduct of the key actors—the prosecutors and the judges—is unquestioningly accepted, or if the story is never discussed, then the legacy of the prosecution will be a sad one. However, if the case of Li Zhuang is used as a focus for a critical re-examination and a reason to call for reforms, then it can be an important and productive milestone in building the rule of law in China. It is encouraging that the Chinese government is now reviewing the

¹⁴⁰ *Kenyeres v Ashcroft* 538 US 1301, 1305 (2003). See also Johnson (n 11) 66.

¹⁴¹ Cf US Constitution, Amendment VI.

¹⁴² Ling Li, 'Corruption in China's Courts' in Randall Peerenboom, *Judicial Independence in China: Lesson for Global Rule of Law Promotion* (Cambridge University Press 2010).

¹⁴³ Roderick O'Brien, 'Towards a Legal Professional Community in China' (2011) 41 Hong Kong LJ 573, 776–77.

prosecution and conviction of Li Zhuang and the broader issues raised by the questionable actions of the Chongqing *da hei*.

A useful comparison can be drawn to different, but equally serious and embarrassing, events in the USA in the early 1970s. During what became known as the Watergate crisis, it was learned that lawyers in the Nixon administration—including the president himself—had been involved in numerous forms of criminal wrongdoing and other forms of misconduct falling far short of their high professional standards.¹⁴⁴ These events came on the heels of a report by an American Bar Association committee, headed by former US Supreme Court justice Tom C. Clark, which had found that the enforcement of standards of conduct within the American legal profession was ‘scandalously’ deficient.¹⁴⁵ The Clark report and the Watergate crisis were deeply troubling to those concerned with the administration of justice and clearly indicated that many lawyers, and, to some extent, the American legal system as a whole, had failed to live up to the ideals of the rule of law.

However, the Watergate crisis and the Clark report were not ignored. Together, they documented the failings of the legal profession and served as a catalyst for reform efforts within the American legal profession that are still underway.¹⁴⁶ Lawyers, judges, and academics called for a comprehensive re-assessment of a wide range of issues related to issues of professional responsibility. In stark contrast to the era before Watergate, legal and judicial ethics are now the subject of required law school courses; knowledge of the rules of ethics is tested on the bar examinations and determines whether law school graduates will be admitted to the practice of law; lawyers in practice must annually satisfy continuing education requirements related to issues of professional responsibility; and professional standards of conduct are routinely enforced through professional discipline,¹⁴⁷ legal malpractice actions,¹⁴⁸ and other means. The Watergate crisis and the Clark report are looked back on today not as embarrassing evidence of the legal profession’s failings but, rather, as the starting points in a comprehensive reform process that has enabled the American legal system to operate in a way that is more consistent with the aspirations of the rule of law.¹⁴⁹

¹⁴⁴ Kathleen Clark, ‘Legacy of Watergate for Legal Ethics Instruction’ (2000) 51 *Hastings LJ* 673, 673.

¹⁴⁵ American Bar Association, *Special Communication on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement*, Final Draft (American Bar Association 1970) 1 <<http://www.americanbar.org/content/dam/aba/migrated/cpr/reports/Clark.Report.authcheckdam.pdf>> accessed 9 January 2013.

¹⁴⁶ Vincent R Johnson, ‘Justice Tom C. Clark’s Legacy in the Field of Legal Ethics’ (2005) 29 *J Legal Prof* 33, 35.

¹⁴⁷ Duff Wilson, ‘Prosecutor in Duke Case Disbarred by Ethics Panel’ *New York Times* (17 June 2007).

¹⁴⁸ Vincent R Johnson, *Legal Malpractice Law in a Nutshell* (West 2011) 2–3.

¹⁴⁹ Mark Curriden, ‘The Lawyers of Watergate’ [June 2012] *ABA J* 36, 42.

The *Li Zhuang* case should be debated in Chinese law schools, discussed within the Chinese legal profession, and remembered for a long time to come. A careful re-examination of the many issues that the case raises and of the demands of the rule of law can be the basis for genuine improvements in the Chinese legal system.

Adherence to the rule of law is a demanding task, particularly in a country like China, with a vast population, a young legal profession, a visible role on the world stage, and an incomplete legal system. Much about the availability and enforcement of legal rights in modern China has yet to be determined.

In many fields of human endeavor, but in particularly in legal matters, progress must be built on the lessons of the past. The prosecutions that followed in the wake of the Chongqing *da hei* were fraught with serious mistakes. It is important that those errors not be repeated for they threaten the very foundations of the developing Chinese legal system. The errors that marred the prosecution and rulings in the Li Zhuang case must be studied and examined so carefully that their lessons will be internalized in ways that will strengthen and confirm China's commitment to the rule of law.