

THE SIGNIFICANCE OF RECENT DETENTIONS FOR THE RULE OF LAW IN CHINA

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Introduction

In my testimony today, I will look at two recent detentions in China and discuss their significance for the rule of law in China. The detentions are those of Xu Zhiyong and Ilham Tohti. I believe that the main significance of these detentions lies not in the substance of the charges against them or the sentences, but rather in the process that accompanied the detentions. It is not news that the Chinese government persecutes those it deems its enemies, so these cases aren't especially significant in that respect. But unlike in some other cases, in these cases the Chinese government has for the most part acted in such a way that it is hard to find clear and unambiguous violations of Chinese procedural rules. Whether it has done so depends on the interpretation of vague concepts such as whether a case is "complex".

Thus, while the rule of law has no place in the investigation and prosecution of Bo Xilai and now Zhou Yongkang, both of whom were and are respectively detained under a Party disciplinary procedure that in legal terms amounts to the crime of unlawful detention, it seems that the authorities are paying more attention to following their own rules in other cases. But those rules are so vague and elastic that even when followed, they offer little protection to defendants. While "rule of law" is an appealing slogan because it seems to command such broad adherence, it does so precisely because it does not necessarily dictate substantively just results. It is better than no rule of law, as Bo Xilai

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might now ruefully admit. But it is not synonymous with the protection of human rights. It is a necessary but not a sufficient condition.

Xu Zhiyong

Xu Zhiyong's current troubles began when he was placed under an informal kind of "house arrest" on April 12, 2013. This meant that he was effectively a prisoner in his own home. I call this kind of detention "informal" because while Chinese law has a form of house arrest called "residential surveillance," it's not clear that that procedure was specifically invoked.

His formal detention began on July 16, 2013.¹ That date is important because it unambiguously started the clock in China's Criminal Procedure Law (CPL) ticking. Detention (*juliu*) in China is a different concept from arrest (*daibu*); whereas in the United States we use the term "arrest" to refer to any situation in which a suspect is not free to leave, the same English word in the Chinese context is used to translate a formal stage of the criminal process that can happen long after a suspect has been locked up.

Detention without arrest is supposed to happen only in a limited set of essentially emergency circumstances (CPL 61); where those emergency circumstances are not present, the police are supposed to get approval for an arrest before physically detaining the suspect. In Xu's case, it is fair to say that none of those emergency circumstances existed.

After detention, the police have three days, extendable to seven days in special circumstances, to request the approval of arrest by the procuracy, the body in charge of prosecutions. In complex cases involving, for example, multiple offenses, the period can be as long as thirty days (CPL 89). The procuracy has seven days in which to decide to approve or disapprove the arrest. In Xu's case, the indictment says he was formally

¹ See *China Detains Activist Xu Zhiyong*, BBC NEWS, July 17, 2013, <http://bbc.in/1mV3zEA>.

arrested on August 22, 2014.² This is exactly thirty days plus seven days following his formal detention; apparently someone in charge was keeping a close eye on the calendar. To call this arrest lawful, however, we would have to be satisfied that the term during which he was under house arrest prior to his formal detention was lawful.

The closest thing China has to house arrest is an institution called “supervised residence” (*jianshi juzhu*) (CPL 72). This is the only lawful rubric under which Xu could have been confined to his residence as he was prior to his formal detention. But supervised residence requires, among other conditions that arguably were not present here, that the conditions for arrest *already be deemed met*. In that case, it is impossible to justify under Chinese law Xu’s subsequent 37 days in formal detention prior to his arrest, since the authorities must have decided he was arrestable as early as April 12.

Xu was arrested on a charge of “gathering crowds to disrupt order in a public place” (Criminal Law 291). Once a suspect is arrested, the authorities have two months—extendable to three with appropriate permission—to keep him in custody while they investigate (CPL 154). This time limit can be extended two months by provincial authorities in complex cases (CPL 156). Even this five-month time limit can be extended indefinitely by action of the Standing Committee of the National People’s Congress (CPL 155).

Thus, he should have been released or put on trial by October 22, 2013, unless certain very unusual circumstances applied to his case. But Xu was not put on trial until January 22, 2014, exactly five months after his formal arrest. This suggests that the generous time limits afforded by Articles 154 and 156 of the CPL were used to the

² The indictment is available in English translation at *Xu Zhiyong’s Indictment*, <http://www.hrichina.org/en/citizens-square/xu-zhiyongs-indictment>.

full—something that should hardly have been necessary, given the Foreign Ministry’s insistence that Xu’s was “an ordinary criminal case.”³

The excessive period of pre-arrest custody was not the only flaw in the proceedings. The trial itself was marred by numerous violations of the letter and spirit of Chinese law. First, the trial was not in any real sense open, despite the lack of any grounds under Chinese law for closing it. Second, the defense was not permitted to cross-examine any witnesses for the prosecution, despite the rule providing for cross-examination or at least some way to challenge evidence in the CPL. It should be noted that Xu’s case is not unique in that regard; the CPL’s rule is honored far more in the breach than in the observance. Third, Xu was not permitted to call his own witnesses.⁴

To protest these and other problems, Xu and his counsel elected to remain silent during the hearing. At the end, Xu attempted to make a statement, but was cut off by the judge.⁵ In the end, he was sentenced to four years of imprisonment.

Ilham Tohti

Ilham Tohti was detained on Jan. 15, 2014.⁶ He was apparently formally arrested on Feb. 20, 2014 on a charge of separatism (*fenlie guojia*).⁷ This period of time between

³ See Jerome Cohen, *Xu Zhiyong’s Trial Makes a Mockery of Beijing’s Pledge to Enforce Rule of Law*, SOUTH CHINA MORNING POST, Jan. 29, 2014, available at <http://bit.ly/MjWYE5>.

⁴ See Andrew Jacobs & Chris Buckley, *China Sentences Xu Zhiyong, Legal Activist, to 4 Years in Prison*, N.Y. TIMES, Jan. 26, 2014, available at <http://nyti.ms/1hQDL98>.

⁵ See *id.*

⁶ See *China: Uighur Scholar Detained*, N.Y. TIMES, Jan. 16, 2014, available at <http://nyti.ms/PBBXXp>.

⁷ See Bei Feng, *Yilihamu Tuheti Bei Daibu* [Ilham Tohti Arrested], Feb. 25, 2014, <http://canyu.org/n85273c6.aspx>. This source reproduces what purports to be a notice issued to Tohti’s spouse. The notice is dated Feb. 20, 2014.

The crime of separatism is listed in the first paragraph of Art. 103 of the Criminal Law. The

detention and arrest could fit within that allowed under Chinese law⁸ if his case is complex. So far, the time between arrest and trial has not been exceeded; the authorities are well within the permitted time period.

Nevertheless, the state has deprived Tohti of his rights under Chinese law in other ways. On March 4, 2014, his lawyer, Li Fangping, stated that he was no longer allowed to communicate with Tohti.⁹ Apparently the reason given was that state secrets were involved. Unfortunately, the Chinese government has used this excuse so often in circumstances where it is highly implausible that it no longer carries any credibility. Occasionally the police have claimed that conditions of detention and interrogation are themselves state secrets, but if this is to constitute a reason for depriving defendants of their right to communicate with a lawyer, then the right is meaningless for all suspects in detention.

Analysis

The point of this detailed history of the Xu and Tohti cases is not to condemn the Chinese government for violating its own rules. It is to further our understanding of the significance of these cases for the rule of law in China.

second paragraph lists a lesser crime of “inciting separatism” (*shandong fenlie guojia*). Under Art. 113 of the Criminal Law, separatism, but not inciting separatism, is punishable in some circumstances by death. The *New York Times* reported that Tohti was formally arrested on Feb. 26 and charged with “inciting separatism,” see Andrew Jacobs, *China Charges Scholar with Inciting Separatism*, N.Y. TIMES, Feb. 26, 2014, available at <http://nyti.ms/1hliulg>, but Bei Feng, *supra*, unless the document it purports to cite is spurious, contradicts this.

⁸ Chinese law allows a 24-hour period of “summons” before formal detention, then up to thirty days before the police must request an arrest, and then seven days for the procuratorate to make a decision, for a total of 38 days following actual detention.

⁹ See Massoud Hayoun, *China, Uyghurs May Have Lost Middle Way in Mounting Ethnic Tensions*, AL JAZEERA AMERICA, Mar. 4, 2014, <http://alj.am/1ejnipp>.

There are two lessons here. First, following legal procedures is better than not following legal procedures, but it does not necessarily produce justice. We have to ask what the laws say and how they were produced. In Chinese criminal procedure, the rules are heavily weighted in favor of the state, and there is no neutral process to challenge the state's interpretation in its own favor of vague and ambiguous concepts.

The second lesson is that the Chinese government retains its ambivalent attitude toward the values of the rule of law. As I have noted, in many cases the government wishes to claim the mantle of fidelity to law; it does so sometimes by making the law vague and flexible enough to achieve its purposes, and sometimes simply by falsely claiming to be following law. One can call this hypocrisy, but hypocrisy is after all the compliment that vice pays to virtue, and it reflects an acknowledgment of the value of process protections.

At other times, however, the state does not seem to be trying even to *appear* to offer fair proceedings, or at least proceedings that follow its own rules. This is what we see in the trial proceedings of Xu Zhiyong and will probably see in Ilham Tohti's trial. While other authoritarian states often try to turn political issues into legal issues in an attempt to neutralize them,¹⁰ the Chinese state sometimes seems to go out of its way to demonstrate that ostensibly legal issues are really political issues. Thus, it is really not clear whether it is reasonable to expect at least a slow movement toward the values of process.

Perhaps equally significant for prospects for a process-oriented rule of law in China is the fact that the government's indifference to the values of process seems to be shared by at least some of its critics. Recently five Chinese legal scholars were brave enough to

¹⁰ See generally *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* (Tom Ginsburg & Tamir Moustafa eds. 2008).

post a public analysis of the flaws in the case against Xu Zhiyong.¹¹ Yet their analysis consisted entirely of a defense of Xu against the substance of the charges made against him. They argued that he had not actually created a disturbance of public order, or that the public spaces in question were special. These kinds of arguments might be useful in a court before a neutral judge, but since they are basically expressions of opinion about what the law means or ought to mean, they lack force. The scholars made no objections to any of the procedural problems in the case. As I have pointed out, the pre-trial procedural flaws are not clear-cut. But they are certainly not harder to criticize than the substantive charges, so it is unfortunate that this critique ignored procedural problems both before and during the trial.

One advantage of a procedural critique is that the government can be criticized without ever questioning the validity of its stated laws and policies. Thus, it is ironic that even the government's critics may share its view that it is the substance of the law that counts, not procedure, even though the best way to advance the rule of law in the current political climate might be to focus on procedure.

¹¹ See *Gan Peizhong Deng Wuwei Faxue Jiaoshou Fabiao Lunzheng Xu Zhiyong Wuzui de Falü Yijian Shu* [Gan Peizhong and Four Other Law Professors Issue Legal Opinion Arguing that Xu Zhiyong Is Innocent], BOXUN.COM, Jan. 27, 2014, <http://bit.ly/1kAgVBR> (presenting text of letter issued by Gan Peizhong, Peng Bing, Yao Huanqing, Wang Yong, and He Haibo).