

CHINESE LAW



Unlawful Detention in the Mainland and the Concerns of Hong Kong

H L Fu and Pinky Choy***

This paper considers the legality of the detention of Hong Kong businessmen in the mainland through an examination of the case of Lok Yuk-shing. It points out the ambiguous status of Hong Kong residents in China's criminal process and the disadvantageous position Hong Kong residents are in, relative to the position of foreign nationals and mainland residents. It argues that while stronger action by Hong Kong government and closer cooperation between Hong Kong and the mainland authorities in criminal matters may offer limited assistance to Hong Kong residents detained in the mainland, the ultimate remedy lies in the further liberalization of China's legal system.

Introduction

The release on bail of Lok Yuk-shing from Inner Mongolia after 16 months of police detention, highlights the insufficiency of protection offered by the mainland criminal justice system and the urgent need for reaching an agreement between Hong Kong and the mainland on a variety of legal matters. According to the reports available in Hong Kong, Mr Lok worked for a Hong Kong company which operated a cashmere factory in Shaoguan city in Guangdong province. Mr Lok supervised the factory. The company bought 5.74 million RMB worth of cashmere from a Mongolia supplier, making only a partial payment before the company collapsed. The factory consequently closed, and the owner of the company went missing. Police from Inner Mongolia detained Mr Lok in Guangdong for alleged deception for the balance of the payment in the amount of 4.09 million RMB. The police demanded the payment of the balance for Mr Lok's release.¹

* Associate Professor, Faculty of Law, University of Hong Kong.

** Instructor, School of Law, City University of Hong Kong.

¹ Billy Wong Wai-yuk, 'SAR man held in Inner Mongolia', South China Morning Post (SCMP), 28 February 1999. After the Lok case was reported in the media, many similar cases came to light. Leung Wing-sum was another scapegoat for his employer who owed a ceramic factory in Henan an amount of 4.5 million RMB. Leung was first kidnapped in April 1999 and detained for five months by people whom he suspected were the employees of that factory. He was further detained by the police for two months before he was finally released on bail in November 1999 after paying 100,000 RMB. Cheung Chi-fai, 'Freed man blasts official "lethargy"', SCMP, 22 November 1999. In another case, Chow Pak-yau was detained by the Qingyuan police because his employer owed a large amount of money to mainland workers who demanded the payment of 800,000 RMB. However, after his family had paid 600,000 RMB, Chow was transferred to the Zhaoqing police, who requested another 1.07 million RMB. '\$558,000 fails to free HK man on the mainland', Hong Kong Standard, 25 November 1999.

The Lok case is only the tip of an iceberg. At the end of November 1999, 25 Hong Kong residents were still detained in the mainland, with twenty of them having been detained for more than six months.² Many detainees claimed that they were detained because of pure commercial disputes between their employers and mainland companies. They were held hostages for payments of money. This paper discusses the legality of such detentions under Chinese law and comments on ways to resolve this problem between Hong Kong and the mainland.

Debt collection in mainland China

It is now well known that it is extremely difficult, if not impossible, to secure the collection of debts through the judicial process in China. A legal victory in court does not guarantee the payment of debts.³ The court appears to be impotent when facing defiant debtors. It is almost impossible to enforce a judgment against a Hong Kong resident, given the fact that court judgments are not mutually enforceable between the mainland and Hong Kong. According to a Supreme People's Court (SPC) interpretation, a mainland court only has the authority to deal with the properties of a Hong Kong debtor in the mainland.⁴ In addition, the intimidating legal fees charged by Hong Kong lawyers and the inconvenience of crossing the border to Hong Kong makes it extremely difficult for mainland plaintiffs to file a new lawsuit in a Hong Kong court. The combined effect is that mainland creditors cannot recover their money from Hong Kong debtors who have no property in the mainland. It is a reasonable concern that once the Hong Kong debtors leave China, the likelihood of recovering the debts is slim.

Under these circumstances, desperate creditors resort to extra-legal or even criminal measures to recover the money. Factory employees may hold a debtor, who owes money to the factory, hostage until the debt is paid. Police and the procuratorate have encouraged, assisted or participated in such detention to collect debts in order to protect local interests and to make quick profits for themselves. Not long ago, the police and procuratorate were even active in

² Hong Kong Hansard (Floor Version), 1 December 1999, p 20; <<http://www.legco.gov.hk>>.

³ For a detailed discussion on the difficulties in enforcing a judgment in China, see Donald C Clarke, 'Power and Politics in the Chinese Court System: The Enforcement of Civil Judgment' (1996) 10 Columbia Journal of Asian Law 1, and Stanley B Lubman, 'Dispute Resolution in China After Deng Xiaoping: "Mao and Mediation" Revisited' (1997) 11(2) Columbia Journal of Asian Law 229. For the most recent effort of the Supreme People's Court (SPC) to improve the enforcement, see SPC, 'The Regulations of the Supreme People's Court Concerning Several Issues Related to Centralized Administration of Enforcement Work by the Higher People's Courts' (14 January 2000), in (2000) 3 China Legal Change 3.

⁴ Paragraph 7(3), SPC, Reply to Several Questions Concerning the Handling of Hong Kong and Macau-related Economic Disputes (19 October 1987), in Ma Yuan and Jiang Ping, *Zhongguo Jingji Minshang Falu Fenjie Shiyong Quanji* (Encyclopedia of the Chinese Economic Laws and Civil and Commercial Laws) (Beijing: People's Court Press, 1996), p 1833.

helping debt collection agencies. Violence becomes an effective way to settle contractual disputes. In a 1997 Notice, the Ministry of Public Security (MPS) noted the prevalence and seriousness of this matter:

Some (public security organs) handle economic contractual disputes, including disputes which courts are trying or have tried, as fraud cases; some detain, freeze or confiscate lawful goods or money of a third party who is not party to a dispute in the name of tracking the proceeds of crime; some demand fees from victims on a variety of grounds to enrich themselves; some detain person without justification and in violations of related rules; some public security organs even intervene in economic disputes and unlawfully detain persons in violation of law; and some even go further and detain innocent people for a long period of time for failing to make payment. At the same time, some refuse to investigate cases of using economic contract to defraud others, and refuse offering assistance to police from other places who are investigating economic contract fraud.⁵

The problem is so serious that it 'has seriously undermined the police authority to enforce law; destroyed the image of the police among the people, affected the operation of normal economic activities and infringed upon the lawful rights and interests of citizens'.⁶ The Chinese government has taken repeated measures to resolve this serious problem. The SPC, Supreme People's Procuratorate (SPP) and MPS for example, have made several rules prohibiting intervention in commercial disputes by the criminal justice agencies.⁷ The SPP has also decided that people who hold others hostage and request money in return for their release might be charged with the offence of robbery, in addition to other possible criminal offences.⁸ The MPS, together with the State

⁵ MPS, Notice on Several Problems in Handling Economic Contract Fraud Cases (9 January 1997), in China Law Association Procedure Laws Research Committee (ed), *Gong Jian Fa Jiguan Zhixing Xingfa Xingshi Susongfa Xinguiding* (New Regulations of Police, Procuratorates and Courts in Implementing Criminal Law and Criminal Procedure Law) (Beijing: Quanzhong Press, 1999) (hereafter *New Regulations*), p 497.

⁶ *Ibid.*

⁷ SPP, Notice Regarding the Prohibition of the Recovery of Debts in the Name of the Procuratorate (16 April 1990), (1990) 2 *Zhonghua Renmin Gongheguo Zuigao Renmin Jianchayuan Gongbao* (Gazette of the Supreme People's Procuratorate of the People's Republic of China) 20; SPP, Notice Regarding the Prohibition of the Acting Beyond the Power and Intervention in Commercial Disputes and Unlawful Arrest of Person by the Procuratorate (31 July 1992), in Editorial Board of the Encyclopedia of the Legislative, Judicial and Administrative Interpretation of the People's Republic of China, *Zhonghua Renmin Gongheguo Lifa Sifa Xingzheng Jieshi Quanshu* (Encyclopedia of the Legislative, Judicial and Administrative Interpretation of the People's Republic of China) (Beijing: Zhongguo Yanshi Press, 1997), p 937; SPC, Notice Regarding the Prohibition of Unlawful Detention in Handling Commercial Disputes (29 August 1992) and MPS, Notice Regarding Questions Relating to the Handling of the Using of Economic Contract to Commit Fraud (9 January 1997), in *New Regulations* (note 5 above).

⁸ SPP, Reply Regarding the Categorisation of Cases Concerning Taking Hostages to Extort Property (27 April 1990), (1990) 2 *Zhonghua Renmin Gongheguo Zuigao Renmin Jianchayuan Gongbao* (Gazette of the Supreme People's Procuratorate of the People's Republic of China) 31.

Administration of Industry and Commerce, has prohibited the formation of any kind of debt collection agency. It has also called for severe punishment for activities of debt collection by threat, force, fraud, and hostage-taking.⁹

Criminal law is frequently used to settle commercial disputes because the distinction between commercial disputes and fraud in mainland laws is vague. It is true that some Hong Kong businessmen may have been unlawfully detained to settle a purely commercial dispute. But it is also true that fraud, including fraud perpetrated by Hong Kong businesspersons, is prevalent in China's emerging market economy. Mainland courts and legal academics are attempting to formulate tests to distinguish between commercial disputes and fraud. There is, as yet, no consensus in theory and in practice.¹⁰

Were the detentions lawful under mainland law?

One of the allegations has been that such detentions are unlawful under mainland law. The Lok case can be examined to see to what extent the mainland Criminal Procedural Law (CPL) was violated.

Mr Lok was alleged to have been involved in a criminal case, and a very serious criminal case, because of the huge amount involved.¹¹ Under mainland criminal procedures, the police may detain a person for up to eight months for investigation before the case is referred to a procuratorate for public prosecution, provided the case is special and serious and authorizations are lawfully obtained. Police detention provided by the CPL includes a maximum of 37 days detention before the formal arrest of a suspect¹² and a maximum of seven months detention after the arrest is approved.¹³ Mr Lok was detained in June 1998. Provided that the necessary approvals by the appropriate procuratorial authorities were obtained, the police in Inner Mongolia could lawfully detain him until February 1999.

⁹ Renmin Gong'an Bao (People's Police Daily), 16 December 1995.

¹⁰ Xu Wusheng, *Jingji Fanzui Yu Jingji Jiu fen* (Economic Crime and Economic Disputes) (Beijing: Law Press, 1998), Chapter 3. See also Ouyang Tao and Qin Xiyan, 'The Distinction Between Crime and Non-Crime in the Economic Activities' in Yang Chunxi and Gao Ge, *Woguo Dangqian Jingji Fanzui Yanjiu* (Studies on Economic Crimes in Contemporary China) (Beijing: Beijing University Press, 1996), p 3.

¹¹ Article 266 of the Criminal Law (CL), which may be applicable in this case, provides that any person who obtains property belonging to others by deception may be subject to punishment ranging from a term of imprisonment of not less than 10 years to life imprisonment if the amount involved is especially huge. According to the explanation of the SPC, 'especially huge' means amount exceeding 200,000 RMB: SPC, Explanation Regarding Several Questions Concerning the Application of Law in Trying Fraud Cases (16 December 1996), in Chinese Procuratorate Press, *Gongjianfa Lushi Zuixin Shiyong Xingfa Xingsufa Sifa Jieshi Tonglan* (Collection of the New Judicial Interpretation on Criminal Law and Criminal Procedure Law for Lawyers) (Beijing: Chinese Procuratorate Press, 1998), p 56. Mr Lok's case was far beyond that amount.

¹² Article 69, CPL.

¹³ Articles 124, 126 and 127, CPL.

The Inner Mongolian police apparently were aware of the time limit. Towards the end of the eight months of detention, the police transferred the case for prosecution. On 4 February, the relevant procuratorate initiated public prosecution against Mr Lok.¹⁴ Under the mainland criminal procedures, the procuratorate has one and half months to prepare the prosecution¹⁵, and where the case needs further investigation, the procuratorate may return the case twice to the police for supplementary investigation, each supplementary investigation lasting no more than one month.¹⁶ The procuratorate thus has three and half months to dispose of the case, which, in this instance, was before 20 May 1999.

After this period, the procuratorate must decide whether to prosecute the case. There are other alternatives. The procuratorate may release Mr Lok on bail or residential surveillance if the case needs further investigation.¹⁷ According to the reports in Hong Kong, Mr Lok was released from custody and put under residential surveillance on 4 July 1999.¹⁸ It seems that the detention of Mr Lok by the procuratorate from 20 May to 4 July 1999 was unlawful under the CPL.

The question whether the detention of Mr Lok was lawful under mainland law may not be very meaningful for two reasons. First, the law is so vaguely drafted and the power conferred is so broad that most of the use and abuse of power can be justified in law. One neglected aspect of the CPL reform is that many of the previous police powers, which were illegal, are legalized after the amendment in 1996. If the lengthy pre-trial detention were justified by executive means, it is now justified by law. As such, it is difficult for a detention to be unlawful.

Second, in a system without effective institutional legal accountability and judicial review, the distinction between lawful and unlawful decisions may only

¹⁴ Government Information Centre, 'LCQ19: Cases of HK residents detained in the Mainland', Press Release, 28 April 1999; <<http://www.info.gov.hk/gia/general/199904/28/0428105.htm>>.

¹⁵ Article 138, CPL.

¹⁶ Article 140, CPL.

¹⁷ Article 133, CPL.

¹⁸ 'Government behind the scene of rescuing Hong Kong detainee in the mainland', *Singtao Daily*, 24 October 1999. Under the Chinese law, the police, the procuratorate and the courts may release a suspect or a defendant by putting him under residential surveillance. The police have the responsibility to supervise the suspects and defendants under residential surveillance. The period for residential surveillance shall not exceed 6 months (Article 58, CPL). Person under residential supervision is not allowed to leave the residence, or where he has no fixed residence, not to leave the place designated by the respective authority, without permission (Article 57, CPL). The designated places should not be built specifically for the purpose of residential surveillance, and residential surveillance should not be executed within police stations or police detention facilities. A person under residential surveillance must observe stringent conditions, including not to meet with any other persons except a lawyer or persons who share the same residence; immediate appearance before a specified authority when summoned, and not to interfere with witnesses or tamper with evidence. A violation of the conditions may lead to an arrest of the person if the circumstances of the violation are serious (Articles 97-99, MPS, The MPS Procedural Rules for the Implementation of the Criminal Procedure Law (hereafter MPS Procedural Rules) (20 April 1998), in Zhao Bingzhi and Bao Zhuxian (eds), *Zhonghua Renmin Gongheguo Gongan Falu Fagui Guizhang Quanshu* (Encyclopedia of the Laws and Regulations of the Public Security Organs of the People's Republic of China) Vol 1 (Beijing: Chinese Procuratorate Press, 1999), p 637.

be a moot question. It is difficult to raise the allegation of unlawful detention as it is not taken seriously when it is raised. Despite the recent reform and improvement, China does not have a criminal justice system as understood in Hong Kong.

Release under pressure: is it lawful?

The mainland authorities are ready to bend the law to achieve certain political purposes, to satisfy a friendship, or to defuse a crisis. Leading political dissidents are released to the US on medical parole under international pressure, while others less known are still lingering in Chinese prisons. President Jiang Zemin's visit to the US brought freedom in exile to China's most famous dissident, Wei Jingsheng. The visit by US President Clinton to the mainland has resulted in the release of Wang Dan. Harry Wu was released in exchange for the US First Lady's participation in the 1995 World Women's Conference in Beijing. These well-deserved releases are, however, in clear violation of Chinese law. Both the releases of Wei and Wang on medical parole to the US are political deals with very shaky legal grounds. Chinese law clearly prohibits convicted persons who are serving their terms from leaving the country,¹⁹ and both Wei and Wang could definitely be treated in China even if they were seriously ill.²⁰

The release of Harry Wu, a US citizen, was most controversial and the decision was strongly criticized by the Chinese legal community for its apparent disregard of legality and the use of the arbitrary power of senior state leaders

¹⁹ Article 8(3), Law of People's Republic of China on the Management of Entry and Exit of Citizens (22 November 1985).

²⁰ Article 2 of the MPS, SPC and SPP, Implementing Measures Regarding the Medical Parole of Criminal Elements (31 December 1990) provides that a criminal who satisfies any of the following requirements may be granted medical parole:

- 1) Person suffers from serious illness and there is a risk of death shortly;
- 2) For person who initially sentenced to life imprisonment or person whose original sentence is death penalty with suspension for 2 years but becomes life imprisonment after reduction of sentence, he can only be granted medical parole after serving at least 7 years sentence. For those who initially sentenced to fixed-term imprisonment, they must have already served at least 1/3 of the sentence before they can be granted medical parole. Persons under these categories must suffer from serious prolonged illness and have not recovered after undergoing long-term treatment. However, if the situation deteriorates and there is a risk of death and that person has good performance in the process of reform he may be exempted from the above restrictions;
- 3) Person with physical disabilities and cannot take care of himself; and
- 4) Old person and constantly ill and losses the ability to endanger the society.

However, Article 4 of the same Measures provides that the medical parole of counter-revolutionaries should be treated strictly. These Measures can be found in *Zhonghua Renmin Gongheguo Gongan Falu Quanshu* (Encyclopedia of the Laws of the Public Security Organs of the People's Republic of China) (Jilin: Jilin People's Press, 1995) (hereafter Encyclopedia), p 338. From the newspaper reports, it seems that the medical conditions of Wei and Wang were not serious at the time when they left China: Mark O'Neill, 'Freed Wang Dan reaches US Surprise release on medical parole for ailing activist INSIDE', SCMP, 20 April 1998; Jasper Becker, "'He will be back. The authorities never said he could not return ... he will not change his ideals' Wei Jingsheng released and flies to US after 18 years in prison', SCMP, 17 November 1997.

over the legal process.²¹ Convicted by the Wuhan Intermediate People's Court in 1995 of impersonating state functionaries and unlawfully obtaining state secrets, Wu received 15 years' imprisonment and expulsion from China as a supplementary sentence. However, Wu was deported to the US on the same day of his conviction.

There were two legal barriers to Wu's immediate deportation after sentencing.

First, the deportation deprived Wu of his right to appeal against the conviction, rendering the conviction ineffective. Second, Chinese law requires that, where a person is sentenced to a fixed term of imprisonment as a principal punishment, and deportation as a supplementary punishment, deportation can only be executed one month after the principal punishment has been served,²² unless the term of imprisonment is varied through another legal process, such as probation, parole or amnesty. As the authorities did not observe the procedures, there is no legal ground for Wu's immediate deportation.²³

The decision to release Mr Lok on cash bail and allow him to return to Hong Kong is also of dubious legality. Implicit in the bail decision are two principal judicial procedural matters: first, Mr Lok is still a suspect and the investigation continues;²⁴ and second, Mr Lok should be present at court when summoned. Since it is abundantly clear that Mr Lok will not voluntarily return to Inner Mongolia to face trial, and there is no mechanism between Hong Kong and the mainland which may compel him to face trial in a mainland court, further investigation of the case in the mainland thus becomes moot. The release of Mr Lok effectively means the end of the investigation of his liability.

The release on bail is a temporary face-saving scheme. It appears logical that the Inner Mongolian authority does not really want to prosecute Mr Lok and send him to prison (they could have done so if they wanted to), because a conviction would destroy the possibility to retrieve any money from him or his family. But at the same time, it does not want to admit wrongdoing. It is too much for the authorities to admit that there is no case after 16 months of detention. But face-saving may only be temporary. Under mainland law, the period for bail is 12 months, and by the end of the 12 months, the authorities would have to return the bail cash and announce the result of the investigation.²⁵

²¹ Huang Feng, *Zhongguo Yindu Zhidu Yanjiu* (Studies on China's Extradition System) (Beijing: China University of Politics and Law, 1997), p 145. For his own account of the matter, see Harry Wu with George Vecsey, *Troublemaker: One Man's Crusade Against China's Cruelty* (New York: Times Books, 1996).

²² SPC, SPP, MPS, Foreign Affairs Office of State Council, Ministry of Justice and Ministry of Finance, Rules on Enforcement Measures of Expulsion of Foreigners (31 July 1992), in *Encyclopedia* (note 20 above), p 355.

²³ Huang (note 21 above).

²⁴ Indeed, Article 58 of the CPL provides that investigation or prosecution must continue while a suspect is released on bail.

²⁵ Articles 56 and 58, CPL.

Status of Hong Kong residents in the mainland law from comparative perspectives

While China has reclaimed its sovereignty over Hong Kong in 1997, the reunification did not change the status of Hong Kong Chinese residents under Chinese law. Susan Finder has succinctly made the case that Hong Kong Chinese compatriots were considered foreigners under commercial law, but were given national treatment under the criminal law.²⁶ This status remained unchanged after the reunification.

Under mainland law, there are three forms of legal protection for persons under detention. First, the police have the obligation to notify the family of the detainee or his work unit of the reasons for detention and the place of custody within 24 hours after the detention. But this notification requirement may be waived under the CPL if 'such notification would hinder the investigation or there is no way of notifying them'.²⁷ Second, a person under police detention has the right to obtain legal advice, with the permission of the police, under police supervision.²⁸ Finally, with the permission of the police, the family members may visit, and communicate with, the detainee.²⁹

The CPL expressly provides that its procedures equally apply to foreign nationals, and the only exception is where a foreign national who enjoys diplomatic privilege or immunity commits a crime in China. In such a case, the crime shall be dealt with through diplomatic channels.³⁰ While foreign nationals enjoy the same rights in China's criminal procedures, those rights are better enforced due to China's participation in the Vienna Convention on Consular Relations (Vienna Convention) and the bilateral consular agreements China has entered into with other countries. The police, the procuratorate and the courts have devised special rules to handle cases involving foreign nationals. In the investigative stage in particular, there are stricter rules and procedures of approval and recording where a foreign national is involved in a criminal offence. A crime involving a foreigner is investigated by the police at a higher level, that is at the level of a prefecture or a city.³¹ Where a foreigner is suspected of having committed a serious crime or a crime which may raise diplomatic concerns, the regional police authority shall report the case to the MPS immediately, and the MPS should notify the respective foreign embassy individually or jointly with the Ministry of Foreign Affairs.³²

²⁶ Susan Finder, 'The Status of Hong Kong Compatriots under Chinese Law' (1996) 26 HKLJ 234.

²⁷ Article 64, CPL.

²⁸ Chapter 4, CPL.

²⁹ Chapter 6, State Council, Regulations of Detention Centres of the People's Republic of China (17 March 1990), in Encyclopedia (note 20 above), p 317.

³⁰ Article 16, CPL.

³¹ Article 325, MPS Procedural Rules.

³² Article 330, MPS Procedural Rules.

There is a more stringent approval procedure where a compulsory measure³³ is imposed on a foreign national. Before a foreign national is put under one of the compulsory measures other than arrest, approval from the person-in-charge of the police at the provincial level must be sought. Materials regarding the case and its investigation must also be reported to the MPS and copied to the foreign affairs department of the provincial people's government within 48 hours after the compulsory measure is imposed.³⁴

Since an arrest needs the approval of the procuratorate, there is an additional level of protection for foreign nationals. Under the SPP Procedural Rules, the approval of arrest by the SPP is required if the alleged offence is one endangering state security or is serious or if there is doubt in the application of law. The SPP decides whether to make an arrest after consulting the Ministry of Foreign Affairs.³⁵ The arrest of foreigners over other types of criminal offences need to be approved by the procuratorate at the provincial level, after consulting the foreign affairs office of the provincial people's government. The decision of the provincial procuratorate should be reported to the SPP for record.³⁶

The Vienna Convention requires the authorities in a receiving state to notify a consulate, without delay, if a national of the sending state is detained, arrested or committed to prison.³⁷ Under the existing consular agreements China has entered into with other countries, the time limit for such notification varies. It is three days for Mongolians,³⁸ four days for Americans,³⁹ five days for Turks,⁴⁰ seven days for Italians,⁴¹ and 'as soon as possible' for nationals for a number of countries.⁴²

The police also have a duty to arrange consular visits for foreign nationals in custody according to the Vienna Convention and the consular agreements China has entered into, except in the case where the detainee refuses to accept the visitation. In that case, the detainee should provide a written statement to that effect. In addition to consular visits, a foreign suspect in custody may also, with the approval of the police, meet his or her relatives or guardians, and may

³³ Compulsory measures include summons, bail, residential surveillance, detention and arrest. See Chapter Six, Part I, CPL.

³⁴ Article 331, MPS Procedural Rules.

³⁵ Article 94, SPP, Criminal Procedural Rules (hereafter SPP Procedural Rules) (15 January 1997), (1999) 3 *Zhonghua Renmin Gongheguo Zuigao Renmin Jianchayuan Gongbao* (Gazette of the Supreme People's Procuratorate of the People's Republic of China).

³⁶ *Ibid.*

³⁷ Article 36(b), Vienna Convention on Consular Relations.

³⁸ Article 31(2), Consular Agreement between the People's Republic of China and People's Republic of Mongolia.

³⁹ Article 35(2), Consular Agreement between the People's Republic of China and the United States.

⁴⁰ Article 13(1), Consular Agreement between the People's Republic of China and the Republic of Turkey.

⁴¹ Article 12(1), Consular Agreement between People's Republic of China and Italy.

⁴² Article 13(1), Consular Agreement between the People's Republic of China and Mexico.

communicate with the outside world through mail.⁴³ But in cases where it is 'not appropriate' to notify the consulate or to arrange consular visits because of the need of investigation, the notifications and visits can be delayed. But the competent authority should seek approval from the higher authorities before allowing any such delay.⁴⁴

A foreign national will not be allowed to leave mainland China if he is a suspect or defendant in a criminal case.⁴⁵ Once a foreigner is subject to one of the compulsory measures under the CPL described above, his passport may be seized pending the investigation. However, any such seizure must be approved by the police at the provincial level and reported to the MPS and the foreign affairs office of the provincial government.⁴⁶ The MPS has stipulated that this measure should only be adopted with great caution. Where it is necessary to seize a passport, the seizure should not exceed three days in normal situations.⁴⁷

Hong Kong residents do not enjoy the benefits in the criminal process which are enjoyed by foreign nationals. According to the Security Bureau of the HKSAR, the HKSAR government has no legal right to demand access to or communicate with a Hong Kong resident detained in the mainland, nor is there any notification system between Hong Kong and the mainland which allows the HKSAR government to be notified about the arrest and detention.⁴⁸ In that sense, the treatment Hong Kong residents receive in the criminal process in the mainland may be below the national standard. The protection of Hong Kong residents in the mainland may have been diminished after the hand-over. Before the hand-over, the status of Hong Kong residents in Chinese law was ambiguous, but colonial government or even the British Embassy and Foreign Office were able to make representations on behalf of the families in Hong Kong.⁴⁹ Now the same ambiguity which gave Hong Kong residents certain protection in the mainland in the past is working to their detriment. Hong Kong residents may be considered neither as Chinese nor foreigners under Chinese criminal law.

⁴³ Article 334, MPS Procedural Rules.

⁴⁴ Article 6, Ministry of Foreign Affairs, SPC, SPP, MPS, Ministry of State Security and Ministry of Justice, Rules on Several Questions on Handling Foreign-Related Cases (27 August 1987), in Encyclopedia (note 20 above), p 354.

⁴⁵ Article 23, Law of the People's Republic China on Control of the Entry and Exit of Aliens (1985).

⁴⁶ Article 335, MPS Procedural Rules

⁴⁷ MPS, Notice on Re-emphasis that Foreign Embassies or Consulates Stationed in China Should Be Notified Promptly of the Detention and Arrest of Their Respective Nationals (12 September 1991), in Encyclopedia (note 20 above), p 354.

⁴⁸ Security Bureau, 'Panel on Security of the Legislative Council: Agenda Item III—Follow-up on Problem of Hong Kong Residents Detained in the Mainland and Assistance Provided by the Administration to Hong Kong Residents Encountering Problems in Taiwan (LC Paper No. CB(2) 2799/98-99(03))', 10 September 1999; <http://www.legco.gov.hk/yr98-99/english/panels/se/papers/se2309_3.htm>.

⁴⁹ Finder (note 26 above).

What can the Hong Kong government do?

It is extremely difficult to deal with cases of detention of Hong Kong residents in the mainland. When a person, Hong Kong resident or not, is detained by mainland authorities, mainland authorities, like any authority, are bound to assert the lawfulness of the detention, and it is easy for them to do so given the nature of the criminal process in the mainland. Thus, instead of challenging the legality of the decision, the Hong Kong government should negotiate better treatment for detainees from Hong Kong.

To achieve this purpose, the Hong Kong government has to maintain good relations with mainland authorities. As a weaker party in this particular relationship, Hong Kong cannot afford offending the mainland authorities. In this sense, the Hong Kong government is bound to be the apologist for the mainland criminal process,⁵⁰ while others, political parties and the media in particular, may be more critical.

Should central authorities in the mainland be willing to assist, the process may still be long and tortuous. According to the Secretary for Security, usually, the relatives of the detainees will first seek the assistance from the Immigration Department. After interviewing the parties who request the assistance, the Department will refer the case to the relevant mainland authorities through Hong Kong's Constitutional Affairs Bureau. However, if the whereabouts of the detainees are unknown, then Interpol in Beijing will also give assistance.⁵¹

In a case of detention by police in Inner Mongolia for instance, it is believed that the HKSAR government has to refer the case to the Hong Kong and Macau Affairs Office (HKMAO) of the State Council. The HKMAO would refer the case to the proper central authority, the MPS, which would then probe into the matter in Inner Mongolia. The case is not only a police matter. The procuratorate is also involved, so the SPP may need to be consulted and persuaded. Dealing with local governments is a more difficult matter. The regional criminal justice system is controlled by, and thus accountable to, the local government rather than the authorities in Beijing. Local governments tend to focus on local interests instead of overseas pressure. After all, the more

⁵⁰ There is of course a limit to what extent the SAR government can justify the mainland authorities' actions. It may be justifiable to say that, according to mainland authorities, certain actions taken in the mainland are lawful under Chinese law. That is to defer to mainland explanation passively. It is another matter to actively legitimize actions taken in the mainland when uncalled for. Mrs Regina Ip's justification of unlawfully prolonged detention of Mr Lok might be justified by Articles 69(2), 126, 127 or 128 of the CPL, which demonstrated not only the misunderstanding by her Bureau of mainland law, but also the willingness of the government to regard whatever mainland authorities do as lawful, even if it is not regarded as lawful in the mainland. See note 14 above.

⁵¹ House Committee of the Legislative Council, Minutes of the Special Meeting held in the Legislative Council Chamber (28 May 1999), Paragraph 12; <<http://www.legco.gov.hk/yr98-99/english/hc/minutes/h280599s.htm>>.

than 4 million RMB were 'conned' from a city in Inner Mongolia rather than Beijing. A consensus has to be achieved before a decision can be made. Given the number of institutions involved and the possible conflict of interests, it naturally took a long time to release Mr Lok.

The possible assistance that could be offered by the Hong Kong government is limited by the 'one country, two systems' principles and is bound to be passive. Assistance has been limited to matters such as obtaining the details of those cases for the detainees' families, conveying the request of the detainees' families to the relevant mainland authorities and relaying back the up-to-date situation of the detainees as informed by the mainland authorities, providing information in relation to the hiring of mainland lawyers, etc.⁵² To a degree, the limitation is understandable. One can only imagine the outrage Hong Kong people would have felt if mainland authorities intervened in the case of Lin Qiaoying, a 17-year-old girl from Fujian who was wrongly prosecuted and convicted in Hong Kong for using a falsified travel document.⁵³

Regional mutual legal assistance

After the transition, the Hong Kong government has been drawn into the discussion of the highly theoretical and sensitive issues of criminal jurisdictions and rendition of fugitives.⁵⁴ The more routine issues, such as detention (often unlawful) of Hong Kong residents in the mainland did not receive sufficient attention. The issue existed long before the transition of sovereignty. The fate of Mr Lok and other detainees in the mainland and Hong Kong's effort for their releases have highlighted the problem.

According to the Hong Kong government, both sides are studying measures specifically designed to protect Hong Kong residents detained in the mainland. The Hong Kong government, the Hong Kong Office in Beijing and the HKMAO have been consulting different government departments in the mainland that have the power of detention to set up a notification system. Both sides have already agreed in principle in relation to such establishment. It is expected that the negotiation can be finished and the mechanism can begin to operate in 2000.⁵⁵ If the notification procedures concerning the detention of foreign nationals as set out in international treaties is of any assistance, we may expect that whenever a Hong Kong resident is detained, the mainland investigating agency, police, procuratorate or others, should notify the Hong

⁵² See note 2 above, p 20.

⁵³ Angela Li, 'Special meeting on passport girl', SCMP, 10 February 2000.

⁵⁴ H L Fu, 'The Battle of Criminal Jurisdictions' (1998) 28 HKLJ 273, and Bing Ling, 'Application of the PRC Criminal Law in Hong Kong and the Prospect of a Rendition Agreement between Hong Kong and the Mainland' (1999) 29 HKLJ 393.

⁵⁵ Note 2 above, p 22; see also, 'Immigration Department: Only 45 Hong Kong People Detained in the Mainland', Mingpao Daily, 26 October 1999.

Kong Office in Beijing within a specific period of time. The Office could then notify the authorities in Hong Kong.⁵⁶

The possibility of visits to Hong Kong residents under detention or in prison is also under consideration. As mentioned above, foreign consulates are allowed to visit their nationals who are under arrest, detention or serving sentences in the mainland. The Hong Kong government is requesting the relevant mainland authorities for Hong Kong officials to have the same rights.⁵⁷

The Security Bureau and the SPP have produced a useful pamphlet concerning the mainland investigative procedure, the judicial procedure and the possible channels of complaints in the mainland.⁵⁸ Unfortunately, what is needed is not more information on mainland law, for an enhanced understanding of the mainland legal system will not produce additional protection of rights. The existing formal complaint channels in the mainland failed Hong Kong residents before, and will fail them in the future. The less formal channel through Hong Kong deputies to the National People's Congress may provide a more effective mechanism because of the deputies' political influence and personal connections in the mainland.⁵⁹

Conclusion

It is important to formalize and institutionalize legal relations between the mainland and Hong Kong in criminal matters. Both Hong Kong and the mainland have already signed mutual legal assistance agreements in criminal matters with numerous countries of different political and legal systems. They should be able to reach agreements on a number of the selected areas mentioned above,⁶⁰ leaving the more difficult issues to be settled at a later time.

But the increasing cooperation between mainland and Hong Kong or any other jurisdiction will not bring the problem of unlawful detention under

⁵⁶ Another possible method of notification is through the Security Bureau in Hong Kong which then will notify the families of the detainees: 'Cases refer to the Beijing Office to follow', *Mingpao Daily*, 17 December 1999. During the year 2000 NPC annual session, the SPP undertook to set up a liaison office to handle detainee cases brought by the SAR deputies: *SCMP*, 15 March 2000.

⁵⁷ Government Information Centre, 'SARG to render all possible assistance to HK residents detained in the Mainland', Press Release, 27 August 1999; <<http://www.info.gov.hk/gia/general/199908/27/0827207.htm>>.

⁵⁸ Security Bureau, *Neidi Xingshi Susong Jianjie* (Introduction to the Mainland Criminal Procedure) (Hong Kong: Security Bureau of the Hong Kong SAR Government, 2000).

⁵⁹ See May Tam, 'Official from Beijing to help local NPC deputies', *Hong Kong Standard*, 1 November 1999 and 'Resolving problems in the mainland depends on personal connection', *Mingpao*, 1 November 1999. A more substantive issue that is under consideration is the transfer of sentenced persons. But this measure of mutual assistance does not render assistance to those who are held under the lengthy pre-trial detention.

⁶⁰ One issue which has not been discussed in Hong Kong is the responsibility of the real culprits in the alleged fraud cases who are also Hong Kong residents. Close cooperation between mainland and Hong Kong could bring them to justice and solve the problem for both sides.

effective control. Even if Hong Kong residents were given preferential treatment, so as to be treated as foreign nationals, their situation would not improve in any substantive way. Unlawful detention remains a serious problem in the mainland despite the recent law reform.⁶¹ As economic disputes concern local interests and the interests of local law enforcement agencies, the impact of central authorities is limited. Not much can be done from the outside until the general condition of the criminal justice system is improved, which in turn depends on further political and legal reforms from inside the mainland.

⁶¹ SPP, Notice regarding Problems of Clearance and Rectification of Prolonged Detention of Suspects in Cases Directly Handled by the Procuratorates (5 June 1998) in (1998) 3 *Zhonghua Renmin Gongheguo Zuigao Renmin Jianchayuan Gongbao* (Gazette of the Supreme People's Procuratorate of the People's Republic of China) 14; and SPP, SPC and MPS, Notice Regarding Rectifying the Problems of Prolonged Detention of Suspects and Accused under Criminal Procedure Law (19 October 1998) in (1998) 6 *Zhonghua Renmin Gongheguo Zuigao Renmin Jianchayuan Gongbao* (Gazette of the Supreme People's Procuratorate of the People's Republic of China) 26.