

Freedom from Arbitrary Detention in Asia: Lessons from China, Taiwan and Hong Kong

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I. Introduction

The power to detain is the power to crush. Freedom from arbitrary detention therefore is one of the most universal protections that international human rights norms and domestic constitutions seek to guarantee. The Universal Declaration of Human Rights provides, ‘No one shall be subjected to arbitrary arrest, detention or exile’¹. The International Covenant on Civil and Political Rights (ICCPR) protects a person’s right to liberty and security and requires a number of procedural guarantees, including notice of the reasons for arrest, judicial control of detention for criminal charges, the right to take proceedings for release, and the right to compensation for unlawful or arbitrary arrest or detention.² National constitutions and domestic laws often have similar provisions for the protection of personal freedom.

This chapter compares these protections across three jurisdictions—the People’s Republic of China (China or the PRC), the Republic of China on Taiwan (ROC or Taiwan), and the PRC’s Special Administrative Region of Hong Kong (Hong Kong). Because they share close ethnic, cultural, geographical, and economic ties, they are often referred to as ‘Greater China.’ They all have constitutional protections against

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¹ Universal Declaration of Human Rights, Art. 9.

² See International Covenant on Civil and Political Rights , Art. 9 (hereafter ICCPR); UN Human Rights Committee, General Comment No. 35, UN Doc. CCPR/C/GC/35.

arbitrary detention.³ Taiwan and Hong Kong have also incorporated the ICCPR, which the PRC has signed but never ratified, into their domestic law.

Yet their practices differ vastly. The rampant resort to unlawful and arbitrary detention in China paints a sobering picture of how law on the books can remain an empty promise. Taiwan and Hong Kong, on the other hand, have made significant strides in limiting arbitrary detention. Their experiences provide valuable insights into how government detention powers can be satisfactorily restrained

China's grim situation is reflected in recent headline news. For example, beginning in 2015, Beijing's infamous '709 Crackdown' targeted hundreds of rights activists and lawyers,⁴ some of whom remain in prison today while others have their freedoms severely restricted following 'release' from arbitrarily-imposed custody.⁵ Another example is the case of Liu Xia, the widow of Chinese dissident and Nobel Peace Prize laureate Liu Xiaobo, who served eight years of his 11-year prison term for 'subversion' before succumbing to cancer. Liu Xia was arbitrarily confined at home for years before her husband's demise. After his death in July 2017, she was 'disappeared' for most of the time until the government permitted her to travel abroad in July 2018.⁶

China's expanding abuse of detention has affected not only mainland China but also Taiwan and Hong Kong.⁷ In 2016, five Hong Kong booksellers who published controversial books about Chinese leaders suddenly disappeared from various places, including Thailand and Hong Kong, before eventually resurfacing in mainland police custody.⁸ In January 2017, a politically well-connected Chinese billionaire was mysteriously kidnapped from his residence in Hong Kong and has since been confined,

³ See Constitution of the People's Republic of China, Art. 37; Constitution of the Republic of China (Taiwan), Art. 8; Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Art. 28 (hereafter Basic Law of Hong Kong).

⁴Fu Hualing, 'The July 9th (709) Crackdown on Human Rights Lawyers: Legal Advocacy in an Authoritarian State' (2018) 27 *Journal of Contemporary China* 554.

⁵ Human Rights Watch, 'China: On "709" Anniversary, Legal Crackdown Continues' (July 2017) <www.hrw.org/news/2017/07/07/china-709-anniversary-legal-crackdown-continues>.

⁶ 'Liu Xia: widow of Nobel laureate arrives in Berlin after release from China', *Guardian* (10 July 2018) <<https://www.theguardian.com/world/2018/jul/10/liu-xia-nobel-laureates-widow-allowed-to-leave-china-for-europe>>.

⁷ Ben Bland, 'China Detains Taiwanese Democracy Activist', *Financial Times* (29 March 2017) <<https://www.ft.com/content/5735ffc4-1461-11e7-80f4-13e067d5072c>>.

⁸ Phila Siu and Kimmy Chung, 'Euro MPs Demand Bookseller's Release' *South China Morning Post* (24 February 2018) 4.

under no legal authority, in highly restricted quarters in Beijing.⁹ In March 2017, Lee Ming-che, a Taiwanese NGO volunteer who had promoted democracy and human rights on Chinese social media and while visiting China, disappeared upon re-entering the mainland until intense publicity stimulated an announcement that he was being investigated, and ultimately sentenced to five years in prison, for ‘subversion of state power.’¹⁰ The list goes on.

This chapter contrasts the current abuses in China with the significant checks on arbitrary detention in Taiwan and even in Hong Kong, despite occasional mysterious kidnappings by PRC agents there. Such checks highlight the importance of meaningful legal institutions and mechanisms—in particular, the judiciary—to give life to the protections of personal freedom enshrined in international and constitutional law. To be sure, an independent, effective judiciary goes hand in hand with a strong civil society and a relatively open political system. This chapter, however, focuses on the role of legal institutions and mechanisms enabled by international and constitutional norms.

II. China

Article 37 of the Chinese Constitution begins with a ringing declaration that ‘the freedom of person of citizens of the People's Republic of China is inviolable.’ The draftsmen did not content themselves with merely an admirable recitation of principle; they went on to address practical issues. According to Article 37:

No citizen may be arrested except with the approval or by decision of a people's procuratorate (the procuracy or prosecutors' office) or by decision of a people's court, and arrests must be made by a public security organ (the police).

On its face, this language suggests that only the police have the power to arrest and that their exercise of that power is subject to review by either one of two judicial institutions that elsewhere in the Constitution are obligated to act independently. This

⁹ Jamil Anderlini et al., ‘Chinese Agents Abduct Billionaire from Hong Kong and Take Him to Mainland’, *Financial Times* (1 February 2017) 1.

¹⁰ ‘China Jails Taiwan Activist Lee Ming-che for “Subversion”’ *BBC* (28 November 2017) <www.bbc.com/news/world-asia-china-42147776>.

arrangement appears to be quite consistent with the checks and balances associated with constitutional governance in most jurisdictions.

Yet to comprehend the meaning of this language one must understand China's criminal justice system. In China, following the former Soviet system, 'arrest' (*daibu*) often refers not to the initial restriction of a person's freedom but to the formal approval of a detention that may have taken place much earlier. Thus it is constitutionally possible for the Chinese police to detain people without seeking approval of either the prosecutors' office or the courts.

Article 37, however, does not overlook the importance of subjecting the detention power to legal restriction. It concludes by stating that 'Unlawful deprivation or restriction of citizens' freedom of person by detention or other means is prohibited and unlawful search of the person of citizens is prohibited.' Yet it fails to indicate how unlawfulness should be defined and by whom, and who shall have the power to decide whether any given conduct violates prohibitions against unlawful action.

The discussion that follows will illustrate that such questions have major practical implications. But it must first be noted that China lacks an effective arrangement for deciding questions of constitutional law. The courts are barred from making such decisions, and the constitutionally-authorized institution for deciding these issues—the Standing Committee of the National People's Congress—has played the role of the reluctant dragon, persistently avoiding its constitutional decision-making responsibility, despite its recent penchant for interpreting Hong Kong's Basic Law.¹¹ Although certain 2018 amendments to the Constitution and new legislation hint at a possible effort to breathe life into this function of the Standing Committee, the proof will be in the pudding.¹² Given the nature of China's party-state, one cannot be optimistic about prospects for the Standing Committee to develop into an independent constitutional tribunal. In the absence of an effective institution for interpreting and applying the

¹¹ See Thomas E. Kellogg, 'Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China', (2009) 7(2) International Journal of Constitutional Law 215.

¹² For example, Article 70, paragraph 1 of the PRC constitution previously required the NPCSC to set up a Law Committee; after the constitutional amendment in 2018, this provision now requires the establishment of a Committee for the Constitution and Law.

Constitution, the Chinese Communist Party has developed arbitrary detention into a science, if not an art.

To be sure, China's police have conventional, legislatively authorized detention options. They can summon people for a brief (not longer than 24-hours) conversation and interrogation that often meets the goal of intimidating the detainee and obtaining whatever information is sought. Under the Security Administration Punishment Law (SAPL), for a broad spectrum of minor vaguely-defined offenses that are not deemed 'crimes', the police can impose an 'administrative punishment' of detention for up to 15 days in a public security detention cell with a dozen or more detainees, some of whom often seek to earn leniency by enforcing harsh measures against other detainees on behalf of the police. The SAPL also permits the police to carry out searches and seizures with minimal procedure and without the approval of any prosecutor, judge or other official.

Although it is possible for someone who believes he has been victimized by SAPL actions to seek judicial review of their legality, limitations of time, legal knowledge, availability of lawyers, procedural obstacles and non-cooperation or threats from their jailers make this option more theoretical than real. Police frequently resort to SAPL detention as a warning to people whom they regard as potential criminals. They may also use SAPL detention while considering whether to subject the detained person to formal criminal process or some other coercive setting, such as psychiatric detention or centers for confining minor drug offenders, prostitutes and their customers, or others deemed in need of intensive 'legal education'.¹³ Although relevant statistics are hard to come by, there are undoubtedly many more SAPL detentions than detentions in the criminal process.

Yet criminal detention is understandably a much more widely-feared phenomenon, even if the detained suspect is eventually released without being formally 'arrested', indicted, or put on trial. Although the Criminal Procedure Law (CPL) has many rules designed to curb the detention powers of the police, the police have significant experience manipulating exceptions to those rules. For example, the CPL ordinarily permits the police to detain a suspect for only three days before requesting prosecutorial

¹³ Verna Yu, 'New Set of Bars', *South China Morning Post* (21 April 2014) 4.

approval of the person's 'arrest'. In certain circumstances the law allows the police to extend that period by four more days. In only three unusual circumstances does the law allow the police to detain their suspect for up to thirty days.¹⁴ Yet, through their unchallenged practice, the police generally give themselves the exceptional thirty-day maximum in all types of cases, even though the suspects in detention have not been 'arrested', much less indicted, tried, convicted and sentenced.¹⁵ This discretion is a powerful and coercive weapon.

Moreover, the police have unfettered power to decide whether to grant a suspect the Chinese equivalent of bail ('obtaining a guarantor pending trial') and are generally reluctant to do so unless it suits their convenience.¹⁶ The CPL has no provision for detainees to seek review of their detention's legality or propriety. The procuracy, which does have statutory authority to review police misconduct, rarely intervenes because of prosecutors' felt need to maintain friendly relations with the police, who are generally more politically powerful than either the procuracy or the courts.

In fact, the formal criminal process in China has become more arbitrary over time. Since the 2012 revision of the CPL, the police have, in addition to their general detention power described above, the power to detain anyone, incommunicado and with no right to see a lawyer, for as long as six months if they purport to believe that the suspect might be involved in a national security violation, terrorism, or major corruption. Moreover, this type of detention, innocuously titled 'residential surveillance at a designated location' (RSDL), occurs not at the suspect's residence or even at a regulated public security detention house, but at unregulated places chosen by police for their isolation and anonymity. This enlarges the ever-present risk of torture that continues to be a feature of detention in China.

Chinese police employ a vague and expansive definition of 'national security' that gives them unchecked power to put away for half a year anyone whom they consider a

¹⁴ See Criminal Procedure Law, Art. 89, para. 2.

¹⁵ Ruihua Chen (陈瑞华), 'The Investigation Centralism' (论侦查中心主义), *Tribune of Political Science and Law* (政法论坛), vol. 35, no. 2, 2017, p. 5.

¹⁶ Yong Jiang (蒋勇), 'Pressured Judicial System and Reform Path for Criminal Detention' (压力型司法与刑事拘留制度的改革路径), *Journal of People's Public Security University of China* (中国人民公安大学学报), No. 199, 2019, p.-49.50.

troublemaker, including many human rights advocates and their lawyers.¹⁷ One imaginative rights lawyer correctly anticipated his RSDL detention and the likelihood of torture, and announced that he had executed a novel ‘pre-detention will’ making clear that any ‘confession’ issued in his name by his jailers would be false and coerced.¹⁸

Sadly, the scope of government-imposed arbitrary detention has recently grown. The Communist Party, through its notorious national discipline and inspection commission and local counterparts, has traditionally subjected many Party members under investigation for corruption or other violations of Party discipline to a secret, incommunicado incarceration known as ‘*shuanggui*’. This often-lengthy process, unauthorized by the government and only lightly regulated by Party rules, has featured interrogations marked by torture and coerced confessions that have driven some suspects to commit suicide.¹⁹

To give this investigation/detention process a facade of legality, the PRC amended its Constitution in 2018, after having conducted relevant provincial-level experiments, to establish the National Supervision Commission (NSC), which inherited and expanded the tasks and powers of the Party's discipline and inspection commission.²⁰ These powers include the authority to detain (*liuzhi*) individuals incommunicado for up to six months under rules that have yet to be finalized. This revised government structure – the most significant innovation that the PRC has made to the Communist system that it imported from the Soviet Union – has inflicted a damaging blow to the composition and functions of the procuracy, which has lost its entire anti-corruption division to the NSC. Moreover, the tasks of the NSC are far broader than those of the Party discipline and inspection commissions. The NSC's investigation and detention powers are not only being applied to Party members but to all government officials, including the managers of state-owned enterprises, state educational institutions, and

¹⁷ Alex W. Palmer, ‘The Last Line of Defense, *New York Times Magazine* (30 July 2017) 24.

¹⁸ ‘Xie Yang’s Handwritten Statement on January 13, 2017’, *China Change* (7 March 2017) <chinachange.org/2017/03/07/xie-yangs-handwritten-statement-on-january-13-2017/>.

¹⁹ Flora Sapiro, ‘*Shuanggui* and Extralegal Detention in China’ (2008) 22(1) *China Information* 7.

²⁰ Changhao Wei, ‘Translation: Communist Party’s Proposals for Amending the P.R.C.

Constitution (2018)’, *NPC Observer* (25 February 2018).

<<https://npcoobserver.com/2018/02/25/translation-communist-partys-proposals-for-amending-the-p-r-c-constitution-2018/>>.

other government-financed units.²¹ Very conspicuously, the constitutional amendment establishing the NSC failed to reconcile the tension between the NSC's power to detain suspects under the sobriquet 'liuzhi' and the constitutional provision prohibiting unlawful 'detentions' (*jüliu*) in Article 37.

Yet the PRC's arbitrary detention innovations are not limited to legally authorized measures. There continues to be a range of lawless government actions, both before any formal detention takes place and after its supposed termination. Many people lose their freedoms at home and at work before any detention occurs. Despite their increasingly effective monitoring of a target's social media as well as telephone, email and postal mail, security police still heavily rely on personal surveillance and informal restrictions on an individual's activities. For example, an individual might be surveilled by the plain-clothes agent seated outside the apartment, the uniformed police in the apartment house courtyard or office building lobby, the unmarked nearby car, and an invitation to tea with government agents.²²

Information collected from such surveillance might trigger formal or informal detention of the target. It might also lead to the loss of the surveilled target's job. For example, human rights lawyers have encountered this fate when the local judicial bureau engineers their ouster from their law firm or denies them the annual registration required to practice law.²³ The target's spouse and children may also suffer in various ways. Police can resort to formal house arrest if they think informal sanctions are insufficient but confining their target in a police detention house or an unidentified 'designated location' is unnecessary. Perhaps the most famous subject of formal house arrest was the blind 'barefoot lawyer', Chen Guangcheng, whose farmhouse was surrounded 24/7 by a large group of local police and their thugs before the authorities decided to prosecute him and condemn him to prison.²⁴

²¹ Jamie P. Horsley, 'What's So Controversial About China's New Anti-Corruption Body?', *The Diplomat*, May 30, 2018, thediplomat.com/2018/05/whats-so-controversial-about-chinas-new-anti-corruption-body/.

²² Cao Yaxue, 'Drinking Tea with the State Security Police', *China Change* (1 March 2012) <<https://chinachange.org/2012/03/01/drinking-tea-with-the-state-security-police-who-is-being-questioned/>>.

²³ Eva Pils, *China's Human Rights Lawyers: Advocacy and Resistance* (Routledge 2014) 154-160.

²⁴ 'China's Blind Activist Chen Guangcheng', *BBC* (19 May 2012) <www.bbc.com/news/world-asia-17866176>.

Sometimes, however, as the prominent law professor and human rights lawyer Teng Biao personally discovered, rougher measures are deemed necessary, and the government's target is kidnapped (hood over his face in the back of a car) and held at an undesignated location for months of incommunicado interrogation, torture and 'persuasion'.²⁵ Indeed, there have been legally-unauthorized long-term detentions imposed on very high-profile political personages ranging from former Party General Secretary and Prime Minister Zhao Ziyang to Liu Xia, the previously-mentioned widow of the late Nobel Peace Prize laureate Liu Xiaobo.

All the legally unauthorized deprivations of liberty described above are also available to the police upon the release of a target from formal criminal custody. Many of those released are, of course, for a limited time subjected to formal legal restraints on their post-release freedoms. For example, those released before conviction, in accord with the PRC version of bail, are usually limited in their freedom and required to report to the police periodically for one year. Those convicted and sentenced to criminal punishment may receive a suspended sentence and immediate release, with or without probation, or granted parole after serving a period of imprisonment. In either case, their post-release freedoms will be formally restricted only for the period prescribed. Moreover, some of those convicted may be sentenced to post-release deprivation of 'political rights' for years, in addition to other punishments. Yet the coercive impact of these legally authorized post-release constraints pales in comparison with that of the panoply of informal, legally unauthorized deprivations.

III. Taiwan

In contrast to China, Taiwan meaningfully restrained the practice of arbitrary detention as its government evolved from an authoritarian regime to a constitutional democracy. During Taiwan's martial law period (1949-1987), the Kuomintang (KMT) authoritarian regime was a Leninist-style party-state dictatorship. The KMT machine penetrated all levels of society to monitor and eliminate any challenge to the party's dominance.²⁶ The secret police and military silenced political dissent by executions, detentions, torture, intimidation, and surveillance throughout the era that became

²⁵ Teng Biao, 'Confessions of a Reactionary', *ChinaFile* (4 September 2013)
www.chinofile.com/confessions-reactionary.

²⁶ Thomas B. Gold, *State and Society in the Taiwan Miracle* (Routledge 1986) 60-64.

known as the ‘White Terror.’²⁷ The KMT government subjected civilians to military trials, extending military jurisdiction to mundane crimes as well as offenses relating to state security. Vaguely worded anti-sedition laws were used to punish non-violent acts that supposedly suggested the person’s intention to ‘overthrow the government’ in the eyes of the authorities.²⁸

The ROC Constitution, which went into force in 1947 for all of China while the KMT was still in power on the mainland, was modeled on ideals of democracy, checks and balances, and rights and freedoms. It guaranteed a list of individual rights—particularly civil and political rights.²⁹ Personal freedom was among these guarantees.³⁰ But the Constitution and other pioneering efforts to promote human rights in China were ineffective. While the Constitution entrusted the Council of Grand Justices (later known as the ‘Constitutional Court’ or ‘TCC’)³¹ with the power of interpreting the Constitution, judges rarely used this power to strike down unconstitutional legislation or practices prior to Taiwan’s democratization.³²

The single exception with respect to human rights was made three decades after the KMT’s retreat to Taiwan, in the TCC’s 1980 interpretation seeking to restrict police detention powers under the Police Punishment Act (*Wei Jing Fa Fa*, PPA). The PPA allowed police-imposed detention without any *ex ante* judicial examination or *ex post* judicial relief. The TCC ruled that, based on Article 8, para. 1 of the ROC Constitution, the power to impose detention as punishment must be exercised not by police alone, but by courts in accordance with the procedures prescribed by law.³³ The PPA was therefore deemed ‘incompatible with the Constitution’ in this aspect. Nevertheless, the PPA remained in effect for another decade until the TCC ruled in 1990 (as the island’s democratization was underway)—this time with more forceful language—that the unconstitutional provisions in the PPA ‘should be invalid’ after the deadline of July 1991.³⁴

²⁷ Denny Roy, *Taiwan: A Political History* (Cornell University Press 2002) 88-94.

²⁸ Ibid.

²⁹ Constitution of the Republic of China (Taiwan), chapter 2.

³⁰ Ibid, Art. 8.

³¹ Yeh Jiunn-rong, *The Constitution of Taiwan* (Hart Publishing 2016) 159.

³² Tay-sheng Wang & I-Hsun Sandy Chou, ‘The Emergence of Modern Constitutional Culture in Taiwan’ (2010) 5(1) National Taiwan University Law Review 1, 26.

³³ J.Y. Interpretation No. 166 (1980).

³⁴ J.Y. Interpretation No. 251 (1990).

The lifting of martial law in 1987 breathed life into Taiwan's legal institutions and the civil society that had come to demand rule of law and rights protection. The TCC gradually began to take bolder actions to check police and prosecutorial powers in response to societal change. In the following decades, the TCC played a momentous role in scrutinizing detention practices and expanding judicial intervention regarding both criminal and administrative detention.

For example, in accordance with the TCC's ruling, the PPA was replaced in 1991 by a milder Social Order Maintenance Act (SOMA). Notably, SOMA's administrative detention punishment (*jiliu*), which ranges from one day to five days, must be decided by the courts, not the police. Nevertheless, the SOMA is still seen as a remnant of Taiwan's authoritarian, police-dominated past.³⁵

The police formerly enjoyed more sweeping powers under the Act for Eliminating *Liumang* (which can be loosely translated as 'hooligans'), a much-feared law from the authoritarian period. Its counterpart in mainland China was the notorious 'reeducation through labor', which was formally abolished in 2013, although similar administrative punishments continue there.³⁶ The *Liumang* Act allowed the police to put those whom they vaguely described as 'hooligans' behind bars for up to three years. The TCC reviewed this problematic system in three rulings at different times beginning in 1995.³⁷ Various provisions in the *Liumang* Act were declared unconstitutional because they authorized arbitrary deprivations of personal liberty and violations of due process.³⁸ Taiwan's legislature, after revising the Act several times in accordance with the TCC's rulings, finally abolished it entirely in 2009.

In the field of criminal justice, one of the TCC's most prominent rulings eliminated the prosecutorial power to approve pre-trial detention independently of the judiciary.³⁹

³⁵ Meei-Huey Fuch [傅美惠], 'The Trends of Amending the Social Order Maintenance Law' [社會秩序維護法之修法動向] [2013] 254 <<http://ir.nou.edu.tw/bitstream/987654321/1318/2/254> 頁起社會秩序維護法之修法動向--(14 頁).pdf>.

³⁶ Marcel A. Green, 'China to Abolish Re-Education Through Labor', *The Diplomat* (5 January 2014) <www.thediplomat.com/2014/01/china-to-abolish-re-education-through-labor/>.

³⁷ J.Y. Interpretations No. 384 (1995), 523 (2001), and 636 (2008).

³⁸ See Jerome A. Cohen and Margaret K. Lewis, *Challenge to China: How Taiwan Abolished Its Version of Re-Education Through Labor* (Berkshire Publishing 2013).

³⁹J.Y. Interpretation No. 392 (22 December 1995).

The ROC Constitution provides that, when a person is arrested or detained on suspicion of having committed a crime, the organ making the arrest or detention must, within 24 hours, turn him over to a competent court (*fayuan*) for interrogation—a habeas corpus-type protection.⁴⁰ Nevertheless, before the TCC’s ruling, prosecutors decided on pre-trial detention beyond 24 hours on the theory that they too, like courts, were part of Taiwan’s ‘judicial organs.’ The TCC, however, ruled that ‘*fayuan*’ is limited to ‘courts’ in the conventional sense. As a result, prosecutors have since been required to seek approval from a court to detain defendants beyond 24 hours.

After the prosecution’s pre-trial detention power terminated in December 1997, pre-trial detentions plummeted. In 1995, 1996 and 1997, the number of criminally detained people was 19,122, 19,521 and 21,457, respectively. After the TCC’s relevant decision in 1998, that number fell to 7,508.⁴¹ While judges’ approval rate for pre-trial detention applications was generally over 80%, prosecutors appeared to be more self-restrained in sending cases to the courts for approval.⁴² In 2017, only 5,957 people were detained pending trial out of a total of 591,500 people under criminal investigation that year.⁴³ This is a tremendous contrast with the criminal process in China, where most prosecutions are initiated by pre-trial detention.

Furthermore, in 2009 the TCC narrowed the scope of grounds that justify pre-trial detention. Responding to a petition filed by former President Chen Shui-bian, who was then detained on corruption charges, the TCC removed the charge of ‘felony cases’ as an independent ground for pre-trial detention. In light of defendants’ constitutional right to generally remain free before conviction, the TCC interpreted the Criminal Procedure Law to place certain requirements on prosecutors seeking to detain a felony defendant pending trial; prosecutors must prove that the defendant might flee or tamper with evidence, and that detention is the only feasible way to address these risks.⁴⁴

⁴⁰ Constitution of the Republic of China (Taiwan), Art. 8, para 2.

⁴¹ Jaw-Perng Wang [王兆鹏], *The Right to Counsel and Cross-examination* [辩护权与诘问权], 2008, p. 135.

⁴² Yu-jie Chen [陈玉洁], ‘Detention System Reform and the Taiwan Experience’ [羁押制度的改革与台湾经验] (*Human Rights in China Biweekly* [中国人权双周刊])
<<http://biweeklyarchive.hrichina.org/article/286.html>>.

⁴³ ‘Ministry of Justice Statistics Monthly (January 2018)’ [法務統計月報 (107年1月)] (Ministry of Justice, 26 February 2018) (Taiwan)

<www.rjsd.moj.gov.tw/rjsdweb/book/Book_Detail.aspx?book_id=278>.

⁴⁴ J.Y. Interpretation No. 665 (2009).

In 2013, the TCC required judicial approval in determining detention pending deportation/repatriation of foreigners⁴⁵ and people from mainland China, Hong Kong, and Macau.⁴⁶ As a result, temporary detainees can request habeas corpus-type judicial relief and ask to see a judge within 24 hours of detention. Anything beyond ‘temporary detention’ (15 days) requires *ex ante* judicial approval. The significance of these rulings lies in their explicit recognition that the constitutional protection of personal freedom applies to people without regard to their nationality, and to administrative proceedings as well as criminal proceedings.

Taiwan’s executive branch and legislature also cooperated in Taiwan’s landmark ratification of both the ICCPR and the International Covenant on Economic, Social and Cultural Rights in 2009.⁴⁷ The United Nations Secretary General, however, rejected Taiwan’s request to deposit the instruments of ratification. In anticipation of this problem, Taiwan’s legislature enacted an Implementation Law for the two covenants to explicitly grant their human rights protections the effect of domestic law. Whether the human rights treaties that Taiwan has ratified have gained the status of constitutional norms is unclear. The TCC has shown no signs of treating human rights treaties as the legal equivalent of constitutional documents, but it has continued to allude to international human rights norms as persuasive authority. The previously mentioned J.Y. Interpretation No. 710,⁴⁸ which referenced the ICCPR’s Articles 12 (freedom of movement) and 13 (prohibition of arbitrary expulsion of resident aliens), is but one example.

As mentioned earlier, Taiwan, unlike China, has a Habeas Corpus Act, but it was formerly interpreted to be limited to only criminal detention. This narrow interpretation was abandoned when the Act went through a revamp in 2014, which was in significant part prompted by the TCC’s 2013 rulings discussed above. The revised Habeas Corpus Act now can be invoked by detainees of all types. It also requires that the detainee and any friend/relative he designates be notified within 24 hours of the reason for, and the time and venue of, the detention.

⁴⁵ J.Y. Interpretation No. 708 (2013).

⁴⁶ J.Y. Interpretation No. 710 (2013).

⁴⁷ See Yu-Jie Chen, ‘Isolated but Not Oblivious: Taiwan’s Acceptance of the Two Major Human Rights Covenants’, in *Taiwan and International Human Rights: A Story of Transformation* (Jerome A. Cohen, William P. Alford and Chang-fa Lo, eds., Springer 2019) 207.

⁴⁸ Ibid.

As these developments demonstrate, the TCC gradually expanded judicial control over various types of detention and stimulated enhanced legislative and executive branch protections. The TCC—a neutral, independent third-party since the inception of Taiwan’s democratic era—has altered the power relationship between the judiciary and the state. Once authoritarian constraints were lifted, the judiciary gradually became an effective institution for protecting constitutional rights.

While Taiwan’s progress is remarkable, limitations that remain should not be overlooked. For instance, the independent foreign experts invited to periodically evaluate Taiwan’s performance under the ICCPR and ICESCR made three major recommendations regarding the island’s detention practices in their 2017 report. They urged significantly reducing the time limit of pre-trial detention under Taiwan’s Speedy Trial Act—currently eight years. They noted that Taiwan’s Mental Health Law seems to be subject to occasional abuse, resulting in arbitrary detention of controversial but not mentally ill persons. Further, they called attention to the large number of undocumented foreigners, including asylum seekers, who are detained by Taiwan immigration authorities.⁴⁹ Whether, how, and when Taiwan will deal with these failings remains to be seen.

IV. Hong Kong

After its transfer to Chinese sovereignty in 1997, the Hong Kong Special Administrative Region (HKSAR) continued to maintain the common law system it inherited from the British, accompanied by a strong sense of judicial independence and well-established rule of law doctrines, including the writ of habeas corpus. All of this enables judicial control of detention, which has been widely accepted in Hong Kong as a fundamental protection for personal freedom.

Hong Kong’s pre-1997 record of detention, however, was not without difficulty and controversy. A prominent problem arose after the Vietnam War ended in 1975, when Vietnamese refugees began to flood into Hong Kong. To deter the influx of these so-called ‘boat people,’ the Hong Kong government put many of them in closed camps

⁴⁹ Review of the Second Reports of the Government of Taiwan on the Implementation of the International Human Rights Covenants, Concluding Observations and Recommendations adopted by the International Review Committee (Taipei, 20 January 2017).

(refugee detention centers) for long periods of time, as long as eight years for some individuals, pending the screening process or forced repatriation.⁵⁰

In the 1996 *Tan Te Lam* case, the United Kingdom's Privy Council, which served as the highest judicial authority in colonial Hong Kong, applied the 'Hardial Singh' principles to the detention of Vietnamese 'boat people' in Hong Kong. Under these principles, immigration detention can only be used for the purpose of deportation, and in all circumstances the detention must be 'reasonable.'⁵¹ The Privy Council determined that the Hong Kong government had no lawful authority to detain people who had no prospect of being returned to Vietnam (those whom Vietnam did not regard as Vietnamese nationals), and even in cases where the government had detention powers, they must be exercised only for the period necessary to accomplish deportation. Despite this ruling, the detention conditions for Vietnamese asylum seekers and violent incidents during their transfers remained a major problem.⁵²

There were, of course, some other major pre-1997 improvements in Hong Kong legal protections. In 1991, Hong Kong's legal landscape changed dramatically with the passage of the Bill of Rights Ordinance,⁵³ which incorporates the ICCPR into domestic law.⁵⁴ This legislative change was prompted by the UK's attempt to ameliorate the confidence crisis in Hong Kong caused by Beijing's mass slaughter of student protesters and others on 3-4 June 1989 near Tiananmen Square.⁵⁵ Since 1991, the courts in Hong Kong have applied the Bill of Rights Ordinance and the ICCPR to strike down practices incompatible with the human rights standards prescribed in those documents.⁵⁶

⁵⁰ Nyaw Mee-kau and Li Si-ming (eds), *The Other Hong Kong Report 1996* (Chinese University Press 1996) 100.

⁵¹ *R. v. Governor of Durham Prison, ex p Hardial Singh* [1984] 1 All ER 983, [1984] 1 WLR 704; David Clark and Gerard McCoy, *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth* (Oxford University Press 2000) 141-142.

⁵² Hong Kong Human Rights Monitor, 'Briefing Paper for the United Nations Human Rights Committee' (1995). <<http://www.hkhrm.org.hk/english/reports/unbrief95.html>>; Hong Kong Human Rights Monitor, 'Briefing Paper for the United Nations Human Rights Committee' (1996). <<http://www.hkhrm.org.hk/english/reports/unbrief96.html>>

⁵³ Johannes Chan, 'Basic Law And Constitutional Review: The First Decade' [2007] 37 Hong Kong L J 409 (hereafter Chan, *Basic Law*).

⁵⁴ Hong Kong Bill of Rights Ordinance, (1991) Cap. 383, part 2.

⁵⁵ Waikeung Tam, *Legal Mobilization Under Authoritarianism: The Case of Post-Colonial Hong Kong* (Cambridge University Press 2013) 12.

⁵⁶ Danny Gittings, *Introduction to the Hong Kong Basic Law* (Hong Kong University Press 2013) 275.

In addition, Hong Kong's Basic Law, enacted by China in 1990 for implementation after the handover in 1997, includes several provisions seeking to ensure the survival of the ICCPR and common law doctrines of the rule of law after the handover.⁵⁷ The Basic Law, which many have called Hong Kong's 'mini constitution', specifies that the ICCPR, ICESCR, and international labor conventions as applied to Hong Kong shall remain in force and shall be implemented through Hong Kong's laws.⁵⁸ The 1984 Sino-British Joint Declaration that provided for the 1997 handover and the enactment of the Basic Law also states that Hong Kong will be vested with independent judicial power, including that of final adjudication (art. 3 (3)).⁵⁹

Regarding personal freedom, the Basic Law offers protection of Hong Kong residents⁶⁰ and non-residents⁶¹ against arbitrary detention and provides for judicial remedy.⁶² The Basic Law also specifies that the courts of Hong Kong may refer to precedents of other common law jurisdictions (art. 84). In addition, Hong Kong's Legislative Council incorporated the common-law right of habeas corpus in the High Court Ordinance just prior to Hong Kong's handover.⁶³ According to the Ordinance, proceedings in habeas corpus applications, including the announcement of every decision and its reasoning, are generally to be conducted in open court.⁶⁴

Since the handover, Hong Kong's judiciary has generally lived up to the expectation of upholding judicial independence and human rights protections.⁶⁵ Yet, Hong Kong's Umbrella Movement in 2014 presented a test of the judiciary's capacity for protecting personal freedoms. Following a great number of arrests of democracy activists, the courts released many activists who challenged their detention. In dealing with the detention of the famous activist Joshua Wong, for example, the judge, upon a habeas corpus application, granted his release unconditionally. Despite the government's allegation that Wong's release might undermine other investigations, the

⁵⁷ Berry Fong-Chung Hsu, *The Common Law in Chinese Context* (Hong Kong University Press 1992) 111-114.

⁵⁸ Basic Law of Hong Kong, Art. 39

⁵⁹ See also Chan, 'Basic Law' (n 53).

⁶⁰ Basic Law of Hong Kong, Art. 28.

⁶¹ Ibid, Art. 41.

⁶² Ibid, Art. 35.

⁶³ See Supreme Court Ordinance, No. 95 (1997) (Hong Kong).

⁶⁴ High Court Ordinance: Applications for, and issue of, writs of habeas corpus, Cap 4, s. 22A (Hong Kong).

⁶⁵ See generally Chan, 'Basic Law' (n 53).

judge dismissed the government's claim and determined that Wong's detention, which lasted over forty hours without charge, was 'unreasonably long' and therefore unlawful.⁶⁶ The government, however, continued to pursue prosecutions of democracy activists, many of whom were convicted and sentenced.

The most pressing problem relating to the protection from arbitrary detention in Hong Kong is the large-scale police arrests responding to the ongoing mass protests that were first triggered in June 2019 by the Hong Kong Government's proposed extradition bill that would have allowed rendition of criminal suspects from Hong Kong to mainland China.⁶⁷ Occasional abductions of Hong Kong people to the mainland had previously agitated local society.⁶⁸ The extradition bill galvanized extensive protests that eventually forced the government to withdraw the bill. The protests continued, however, even after the bill's withdrawal due to protesters' unresolved distrust of the government.

The protests have exposed a major problem with Hong Kong's law enforcement. In principle, the Hong Kong police have 48 hours to decide whether to charge a detained person or free him, and, if the former, to decide whether to release the charged person on bail. If not released on bail, the arrested person must be brought before a magistrate 'as soon as practicable,' generally not exceeding 48 hours from the time of arrest.⁶⁹

The purpose of such judicial control is not only to provide immediate relief for those who are unnecessarily detained but also to prevent the police from making arbitrary arrests in the first place. The Hong Kong police, however, have been widely criticized for the use of excessive force and arbitrary detention against protesters—whether the protesters have been violent or peaceful—based on an 'outdated and draconian' Public Order Ordinance.⁷⁰ As of mid-January 2020, the police have made over 7,000 arrests associated with the protests. Yet, by the end of 2019, only 1,050

⁶⁶ Julie Chu, 'Scholarism's Joshua Wong Released at High Court Judge's Instruction' *South China Morning Post* (28 September 2014) 5.

⁶⁷ Albert H.Y. Chen, 'A perfect storm: Hong Kong-China rendition of fugitive offenders, 2019', (2019) 49 *Hong Kong Law Journal* 419.

⁶⁸ See notes 7-8 and accompanying text.

⁷⁰ Hong Kong Watch, 'Outdated and Draconian: Hong Kong's Public Order Ordinance' Hong Kong Watch (2019), <https://www.hongkongwatch.org/all-posts/2019/7/10/drop-outdated-rioting-charges-and-call-independent-inquiry-new-report>.

cases have resulted in police charges or more minor sanctions.⁷¹ While the police claim that the other cases are still under investigation, the question remains whether the Hong Kong police have abused their powers by arresting many people who should not have been arrested. Moreover, despite the widespread complaints about police abuse, no officer has yet been charged or prosecuted over protest-related actions. Without independent investigation into and effective checks on police powers, there is reportedly a pervasive sense of impunity in the Hong Kong police force.⁷² A major concern is whether continuation of this problem will also undermine the efficiency and capacity of Hong Kong's courts to check arbitrary detention during the years to come.

Another potential venue to raise concerns about arbitrary detention in Hong Kong is the UN Human Rights Committee, the treaty body of the ICCPR. China informed the UN Secretary-General that the ICCPR shall remain in force in Hong Kong after its handover. Hong Kong, therefore, continues to accept the monitoring of the Human Rights Committee, although China itself has not ratified the ICCPR's application to the mainland. Since 1997, the Hong Kong Government has undergone three rounds of review of its performance under the ICCPR, the latest concluded in 2013.⁷³ The next reporting, which is slated to take place in 2020, is likely to be an occasion for Hong Kong's vibrant civil society to raise the problems regarding the police's arbitrary arrests and detentions during recent protests. In addition, the UN's independent human rights experts have intervened, expressing serious concerns over repeated instances where the Hong Kong authorities 'failed to ensure a safe environment for individuals to engage in public protest free from violence or interference'⁷⁴ by, for example, arresting activists and human rights defenders in protests.

⁷¹ Meihua Chang [張美華], 'Over 7,000 people arrested, with only over 10 percent charged; review of the arrests and charges in major incidents'[逾 7000 人被捕 被控僅一成多 重溫主要事件拘控情況] *Hong Kong 01* (4 January 2020),<https://www.hk01.com/社會新聞/417468/逃犯條例-逾 7000 人被捕-被控僅一成多-重溫主要事件拘控情況..>

⁷² Shibani Mahtani, Timothy McLaughlin, Tiffany Liang and Ryan Ho Kilpatrick, 'In Hong Kong Crackdown, Police Repeatedly Broke Their Own Rules — and Faced No Consequences' *Washington Post* (24 December 2019) <<https://www.washingtonpost.com/graphics/2019/world/hong-kong-protests-excessive-force/>>.

⁷³ While arbitrary detention was not a prominent issue in the pre-2014 proceedings, the Human Rights Committee's 2006 Concluding Observations expressed concern about reports that Hong Kong residents detained on the mainland encounter difficulties contacting their families in Hong Kong. United Nations Human Rights Committee, 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Hong Kong Special Administrative Region (HKSAR)' UN Doc. CCPR/C/HKG/CO/2 (21 April 2006).

⁷⁴ 'China/Hong Kong SAR: UN experts urge China to respect protesters' rights' *UN Human Rights Office of the High Commissioner* (12 September 2019),
<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24979&LangID=E>.

To conclude, Hong Kong's current and future challenges regarding detention come from both China and Hong Kong itself. On the one hand, abductions of people from Hong Kong to the mainland and, more generally, Beijing's push to place Hong Kong's political-legal system under tighter central government control have overshadowed the promises of 'One Country, Two Systems'. On the other hand, Hong Kong is confronted with problems of its own. Credible allegations of police abuse have not been addressed by local officials, and this unresponsiveness compromises government accountability. The city that once prided itself on the rule of law is now struggling to preserve it.

V. Conclusion

This chapter paints a broad-brush portrait of the protection against arbitrary detention in China, Taiwan, and Hong Kong. China has no meaningful external mechanism to control the actions of the police, who are much more powerful than both the procuracy and the courts. China's current repressive policies under Xi Jinping exacerbate the use of arbitrary detention to stifle dissent, the shocking incarceration of possibly over one million Muslims in the Xinjiang area being only the most extreme example. Taiwan offers a meaningful and important contrast. It has successfully transitioned from authoritarianism to democratic governance, and from a police-centric to court-centric legal system. Taiwan's judiciary has become a powerful actor in checking government detention abuses.

Hong Kong is a different comparative reference and a worrying example. Since the handover of Hong Kong to China, Hong Kong's courts have played an important role in checking police powers to detain. However, recent developments in Hong Kong, such as the protests triggered by the proposed extradition bill, have exposed problems of excessive policing and a lack of political will to address them. Whether or not, in the absence of democratic government, Hong Kong's well-established rule of law traditions can continue to guarantee protection against arbitrary detention remains to be seen.