

Pre-trial detention is the norm on the mainland, and suspects are released more as a coercive measure, writes **Jerome A. Cohen**

Key decisions

Two cases have riveted foreign attention on criminal justice in mainland China this summer. On July 5, the state security agency detained Rio Tinto representative Stern Hu on suspicion of espionage and bribery.

On July 29, the ordinary police detained human rights activist Xu Zhiyong (許志永) on suspicion of tax evasion.

Xu was released on the mainland's equivalent of bail after less than three weeks of investigation. Although the major charge against Hu has been reduced from espionage to theft of business secrets, he is still in detention after nine weeks and may be there for many more months before investigations and expected trial proceedings are concluded.

Every country needs a pre-trial detention system. But pre-trial detention infringes upon the presumption of innocence, since it punishes before conviction. It also tempts police to torture suspects in order to extract confessions and restricts suspects' opportunities to prepare a defence. That is why the International Covenant on Civil and Political Rights, which Beijing has signed but not ratified, mandates a presumption in favour of pre-trial release.

Yet in what circumstances should suspects be released pending completion of investigations and, if necessary, trial? Who should make that decision and when? After what procedures? And what, if any, conditions should be attached to pre-trial release?

Xu's release was a surprise, since on the mainland most accused remain detained throughout the trial and appellate process. Bail applications are seldom granted, even in cases where a long prison sentence is not possible.

On the mainland, bail is not an individual right designed to minimise restraints on freedom but an alternative pre-trial coercive measure. When bail is granted, it is usually on the initiative and for the convenience of the police. Is the detainee gravely ill, pregnant or unlikely to confess further? Are detention facilities overcrowded? Are there personal or political pressures to release the detainee? Are the generous time limits for pre-trial detention about to expire, but investigation is not completed?

Some suspects cannot receive bail because they are likely to commit harm if free, and migrants are usually not eligible for fear they would disappear. Yet investigators often deny bail because

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nothing stimulates confession like detention, where conditions can be awful even without torture.

If evidence of guilt is insufficient, but police or prosecutors want to save face and reduce the risk of being sued for false imprisonment, instead of simply releasing the suspect, they may resort to bail. This enables them to keep the released person, who may not travel without permission and can be subjected to other restrictions, on a short leash for up to a year. Thus they punish someone they cannot convict and hope to deter similar conduct. Whether



bail decisions are made by police or prosecutors, no hearing gives suspects or lawyers an opportunity to present arguments favouring bail. No written reasons for denial are required, and there is no outside review.

Sometimes investigators and detainees negotiate the terms of release. Will the suspect sign a "confession" that protects his captors against a lawsuit? Will he promise to abandon the conduct that got him locked up? The police can always cancel the release if the suspect repudiates any statement or promise extracted as its price. Thus, although not convicted or even indicted, the released person is monitored like a criminal on probation or parole.

This may be the plight of Xu – release without relief. He has declined to discuss his case. Yet he has announced his determination to continue the important public interest work that was interrupted by his detention and the closing of his legal aid organisation. He balanced this, however, by stating that recent experience

had taught him to show compassion towards not only the victims of unjust actions but also their perpetrators, that compromise is necessary and that he should maintain a lower profile.

To be sure, Hu would welcome conditional release. There could still be many months before trial, and theft of commercial secrets and bribery are charges serious enough to make him an unlikely bail prospect.

Yet no one had predicted Xu's release. Hu's lawyers should certainly seek bail, as Xu's did. Hu has probably revealed everything he knows about his case, he can be released on conditions that prevent flight and granting him bail would ease the continuing pressure on Beijing from foreign governments and business. As Rio Tinto knows, nothing ventured, nothing gained!

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