

No place like home

Jerome A. Cohen recounts how, in Ai Weiwei's continued detention, Chinese police are once again violating at will a provision of the law that allows them to hold a suspect only under strict conditions

Recent developments in the investigation of the artist-activist Ai Weiwei (艾未未) have again laid bare the extent to which China's police have warped the country's Criminal Procedure Law. On May 16, Ai's family announced that his wife had just been allowed to see him for about 20 minutes of monitored conversation in an unknown place.

It might have seemed that the police, perhaps to take the sting out of widespread foreign condemnation of their conduct in the case, were softening their attitude after keeping Ai in unexplained incommunicado detention for six weeks. Yet, as Xinhua confirmed last Friday, instead of demonstrating uncharacteristic police leniency, this visit revealed a new stage in Ai's prolonged detention, one that constitutes a stark violation of Chinese law.

That law requires the police to make one of three choices if, within 37 days after detaining a suspect, they do not have enough evidence to convince the prosecutor's office to approve a formal arrest. First, they can unconditionally release the suspect. Second, if the investigation is to continue, under an arrangement similar to bail in many countries, they can release him for up to a year under a guarantee that allows him freedom of the city.

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Finally, if the suspect has a local residence, they can strictly confine him to his home for up to six months. This last sanction, called "residential surveillance", is designed to allow the police to keep close tabs on a suspect without him continuing to suffer the total deprivation of personal freedom imposed by detention. Only suspects who do not maintain a local residence but are deemed to require "residential surveillance" can be kept at a location designated by the police.

Nevertheless, in practice, the police frequently use "residential surveillance" as a pretext for continuing to hold someone in the detention-like custody of their designated location, even though his home is in the area. They pretend that the local suspect is under "house arrest", but keep him not at his house but at theirs! This is in direct violation of not only the law but also the Ministry of Public Security's own interpretations of the law, which prohibit what they accurately call "disguised detention".

Yet this is precisely what the police in China's capital – not in some remote hamlet –

have brazenly done to one of Beijing's most famous residents.

Having apparently failed to come up with enough evidence to persuade prosecutors to approve Ai's arrest, despite over a month's intensive investigation and multiple interrogations of Ai, his colleagues and family, the police at some point placed him in their twisted version of "residential surveillance". This gives them five more months to continue their investigation and incommunicado interrogations, without the time pressures of any other legal deadlines, before deciding whether to renew their prosecution efforts, release the suspect unconditionally or restrict him to the city under guarantee for another year.

Of course, if further frustrated in their hope of formally convicting Ai of a crime, they can always resort to another major weapon in their arsenal – "re-education through labour", which would allow them to impose up to three years of "administrative punishment" in a labour camp without having to tolerate the inconvenience of submitting evidence to prosecutors and judges.

For now, Xinhua has concluded that one of Ai's companies, managed by his wife, committed crimes by not only failing to report a "huge" amount of taxes but also destroying accounting documents.

Of course, if the police do not yet have sufficient proof even to obtain an arrest warrant, not to mention an indictment, how can Xinhua be so confident? The news agency tries to give the impression that the police are following the law, and were even being lenient, by allowing Ai's wife to visit him.

Yet the Beijing police did the same in the Liu Xiaobo (劉曉波) case, when the Nobel Peace Prize winner, a Beijing resident, was being illegally held under "residential surveillance" at an unknown location before his formal arrest, and Liu ended up with an 11-year prison sentence. Moreover, in sentencing Liu, the courts refused to count the time he served in residential surveillance as detention time to be subtracted from his sentence, even though it had been "disguised detention".

Liu's lawyers were denied the right to visit him while he was in "residential surveillance", despite the fact that regulations permit such visits without police permission. Thus far, police have discouraged Ai's family from retaining counsel, but their friend, lawyer Liu Xiaoyuan (劉曉原), has bravely volunteered to take the case, if asked. He certainly knows there is little even the best lawyer can do to challenge unlawful police custody, as Liu's case showed.

Although prosecutors have the theoretical power to review the case, in practice they do not. Courts can review a claim of illegal "residential surveillance", at least when deciding upon the punishment, but, as in Liu's case, they treat the matter as if the defendant has been confined at home. And no police official has

been prosecuted for keeping the accused in "disguised detention", even if it runs overtime.

There is broad agreement in Chinese legal circles that the expected revision of the Criminal Procedure Law by the National People's Congress should deal with "residential surveillance". No consensus exists, however, about what the NPC should do. In China's current repressive political climate, one cannot

be optimistic that revision will end this abusive police fiction, despite the exposure Ai Weiwei's plight has given it.

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