Hong Kong: Democracy Activist and Publisher Jimmy Lai Under Attack

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Who is Jimmy Lai?

Jimmy Lai Chee Ying is a Hong Kong business magnate who has founded numerous companies, notably Apple Daily, a popular tabloid known for critiquing the governments of mainland China and Hong Kong. Lai has been a prominent leader in Hong Kong's pro-democratic movement, particularly during the 2019-2020 Hong Kong protests. These protests were triggered by legislative amendments proposed in February 2019 that would enable those charged with certain crimes to be extradited from Hong Kong to countries that Hong Kong did not have an extradition agreement with, notably mainland China. Those amendments were ultimately withdrawn but the protests, which had broadened into challenging Chinese political interference in Hong Kong, continued. In response, the mainland Chinese legislature passed the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (National Security Law or NSL) in June 2020, which hands mainland Chinese authorities sweeping powers to punish dissent in Hong Kong.

Authorities have used various laws, including the NSL and the colonial-era Public Order Ordinance, to target Lai for his publishing and pro-democracy activism. Lai also faces a

separate fraud charge under section 16A of the Theft Ordinance for alleged misuse of the lease for Apple Daily's premises. Additionally, he was arrested for allegedly committing a "conspiracy to assist offenders" under section 90 of the Criminal Procedure Ordinance by allegedly assisting an activist in an attempt to flee to Taiwan, although it is not clear if formal charges have been laid following this arrest. This note focuses on the charges under the NSL and the Public Order Ordinance since those laws are especially problematic from an international human rights perspective.

Unauthorised Assembly

Lai faces various charges under section 17A of the Public Order Ordinance for activity related to pro-democracy protests on four occasions: 18 August 2019, 31 August 2019, 1 October 2019 and 4 June 2020. Section 7 of the Public Order Ordinance requires a notice of no objection be obtained from the Police Commissioner for public meetings that comprise more than 50 persons and take place in public locations, while section 13 requires a no objection notice be obtained for public processions that comprise more than 30 persons and take place on public highways, thoroughfares or parks. Section 17A(2)(a) provides that public meetings and processions that take place without a notice of no objection are unauthorised assemblies, and section 17A(3) criminalises different forms of involvement in such unauthorised assemblies, with a maximum punishment of 5 years' imprisonment.

On 1 April 2021, a District Court found Lai and six other activists guilty of organising and participating in an unauthorised assembly on 18 August 2019. The police had issued a no objection notice for a public meeting in Victoria Park but had objected to subsequent assemblies, namely a planned procession from Victoria Park to Chater Road and a public meeting at Chater Road. The seven activists had led a procession away from Victoria Park but argued that doing so was necessary to safely disperse the large crowd at Victoria Park. This defence of necessity was dismissed by the judge, who pronounced that the activists intended to "deliberately flout the law openly by claiming [the procession] was necessary for safety reasons".

The judge also dismissed the defence's arguments against the constitutional validity of the provisions used to charge the activists, citing Hong Kong Final Court of Appeal (HKFCA) precedent that the law's criminalisation of unauthorised assemblies was not a disproportionate interference with freedom of assembly. Sentencing for the 18 August 2019 assembly will take place on 16 April 2021. During a 7 April 2021 hearing for the separate charge of taking part in an unauthorised assembly on 31 August 2019, Lai pled guilty. Lai has yet to be tried for charges relating to the allegedly unauthorised assemblies on 1 October 2019 and 4 June 2020.

The International Covenant on Civil and Political Rights (ICCPR) is in force in Hong Kong by virtue of Article 39 of Hong Kong's constitutional Basic Law; the ICCPR's provisions are given local effect in Hong Kong through the Bill of Rights Ordinance. Article 21 of the ICCPR protects the right to peaceful assembly. The UN Human Rights Committee, the treaty monitoring body for the ICCPR, criticised the Public Order Ordinance in 2013 for vague terminology that "may facilitate excessive restriction of Covenant rights".

Collusion with Foreign Countries

Lai also faces one charge of colluding with a foreign country or foreign elements to endanger national security under Article 29(4) of the NSL. Article 29(4) criminalises any involvement with the imposition of sanctions or other undefined "hostile activities" by foreign actors on the governments of mainland China or Hong Kong. The charge sheet cited months of expressive activity by Lai – including Twitter posts, media interviews, attending meetings with U.S. officials and opinion pieces – which allegedly involved direct or indirect calls for sanctions on the governments of Hong Kong and mainland China. Some of this allegedly collusive activity occurred before the NSL had entered into force in June 2020. Lai faces a maximum punishment of life imprisonment if convicted under the NSL. When Lai was arrested under this charge on 10 August 2020, police, armed with a warrant, also raided and searched the Apple Daily newsroom; the raid was livestreamed online by Apple Daily staff.

Lai's application for bail under the Article 29(4) charge was denied at first instance and then approved by a High Court judge, but the High Court's decision was ultimately overturned by the HKFCA on 9 February 2021. The apex court held that the bail provision in Article 42(2) of the NSL creates an exception to Hong Kong's normal bail rules, meaning that it is more difficult for applicants charged under the NSL to obtain bail than suspects charged under other laws. The apex court also cited HKFCA precedent to hold that the NSL was immune to judicial review by Hong Kong courts for compliance with the Basic Law and the ICCPR because the NSL and the Basic Law are Chinese national laws (as opposed to local Hong Kong laws) that were validly passed by the mainland Chinese legislature, which has the final power to interpret Chinese national laws. Lai remains in pre-trial detention at the time of writing.

Article 29(4) of the NSL's vague restrictions on expressive activity violate the ICCPR's guarantee of freedom of expression (Article 19) and requirement that criminal laws be sufficiently precise to guide activity (Articles 9 and 15). Article 42(2) of the NSL's presumptive denial of bail may also violate Article 9(3) of the ICCPR's requirement that there should be a presumption in favour of bail instead of against it.

Annex -- Sources for Further Reading

National Security Law:
https://www.elegislation.gov.hk/doc/hk/a406/eng_translation_(a406)_en.pdf

The Public Order Ordinance:
https://www.elegislation.gov.hk/hk/cap245

1 April 2021 HK District Court decision on unauthorised assembly:
https://www.hklii.hk/en/cases/hkdc/2021/398

International Covenant on Civil and Political Rights:
https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

2013 UNHRC Comment on the Public Order Ordinance:
https://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-CHN-HKG-CO-3_en.doc

9 February 2021 HKFCA decision on bail:
https://www.hklii.hk/en/cases/hkcfa/2021/3