

Ai Weiwei's detention shows yet again the ills of a police authority unchecked by the law, writes **Jerome A. Cohen**

# Absolute power

**M**ultitalented artist Ai Weiwei (艾未未) was one of the Chinese government's greatest assets in its quest for "soft power". His imaginative, diverse artworks and his vivid, outspoken personality not only made him a world celebrity but also suggested that the "people's democratic dictatorship" fostered impressive artistic achievement as well as phenomenal economic development and military prowess. The Communist Party has resurrected the formerly reviled Confucius as an icon of its soft power but, for many, the bearded, sage-like Ai Weiwei, son of a famed revolutionary poet, is a more potent contemporary embodiment of China's great culture.

Unfortunately for the party, Ai increasingly devoted his artistic energies to fearlessly exposing the Chinese system's negative aspects. After the 2008 Sichuan (四川) earthquake, he spotlighted officials' failure to sincerely investigate faulty

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construction of many collapsed schools, and he focused popular attention on government persecution of its critics. A videotape of Ai's brutal beating by Sichuan police, and his frustrated efforts to get them to admit responsibility, revealed the misconduct that is typical of China's public security force. That beating necessitated emergency surgery in Germany.

Ai's mocking response to the government's arbitrary demolition of his Shanghai studio left no doubt about official refusal to respect property rights as well as personal rights. And his adept use of Twitter and other social media to register protests developed a large following.

Ai's April 3 detention has now given him a greater, albeit unwanted, opportunity to demonstrate the injustice of Chinese criminal justice. His case illustrates the abject helplessness of the individual before the unchecked power of the police, despite legislative and judicial measures attempting to curb that power.

Because of the notoriety of Ai's detention, police are more likely to comply with the letter of the law in this case than in less visible cases, where they have shown a disturbing tendency to act outside the law. For that reason, Ai's case is especially educational, since it may help us understand what foreign ministry spokesmen mean when they say that China "is a country ruled by law" but that perceived "troublemakers" cannot "use the law as a shield" and "no law can protect them".

Ai's family still has not received the formal notification of his detention ordinarily required by law. Without that, they cannot be sure who has detained him and where and why he has been detained. Yet the failure to notify does not clearly violate the Criminal Procedure Law, which makes an exception for cases in which the police believe – in their own discretion – that notification "might hinder the investigation".

Without such a notice, it is often difficult for lawyers retained by the suspect's family to even meet him, so the police are often tempted to avoid issuing the notice. Moreover, police are frequently reluctant to identify themselves, the suspect's location and the charges. In Ai's case, despite the foreign ministry's claim that the investigation has "nothing to do with human rights and freedom of speech", it took government media several days to announce that he is being investigated for "economic crimes".

Ai's lawyers have still not been able to meet him, although the Law on Lawyers guarantees their right to promptly do so. The procedure law, by contrast, gives investigators discretion whether to allow such a meeting in cases they decide involve "state secrets", which are broadly defined in China. The police interpret away the conflict between the two laws, maintaining that the lawyers' law does not govern investigators. Again, neither the judiciary nor the procuracy – prosecutors who are supposed to be the "watchdog of legality" – is allowed to review such police decisions.

Also unreviewable is investigators' decision to conduct a search and seize a suspect's property. Both Ai's home/studio and a partner's business premises were searched in accordance with search warrants that the police issued to themselves.

In principle, a detained suspect is entitled to pre-trial release upon "obtaining a guarantor", but that, too, is within the uncontrolled discretion of investigators and seldom granted. Although the procedure law purports to limit how long investigators may hold a

suspect, again police use their unreviewable discretion to apply the law to suit their convenience. In most cases, this law gives investigators only three days to hold someone before releasing him or applying to the prosecutors for a formal arrest warrant that allows them to continue detention for further investigation.

Yet, exceptions extend this for up to seven days and, in very limited circumstances, up to 30 days. Police usually turn the exceptions into a 30-day rule, although global scrutiny may cause them to speed up the process in this case. Prosecutors have seven days to decide whether to approve arrest, so Ai may hear nothing about this decision for 37 days.

Arrest virtually assures indictment, conviction and prison time.

Eventually, Ai's lawyers will be allowed to visit him, although it may not be until the investigation has concluded, possibly after many months of incommunicado detention. During investigation, such visits are of limited significance, since at this stage lawyers are not yet deemed to be "defenders" but mere "advisers", who are not permitted to learn about the case and can offer only modest assistance.

Moreover, meeting time is restricted, and lawyer-client conversations are monitored by police. Yet such visits offer the suspect his first contact with the outside and a chance to report torture or other abuse.

It is possible, in view of foreign protests and the transparently spurious nature of the charges, that Ai will be released instead of formally arrested. To save official face and confine his activities, he may be released under guarantee, which would allow him to remain relatively free but still monitored within the precincts of Beijing while investigation nominally continues for one year. This was done, for example, in the case of the admired lawyer/activist Xu Zhiyong (許志永).

If, on the other hand, Ai is arrested and indicted, his trial will further illustrate the unfairness of the criminal process in a country where "troublemakers" cannot be protected by law.

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