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**People's Republic of China: Establishing the rule of law and respect for human rights: The need for institutional and legal reforms. Memorandum to the State Council and National People's Congress of the People's Republic of China.**

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## **PEOPLE'S REPUBLIC OF CHINA**

# **ESTABLISHING THE RULE OF LAW AND RESPECT FOR HUMAN RIGHTS: THE NEED FOR INSTITUTIONAL AND LEGAL REFORMS**

**Memorandum to the State Council and National People's Congress of the  
People's Republic of China  
by Amnesty International  
September 2002**

In late 2001, shortly before China's entry into the World Trade Organisation (WTO), Chinese officials made a series of statements about the need to build an impartial and efficient judicial system to bring it into line with WTO requirements. In one such statement in December 2001, the President of the Supreme People's Court, Xiao Yang, stressed that courts should conduct trials impartially and efficiently, and announced a series of measures to improve the professional standards of judges. These measures included amendments to the Law on Judges and new regulations stipulating the procedures to dismiss incompetent or corrupt judges. While announcing the new measures, the Supreme Court President also acknowledged that people's confidence in the judicial system had been seriously harmed by nepotism and bias, particularly in many provincial courts.(1)

Amnesty International welcomes the openness reflected in these statements and the steps taken towards improving the professional standards of judges.

Amnesty International believes that solid foundations for the rule of law can only be established if the full range of rights is respected and if the requirements of rule of law in a broad sense are served by an independent and impartial judiciary. In this memorandum, it makes recommendations for reform of the judiciary, the abolition of two systems of administrative detention and the introduction of effective measures to prevent torture. Amnesty International



believes that these reforms would constitute immediate major steps towards establishing the rule of law and respect for human rights in China.

The judiciary has a crucial role to play in ensuring respect for the rule of law and human rights. One of the most important conditions to achieve this aim is to ensure that the courts are independent and impartial and have sufficient powers to act against all abuses of the law and human rights. In particular, the courts should have jurisdiction to review all detention in order to ensure that it conforms with international human rights standards. They should also be able to take action at an early stage of the criminal process in cases where allegations of torture are made.

Analysis by Chinese legal scholars and reports in the Chinese media show that the necessary conditions for the judiciary to play this role are still lacking in China. The judiciary lacks independence and continues to be subject to interference by people holding positions of power. There are no effective mechanisms to check the wide powers granted to the law enforcement agencies. Corruption is widespread and increasingly affects both the law enforcement and judicial process.

In addition, the law itself contains vague and contradictory provisions, which lead consistently to its arbitrary use and provide wide scope for abuse of power. Widespread illegal practices by law enforcers, such as the use of torture to extract confessions, which has been explicitly prohibited by law since 1980, continue unabated and remain unpunished in many cases.

The combined effects of repressive and vaguely worded criminal legislation, the existence of a system of administrative detention, a weak judiciary, powerful law enforcement agencies, and impunity for officials who abuse their power, mean that anyone can suffer human rights abuses at the whim of individuals in a position of power.

Amnesty International is mindful that the Chinese authorities have taken steps since the 1990s to address some of these issues. These steps include notably the revision of some fundamental laws, such as the Criminal Procedure Law, and the introduction of new laws, such as the Compensation Law which makes it possible for individuals to seek redress against abuse of power.

However the measures taken so far have been too limited to significantly change law enforcement and judicial practices. These measures still fail to protect individuals in China against arbitrary detention, unfair trials, torture and other human rights violations.

Amnesty International believes that further revision of legislation, including the Criminal Law and Criminal Procedure Law, is essential to improve the protection of human rights in China. It has made detailed recommendations about such changes in a number of reports published in recent years.(2)

Amnesty International also believes that, beyond the substance of the law, the issue of its implementation must be urgently addressed, and that institutional reforms and other appropriate measures must be introduced to improve respect for the law.

This memorandum addresses only a few of Amnesty International's concerns regarding the protection of human rights in China. It urges the State Council and National People's Congress of the People's Republic of China to consider adopting measures which would constitute

immediate major steps towards establishing the rule of law and increasing respect for human rights. These include introducing reforms to lay the basis for ensuring independence of the judiciary; abolishing two systems of administrative detention and introducing effective measures to prevent torture.

## **1. THE INDEPENDENCE OF THE JUDICIARY**

An independent and impartial judiciary is the cornerstone of the right to a fair trial in international law. It ensures that the interests of justice and the requirements of fairness and rule of law are served in a broad sense, including by preventing abuse of power by executive authorities at all levels and other political influences over law enforcement and justice.

Some of the main obstacles to the independence and effective functioning of the judiciary in China identified by Chinese and foreign legal experts<sup>(3)</sup> include the following factors:

**The long established supremacy of Communist Party policy over the law** and the resulting practice for judges to apply the law in accordance with Party policy, be it national policy or that enforced by local Party officials. This is institutionalized through the Party's Political and Legal Commissions, which have a leading role in judicial work at every administrative level and therefore control the work of the courts. Under this system, the courts are effectively answerable to the Communist Party, despite provisions in the Constitution stipulating they are responsible to the people's congresses.

**The lack of definition of what constitutes judicial power**, in particular in relation to political, executive, and legislative power, but also in relation to the media, economic or social bodies and the general public. This issue and that outlined above are among the major factors limiting judges' ability to make independent and impartial decisions. Judges are subject to internal institutional pressures and public interference which they can neither prevent nor resist. The state-controlled media, for example, regularly pre-empts the outcome of trials by describing some criminal suspects who have not yet been tried as guilty of the charges against them. As a result, whatever the nature of the evidence subsequently presented in court, it is effectively impossible for the judges who hear these cases to pronounce non-guilty verdicts. Such interference reduces the role of the courts to that of rubber-stamps and seriously undermines their credibility with the public.

**The lack of a system of judicial review for legislative and administrative actions pertaining to interpretation of the law.** Under the Chinese Constitution, the Standing Committee of the National People's Congress, not the courts, is responsible for interpreting the law (Constitution, Article 67), and the courts have no power to review decisions involving interpretation of the law by legislative or executive bodies.

**The lack of independence of individual judges within their own court.** This is due to the role played by the courts' adjudication committees and court presidents, who are in a position to put pressure on judges and influence judgements without sitting in the hearings of cases.

**The dependency of local court presidents and judges on local organs of power**, and the resulting tendency for local judges to be loyal to local interests, whether political or

economic. In particular, local court presidents are appointed and dismissed by the local people's congresses, which are themselves closely associated with local government and other local centres of power. Another manifestation of local protectionism, which impacts on the work of the courts, is the proliferation in recent years of provincial and local regulations, which often contradict national laws and regulations but are nevertheless applied locally.

**The lack of financial and human resources.** Despite recent improvements in this area, there is still a shortage of properly trained judges – the majority have not had any formal legal education – and there are still too few incentives, financial and otherwise, to attract trained lawyers to this profession. Judges are poorly paid and the prestige of the profession in society is low. In addition, in an environment where wealth and economic power have become all important, it is easy to intimidate or influence judges and they are particularly susceptible to bribery and corruption.

**The lack of checks and balances,** including those that could be exercised by independent civil society bodies and non-governmental organizations if these were not severely restricted.

**The lack of a code of professional ethics,** to set standards of professional conduct for all members of the profession.

These shortcomings and major obstacles to the independence of the judiciary in China continue to undermine the legitimacy and credibility of the judiciary. They have an impact not only on the courts' ability to deliver justice today, but also prevent them from acting as a credible deterrent against the commission of crimes in the future. In Amnesty International's experience, the lack of professional and truly independent judges has a catastrophic effect on all cases with a human rights dimension. It encourages human rights violators and others with financial or other forms of influence to believe that they can continue to break the law and violate human rights with impunity.

Amnesty International urges the government and National People's Congress to examine these factors in the light of international standards on independence of the judiciary<sup>(4)</sup> and to introduce fundamental institutional and other reforms to remove the main obstacles to judicial independence described above.

Amnesty International also urges the authorities to consider adopting measures to increase transparency in the judicial process, which may have an immediate improving effect on the conduct of cases. These include for example the publication of court judgements and records of court proceedings, to make individual judges publicly accountable for their conduct of a case. Another measure to increase public accountability would be to institute – at least initially in some courts – a program of independent court observers to consistently monitor all cases and report on judgements. This task could be undertaken by representatives of independent civil society organizations.

## **2. ADMINISTRATIVE DETENTION**

When the Criminal Procedure Law (CPL) was revised in 1996,<sup>(5)</sup> one form of administrative detention known as "Custody and Investigation"<sup>(6)</sup> (*shourong shencha*) – which had caused widespread human rights violations – was abolished. This positive move was somewhat counterbalanced by the introduction of new provisions in the CPL which permit the detention of

categories of people who previously fell within the scope of Custody and Investigation.<sup>(7)</sup> Under the revised CPL, they can be detained for longer periods than "ordinary" categories of criminal suspects.

Nevertheless, the abolition of "Custody and Investigation" was in itself a positive development. Reports by Chinese legal experts indicate that, at the time, its abolition as a form of administrative detention was considered necessary in order to prevent the widespread abuses resulting from its use. Despite this, however, no serious consideration appears to have been given to abolishing other forms of administrative detention which are also a major source of abuses and continue to be used in parallel to the criminal justice system.

Two of the remaining forms of administrative detention are "Custody and Repatriation" (*shourong qiansong*), which provides as much or more scope for administrative detention as "Custody and Investigation", and "Re-education Through Labour" (*laodong jiaoyang*), which permits the detention for up to four years of people who are not formally regarded as "criminals".

These two forms of administrative detention continue to be used extensively. Their use has in fact increased considerably in recent years, thus seriously undermining the purpose of the improved procedures introduced in the criminal process when the CPL was revised.

## **2.1. "Custody and Repatriation" (*shourong qiansong*)**

Amnesty International is concerned that the system of "Custody and Repatriation" is being used extensively to detain arbitrarily, often for prolonged periods and without charge or judicial supervision, people who belong to the most vulnerable groups in society.

The majority of those taken to "Custody and Repatriation Centres" are reported to be migrant workers, many of whom have moved from rural areas in the inland provinces of China to the major cities on the east coast in search of work. Others detained in such centres include beggars, vagrants and other people with no fixed residence or regular employment, including people who are disabled or mentally ill and homeless children.

Amnesty International understands that this system was initially introduced in the 1950s and used over the next decade mainly to give shelter to and repatriate to their area of origin demobilised soldiers, vagrants and refugees from natural disasters.

Since the 1980s, however, the system has been increasingly used to detain migrant workers, who are often accused of being a source of crime in the cities by urban residents and local authorities alike. Regular sweeps to detain them are ordered by the local authorities, particularly before national festivals and holidays. Even those who have proper identification or work permit documents may be detained - the police reportedly often destroy their papers to allow for detention to proceed.<sup>(8)</sup>

According to 1982 regulations, the aim of "Custody and Repatriation" is to "protect urban social order" by "providing relief to vagrant beggars, educating them and helping them to settle down"; although this is mainly achieved in practice by taking them into custody and sending them back to their original place of residence.<sup>(9)</sup> This task is performed jointly by the civil affairs departments and public security (police) agencies. The scope of Custody and Repatriation has been considerably expanded since these regulations were introduced.

This system effectively permits the arbitrary detention of individuals who are not suspected of committing any crime. In addition, reports from various sources indicate that the system is being grossly abused to detain people, often for prolonged periods, as a source of revenue or free labour for local authorities.

People held in "Custody and Repatriation Centres" have to pay for their food and "accommodation" in the centres and for their transportation to the place of "repatriation". Those who can not pay are forced to work instead. Many are reportedly held in such centres for months on end without prospect of release because they have no money and no relatives or friends to bail them out, or the latter are too poor to pay for them. In addition, conditions of detention in many centres are reported to be appalling and those held there frequently subjected to cruel, inhuman and degrading treatment.

According to figures from the Ministry of Civil Affairs cited in Chinese newspapers, there are 700 "Custody and Repatriation Centres" in China and more than one million people are detained in these centres every year. The majority are reported to be detained in three main areas: Guangdong province, and Beijing and Shanghai municipalities. According to some reports, only 15% of those detained are genuinely in need of shelter and assistance.<sup>(10)</sup>

While initially conceived as a welfare system, "Custody and Repatriation" has now become a major source of arbitrary detention against people who have committed no crime. It is also a source of other abuses, including cruel, inhuman and degrading treatment. In addition, it targets people who belong to the most vulnerable groups in society and who, as such, have little means to defend themselves against abuses. They should be protected by the State rather than being made the targets of a system which fosters abuse.

Amnesty International urges the government to abolish the system of "Custody and Repatriation" and introduce instead a system whereby the homeless and others who are genuinely in need of assistance can be given such help without being deprived of their liberty.

## **2.2. "Re-education through Labour" (*laodong jiaoyang*)**

The system of "re-education through labour" - a form of administrative detention imposed as a punishment - is based on a State Council Decision approved by the National People's Congress in 1957, which was later updated with new regulations.

"Re-education through labour" (RTL) involves detention without charge or trial, and without judicial review, for between one and three years - which can be further extended by one year. People receiving terms of "re-education through labour" have no right of access to a lawyer and there is no hearing for them to defend themselves. "Sentencing" or assignment to a term of RTL is usually decided by the public security (police) alone, without judicial supervision or review.

RTL does not objectively address "crime". It applies to people who are regarded as troublemakers or accused of minor offences which are not considered to amount to "crime" and which therefore are not prosecuted under the criminal justice system. Under the regulations on RTL, people who can be subjected to this punishment include those regarded as being "counter-revolutionary", "anti-Party" or "anti-socialist" elements, as well as a broad range of

people who are deemed to disturb public order, such as prostitutes, drug addicts, people visiting brothels, and those who engage in fights, petty theft or other minor offences and misdemeanours.

The use of this form of administrative detention has increased considerably in recent years. According to official statistics, in 1996 there were 200,000 people in RTL camps in China. By early 2001, the number had increased to 310,000.(11) Although recent official figures are not available, the number is believed to have further increased since then - notably due to the continuing campaign against the Falun Gong and the Strike Hard campaign against crime launched in April 2001.

The system of RTL has been consistently criticised by many people in China over the past two decades. The problems arising from RTL have been described in detail by Chinese legal scholars(12). They include:

**The lack of fundamental legal basis for the RTL system.** The legitimacy of the legislation regulating RTL is questionable. Two of the earlier regulations on RTL (1957 and 1979) were promulgated by the State Council (government). Even though they were approved by the Standing Committee of the National People's Congress (NPC), there have been debates about whether these regulations amounted to "law". Furthermore, a third regulation, promulgated in 1982 by a branch of the executive, the Ministry of Public Security, has been regulating the system since then, even though it was not approved by the NPC and does not formally amount to "law". This breaches several recent laws that stipulate that punishments and other measures which restrict personal freedom can only be prescribed by laws passed by the NPC and its Standing Committee.

**The severity of the punishment is incompatible with the nature of RTL and with the provisions of the Criminal Law.** RTL is a punishment for behaviour and acts which are not considered to amount to "crime". However, the regulations on RTL provide punishments from one to three years' detention, which can be further extended by one year. In contrast, for acts defined as "crimes", the Criminal Law provides punishments including fines, "surveillance" (served at home), "detention with labour" (1 to 3 months), as well as for the suspension of sentences.

**The lack of effective mechanisms to supervise the imposition and implementation of RTL.** Decisions to impose RTL are in practice often made by the Public Security (police) agencies alone, as are decisions on review of sentences. Some supervision is in principle exercised by the Procuratorate but it is so limited that it fails to amount to adequate outside intervention and fails to correct abuses.

**The arbitrary application and abuse of the RTL system.** The large number of single rulings, legal judgements and other regulatory documents issued on RTL in the past two decades has made its application increasingly confused and arbitrary. In addition, RTL is often used in breach of fundamental law to detain people who were first held in police custody as "criminal suspects" but whom the Procuratorate decided not to prosecute, and who should therefore have been "released immediately" in accordance with Article 143 of the Criminal Procedure Law. Instead of being released, they are assigned to RTL by the police.

The debate on RTL has moved on in recent years when the authorities started giving consideration to reforming the system, rather than abolishing it. This occurred after China signed the International Covenant in Civil and Political Rights (ICCPR) in 1998, as it was recognised that the RTL system is incompatible with the provisions of the ICCPR and would need to be abolished or fundamentally changed to enable China to ratify the Covenant. In particular, this system contravenes Article 8 (3) (a) and (b) of the ICCPR, which states that:

3. (a) *"No person shall be required to perform forced or compulsory labour;*

*(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court."*

According to various sources, the main reasons why the authorities have chosen the option to reform the RTL system, rather than abolish it, appear to be the following:

(1) The strong resistance of some sectors of the political establishment, both nationally and locally, to abandon a system which grants some branches of the executive wide powers of detention. This is widely acknowledged privately, while publicly it is usually argued that the RTL system has existed for over 40 years and is a "unique Chinese solution" which has made important contributions to the maintenance of public order and can continue to do so.

(2) The perceived need to have a system separate from the criminal justice system to deal quickly and effectively with minor crimes and disturbances of public order. This view is justified by arguments that crime of all kinds is rising and that abolishing the RTL system would create a vacuum which the criminal justice system may not fill properly.

Several drafts of a new RTL law are reported to have been produced for consideration by relevant departments of the Party, government and legislature, but there appears to be no consensus as yet as to how it should be reformed.

The main suggestions for substantial reform of the system are reported to include reducing the length of the punishment, giving jurisdiction to the courts for making decisions on RTL through a simplified procedure, and introducing a procedure allowing those sentenced to appeal against the decision. Some legal experts have also suggested introducing a system of magistrate courts, similar to those existing in the common law system, to deal with cases coming under the remit of the new law.

While such changes would be an improvement, Amnesty International believes that they still raise fundamental questions. In particular, it is not clear how the misdemeanours and minor offences covered by the new law would be defined. No indication has been given as to whether this would still rely on appraisal of behaviour, rather than specific acts which are recognisably criminal in most jurisdictions, and whether this would still include politically motivated behaviour, which is punishable under existing RTL regulations.

Nor is it clear how the offences and punishments provided by the new law would relate to the provisions of the Criminal Law, or to those of the Security Administration Punishment Act (SAPA) – the most prominent law providing administrative punishments, including up to 15 days' detention, for minor breaches of public order.

In Amnesty International's view, both SAPA and the Criminal Law provide a sufficient basis to punish a broad range of minor offences. Whereas the authorities may want to introduce special procedures or bodies, such as magistrate courts, to deal with minor crimes or with young offenders, the law should not punish people on the basis of their subjectively assessed "anti-social" behaviour. It should punish only activities clearly defined in fundamental laws as offences and recognisably criminal under international law.

In the light of all these factors, Amnesty International urges the State Council and National People's Congress to abolish the system of Re-education Through Labour.

### **3. MEASURES TO PREVENT TORTURE**

Amnesty International has noted concern expressed by legislators and other officials in China about the continued use of torture by law enforcement officials across the country. It has also noted steps taken by the government in this respect, notably the creation of new police affairs supervisory departments within the public security organs to investigate police officers who use torture to extract confessions and break the law in other ways.<sup>(13)</sup> However, despite such measures and the prohibition of torture by law, torture continues to be widespread.

One of the major reasons why torture continues is the lack of key safeguards to prevent it. Amnesty International has made detailed recommendations on this issue in a number of reports in the past.<sup>(14)</sup> It urges the authorities to introduce such safeguards without delay, in line with China's obligation as a state party to the UN Convention against Torture and Cruel, Inhuman and Degrading Treatment or Punishment. These safeguards should be part of a comprehensive framework of effective legislative, judicial and other measures to prevent torture. They should include:

Ensuring that notification of custody is given promptly to the family and legal representative of any person taken into custody.

Allowing access to a lawyer promptly after detention and regularly thereafter, particularly during interrogation, and guaranteeing the right to confidential communication between lawyers and their clients.

Allowing access to the family.

Allowing access to doctors of the detainees' choice at all stages of the legal process, and ensuring that doctors who examine detainees are trained in documenting signs of torture.

Introducing rules for the conduct of interrogation, including written records and tape-recording of interrogation, and mechanisms to ensure that these rules are respected, including by allowing the suspect's legal representative to be present during interrogation.

Respecting the right not to be compelled to confess guilt or testify against oneself, and introducing the right to silence, in line with the principle of the presumption of innocence.

Excluding unambiguously in law the use as evidence in court of any statement obtained as a result of torture.

Ensuring that prompt and impartial investigations are carried out whenever there are reasonable grounds to believe that torture has taken place.

Introducing effective complaints mechanisms which include protection of people who claim to have been tortured as well as witnesses.

Ensuring that law enforcement officials, medical personnel, investigators and other personnel involved in the custody, interrogation or treatment of detainees receive appropriate training about the prohibition of torture.

The authorities should also consider introducing a pre-trial procedure for assessing claims that confessions and other statements have been obtained through torture or ill-treatment, so that evidence obtained through illegal means does not come before the court which makes a final determination of guilt or innocence. At present, Chinese law does not provide for detainees to be brought before a judge promptly after they are taken in custody, and in most cases detainees do not have access to a judge until their trial, which may be months, or even in some cases years, after detention. Allowing early access would allow judges to take action about allegations of torture at an early stage of the criminal process. This would constitute an important step in the prevention of torture.

In addition, when allegations of torture are raised by defendants during trial, the burden of proof should be on the prosecution, to prove that the evidence was not obtained through torture.

The provisions of Chinese law and practices related to some of the key safeguards against torture listed above are examined in more detail below. They concern the right of access to lawyer, the question of the burden of proof about allegations of torture, the right to avoid self-incrimination, and the exclusion of evidence obtained through torture.

### **3.1. Access to Lawyers :**

The experience of many countries shows that guaranteed access to lawyers and legal representatives is one of the strongest protections against torture for any detainee.

Under China's Criminal Procedure Law (CPL), however, access to lawyer during the investigation stage of pre-trial detention is not a guaranteed right to all suspects and remains firmly at the discretion of the investigating authorities. While this situation continues, there is unlikely to be major progress in the fight against torture in China. In May 2000, the UN Committee against Torture recommended that the Chinese government consider abolishing the need to apply for permission, for any reason, before a suspect can have access to a lawyer whilst in custody.

Article 96 of the CPL states that a suspect "may appoint a lawyer to provide legal advice or to file petitions and complaints on his behalf" **after** the first session of interrogation by the "investigative organ", or from the day the suspect is subjected to one of the forms of detention or restriction provided by the law ("compulsory measures").<sup>(15)</sup> Appointed lawyers have a very limited role at this stage and during the phase of investigation which follows formal "arrest" (charge).<sup>(16)</sup>

At the investigation stage - which may last for months before the case is prosecuted - detainees are not entitled to free legal assistance. This only becomes a right much later on - "at least 10 days" before the trial under the CPL - and only for some categories of detainees. In practice, therefore, many detainees will not have the means of accessing legal assistance for long periods after being taken in custody. Regulations from the Ministry of Public Security stipulate that the police must inform suspects of their rights to appoint a lawyer at this stage, but officials admit that this is often disregarded and most suspects are unaware of the law.

Special restrictions on access to lawyers apply to cases "involving state secrets". In these cases, prior approval of the investigative organs is required for a suspect to appoint a lawyer or before any meeting between lawyer and client takes place. The vague and potentially all encompassing definition of "state secrets" has meant that this provision has been heavily used to deny access to legal representation in these cases.(17)

In practice, very few detainees have a legal representative during the investigation stage of detention. Incomplete statistics from the Ministry of Justice for 1997 and the first half of 1998 show that lawyers were appointed at this stage in only 16.9% and 17.7% of cases respectively. Some areas report less than 10%.

In addition, state institutions and investigators themselves have used a wide range of expedients to curtail and deny suspects' access to lawyers.(18) In some cases, for example, lawyers appointed by a suspect's family have been obstructed with many different excuses before being informed several weeks later that the suspect "does not want to see a lawyer". The lawyers have no power to verify or challenge this response. These blocking tactics are particularly effective when lawyers are seeking access away from their hometown. Lawyers have also complained that there is completely inadequate provision of meeting rooms in many detention centres, resulting in costly waiting and delay, and that, when they attempt to exercise their functions to apply for medical bail or to complain at detention beyond legal time limits, they frequently receive no reply.

Through local "internal" implementing regulations, limits have also been set on the duration and number of meetings allowed between lawyers and clients. The police in several regions reportedly implement a complicated approvals process for all requests concerning access to lawyer, so that the Ministry of Public Security regulations that a lawyer's visit should be approved within 48 hours, or 5 days in "complex cases", are not followed in practice.

In addition, lawyers themselves can be subjected to harassment or detention for carrying out their professional duties. There have been numerous reports of illegal detention and torture of lawyers across the country in recent years. Defence lawyers seeking to prove the innocence of their clients have also been prosecuted on charges of falsifying evidence, ill-treated and denied due process even in cases attracting considerable public attention in Beijing. This has prompted calls for the reinstatement of provisions granting trial lawyers immunity from prosecution which were cut from the original draft of the 1997 Lawyer's Law.(19)

As for pursuing their clients' allegations of torture, one defence lawyer has stated: "The use of torture to obtain a confession is something defendants often raise, but it puts us in a very delicate situation since we need facts and evidence to back up these claims... but it is very hard to gather evidence because it is almost impossible to get access to clients at these times".(20)

### 3.2. Who should bear the burden of proof ?

Many judges in China refuse to consider a defendant's allegations of torture unless the defence lawyer can "prove" that torture has occurred, even though it is common knowledge that it is practically impossible for lawyers to gather such evidence. Placing the burden of proof on lawyers in such cases is both inappropriate and unreasonable. Many expert studies carried out in a variety of countries show that, even in the best of situations, it is extremely difficult to find indisputable proof of torture carried out by individual state officials. Given the limitations on access faced by lawyers in China, it is particularly unrealistic to expect them to be able to find such proof.

On this issue, the UN Special Rapporteur on Torture has recommended that: "where allegations of torture are raised by a defendant during trial, the burden of proof should shift to the prosecution to prove beyond reasonable doubt that the confessions was not obtained by unlawful means, including torture and ill-treatment." (21)

Amnesty International urges the authorities to introduce such a measure, as well as other effective measures to improve access to lawyers, including further revisions of the CPL, as part of a framework of key safeguards to prevent torture.

### **3.3. The Right to Silence or to Avoid Self-Incrimination:**

Amnesty International believes the right of an accused to remain silent during the investigation phase and at trial is inherent to the presumption of innocence and an important safeguard of the right not to be compelled to confess guilt or testify against oneself. At present this right is not guaranteed in Chinese law. The CPL states:

*Article 93: When interrogating a criminal suspect, the investigators shall first ask the criminal suspect whether or not he has committed any criminal act, and let him state the circumstances of his guilt or explain his innocence; then they may ask him questions. The criminal suspect shall answer the investigators' questions truthfully, but he shall have the right to refuse to answer any questions that are irrelevant to the case.*

Legal analysts in China argue that the duty to answer fully and truthfully puts the suspect at great disadvantage: it legitimises the investigator's use of ill-treatment and demonstrates that the presumption of guilt is still the reality. The established practice of exercising "leniency to those who confess, severity to those who resist" (*tanbai congkuan, kangju congyan*) has a similar effect.

The right to remain silent and to avoid self-incrimination is an important safeguard against torture. Amnesty International urges the authorities to introduce this right in law.

### **3.4. The Exclusion of Evidence Obtained Through Torture:**

While the CPL prohibits the use of torture to extract statements and "the gathering of evidence by threats, enticement, deceit or other unlawful methods" (Article 43), it does not specifically exclude the use as evidence in court of confessions or statements extracted through torture, as required under the UN Convention against Torture (article 15). Article 46 of the CPL simply states:

*"...In cases where there is only the statement of the defendant and there is no other evidence, the defendant cannot be found guilty and sentenced to criminal punishment."*

In recent years, interpretations of the law and procedural regulations in China have progressed and then retreated on this issue. Stipulations currently in effect are inconsistent and confusing. None of them exclude all types of statements extracted through all types of torture. Nor do they comprehensively bar the use of all evidence derived from such statements.

Before the revision of the CPL, on 21 March 1994, the Supreme People's Court (SPC) adopted "Specific Regulations on Criminal Adjudication Procedures", which stipulated: *"...Any witness testimony, victim's statement, defendant's confessions verified to have really been (jing chazheng qieshi) obtained through torture to extract a confession, threats, luring, deceit, or other illegal methods, cannot be used as evidence"* (buneng zuowei zhengju shiyong).

However, this has been superseded by what appears to be a weaker conditional provision in a 1998 SPC Decision<sup>(22)</sup> which stipulates only that such statements: "... cannot become the basis for determining a case (buneng zuowei ding'an de genju)." <sup>(23)</sup> Some legal sources in China point out that this new formulation does not even fully exclude all types of coerced statements and that such statements may be still be used to "supplement" the major evidence used to determine a case. Moreover, material evidence derived from such coerced statements would not be excluded either.<sup>(24)</sup> Other experts maintain that, a confession or statement extracted through torture may also be legally "recollected" for use as evidence at trial. This means that, if a suspect agrees to repeat statements which were initially extracted through torture, these may be admissible.

There are growing calls in China for full and firm exclusion of evidence extracted by torture and other illegal means. Commentators argue that, without it, efforts to eradicate torture have little hope of lasting success.

Amnesty International believes that China's Criminal Procedure Law should be revised as a matter of urgency to explicitly exclude the use of all evidence extracted through torture of any kind.

There should also be a fair and transparent procedure established in law for accused persons to apply to have such evidence excluded, and provisions should be made for appropriately trained doctors to gather appropriate medical evidence.

#### 4. CONCLUSION

Official statements show that the authorities in China are fully aware of the need to introduce reforms in line with China's rapid economic development and social changes and with the requirements of international trade agreements to which China is now a party. In the area of law and justice, however, the reforms envisaged or undertaken so far appear to focus nearly exclusively on the economic aspects of the rule of law and protection of rights. There is little evidence as yet that efforts are being made to give a broader meaning and solid foundations to respect for the rule of law and human rights. This requires institutional reforms and protection of the full range of rights.

The serious human rights violations which occur in China due to inadequacies and systemic problems in the law enforcement and justice system - in particular the lack of independence of the judiciary, the use of administrative detention and the continuing practice of torture - affect hundreds of thousands of people every year, many of them ordinary people who are victims of abuse of power. In the current economic and social climate in China, violations on this scale can not be ignored if China is to continue to develop in a stable social environment.

Social and economic changes in China continue at a rapid pace. The reform and renewal of state institutions, to serve the Chinese people in their changing environment, must be a priority. At the heart of these reforms must be the fundamental principle of human rights for all, protected by appropriate laws and a strong, independent judiciary.

## APPENDIX

### Basic principles on the Independence of the Judiciary

*Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.*

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public

in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

#### *Independence of the judiciary*

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

#### *Freedom of expression and association*

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.
9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

#### *Qualifications, selection and training*

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

#### *Conditions of service and tenure*

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.
12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.
13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.
14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

#### *Professional secrecy and immunity*

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.
16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

#### *Discipline, suspension and removal*

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.
18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.
19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.
20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

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(1) See "Faster judicial reforms pledged", South China Morning Post, 19 December 2001; "China issues new rules to sack incompetent, corrupt judges", Xinhua News Agency, 6 November 2001, in BBC Mon AS1 AsPol cdc, 6/11/2001; "Chinese Vice-President says judiciary ready for WTO entry", Zhongguo Xinwen She, 23 November 2001, in BBC Mon AS1 AsPol ds, 24/11/2001; and "Li Peng says China to build impartial, efficient judicial system", Xinhua News Agency, 11 December 2001, in BBC Mon AS1 AsPol al, 11/12/2001.

(2) Such recommendations and analysis of laws and regulations which have a human rights impact in China can be found in a number of Amnesty International reports, including "People's Republic of China - Law Reform and Human Rights", March 1997 (AI Index: ASA 17/14/97); "PRC - the Death Penalty in 1999", February 2001 (ASA 17/005/2001); "PRC - The Crackdown on Falun Gong and other so-called heretical organizations", 23 March 2000 (ASA 17/11/2000); "Torture: A growing scourge in China - Time for Action", 12 February 2001 (ASA 17/004/2001); and "China's anti-terrorism legislation and repression in the Xinjiang Uighur Autonomous Region", March 2002 (ASA 17/010/2002).

(3) See for example "The right to a fair trial in China", by Daphne Huang, Pacific Rim Law and Policy Journal, Vol 7 No.1, 1998; "Countries with the rule of law peddle a 21st century world of Orwellian rule by law", by Guo Daohui, Fazhi Ribao, 2 January 2000, in BBC Summary of World Broadcasts, 04.02.2000; "China :towards an 'Economic Rule of Law' ", by Jean-Pierre Cabestan, and "Judicial Reform: Diagnosis and Prescriptions", by He Weifang, papers presented at a conference at the London School of Economics (LSE) 10-12 May 2002;

(4) The text of the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985, is attached in Appendix.

(5) The substantial revision of the Criminal Procedure Law passed by the National People's Congress in March 1996 was the most significant legal development in China since 1979, when the CPL and the Criminal Law were adopted, and improved the provisions of the CPL in several respects. Amnesty International welcomed these changes at the time. However, some of the amendments also increased the potential for incommunicado, lengthy and arbitrary detention and related abuses in the criminal justice system. The revisions altogether left the law far short of international fair trial standards. Six years of implementation of the 1996 revisions have confirmed Amnesty International's initial concerns about these features of the revised law. Some of these concerns are examined in Section III of this memorandum and others are described in "Law Reform and Human Rights" cited at note 2.

(6) Also translated as "Shelter and Investigation".

(7) They include: (a) Special categories of suspects who may be detained without charge for up to 37 days (CPL Article 69); and (b) those "who do not tell their true name or address, whose status is unclear", for whom the time limits on detention start only from the time "when their status is clarified" (CPL Article 128 para. 2). See "PRC "Law Reform and Human Rights", cited at note 2, p.5.

(8) See "Misery of China's urban migrant workers exposed", by John Gittings, [www.guardian.co.uk](http://www.guardian.co.uk), 8 January 2002.

(9) "Not welcome at the party: Behind the 'clean-up' of China's cities - A report on administrative detention under Custody and Repatriation", by Human Rights in China, September 1999, page 9. This report gives a detailed description of the regulations on Custody and Repatriation and of the way in which the system is used in practice.

(10) Nanfang Zhoumo (Southern Weekend) 13 December 2001, and Beijing Morning Post cited in the South China Morning Post of 19 December 2001.

(11) See "Re-education Through Labour and its Reform", by Liu Renwen, China Procuratorial Daily - Justice Net, 5 January 2001.

(12) See for example Liu Renwen (note 11); Peking University Law Journal (Zhong Wai Faxue), special issue on RTL, Vol.13, No.6, 2001; and "Protection of Human Rights in the Context of Punishment of Minor Crimes in China", by Veron Mei-ying Hung, Testimony before the Congressional Executive Commission on China, Washington DC, 26 July 2002.

(13) "Top Chinese security official calls for tighter discipline of police", Zhongguo Xinwen She news agency, Beijing, 19 June 2002, BBC Mon AS1 AsPol cdc, 20/06/2002.

(14) See "Torture: A growing scourge in China - Time for Action", 12 February 2001 (ASA 17/004/2001).

(15) Detention before formal "arrest" (charge) may last to up to 14 days or 37 days, depending on the cases, and potentially indefinitely in other cases.

(16) At this stage, lawyers can demand to be told the offence imputed to the suspect, can apply for "Taking a Guarantee and Awaiting Trial" (a form of bail) once the suspect is formally arrested (charged), and "may" meet the suspect in custody "to enquire about the case". Representatives of the investigative organs may be present at such meetings.

(17) This has continued even after the term was clarified in a joint communique in January 1998 which also spelt out that no approval was required in any other cases.

(18) They have been assisted for example by ambiguities in Article 96 of the revised CPL, the lack of definition of "investigative organs", "first interrogation", and "compulsory measures". State organs authorized to detain suspects have sought to exclude themselves from the remit of the law. The Customs authority, for example, works closely with the Ministry of Public Security investigating drug trafficking cases and smuggling cases which have been a major focus of a corruption crackdown in recent years. The Custom authority has the legal power to "Detain and Transfer" (kouliu yisong) suspects in smuggling cases. In a recent notice the authority stated that such detention was not one of the "compulsory measures" under the CPL, so requests from lawyers to see clients during Detention and Transfer should be denied.

(19) See "Torture: A growing scourge in China - Time for Action", 12 February 2001 (ASA 17/004/2001), page 47.

(20) New York Times, 6 January 2000, quoting Sun Guoxiang, "a prominent defence lawyer in Nanjing".

(21) Report of the Special Rapporteur on Torture to the UN General Assembly, UN Document A/56/156, 3 July 2001, paragraph 39(j).

(22) SPC "Decision on Specific Issues in the Implementation of the CPL", effective 8 September 1998.

(23) The Supreme Peoples' Procuratorate followed the same language as the SPC in their "Rules on Implementing the CPL" (effective 18 January 1999): Criminal suspects' confessions, victims' statements, and witness testimonies collected through torture to extract a confession (xingxun bigong), or threats, enticement, cheating and other illegal methods cannot become the basis for a criminal charge (buneng zuowei zhikong fanzui de genzhu).

(24) Sources also highlight that, however significant this SPC interpretation may be, it only binds judicial organs and does not directly bind administrative organs like the public security agencies. Significantly, numerous regulations from the Ministry of Public Security, which is responsible for the majority of state officials involved in interrogation, do no more than repeat the general prohibitions against torture in CPL article 43.

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