People's Republic of China

Abolishing "Re-education through Labour" and other forms of punitive administrative detention:

An opportunity to bring the law into line with the International Covenant on Civil and Political Rights

Memorandum to the State Council and the Legislative Committee of the National People's Congress of the People's Republic of China

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This memorandum details Amnesty International's concerns with two forms of punitive administrative detention imposed by the police in China: "Re-education through Labour" (RTL) and detention imposed under the new Public Order Administration Punishment Law (POAPL).[1] *These concerns are submitted to the State Council and National People's Congress in the hope that they will be taken into consideration during the ongoing legislative review of RTL and reflected in any reforms aimed at bringing procedures for detention, trial and punishment in China into line with international human rights law and standards, including the International Covenant on Civil and Political Rights (ICCPR).*

1. Introduction

Amnesty International has followed with interest the debate within China over many years on the need to substantially reform or abolish the system of "Re-education through Labour" (RTL). The organization has consistently called for the abolition of RTL, regarding it as a system of arbitrary detention, which is incompatible with international human rights law and standards. Amnesty International is aware that a new "Illegal Behaviour Correction Law" [*weifa xingwei jiaozhi fa*] (IBCL) is currently being drafted by the Legislative Committee of the National People's Congress (NPC) to replace legislation on RTL.[2] At the time of writing, a draft of the new law was not publicly available. However, public commentary on the proposed content of the new law suggests that it is unlikely to meet the requirements of

[1] Also translated into English as the *Law on Penalties for Offences against Public Order* or the *Security Administration Punishments Law.*

[2] See "China will draw up Illegal Behaviour Correction Law" (*Woguo jiang zhiding weifa xingwei jiaozhifa),* Beijing News, 1 Feb 2006.

international human rights law and standards, including the ICCPR, which China has declared an intention to ratify in the near future.

Amnesty International also notes that the NPC Standing Committee passed a new Public Order Administration Punishment Law (*zhi'an guanli chufa fa*) on 28 August 2005, replacing the Public Order Administration Punishment Act (*zhi'an guanli chufa tiaolie*, POAPA)[3]. The new law took effect on 1 March 2006. Amnesty International understands that the POAPL was introduced in order to resolve legal uncertainty surrounding the POAPA, in particular that under China's Legislation Law, punishments that result in deprivation of personal freedom must be established by national law and not by 'regulation'. The organization recognizes attempts to establish greater legal certainty in this area, but remains concerned that the POAPL fails to meet international fair trial standards.

This memorandum is submitted to the State Council of the PRC and the Legislative Committee of the NPC with the intention of emphasising the importance of human rights considerations in ongoing deliberations on legal reform in China. The organization hopes that by highlighting current human rights concerns with the POAPL and RTL, these considerations will be factored into the ongoing debate surrounding the drafting of the IBCL.

Amnesty International made comprehensive recommendations on several areas of human rights concerns in a memorandum submitted to the State Council of the PRC and the Standing Committee of the NPC in September 2002.[4] The organization maintains that the reforms recommended in that memorandum, including the abolition of 'Re-education through Labour', would constitute immediate and major steps towards establishing the rule of law and respect for human rights in China. Further recommendations in that memorandum on the independence of the judiciary and measures to prevent torture are germane to discussions presented here on police powers of detention, and are therefore included as an appendix to this memorandum.

The September 2002 memorandum also included recommendations for the abolition of "Custody and Repatriation" (C&R). Amnesty International welcomed the abolition of the latter in correspondence addressed to Premier Wen Jiabao in August 2003.[5] The organization is mindful that the abolition of C&R is one of several steps taken in the last decade or so with the expressed intention of protecting human rights in China. Previously, revisions to the Criminal Procedure Law (CPL) in 1996 and the Criminal Law in 1997 heralded some positive changes to legislative frameworks in China, although these reforms were not sufficient to satisfy the requirements of international human rights law and standards.

More recently, Amnesty International welcomed the introduction of the clause "the State respects and safeguards human rights" into the Constitution of the PRC, recognizing the potential that this amendment has for enabling the introduction of further legal and

[3] Also translated into English as the Security Administration Punishment Act/Regulations.
[4] Amnesty International: *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*, September 2002 (AI Index: ASA 17/052/2002).
[5] See Amnesty International, AI Index: TG ASA 17/2003.6, 22 August 2003.

institutional reforms for the protection of human rights.[6] However, systemic reforms which would lay a solid foundation for the protection of human rights have yet to be introduced. Consequently, human rights violations remain a prominent feature of the law enforcement and justice systems in the PRC.

Amnesty International believes that the effective protection of human rights – rights defined by international human rights law and standards including the Universal Declaration of Human Rights (UDHR) and the ICCPR – is an essential pre-requisite for the sustainable, just and harmonious development of any society. The failure to effectively respect, protect and fulfil those human rights is regularly seen to be a major destabilising factor in societies in all stages of development throughout the world.

2. Punishment without crime - the incompatibility of punitive administrative detention with international human rights standards

Amnesty International has long-standing concerns about the power of the police to detain individuals in China for lengthy periods in the absence of effective safeguards to guarantee the right to fair trial. The failure to uphold such safeguards seriously undermines the quality of the criminal justice system and facilitates the use of torture and other cruel, inhuman or degrading treatment or punishment (other ill-treatment) - abuses which unfortunately persist in China despite measures taken by the authorities to prevent them.

Amnesty International's concerns over the use of punitive administrative detention in China are based on key provisions of the ICCPR, which China has signed and is due to ratify in the near future:

- Article 9 on the right to liberty and security of the person, which *inter alia* prohibits arbitrary detention, upholds the right of detainees to be brought promptly before a judge and entitles detainees to take proceedings before a court so that the court may assess the lawfulness of detention;
- Article 14 on the right to fair trial, which *inter alia* upholds detainees' rights of access to legal counsel of their choosing at all stages of the legal process and a fair and public hearing by a competent, independent and impartial tribunal;
- Article 8, on the prohibition of slavery, which *inter alia* states that no one shall be required to perform forced or compulsory labour.

Amnesty International notes that Articles 9 and 14 of the ICCPR apply to those facing a *criminal* charge. It might therefore be argued that since punishments under the POAPL, RTL and the proposed IBCL are conceived of as *administrative* punishments, these provisions do not apply. In this respect, Amnesty International notes that legislation bypassing the courts by creating offences punishable with imprisonment and empowering a non-judicial body to mete out such punishment violates international law.

[6] See Amnesty International, *China: Constitutional amendment on human rights must be backed by concrete action*, 15 March 2004 (AI Index: ASA 17/011/2004).

Under international human rights law and standards, only competent, independent and impartial courts carrying out proceedings which meet international standards of fairness may mete out punishments depriving persons of their liberty. Even if subject to judicial review, administrative procedures which result in deprivation of liberty for punitive purposes are inherently arbitrary and therefore unlawful.[7]

In the legal debate surrounding the reform of RTL in China, it has been argued that systems of punitive administrative detention should be maintained so that individuals may be punished in ways which do not leave them with the lasting stigma of a criminal record. This argument is bolstered with reference to negative social perceptions of being branded a 'criminal' in China.

Both RTL and POAPL apply to people regarded as "troublemakers", or accused of minor offences which are not considered to amount to "crime" and which are therefore not prosecuted under the criminal justice system. RTL was once described in an official legal newspaper as punishment for actions which fall "somewhere between crime and error".[8]

Similarly, the IBCL will reportedly not objectively address "crime" either. According to recent statements by Wang Gongyi, vice director of the Legal Research Department at the Ministry of Justice, the scope of the IBCL will be "[t]hose who have seriously broken the law [*yanzhong weifa*] but not sufficiently to constitute a crime, and those who have committed a minor crime but for whom the limitation of personal freedom is not necessary."[9]

However, as noted by the UN Working Group on Arbitrary Detention:

> "Even if the Chinese authorities might be led by the good intention to provide a milder system of sanctions for petty criminals, the result of removing them from the criminal system is ultimately that they are stripped of the guarantees surrounding criminal procedure."[10]

Thus, concerns remain over the maintenance of systems of punitive detention in China that run in parallel to the formal criminal justice system, but fail to uphold the basic human rights safeguards that should apply to criminal trials under international law. While the

[7] Amnesty International has highlighted such concerns on several countries. In a recent report on the United Kingdom, the organization notes that the European Court of Human Rights has established that there is an autonomous definition of the term 'criminal' irrespective of the way such proceedings are characterized domestically [see for instance *Engel v Netherlands* (1979-80) EHRR 647]. In addition to the domestic classification of the 'charge', the Court also considers the nature and severity of potential and actual penalties. Where deprivation of liberty is at stake, the latter is often decisive in classifying such proceedings as 'criminal'. See Amnesty International, *United Kingdom: Human rights: a broken promise*, February 2006 (AI Index EUR 45/004/2006).

[8] See Amnesty International: *People's Republic of China: Law reform and human rights*, March 1997 (AI Index: ASA 17/014/1997).

[9] "Illegal behaviour correction to replace RTL" [*weifa xingwei jiaozhi si tidai laojiao*], *The Beijing News*, http://www.thebeijingnews.com (in Chinese), 2 March 2005.

[10] Report of the Working Group on Arbitrary Detention, Addendum: Mission to China, 29 Dec 2004, at para. 55, UN Doc. E/CN.4/2005/6/Add.4

authorities may wish to introduce special procedures or bodies, such as magistrate courts, to deal with minor offences or young offenders, essential procedural safeguards must be upheld; laws should not be used to punish people on the basis of their 'anti-social' behaviour as assessed by non-judicial bodies.

Amnesty International maintains that this dilemma should be resolved by eliminating punitive administrative detention altogether and bringing all sanctions which may result in deprivation of liberty within the scope of the Criminal Law and Criminal Procedure Law. This would not prevent the maintenance of other administrative sanctions initially imposed by the police, which do not result in deprivation of liberty, such as warnings or fines. However, even in these circumstances, under international standards, offenders must be guaranteed the right of appeal to an independent court.

In this context, Amnesty International notes that in addition to RTL and POAPL, concerns remain about other forms of punitive administrative detention in China imposed without charge, trial or judicial review. These include 'Custody and Education' (*shourong jiaoyu*), used to punish alleged prostitutes and their clients with between six months and two years' administrative detention, and 'Enforced Drug Rehabilitation' (*qiangzhi jiedu*), which enables the police to impose between three and six months' detention on alleged drug addicts. While the draft text of the POAPL effectively repealed decisions of the Standing Committee of the NPC which provided a basis for these systems,[11] these provisions were omitted in the final draft of the POAPL. Both 'Custody and Education' and 'Compulsory Drug Rehabilitation' therefore appear to co-exist alongside the POAPL, which also includes specific provisions on such offences.

The following sections explain in more detail how the POAPL and the proposed IBCL contravene international standards, including the ICCPR.

2(i) Definition of 'offences' under the POAPL and the proposed IBCL

Amnesty International has long-standing concerns that many offences in Chinese legislation are either defined vaguely or worded in such a way as to allow for the detention of individuals for the peaceful exercise of their fundamental human rights, including freedom of expression, assembly and association. These concerns apply to the wording of several provisions of the Criminal Law as well as the definition of "offences" in various 'administrative' regulations, including RTL and the POAPL. Furthermore, under the laws and regulations providing for administrative detention, the right of interpretation of such "offences" and consequent imposition of punishments remains vested in the police, the very organ charged with investigating the case.

[11] The last article of the draft POAPL (Article 126) repealed several decisions of the Standing Committee of the National People's Congress, including the Decision on Strictly Prohibiting Drugs (*Guanyu Jindu de Jueding*) of 28 Dec 1990 and the Decision on Strictly Prohibiting Prostitution and Visits to Prostitutes (*Guanyu Yanjin Maiyin Piao de Jueding*) of 4 Sept 1991. However, these provisions were cut in the final draft of the POAPL. The last article of the final text of the POAPL (Article 119) only repeals the POAPA.

Many of the public order offences detailed in the POAPL are not clearly defined, potentially giving the police free rein to detain individuals in violation of their rights to freedom of expression, assembly and association. Such 'offences' include: 'spreading rumours' (Article 25), 'provoking quarrels' (Article 26) and 'instigating or plotting illegal gatherings, marches or demonstrations' (Article 55). Such provisions have regularly been used in the past to arbitrarily detain numerous individuals for the peaceful exercise of basic human rights, including petitioners and human rights defenders.

Amnesty International is also concerned that the law proscribes certain religious or spiritual activities in broad and sweeping terms which contravenes international standards on freedom of religion or belief. For example, Article 27 of the POAPL punishes with a maximum sentence of 15 days imprisonment the 'offence' of organizing, instigating, threatening, deceiving or inciting others to engage in 'heretical organizations, superstitious sects or secret societies' (*xiejiao, huidaomen huodong*) or using 'heretical activities, superstitious sects or secret societies' (*xiejiao, huidaomen, mixin huodong*) to 'disrupt social order' (*raoluan shehui zhixu*) and 'damage the health of others' (*sunhai taren shenti jiankang*). The provision continues by penalising 'those who misuse religion or *qigong* to disrupt social stability or damage the health of others'.

Amnesty International is deeply concerned about the broad definition of these provisions, enabling the police to detain individuals in violation of their human rights. The right to freedom of thought, conscience and religion is enshrined in the UDHR (Article 18) and provided for in the ICCPR (Article 8). Yet provisions of both administrative regulations and the Criminal Law have been used in the past to detain and imprison people who peacefully exercise their right to freedom of expression, assembly or association, as well as members of unofficial religious and spiritual groups, including adherents of the *Falun Gong* spiritual movement which was banned as a 'heretical organization' in 1999. Amnesty International has raised numerous concerns that such detentions and imprisonment are politically-motivated and that many sent to RTL or sentenced to prison terms under the Criminal Law are held arbitrarily, in violation of international human rights standards.

Amnesty International is also concerned that the broadly defined concept of "state secrets" is included in the revised POAPL. Article 90 of the draft law provides: "When dealing with public order cases, public security organs and police officers shall keep confidential (*baomi*) any evidence which touches upon state secrets, commercial secrets, or personal privacy." The definition given to 'state secrets' in China is very broad, encompassing matters which would be the subject of public scrutiny in other countries. Amnesty International has longstanding concerns that the invocation of "state secrets" in a criminal case enables authorities in China to deny detainees the right to access to family, lawyers and a public trial. The organization also fears that the police may seek to use this provision in the law to deny detainees access to evidence against them.

In its 2002 memorandum, Amnesty International expressed concerns that RTL does not objectively address 'crime', but is applied to those regarded as troublemakers or accused

of minor offences which are not considered to amount to 'crime'.[12] Under current RTL regulations, people who can be subjected to this punishment include those regarded as 'counter-revolutionary', 'anti-Party' or 'anti-socialist' elements as well as a broad range of people who are deemed to disturb public order, including prostitutes, those who visit brothels, and those who engage in fights, petty theft, or other minor offences or misdemeanors.

It remains unclear whether the new IBCL will offer more precise definitions of the types of behaviour deemed "illegal" than is currently the case under the POAPL or legislation covering RTL. Amnesty International continues to urge the authorities to ensure that all new legislation only punishes activities which are clearly defined as offences and recognizably criminal under international law - and is formulated with sufficient precision for individuals to understand - to prevent the arbitrary detention of individuals for the peaceful exercise of their fundamental human rights in violation of international standards.

2 (ii) The incompatibility of POAPL with Articles 9 and 14 of the ICCPR

Deliberations surrounding the drafting of the POAPL focused on the need to balance human rights protections (limiting police powers to impose punishments and curtailing police abuse of power) with providing an effective mechanism for maintaining public order.[13] The POAPL, which came into effect on 1 March 2006, provides for a variety of sanctions, including warnings, fines, withdrawal of permits or administrative detention as a form of punishment for so-called 'minor offences' which are not deemed serious enough to be punished under the Criminal Law. Such offences include traffic offences, prostitution, public disturbances and drug use.

The maximum penalty under the POAPL is 20 days administrative detention for multiple offences. Punishments are decided and imposed by the police (Public Security Bureau) and are based on their interpretation of whether the circumstances of a case are serious or minor.

Article 94 of the POAPL stipulates that alleged offenders have the right 'to make statements and present a defence' but this is within a system where the punishment is imposed by the Public Security Bureau (police). Similarly, while Article 98 of the law gives individuals the right to 'apply for a hearing' (*yaoqiu juxing tingzheng*) if they disagree with the punishment, this hearing is also conducted within the public security system; the law prescribes no role for the courts in adjudicating cases or ruling on the legality of detention. Detainees have no right to engage a lawyer at any stage of the process.

[12] AI Index: ASA 17/052/2002 op cit, pp 8-9.

[13] See for example: "Draft POAPL reflects the people's desires for protection of human rights and more focus on common disputes" [*zhi'an guanli chufa cao'an fanying minyi baozhang renquan, gengjia guanzhu richang jiufen*], available at www.dps.ln.gov.cn (in Chinese), dated 1 November 2004; "Six major keywords in the POAPL (draft) [*zhi'an guanli chufa fa (cao'an) liu daguan jianci*], available at www.jcrb.com (in Chinese), dated 25 October 2004; "Draft POAPL: sending pornographic SMS messages could cause detention" [*zhi'an guanli chufa cao'an: fa duanxin huang duanzi keneng bei juliu*], available at www.people.com.cn (in Chinese) dated 25 October 2004.

Article 5 of the POAPL provides that punishments must be administered in an 'open and fair manner' which 'respects and safeguards human rights'. However, as noted, empowering public security agencies to impose detention as a punishment is in itself a violation of human rights standards. Other articles also prohibit the use of torture and the collection of evidence through illegal means.[14] While such provisions are welcome, they should not be seen as a substitute for more wide-ranging, institutional reforms aimed at protecting human rights in line with provisions of the ICCPR as detailed above.

In particular, the failure to bring detainees promptly before a judge and to give them prompt access to a lawyer contravenes Articles 9 and 14 of the ICCPR. In addition, the role played by the police in adjudicating cases and administering punishments resulting in deprivation of liberty, even if for a maximum of 20 days, violates the right to a fair trial and is inherently arbitrary under international human rights standards.

As discussed above, under international standards, such punishments may only be imposed by courts which are independent and impartial. Indeed, the Human Rights Committee has stated that the right to trial by an independent and impartial tribunal is "an absolute right that may suffer no exception".[15] (See also Appendix: "The Independence of the Judiciary".)

Amnesty International therefore considers that detention imposed as a punishment by the police under the POAPL contravenes Articles 9 and 14 of the ICCPR. The organization urges the Chinese authorities to conduct an urgent review of the law with a view to bringing it into line with the ICCPR and other international human rights standards.

2(iii) The incompatibility of RTL and the proposed IBCL with Articles 8, 9 and 14 of the ICCPR

The new IBCL is reportedly being drafted in order to provide a more solid legal foundation for the system currently known as "Re-education through Labour" (RTL).[16] While a draft of the new law is not yet available, public commentary in the official Chinese press has provided some guidance on its likely content.

Reports indicate that the IBCL is likely to provide for a maximum of 18 months' detention, reduced from a maximum of four years under RTL. While efforts to reduce terms of detention are welcome, such measures do not resolve the fundamental problem that *any* period of detention imposed as an administrative punishment by the police is inherently

[14] POAPL Arts 79, 113 and 116.
[15] Communication No. 263/1987, *M. González del Río v. Peru* (views adopted on 28 October 1992, forty-sixth session), para. 5.2, Report of the Human Rights Committee, vol. II, UN Doc. A/48/40 (1993).
[16] Like the old Security Administration Punishment Act, "Re-education through Labour" is imposed under regulations which have not been formally passed by the NPC or its Standing Committee. As detailed above, according to China's Legislation Law, punishments that result in deprivation of personal freedom must be established by national law and not by 'regulation'.

arbitrary and therefore unlawful. Amnesty International also notes that 18 months in detention remains far higher than minimum penalties under the Criminal Law.

The information available also raises concerns that essential safeguards guaranteeing the right to fair trial are likely to be lacking under the IBCL. Amnesty International understands that procedures under the IBCL will retain certain similarities with procedures under RTL.[17] In particular, publicly available official comment on the draft IBCL states that individuals accused by police of "illegal behaviour" will still have their culpability and period of detention decided by Public Security Bureau (PSB) officials – as is general practice under the current system of RTL.

Reports have stressed that persons accused by police of "illegal behaviour" under the IBCL will have the right to "apply for a hearing" [*shenqing tingzheng*] which may include the right of detainees to appeal to a court to rule on the legality of the initial decision by the police. Amnesty International welcomes efforts to provide greater safeguards against potential abuse of power by the police than currently exists under RTL. However, Amnesty International is concerned that the court's role may be limited to ruling on the *legality* of the police's decision. In other words, it may be limited to ensuring that procedures have been followed, rather than dealing with the substantive issues and ruling on the fundamental question of guilt or innocence, examining evidence and addressing whether the person should or should not have been detained in the first place. Under such circumstances, the court would not be challenging the grounds for detention, leaving intact the fundamental power of the police to impose punitive detention without trial provided that the required procedures have been followed.

Additionally, Amnesty International re-iterates that to comply with Article 14 of the ICCPR, such a court must be 'competent, independent and impartial', a requirement which entails significant structural reform to remove all forms of political interference from the judicial system in China. (See Appendix: "The Independence of the Judiciary").

Commentary also indicates that detainees held under the IBCL may have the right of access to a lawyer, although it remains unclear at what stage this right will become effective. Amnesty International welcomes this measure, but re-iterates that to comply with the ICCPR, detainees must be given *prompt and regular* access to a lawyer of their choosing, both to uphold the right of fair trial, and as an essential safeguard against torture, ill-treatment, coerced confessions and other abuses.[18]

[17] "China's RTL system facing reform, IBCL to be formulated" [*woguo laojiao zhidu mianlin gaige jiang zhiding weifa xingwei jiaozhi fa*], available at www.sina.com.cn (in Chinese), 2 March 2005; "Illegal behaviour correction drafted to replace RTL" [*weifa xingwei jiaozhi ni tidai laojiao*], *The Beijing News*, available at www.thebeijingnews.com (in Chinese), 2 March 2005.

[18] In further elaboration of this standard, the UN Special Rapporteur on torture has recommended that anyone who has been arrested 'should be given access to legal counsel no later than 24 hours after the arrest.' [Report of the UN Special Rapporteur on torture, UN Doc. E/CN.4./1990/17, 18 December 1989, para 272.]

Other concerns expressed by critics of RTL both within China and abroad have focused on the nature of RTL facilities, which are akin to prisons or "Reform through Labour" [*laogai*] facilities. Those assigned to RTL are forced to work for long hours as part of their 're-education' in a manner similar to compulsory labour in reform-through-labour camps or prisons. Such a system contravenes Article 8(3)(a) of the ICCPR providing that 'no one shall be subjected to forced or compulsory labour'. While Article 8(3)(b) states that this should not 'preclude…the performance of hard labour in pursuance of a sentence to such punishment by a competent court,' the fact that the initial decision to punish ('sentence') is made by the police rather than a court renders this provision inapplicable. It remains unclear whether those held in 'correction' facilities will be forced to work, but if so this would contravene Article 8 of the ICCPR unless the decision to punish is made by a 'competent court' rather than the police.

Amnesty International understands that facility management practices under the IBCL are to be eased, reportedly allowing detainees to return home at weekends, or during the day or night, depending on certain conditions, although it is understood that a proportion of facilities will retain a strict security regime. In addition, it has been reported that iron windows and doors currently used in many RTL facilities will be removed when the facilities are re-named 'Illegal Behaviour Correction Centres.'[19]

Amnesty International has expressed concern about the prevalence of torture and other ill-treatment in all forms of detention facility in China, including RTL facilities.[20] The experience of many countries shows that guaranteed access to family members and legal representatives is one of the strongest protections against torture and ill-treatment for any detainee. The organization hopes that the reported intention to allow detainees a greater of degree of mobility both within and outside detention facilities under the IBCL will help to reduce instances of torture and ill-treatment.

Nevertheless, Amnesty International continues to urge the government of the PRC to implement a comprehensive framework of effective legislative, judicial and other measures to prevent torture and ill-treatment within all forms of detention, in line with China's obligations as a state party to the UN Convention against Torture and Cruel, Inhuman and Degrading Treatment or Punishment. (See Appendix: "Measures to Prevent Torture").[21]

[19] See: *Labour Re-education system faces big changes* (*Laojiao zhidu mianlin da biange*), Shanghai Labour News (*Shanghai Laodong Bao*), 21 Feb 2006, posted at: http://www.peacehall.com/news/gb/china/2006/02/200602211212.shtml

[20] See for example: "Torture: a growing scourge in China – Time for Action", February 2001, AI Index: ASA 17/004/2001, available at www.amnesty.org.

[21] See also *Amnesty International's 12-point programme for the prevention of torture and other cruel, inhuman or degrading treatment or punishment by agents of the state*, 22 April 2005 (AI Index: ACT 40/001/2005).

2(iv) The right to appeal against punishments imposed under the POAPL and the proposed IBCL

Under the current system of RTL (and other forms of administrative detention), the main mechanism of appeal against imposition of detention is the Administrative Procedure Law [*xingzheng susong fa*] (APL). While this law does indeed provide for the right to appeal decisions to a People's Court, under current practice this right is only granted once the punishment has become effective, and the period of detention has begun. In practice many detainees are unaware of their rights to appeal against the punishment. There are also concerns that those who try to exercise this right may suffer retribution in the form of torture or ill-treatment or extension of detention in RTL facilities, since such an action may be perceived to be evidence of 'resisting reform'.

The APL appears to continue to be the sole legal recourse to appeal against a decision to impose a period of detention under the POAPL. Under Article 102 of the POAPL, offenders who disagree with a punishment imposed under the POAPL may apply for an administrative review (*shenqing xingzheng fuyi*) or launch an administrative appeal (*tiqi xingzheng susong*).

It is not clearly articulated whether the punishment would be postponed pending the results of such a hearing. However, Article 107 clarifies that those who seek administrative review or appeal may also apply to the police for 'suspension of detention'. Police 'may' grant such a request as long as it 'does not pose a risk to society.' In the absence of any effective mechanism to challenge the police's interpretation of a 'risk to society', Amnesty International is concerned that in practice, the police are likely to employ this discretionary power in favour of detention rather than release.

Under such circumstances, the right of appeal cannot act as an effective check against unlawful detention by the police, or substitute for the failure to assign the role of initial decision-maker to an independent court or tribunal rather than the police.

As noted above, public commentary indicates that the proposed IBCL may include stronger rights to appeal to a court, perhaps by ensuring that the right to apply for a hearing (*shenqing tingzheng*) entitles detainees to a hearing by an independent court, rather than the police. It remains unclear whether such an act would automatically result in suspension of detention pending the results of the hearing. While welcoming potential improvements in appeal procedures under the IBCL, Amnesty International re-iterates that such measures cannot substitute for the role of an independent court or tribunal in imposing the initial punishment of detention as required under international human rights standards – a role which is likely to remain vested with the police under the IBCL.

3. Recommendations

Based on the arguments presented above, Amnesty International makes the following recommendations for consideration in ongoing deliberations surrounding the reform of punitive administrative detention in China.

- Conduct an urgent review of the POAPL with a view to bringing its provisions into line with international human rights law and standards, including Articles 9 and 14 of the ICCPR. In particular, ensure that those arrested and accused of offences punishable with deprivation of personal liberty are afforded all due process rights, including the right to be brought before a judge to assess the necessity of detention, the right to a fair and public trial by a competent, independent and impartial tribunal, and the right of access to legal counsel of one's choosing;
- Ensure that these considerations inform the ongoing legislative review of "Re-education through Labour". In particular, abandon plans to introduce the new "Illegal Behaviour Correction Law" as a system of administrative detention controlled and imposed by the police, and bring all offences punishable by deprivation of personal liberty within the scope of the Criminal Law;
- If plans to introduce the IBCL are retained, ensure that its provisions meet internationally agreed fair trial standards, including Articles 8, 9 and 14 of the ICCPR;
- Accordingly, transfer all powers to impose imprisonment as a punishment from the police to the courts. Introduce institutional reforms to ensure that courts are competent, independent and impartial and carry out proceedings which meet international fair trial standards;
- Abolish other forms of punitive administrative detention in China imposed without charge, trial or judicial review, including 'Custody and Education' (*shourong jiaoyu*) and 'Compulsory Drug Rehabilitation' (*qiangzhi jiedu*);
- Review criminal and administrative legislation to ensure that all offences are clearly and narrowly defined, including those which relate to public order and 'state secrets'. Exclude from punishment any act undertaken in peaceful pursuit of fundamental human rights, including the rights to peaceful assembly and association, and the rights to freedom of expression and opinion, as provided in the ICCPR and other international treaties and standards.

APPENDIX

The following appendix contains extracts from "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", submitted by Amnesty International in September 2002.[22]

I. 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[23] 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

[22] AI Index: ASA 17/052/2002

[23] 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.

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 NPC, 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 NPC to examine these factors in the light of international standards on independence of the judiciary 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.

II. 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. 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. 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.