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SUBMISSION TO THE NPC
STANDING COMMITTEE'S
LEGISLATIVE AFFAIRS
COMMISSION ON THE
DRAFT "SUPERVISION
LAW"

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Amnesty International is a global movement of more than 7 million people who campaign for a world where human rights are enjoyed by all.

Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

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Amnesty International welcomes the Chinese Government's practice of conducting public consultation before promulgating laws, and we are submitting the following comments regarding the People's Republic of China (PRC) Draft Supervision Law (hereafter Draft Law), issued by the Standing Committee of the National People's Congress (NPC) on 7 November 2017. Amnesty International would appreciate any opportunity to present further information, in writing or in person, to the Legislative Affairs Commission of the Standing Committee.

As part of our work, Amnesty International promotes the adoption of legal instruments that protect internationally recognized human rights. Although the Draft Law does set out some protections for individuals by providing for family notification in case of detention and excluding evidence collected by illegal means in criminal cases, Amnesty International's position is that many provisions of the Draft Law appear to be incompatible with China's international human rights obligations, whether embodied in treaties and other instruments, or under customary international law. The Draft Law would legalize a form of arbitrary detention and create a new extra-judicial system with far reaching powers that has significant potential to infringe human rights.

In this submission, Amnesty International provides illustrative and non-exhaustive examples of problems with the Draft Law, while not purporting that is a comprehensive human rights analysis.

The government has promoted the Draft Law as an important component of future "anti-corruption work". Amnesty International believes anti-corruption efforts can aid in the protection of human rights and broadly supports anti-corruption efforts and international cooperation to tackle corruption. However, we do not support anti-corruption efforts that in themselves result in violations of human rights. **According to our analysis, the Draft Law falls short on this point. Therefore Amnesty International urges the Chinese government to withdraw the present Draft Law and make amendments to ensure any new draft law will be compatible with international human rights law and standards and human rights obligations under China's national laws.**

1. The Scope of the Draft Supervision Law

Article 1 in the General Provisions (Chapter I) states the objective of the Draft Law is "to promote comprehensive governance in accordance with law, to bring about full national supervision coverage, and to thoroughly carry out anti-corruption work." The law places significant powers in one body – the national level Supervision Commission – and its subordinate commissions at lower levels of government - without specifying any oversight from other government organs. These supervisory bodies have the duties of oversight, investigation and disposition as detailed in Chapter IV of the Draft Law.

First, while Article 4 of the Draft Law states that the work shall "adhere to the Constitution and the laws", it makes no mention that this also includes China's international legal obligations, including to respect and protect internationally recognized human rights, such as the right to fair trial and protection from arbitrary detention. Secondly, it appears to run into direct conflict with provisions in the Constitution that set out the role of the procuratorate and the courts. Specifically Article 37 of the Constitution which provides that:

- No citizen may be arrested except with the approval or by decision of a people's procuratorate or by decision of a people's court, and arrests must be made by a public security organ.
- Unlawful detention or deprivation or restriction of citizens' freedom of the person by other means is prohibited, and unlawful search of the person of citizens is prohibited.

At the time the current Draft Law was made available for consultation, state media reported that the system of "retention and custody", or *Liuzhi*, was to replace the largely informal *Shuanggui* system that is used to investigate Communist Party members. However the new detention system and supervisory investigations apply to a much larger group according to Article 12 of the Draft Law and includes not only party officials but also personnel engaged on public affairs, management of state-owned enterprises, management in public education, scientific research, health care and other such units and "other personnel who perform public duties in accordance with law".

The Draft Law also creates a broad mandate to cover oversight of more than just corruption but as detailed in Article 17 additionally includes "abuse of power, dereliction of duty and wasting state assets."

With almost complete control over initiation and supervision of investigation, ability to carry out investigations, detain individuals, and collect evidence for potential criminal prosecutions and authority over such a large group of personnel involved in public services, the new Supervision system creates a new extra-judicial system with far reaching powers that has significant potential to infringe human rights.

2. Arbitrary Detention

The protection against arbitrary detention is enshrined in Article 9 of the Universal Declaration of Human Rights which states: "No one shall be subjected to arbitrary arrest, detention or exile" and in Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) which provides: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention."

The prohibition of arbitrary detention is a rule of customary international law.¹ The UN Working Group on Arbitrary Detention has even stated that the prohibition constitutes a peremptory

¹ That is, an international legal rule which has emerged from consistent state (legal) practice and consistent consideration by states of it as binding on them (*opinio juris*). See for instance Human Rights Committee, General comment no. 29: States of emergency (article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11; Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, para. 8, Restatement (Third) of Foreign Relations Law of the United States § 702(e) (stating that "prolonged arbitrary detention" practised, encouraged or condemned by a state is a violation of customary international law of human rights).

norm of international law, meaning that no derogations from it are permitted.² Such rules are binding on all states irrespective of whether or not they have ratified relevant international treaties. The fact that this customary rule applies even in times of war³ - arguably the severest of national emergencies - attests to the crucial importance that the international community attributes to the human right not to be subject to arbitrary detention. Significantly, the UN Working Group on Arbitrary Detention has more than once addressed the Chinese government specifically to remind it that "prohibition of arbitrary detention is customary international law".⁴

The prohibition of arbitrary detention means that anyone detained or arrested by the authorities, whether or not they are facing criminal charges, has the following specific rights:

- The right to be informed immediately or promptly of the reasons for arrest or detention;
- The right to be notified immediately or promptly of their right to legal counsel;
- The right to be informed promptly of any charges against them;
- The right to be held in a recognized place of detention;
- The right to have their family or friends promptly notified of the reasons for and location of their detention;
- The right not to incriminate oneself, including the right to remain silent;
- The right to legal assistance/ representation of their own choice;
- The right to take proceedings before a court challenging the lawfulness of detention;
- The right to complain and recourse for complaints about ill-treatment or conditions;
- The right to compensation in case of unlawful detention.

These standards hold for every person arrested and detained. They apply whether or not the person is formally charged for a criminal offence. They apply regardless of the nature of any alleged offence or criminal charge.

In addition, as a further safeguard against abuses during detention, the authorities responsible for detention should be separate from those in charge of questioning. Both the UN Working Group on Arbitrary Detention and the Committee against Torture have stated that the detention

² Working Group on Arbitrary Detention, Deliberation No.9, UN Doc. A/HRC/22/44 (2012), paras 37-76.

³ See the International Committee of the Red Cross (Jean-Marie Henckaerts and Louise Doswald-Beck, eds.), Customary International Humanitarian Law (Cambridge: Cambridge University Press, 2005), Rule 99 (Vol. I pp. 344-353, Vol. II Ch. 32, Sec. L, pp. 2328-2362. This study is updated periodically, see <http://www.icrc.org/customary-ihl/eng/docs/home>).

⁴ UN Working Group on Arbitrary Detention, Opinion No. 15/2011 (People's Republic of China), Communication addressed to the Government on 3 February 2011, para. 20; Opinion No. 16/2011 (People's Republic of China), Communication addressed to the Government on 8 February 2011, para. 12.

and investigation or interrogation functions should be separated.⁵

The new form of pre-trial detention created in the Draft Law, *Liuzhi*, which provides for detention at a designated location, with no guaranteed rights of access to family or lawyers, for up to six months violates these standards. It is a kind of incommunicado arbitrary detention, infringing the rights to liberty and security of person, and humane treatment of persons deprived of liberty, and places individuals in custody at risk of torture and other ill-treatment.

Right to legal counsel

International standards call for a person in detention to have access to legal counsel during all stages of criminal proceedings, including pre-trial questioning. International human rights instruments, treaty bodies and independent experts have recognized that the right to a fair trial requires the assistance of a lawyer during detention, interrogation and preliminary investigations.

The Human Rights Committee has stated that "all persons arrested must have immediate access to counsel."⁶ Principle 1 of the UN Basic Principles on the Role of Lawyers states that "(a)ll persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings." (emphasis added). "All" stages of criminal proceedings has been interpreted to include during detention, questioning and preliminary investigation, and to be effective "immediately" or "promptly" after arrest.⁷

The right of access to a lawyer is a fundamental safeguard against torture and other ill-treatment, and is one of the key norms for a fair trial under international human rights standards.⁸ The right encompasses that detainees should have access to a lawyer from the outset of their detention, including during questioning, and to protect their rights and begin to prepare their defence. There should be no systematic delays in access to counsel for any specific categories of offences.

A key purpose of these rules is to ensure prompt legal counsel to serve as a safeguard against torture and other ill-treatment, for instance to coerce a "confession", a problem in the Chinese justice system recognized by Chinese authorities.

⁵ UN Working Group on Arbitrary Detention report: Latvia, UN Doc. E/CN.4/2005/6/Add.2 (2004) §84(g); Concluding Observations of the Committee against Torture: Jordan, UN Doc. A/50/44 (1995), para. 176.

⁶ Concluding Observations of the Human Rights Committee: Georgia, UN Doc. CCPR/C/79/Add.74, 9 April, 1997, para. 28.

⁷ Principle 7 of the UN Basic Principles on the role of Lawyers states that access to a lawyer must be granted "promptly".

⁸ Human Rights Committee, General comment no. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007, paras 10 and 32.

While Amnesty International has documented many cases where detainees in China are denied access to lawyers of their choice, the PRC Criminal Procedure Law at least recognizes the right and provides that suspects should have access to legal advice. The Draft Law, however, takes a step backwards and has no provisions on suspects' access to legal advice in the investigation stage. The absence of the right to access legal counsel during interrogation increases the risk of self-incrimination and coerced "confessions", especially when the Draft Law does not provide for the right of suspects to remain silent.

Lawyers are integral to any serious effort to curb torture and other ill-treatment, especially in the criminal justice system. They can play a critical role in preventing torture if they are allowed to meet their clients in detention. Lawyers can be a driving force to ensure that fair trial standards are met and they are almost indispensable for individuals to be able to seek redress for human rights abuses.

Unofficial detention facilities

Article 41 of the Draft Law grants the Supervision agents the power to "retain in custody" a suspect for up to three months, and then seek approval from higher level Supervision organ to extend retention for up to another three months. The detention takes place "at a designated location" (Article 24), which is outside an official detention facility.

The evidence of the past years has shown that a similar method of detention under the Criminal Procedure Law – "residential surveillance in a designated location" which is not a detention facility or an investigation facility – has been turned from an exceptional measure designed as a form of more lenient detention for suspects deemed not to pose a threat to society, to the norm in sensitive cases which may carry severe penalties. This type of detention in many cases effectively cut off the detainees from all contact with the outside world for prolonged periods of time, resulting in incommunicado and secret detention and facilitating the associated risks of torture and other ill-treatment, without adequate safeguards.

Unlike official prisons and detention centres where oversight is provided for in other laws and regulations, there is no system established to regulate the unofficial detention facilities conditions and treatment of people in *Liuzhi*. This violates the right of all persons held in custody to be held only in a place of detention that is officially recognized and supervised and could amount to enforced disappearance under international law.⁹

Article 41 goes on to provide that "the Supervision organs shall ensure the food, drink and rest of persons retained in custody, and provide medical services. Interrogation of persons retained in custody shall have reasonably arranged interrogation times and lengths...". It also states that the detainee's family must be informed within 24 hours "except where it would

⁹ Article 17(2)(c) of the Convention on Enforced Disappearance; Human Rights Committee, General comment no. 35: Article 9 (Liberty and security of person), UN Doc. CCPR/C/GC/35, 16 December 2014, para. 58; Human Rights Committee, General comment no. 20, Article 7, UN Doc. HRI/GEN/1/Rev.1 (1994) at 30, para. 11; Special Rapporteur on torture, UN Doc. E/CN.4/2003/68 (2002), para 26(e).

impede the investigation". However, allowing the Supervision agents to hold suspects in locations that are not official place of detention for in total up to six months without family being informed where or why they are being held, contradicts international law and standards and the provisions in Article 41 alone are not sufficient to protect the persons in custody from torture or other ill-treatment.

The Chinese legal system still overly relies on "confessions" as the basis of most convictions, providing an almost irresistible incentive for law enforcement agencies to obtain them by any means necessary. This, in turn, considerably increases the risk of abuse while in detention, as well as miscarriages of justice and wrongful convictions.

Right to notification

Anyone who is arrested, detained or imprisoned must be informed of their right to notify or have the authorities notify someone in the outside world that they have been arrested and where they are being held.¹⁰ This ensures that there is an official acknowledgement of the fact of the arrest and place of detention, and that contact with the outside world is maintained.

International human rights standards call for notification to the family of a detained or arrested person to take place "immediately", or at least "promptly" or "without delay" and for family to be notified of where an individual is being held. Those arrested have the right to notify their family immediately, according to Rule 68 of the revised UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).¹¹

While the Draft Law requires that "after retention in custody is adopted, the family of the person being investigated shall be informed within 24 hours" it also continues by saying, "except where it would impede the investigation" (Article 41). Already the principle period of 24 hours creates concerns as to its compatibility with those international standards that require notification to family to take place "immediately" or at least "promptly" or "without delay. However, risks are compounded by the vague exception clause – "where it would impede the investigation", which is regularly used in criminal cases that Amnesty International has monitored in China and creates a loophole for the Supervision agents to deny the right to family notification. The inability of families to monitor the whereabouts and well-being of their family members increases the potential for torture and other ill-treatment in custody. The risk of torture or other ill-treatment is particularly acute in the first period of any detention.

In exceptional cases, notification of others of the arrest may be delayed but only if absolutely

¹⁰ Article 17(2)(d) of the Convention on Enforced Disappearance; Principle 16(1) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN Doc. A/RES/43/173, 9 December 1988; Committee against Torture, General Comment 2, Implementation of article 2 by States parties, UN Doc. CAT/C/GC/2, 24 January 2008, para. 13.

¹¹ Revised UN Standard Minimum Rules for the Treatment of Prisoners, adopted by the UN General Assembly on 17 December 2015, UN Doc. A/RES/70/175.

necessary to ensure the effectiveness of the criminal investigation, for example to prevent the destruction of evidence or the flight of accomplices, and only for "a reasonable period".¹² However, such an exception must be clearly defined in law, absolutely necessary to ensure the effectiveness of the investigation, and strictly limited in time. It should in any case not exceed "a matter of days".¹³

The present wording of the Draft Law, which would allow a denial of family notification for up to six months in total, clearly contravenes these international standards, as does the ongoing practice of "residential surveillance in a designated location" under the Criminal Procedure Law.

It is further noteworthy that when revising the Criminal Procedure Law in 2013, respective exceptions to the 24 hour requirement were somewhat narrowed, namely by eliminating the legal exception based on notification hindering the investigation in some cases. It now appears that this Draft Law back tracks again from this – minimal – improvement of the revised Criminal Procedure Law. In addition, the further vague exception allowed in 2013 in cases of alleged crimes of "endangering state security" or "terrorism" is widely misused as excuse not to notify families.

Right to challenge the lawfulness of detention

The Draft Law does not provide for adequate opportunity to challenge the detention. The only option for appeal is provided in Article 59 which states if Supervision organs do not lift the retention in custody when the period is complete, the person being investigated and close relatives have the right to appeal to that organ. No appeal is foreseen against the detention as such. Furthermore, an appeal will be impossible if the family has not been notified and the person being investigated is being held incommunicado. The appeal is directly to the Supervision organ itself and there is no provision for appeal to an outside body or court.

The right to challenge the lawfulness of detention is essential to safeguard the right to liberty and security. It provides protection against human rights violations such as torture and other ill-treatment, and can also serve as a safeguard against enforced disappearances. This right is guaranteed to all people deprived of their liberty, for whatever reason, and to all forms of deprivation of liberty.¹⁴

¹² Principle 16(4) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN Doc. A/RES/43/173, 9 December 1988.

¹³ Principle 15 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN Doc. A/RES/43/173, 9 December 1988; Special Rapporteur on torture, UN Doc. A/HRC/13/39/Add.5 (2010), para. 82.

¹⁴ Committee against Torture, General Comment 2, Implementation of article 2 by States parties, UN Doc. CAT/C/GC/2, 24 January 2008, para. 13; Human Rights Council, resolution 15/18, UN Doc. A/HRC/RES/15/18, 6 October 2010, para. 4(e).

The prohibition against arbitrary detention provides all detained individuals the right to promptly take legal proceedings before a court to challenge the lawfulness of their detention.¹⁵ The body reviewing the lawfulness of detention must be a court that is independent of the executive and impartial. The purpose of this is to provide an independent assessment of the legal basis for detention, of the need for detention before trial, and to protect the well-being of the detainee. States must establish procedures that are simple and expeditious so as to allow anyone deprived of his or her liberty to challenge the lawfulness of the detention and to be released if the detention is unlawful.

3. Conclusion and Recommendations

Amnesty International agrees that systemic corruption in a country can undermine the rule of law, and in fact frequently results in the violation of human rights, such as by diverting public resources away from important services. However, anti-corruption efforts must not in themselves result in violations of human rights.

The Draft Supervision Law in its current state creates a broad extra-judicial system that would run counter to China's international and national obligations, in particular to safeguard the rights to liberty and security of persons, humane treatment of persons in custody, and fair trials.

Any Draft Law should prohibit arbitrary and incommunicado detention, and set out specific safeguards for the protection of liberty and security of persons.

China should ratify the International Covenant on Civil and Political Rights and incorporate their provisions into Chinese law.

Amnesty International calls on the Standing Committee of the National People's Congress to withdraw this draft and ensure that any new draft is revised in line with international law and standards and meets China's international and domestic obligations to respect and protect human rights.

¹⁵ UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN Body of Principles) Principle 32(1) states: "A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.." UN Doc. A/RES/43/173, 9 December 1988; see also Article 9(4) of the International Covenant on Civil and Political Rights; Article 17(2)(f) of the Convention on Enforced Disappearance; Human Rights Council, resolution 15/18, UN Doc. A/HRC/RES/15/18, 6 October 2010, para. 4(d).

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