# Barriers to Exercising Right to a Fair Trial in Tibet

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# BARRIERS TO EXERCISING RIGHT TO A FAIR TRIAL IN TIBET

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## Introduction

In September 2019, the government of the People's Republic of China (PRC) claimed in a white paper that it had "continuously strengthened the rule of law for human rights" by "uphold[ing] law-based governance, law-based exercise of power, and law-based government administration".[1] Titled "Seeking Happiness for People: 70 Years of Progress on Human Rights in China", the document added that the PRC had made efforts to "ensure independent and impartial exercise of judicial and procuratorial powers, guarantee the right to fair trial for all parties and the legitimate rights and interests of criminal suspects, defendants, prisoners".

Around the same time, local Chinese authorities including the police, procuracy and court officials in Gade (Ch: Gande) County, Golok (Ch: Guoluo) Tibetan Autonomous Prefecture (TAP) were actively exerting undue pressure and intimidation tactics against Tibetan defendant A-nya Sengdra and his lawyer Lin Qilei. Sengdra, a popular anti-corruption campaigner, had been detained in September 2018 for leading a successful campaign to expose corrupt practices of the local Chinese authorities embezzling poverty alleviation funds.[2]In December 2019, after more than 14 months of pretrial detention, he was sentenced to seven years in prison and other eight Tibetans were given varying prison terms.

Sengdra is among the thousands of Tibetans who have been denied the right to a fair trial in the PRC's criminal justice system, in compliance of international standards. Since 2017, Chinese authorities have detained thousands of Tibetan monks and nuns in extrajudicial detention centres for political re-education for months without charge or trial.[3]

Owing to the inherent contradiction between the 'Socialist Rule of law with Chinese Characteristics', as formulated by PRC authorities, and the independence of the judiciary and lawyers, as set out in the well-established international legal framework, the PRC's Constitution holds supremacy under the PRC hierarchy of laws and provides for the rule of law, but the Constitution also provides that the Chinese Communist Party ('Party') takes precedence and is above all else.

Chinese legal provisions allow for practices that are in breach of international law including but not limited to criminal detention and charges for those who are peacefully exercising their human rights; lengthy periods of detention without judicial approval or oversight; placing the prosecution in a superior position to the courts and fettering the independence of the judiciary through use of Political-Legal and Adjudicative Committees; and restrictions on the right to defence and the role of effectiveness and security of lawyers.

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[1] China strengthens rule of law for human rights: white paper, Xinhua, 22 September 2019, available at http://www.xinhuanet.com/english/2019-09/22/c_138412620.htm

[2]China: Tibetan anti-graft campaigners sentenced on bogus charges in a show trial, TCHRD, 16 December 2019, available at https://tchrd.org/china-tibetan-anti-graft-campaigners-sentenced-on-bogus-charges-in-a-show-trial/

[3] Tibetan monk's account reveals rampant torture and sexual abuse in China's 'political re- education' centres, TCHRD, 28 May 2018, available at http://tchrd.org/tibetan-monks-account-reveals- rampant - torture-and-sexual-abuse -in-chinas-political-re-education-centres/

There are no safeguards in place that uphold international law, convention and guidelines such as independent challenge to detention, right to silence, presumption of innocence, privilege against self incrimination, guarantee of prompt legal representation and inadmissibility of confessions obtained through torture. The procuracy has a dual role as both prosecutor and supervisor of the legal process, as it supervises the work of judges and the courts and can call for the reconsideration of cases including the instigation and extension of pre-trial detention, which result in a serious conflict of interest and a lack of independent oversight.[4]

**Legal Standards**

The right to a fair and public trial is enshrined in multiple international treaties and provisions, beginning with the Universal Declaration of Humans Rights (UDHR).[5] Further, Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) provides that "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."[6] Thus, any arrests made contrary to provisions in the domestic law, i.e. without a warrant, without lawful justification or prolonged custody, are a violation of both domestic and international standards, and may constitute arbitrary detention.[7]

During pretrial detention, all detainees must be treated with the upmost respect and have their basic needs fulfilled in a considerate manner. This particularly references a defendant's right to freedom of torture and humane living conditions. Detainees should also have timely access to counsel of their own choosing. This is outlined in both Article 14 of the ICCPR and the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.[8] This right should be upheld during the investigative, detention and trial stages of a criminal, civil or administrative conviction, according to the Special Rapporteur on the Independence of Judges and Lawyers.[9] Once a defendant has obtained timely access to legal representation, the lawyer must be allowed to confer with their client and provide them legal advice in confidence. This element is fundamental to ensure a fair trial. It enables detainees to challenge unjust charges or treatment and prevents illegalities such as coerced confessions.

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[4]Congressional-Executive Committee on China. Annual Report 2016. October 2016. Available at https://www.cecc.gov/sites/chinacommission.house.gov/files/2016%20Annual%20Report.pdf

[5] United Nations Human Rights Office of the High Commissioner, Universal Declaration of Human Rights, online (2009), available at https://www.ohchr.org/EN/UDHR/Pages/UDHRIndex.aspx

[6] Article 14, International Covenant on Civil and Political Rights, available at https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

[7] United Nations High Commissioner for Human Rights, International Human Rights Standards for Law Enforcement: A Pocket Book on Human Rights for the Police, online (2009), available at https://www.un.org/ruleoflaw/files/training5Add1en.pdf

[8] United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2013), available at https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf

[9] Lawyers' Rights Watch Canada, International Law Right to Timely and Confidential Access to Counsel, online: (2017), available at https://www.lrwc.org/international-law-right-to-timely-and-confidential-access-to-counsel-report/

A vital component to an impartial and competent trial is the publicity of oral hearing. This is emphasized in both Article 14 of the ICCPR and the Declaration on Human Rights Defenders.[10] The public and media access to court proceedings enables transparency of a State's court system and acts as a safeguard to the defendant.

Another crucial component is the right to be tried by an independent and impartial judiciary, which is established by law. There are no exceptions to this provision, as it is absolute. It is one of the general principles of customary international law and therefore, regardless of their commitments to international treaties, States have an obligation to ensure judicial independence at all times.[11]

Although China signed the ICCPR in 1998, it has yet to ratify it. There is no provision in the Chinese Constitution that stipulates how international treaties should be introduced into domestic law.[12] With the amendments in 1979 and then in 1996 of its Criminal Procedure Law (CPL), the Chinese Court System has endeavored to make certain aspects of the international standards of a fair trial legally binding. However, this has failed to produce results.

Despite the 1996 CPL and a more recent amendment in 2012 that theoretically granted numerous procedural safeguards to the accused, defense lawyers still face tremendous hurdles in defending their clients.[13] In practice, the PRC still follows the previous inquisitorial model with small elements of adversarial making an appearance occasionally. Despite PRC's multiple amendments to the CPL, the right to a fair trial has never been on its agenda.[14]

**Detention and Arrest**

In the Chinese criminal justice system, 'detention' (Ch: *xingshijuliu;* Tib: *juzung*) by public security organs such as the Public Security Bureau (PSB)or the police leads to formal 'arrest' (Ch: *daibu*; Tib: *zinzung*).Tasked with the responsibilities to review cases and investigate, detain, arrest criminal suspects, the PSB employ the common practice of holding a suspect in detention for prolonged periods before making formal arrestowing to a lack of rigorous institutional oversight or significant consequences for improper application.

[10] "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms", available at https://www.ohchr.org/en/issues/srhrdefenders/pages/declaration.aspx

[11] ibid

[12]Xu, Sun. "The Implementation of the International Covenant on Civil and Political Rights in China's Judicial System: Perspectives on Adoption of Exclusionary Rule in China". Kathmandu School of Law Review, vol. 5, no. 1, 2017, pp. 162-168. Available at HeinOnline, https://heinonline-org.ucc.idm.oclc.org/HOL/Page?collection=journals&handle=hein.journals/kslr5&id=171&men_tab=srchresults

[13]Lan, Rongjie. "A False Promise of Fair Trials: A Case Study of China's Malleable Criminal Procedure Law". Pacific Basin Law Journal, vol. 27, no. 2, 2010, pp. 153-212. Available at eScholarship, https://escholarship.org/content/qt0hh4t5gb/qt0hh4t5gb.pdf

[14]Duff, Peter and Shytov, Alexander "Truth and procedural fairness in Chinese criminal procedure law". The International Journal of Evidence & Proof, vol. 23, no.3, 2019, pp. 299-315. Available at Sage Journals, https://journals.sagepub.com/doi/pdf/10.1177/1365712719830704

Where an arrest is made, there are a number of provisions that enable time limits to be extended, in some cases for as long as six months at a time. Many Tibetan detainees are held without charges or trials beyond the prescribed maximum limit of six months. Police may also release and re-arrest a suspect and use detention to obtain confessions in time-sensitive cases.[15]

Although an amendment to the CPL in 2012 prohibited self-incrimination, this provision is applicable only to questions that are "irrelevant to the case" (Article 118, 2012 CPL). Thus, if a suspect is asked questions specific to the case, they must answer. This undermines the presumption of innocence. The weak protection against self-incrimination, or the right to be presumed innocent led to a prominent Tibetan named Tsegon Gyal holding a 'silent protest' in December 2016 in the Kangtsa (Ch: Gangcha) County Detention Centre in Tsojang (Ch: Haibei) 'Tibetan Autonomous Prefecture' (TAP), Qinghai Province.[16] Mr Gyal was sentenced to three years in prison for "inciting separatism" in January 2018, more than a year after his detention and eight months after his closed-door trial.[17]The UN Working Group on Arbitrary Detention (UNWGAD)in 2017 had ruled that the deprivation of liberty of Mr Gyal was arbitrary and that there was no legal basis to justify his detention. The (UNWGAD) ruled that international norms relating to the right to a fair trial as established in the UDHR and in the relevant international instruments were not observed and that Mr Gyal's detention "constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion … or any other status, that aims towards or can result in ignoring the equality of human beings."[18]

Although the domestic law requires an official arrest warrant (Article 91, 2012 CPL) and notification of the suspect's family, these steps are rarely followed in terms of Tibetan suspects, as the initial steps to ensure procedural guarantees in exercising the right to a fair trial.Those who have been detained or arrested and whose whereabouts are unknown are routinely denied the right to a judicial proceeding regarding the legitimacy of their arrest or detention. Since Tibetan detainees are mostly charged with national security crimes without due process, they are held incommunicado for months and sometimes never to be found alive.[19] The PRC's vaguely worded Counter-Terrorism Law legalizes the detention of those accused of 'terrorism' for indefinite amounts of time.[20] The law permits Chinese authorities to use lethal force

[15]"Tibetans in Ngaba Warned Over Anti-Mine Protests". Radio Free Asia. 27 May 2016. Available at: http://www.rfa.org/english/news/tibet/warned-05272016145835.html

[16]Charged of inciting separatism, detained former Tibetan political prisoner Tsegon Gyal on 'silent protest', TCHRD, 29 December 2016, available at https://tchrd.org/charged-of-inciting-separatism-detained-former-tibetan-political-prisoner-tsegon-gyal-on-silent-protest/

[17]Prominent former political prisoner Tsegon Gyal sentenced to three years on charge of 'inciting separatism', TCHRD, 18 February 2018, available at https://tchrd.org/prominent-former-political-prisoner-tsegon-gyal-sentenced-to-three-years-on-charge-of-inciting-separatism/

[18] Opinions adopted by the Working Group on Arbitrary Detention at its 78th session, 19-28 April 2017, Working Group on Arbitrary Detention, 11 August 2017, A/HRC/WGAD/2017/4.

[19] Release Tibetan monks from arbitrary detention: Sentencing is politically motivated, TCHRD, 26 June 2017, Available at: http://tchrd.org/release-tibetan-monks-from-arbitrary-detention-sentencing-is-politically-motivated/

[20] "Counter-Terrorism Law of the People's Republic of China," *National People's Congress of the PRC*, 27 Dec. 2015, *available at*: http://chinalawtranslate.com/%E5%8F%8D%E6%81%90%E6%80%96%E4%B8%BB%E4%B9%89%E6%B3%95-%EF%BC%882015%EF%BC%89/?lang=en.

against protesters and outlines broad and ambiguous justifications for detaining protestors.[21]

As interviews with former Tibetan political prisoners revealed, the CPL provisions regarding detention and arrest are rarely observed typically due to the so-called "political sensitivity" of a case involving Tibetans who are usually charged of 'state security' crimes that give the law enforcement officials much discretion in flouting the legal norms and procedures. For instance, families of at least 75% of the former Tibetan detainees interviewed for this report were not notified of either detention or arrests. The account of a former Tibetan political prisoner Lama Nagkor,[22] who was imprisoned for allegedly 'leaking state secrets' in Ngaba Tibetan Autonomous Prefecture, represents the common practice of Chinese police not informing family members about the detention of their loved ones.[23]Lama Nagkor was held in pretrial detention for more than 17 months since March 2011 without the knowledge of his family members. His family members were only allowed to visit him after he was sentenced in August 2012. He was tortured for the first 42 days at Wenchuan PSB detention centre near Chengdu city by officers from the State Security Bureau, which was responsible for investigating state security crimes.

"I was kept in solitary confinement during the period before sentencing with little food and subjected to sleep deprivation. They continuously tortured and beat me up for the first 42 days. The torture was excessive and extremely inhumane," Lama Nagkor told TCHRD. To lend a semblance of due process, the authorities had appointed a Chinese lawyer to represent him. "I did not choose the lawyer; it was appointed by the government, which also arranged the time and date of my meeting with the lawyer," Lama Nagkor said. "In fact, they arranged everything from appointing a lawyer to making me sign documents, without ever consulting me. I just followed the orders and if I did not, I would have received more beatings and extended detention."

## Other Restrictions of Liberty

In addition to detention and arrests, the public security organs can deprive a suspect's personal liberty through other measures. Certain compulsory measures such as 'bail/guarantor', and 'residential surveillance' are used to impose "police supervision and restriction on persons not under police custody".[24] These measures, outlined in the 2012 CPL, are often viewed as guidelines instead of the legal procedure. The bail/guarantor or bail pending trial can be granted to suspects that fulfill certain requirements (Article 65, 2012 CPL). The police use it as a restrictive measure in cases where there is insufficient evidence to charge an individual, as investigation and prosecution of the case continues during this time. [25]A person released on bail must follow numerous conditions such as not leave their city or country of residence

[21] Ibid.
[22] See appendix for interview transcripts of former Tibetan political prisoners
[23] All interviews conducted by TCHRD researcher Pema Gyal in July 2019. Dharamshala, India.
[24] Stanley Lubman, Arrested, Detained: A Guide to Navigating China's Police Powers, Wall Street Journal, 12 August 2014, available at https://blogs.wsj.com/chinarealtime/2014/08/12/arrested-detained-a-guide-to-navigating-chinas-police-powers/
[25] Supra note 18

without the permission of the bail officer for a year, account for any change in employment, residence or contact information. (Article 69, 2012 CPL). The period of bail is not to exceed 12 months.

The obligations and provisions for residential surveillance is much the same as bail, however this measure shall be enforced in the residence of the criminal suspect. For investigations that might involve crimes of "endangering state security," "terrorism" or "serious crimes of bribery," residential surveillance takes place at an undisclosed location about which the family of a suspect may be informed but not necessarily of the location or the charges (Article 73, 2012 CPL). There is a right to retain a lawyer but the requirement that a meeting take place within 48 hours is suspended and the police must approve any meeting (Article 37, 2012 CPL). Human rights advocates and legal analysts have termed this measure an "extraordinary form of *de facto* extended detention". [26] The UN Committee Against Torture criticized this coercive measure because it ''may amount to incommunicado detention in secret places, putting detainees at a high risk of torture or ill-treatment.''[27]

In the case for administrative cases in China when the crime is thought to be minor in severity and is not criminal in nature, administrative sanctions usually amount to compensation, whereas criminal sanctions would result in deterrent punishment. Physical detention is the most severe type of administrative sanction in China as it deprives the accused of liberty and often results in political re-education in police custody for up to 15 days. Despite the abolition of the Re-education Through Labour (RTL) system in 2013,there exist 'black jails', 'legal education centers', and mental hospitals where human rights defenders and petitioners are detained, and torture and other abuses are common.[28]In September 2016, Tibetan writer Gangkye Drupa Kyab was held in administrative detention for 15 days as punishment for displaying a photo of the Dalai Lama at the banquet organised to celebrate his release from prison.[29] In February 2019, Tsering Dorjee was detained for about a month for "re-education" in Dingri (Ch: Tingri) County, Shigatse (Ch: Xigaze) City, Tibet Autonomous Region.[30] Dorjee had been apprehended for conversing on phone about the importance of teaching Tibetan to their children with his younger brother who lives in India.

**Extortion of Confessions**

The prohibition on the use of torture to extract confessions of any kind is stated in both the 1996 and 2012 amendments to the CPL. But this rule is rarely followed, as

[26] Edited by Mike McConville and Eva Pils. Comparative Perspectives on Criminal Justice in China, Edward Elgar Publishing Ltd, 2013, Print.
[27]Concluding observations on the fifth periodic report of China, Committee against Torture, 3 February 2016, CAT/C/CHN/CO/5
[28] Verna Yu, How China is using criminal detention in place of re-education through labour, South China Morning Post, 21 April 2014, Available at: http://www.scmp.com/news/china/article/1492192/china-using-criminal-detention-place-re-education-through-labour
[29]China detains recently-released Tibetan writer and his friend for 'brainwashing class', TCHRD, 26 September 2016, available at https://tchrd.org/china-detains-recently-released-tibetan-writer-and-his-friend-for-two-week-brainwashing-class/
[30]Tibetan man criminally detained for phone conversation about Tibetan language education, TCHRD, 20 December 2019, available at https://tchrd.org/tibetan-man-criminally-detained-for-phone-conversation-about-tibetan-language-education/

majority of the confessions extorted by torture happen during interrogation in pretrial detention. The torture endured by suspects and detainees is both mentally and physically brutal. The longer that they neglect to confess their crime or withhold information, the more severe the torture becomes.

Lobsang Thinley, 30, was arbitrarily detained on 18 March 2011 for sharing information about the 16 March self-immolation protest of a monk from Kirti Monastery in Ngaba County, Ngaba Tibetan and Qiang Autonomous Prefecture. He was held incommunicado in pretrial detention for one year and five months before being sentenced to three years in prison for "leaking state secrets".[31] For the full 45 days of his pretrial detention, he was subjected to severe beatings, torture, sleep and food deprivation, because he had refused to accept the false confession that he had acted in collusion with exile Tibetan separatist groups to create disturbances. He had to undergo a series of medical treatments including two surgeries.

Thinley's account is hardly exceptional, as another former political prisoner recalled being beaten continuously with an electric baton while his hands remained chained. Often prisoners become hospitalized due to the injuries sustained from torture. Lhamo Kyab, who was arrested on charges of 'leaking state secrets' and 'publicizing political propaganda' in 2006, was hospitalized because the severe beatings during pretrial detention permanently injured one of his kidneys. However, the authorities forced him to sign medical documents that stated that he had appendicitis. To this day, he suffers from extreme pain in his kidneys and right ear, a lifelong medical condition he picked up during detention.

Confessions as well as witness and victim statements extorted by torture or violent means are made illegal in Article 54 of the 2012 CPL. Although the 1996 CPL amendment prohibited the authorities from extracting confessions through illegal means of torture, it did not provide any instructions for judges' power to exclude such evidence in the courtroom. The 2012 amendment did, by providing the difference between tangible and testimonial evidence. Despite this, judges often do not exclude evidence tainted by tortureowing to internal and external pressure, as well as the relationships between other institutions.

China has yet to provide a definition of torture in commensurate with international legal standards. This makes it hard for domestic supervisory powers to determine evidence obtained through torture and degrading treatment. Another flaw evident with the exclusionary rule is that it differentiates between evidences that must be excluded and evidence that may be excluded. This means that if the latter is provided with reasonable explanation, then it may be introduced as evidence. This has led many judges to rely on the rule of defective evidence. Also, despite procedures stating that copies of the interrogation files should be produced as evidence, often a copy of health inspection records is produced, which is not a legal record of the investigation and should not qualify to show that no torture or degrading treatment has taken place.

Article 56 of the 2012 CPL provides that defendants can apply for exclusion of illegal evidence. Between 2015 and 2016, the number of defendants that applied for

[31] 2017 Annual Report: Human Rights Situation in Tibet, Arbitrary Detention and Torture, pg. 32, TCHRD, available at https://tchrd.org/2017-annual-report-on-human-rights-situation-in-tibet/

exclusion of evidence in comparison to the number of cases tried was 2.6688 %. Out of those that did apply for exclusion, courts responded only 2.122 % of the applications. The highest percentage of exclusion of illegal evidence by courts was 0.157 %. The 2012 CPL requires the illegal obtainment of evidence with clues or materials and in the Supreme People's Court's interpretation of the 2012 CPL, such materials could be anything pertaining to the time, date, location, and obtainment of evidence, etc. However, in the majority of criminal cases this is almost impossible, as many suspects are unaware of the location they are taken to, or how long they had been kept there, which rules out time, date and location. The interpretation also does not clarify if only one item needs to be supplied or all. This ambiguity leads judges to deny most applications of exclusion.

**Open Trial Court System**

Every citizen has the right to have his or her trial held publicly to ensure transparency and fairness of the judicial system. In the PRC, this right is violated in the name of broadly defined provisions on crimes related to 'state security' or 'state secrets'. These cases are often politically sensitive in nature and thus, the Chinese government restricts access or completely prohibits access to the trial.

Despite attempts at judicial reforms that began in 1996, little has changed in terms of making trials and the ensuing judgments public in the PRC. This is largely due to the lack of a punishment procedure for those who refuse to follow the change brought about by the reforms. It has also triggered great confusion among judges and officers, owing to uncertainty on the correct procedures. There is also fear of public and international backlash against the judicial system, as media reporters would scrutinize the legal structure, thus, many court cases remain closed to the public.

The PRC manipulate and abuse the exceptions to international standards on the publicity and fairness of court proceedings by invoking 'state security' or 'state secrets' in politically sensitive cases, and justifying close-door trials. The cases against Tibetans are mostly completely closed to the public and the media. More than a decade ago in the aftermath of the 2008 uprising in Lhasa, 30 Tibetans were sentenced to imprisonment between three to life imprisonment for taking part in protests against the Chinese government. Although Chinese state media reported that their trials were open to the public, the courts had conducted a 'sentencing rally' (Ch: *xuanpandahui*) on 29 April 2008.[32] At the time, the Tibet Autonomous Region (TAR) Communist Party Secretary Zhang Qingli had called for "quick arrests, quick hearings, and quick sentencing". Many other Tibetans have been since sentenced in closed or 'secret' trials. Many of their families were not granted access.

Former political prisoner Tenpa Dhargyal, who was detained at Dingri Detention Centre, Nyari Prison, Drapchi Prison, and Chushur Prison on the charges of undertaking activities to "split up the nation" in 2011.[33] He was sentenced to four years and six months at a closed-door trial where an official from the procuracy[34] and

[32] China: Tibetan Protesters Denied Fair Trial, Human Rights Watch, 30 April 2008, available at https://www.hrw.org/news/2008/04/30/china-tibetan-protesters-denied-fair-trial
[33] Online interview with TCHRD researcher Pema Gyal in July 2019
[34] The procuratorate's main responsibilities include supervision of case proceedings, authorization of arrests, carrying out further investigation and in the circumstance that a case is filed directly to the

three members of court staff were present. His family was not allowed to visit him after the sentencing. He was released in March 2006, four months after the expiration of his prison term without any stated reason.

More recently, the Tibetan language advocate Tashi Wangchuk was sentenced to five years in prison for "incitement to separatism" sparking international outcry as Chinese authorities banned media and foreign diplomats from observing the trial. Tashi had a closed trial, which only three members of his family could attend, although 15 of them had observer passes.

**The Right to Counsel**

The right to hire and retain a lawyer is one of the foundations of the right to a fair trial and due process. Without this privilege, the prosecutor has an immense advantage against the defendant, who may or may not have knowledge of the legal process or the capability to defend himself or herself. The PRC's domestic law provides not only the right of the defendant to obtain a lawyer, but also the abilities and restrictions of a defense lawyer in this instance.

But these legal procedures enshrined in the 2012 CPL have failed to put an end to the harassment or threats faced by prospective lawyers from defending their clients. This is especially true for cases involving Tibetans, as many of the charges held against Tibetans involve national security crimes. For example, Li Dunyong, a lawyer from Beijing attempted to defend Tibetan filmmaker Dhondup Wangchen, who was arrested for shooting interviews with Tibetans on their political views in 2008. Li met with Wangchen on one occasion in Qinghai before authorities forced him to return to Beijing. Thus, Wangchen was forced to hire a state-appointed attorney, whose views were aligned with the government.[35] He was sentenced to six years imprisonment and released on 5 June 2014 with lifelong psychological illnesses of memory disruption, anxiety, fear, and nightmares.

Tibetans are rarely informed of their right to counsel. When they are informed, it is at the discretion of the government whether they receive a court appointed lawyer or not. Very rarely are they able to retain a defence lawyer of their own choice. Many do not have legal representation at their trials. This was either because they denied a court appointed lawyer or they were denied legal representation completely. In some cases, Tibetan suspects receive a court appointed lawyer by force, as they are threatened with torture if they did not sign documents accepting a lawyer from the government.

During detention, the defendant has the right to meet with his or her lawyer. The detention house may facilitate this meeting within 48 hours of a request. During this meeting, the counsel may provide adequate legal advice and discuss relevant details

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procuratorate, they instigate public prosecution. Congressional-Executive Commission on China, Criminal Procedure Law of the People's Republic of China, online (2012), available at https://www.cecc.gov/sites/chinacommission.house.gov/files/documents/PRC%20Criminal%20Procedure%20Law.pdf

[35] China: Ensure Fair Trial for Tibetan Filmmaker, Human Rights Watch, 3 August 2009, available at https://www.hrw.org/news/2009/08/03/china-ensure-fair-trial-tibetan-filmmaker

pertaining to the case, i.e. evidence against the defendant. This meeting must remain confidential between the defendant and their counsel and shall not be monitored. Cases involving 'state security' and 'terrorism' require the defence lawyers to obtain approval from the investigative organs to meet their clients (Article 37, CPL 2012).

Defence lawyers have the right to source any and all evidence pertaining to the case once it has been transferred to the procuratorate for examination (Article 38, CPL 2012). In the instance that the defender is of the opinion that the procuratorate or the investigative organ has failed to provide all evidentiary material, they may apply to obtain such evidence from the court or the procuratorate (Article 39, CPL 2012).

The Human Rights Committee clarified that the term "adequate facilities" in Article 14 (3) of the ICCPR indicates that all documents and evidence that the prosecution has obtained against the defendant must be made available to the defendant and their counsel.[36] This includes all evidence that is not necessarily substantive when proving the innocence or guilt of the defendant but also material that may be of use for the defense. The committee recognized that this might include illegally obtained evidence by torture or other means. In this instance, the prosecution must provide information on the attainment of such evidence, so that relevant inquiries may take place.

**Barriers to Defense Lawyers**

The role of defense lawyers in the judicial system cannot be overstated as they maintain due process and acts as a bridge of understanding between the defendant and the judiciary so that horrific acts such as arbitrary detention are prevented. Most importantly, a lawyer has the opportunity to analyse the prosecution's evidence on behalf of the defendant and in some cases, provide evidence that may absolve the defendant of any charges.

In the PRC, when lawyers wish to meet their client, they must first seek the approval of the government investigative body, and the prime investigator of the case must be present during the meeting. This is a clear violation of the CPL provisions and acts as a deterrent for both the lawyer and the defendant to meet. Also, the investigator present determines the date, time, and venue for the meeting. If approved by the investigation body, the meeting cannot exceed 30 minutes and will likely be the only chance for the defendant and their lawyer to speak before trial. This meeting usually takes place during the investigative stage, while the investigation can take months to conclude. It is impossible for a defence lawyer to build a case at this stage, as the prosecution does not transfer case files until they have completed the investigation. Therefore, while a defendant may have access to a lawyer in the pre-trial stages, the lawyer does not begin building a defence until the investigation is finished.

Defence lawyers often do not attempt to gain pretrial access to their client, as they know that their efforts will fail. In the majority of cases, lawyers receive assignment a mere 10 days before trial; some receive it on the day of a trial. To defend a case involving 'state security' or 'state secrets', a lawyer must first seek the approval of the

[36] Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994).

investigative body. This is a deliberate attempt to deny defendants access to representation as the term 'state security' has never been appropriately defined.

Many lawyers do not have the right to timely appointment. The courts regularly assign cases to legal aid centers less than 10 days before trial. Further, cases are not immediately assigned to individual lawyers but to the legal aid center as a whole. Due to lack of administrative capacity, these cases are often appointed to individual lawyers until a day or two before trial. A major reason for the courts applying for legal services days before the trial is that many judges believe the facts against the accused are straightforward and thus feel no reason for earlier appointment. Also the lawyers feel powerless in their role, as they rely on their relationships with the prosecution and the investigative body. They know that they cannot disagree with these governmental bodies. Defense lawyers often face extreme lack of cooperation from other governmental bodies that have access to files and documents relevant to their case. The procuratorate and the police have the advantage in this circumstance, as they are able to request these files from the relevant departments.

The evidentiary procedure also poses as a problem for defence lawyers since they only receive a case file containing evidence against the client once the prosecution transfers this to the court. The case file does not include all the evidence the prosecution has obtained against the defendant including any exculpatory evidence. The law does not specify as to what those files should contain thus allowing the prosecution to provide routine formal documents such as the notices of detention and arrest and a summary of evidence. To prohibit the judge from assuming an investigative role in court proceedings, the prosecution must only transfer a summary of the evidence to the courts, as per the 1996 CPL. But this prevents lawyers from receiving the full discovery of case files. Clearly, the evidence provided is of little use to the defence. Although they can request the courts for a timely discovery and for supplementary evidence on behalf of the prosecution, this request is rarely sought after and seldom approved. This is because they can request access to evidence that may prove the innocence of their client or may lessen their sentence, not all of the evidence obtained by the prosecution. If the request is approved, the court shall order the procuratorate to reveal such evidence within three days of receiving the request from the courts. In circumstances where lawyers believe a false confession has been obtained through means of torture and have requested evidence to support this claim, such as records of medical inspections, this request has been denied.

Lawyers rarely attempt to argue the evidence against their clients as the CPL stipulates that any attempt of the lawyer to 'collude' with the defendant, fabricate evidence, or impede judicial proceedings will be dealt with in accordance of the law (Article 42). It is interpreted that any defiance shown by the lawyers to accept the evidence proposed by the prosecution against their client will lead to a conviction of perjury and longer sentence for their client. The Lawyer's Law and the Criminal Code further specify this. It is considered perjury when a lawyer persistently introduces evidence that contradicts with that of the prosecution. Lawyers have continuously been persecuted under this provision for challenging illegally obtained confessions.

## Lin Qilei

***"The Chinese court is only a department of the Party, that is, as many said, the hilt of a knife. It does not and cannot have an open and fair trial system. It only strikes hard on democracy and human rights activists 'according to the law'."***

The '709 crackdown' exposed the realities that many human rights lawyers face at the hands of the Chinese government. Lin Qilei is a prominent Chinese human rights defence lawyer who worked for Rui Kai law firm in Beijing and as the contact person for the 'China Human Rights Lawyers Group'[37]. He has chosen to defend controversial political cases including Tibetans that could potentially derail his career or lead to his arrest. Most notably, he has defended Tashi Wangchuk, a Tibetan language advocate and A-nya Sengdra, a Tibetan anti-corruption activist. In his interview with TCHRD, Linstated that there was little incentive to represent Tibetans, as almost all cases against Tibetans are political and sensitive incurring huge risks.[38]"Although all cases both Tibetan and other cases fall within the scope of Chinese law, Tibetan cases are treated and viewed differently from other cases."

There is often a severe lack of communication with clients and lawyers are paid less for representing Tibetans, which becomes problematic as lawyers must bear high costs, such as transportation to distant Tibetan towns. Despite these difficulties, Lin is a firm believer that everyone should have the right to hire a lawyer and deal with the consequences. "I have handled many cases involving both Tibetans and others, and as a lawyer it is our duty to represent them. All the while, I did not let the fear of persecution and crackdown stop me; it is only appropriate that a lawyer does this. At the same time, we have to be psychologically prepared to counter any risks or consequences. For example, to be mentally prepared when you are arrested and imprisoned. Or when your lawyer's license is revoked."

Lin and other Chinese lawyers defending Tibetan clients endure harassment and barriers every step of the way. Initially, public security organs threaten lawyers who attempt to undertake Tibetan human rights cases with revocation of their licenses. When this pressure tactic failed, the Political and Legal Committee (PLC) involved with the case will begin harassment to ensure that the defendant has no other option than to be represented by a court-appointed lawyer. In the instance that this harassment fails, the courts collude with the procuratorate and make every effort to hinder lawyers as they try to build a defense. In addition, lawyers must face all punishments meted out by the PLCs.

[37] Established in January 2007, China Human Rights Lawyers Concern Group (CHRLCG) is a Hong Kong-based non-profit organisation that aims to advocate for the protection of the rights of human rights lawyers and legal rights defenders in China. More at https://www.chrlawyers.hk/en/content/vision-and-mission

[38] Interview conducted by TCHRD's Chinese researcher Sangjie Kyab in 18 July 2019

Lin recalls that the PLC asked him not to represent Tashi Wangchuk. When Lin persisted, he was told not to publicize any details of the case. Any effort Lin has made to meet with his clients has come about with great difficulty. In order to meet with his clients, he must make several attempts and spend frequent hours and a great deal of money to get past the authorities. Every rejection and hindrance that Lin has faced is considered 'legal' by the authorities, which highlights the government's reluctance to honor the right to fair trial.

The procurement of evidence has been a significant hurdle for Lin and other lawyers in recent times owing to the nationwide crackdown under the anti-crime campaign. Before this, Lin used to receive evidence files against his defendant when the police investigation had concluded, and the case was transferred to the procuratorate. However, the procuratorate has now begun creating unnecessary problems that slow down this process, in the name of the abovementioned anti-crime campaign, which means that Lin must obtain the approval from the PLC to receive a copy of the case files, a significant hurdle as he has already defied them in choosing to represent this case. This happened with his defendant A-nya Sengdra. The trial process is very much a formal proceeding that has already been decided. Lin is unable to cross-examine witnesses because they rarely appear in court. The CPL outlines many instances where a witness is able to miss the trial, but Lin states that the PLC does not allow many witnesses to attend trial. More than half the amount of cases Lin has represented involved confessions obtained through torture. When lawyers attempt to challenge these confessions, the judge, an extension of Party rule, predictably does not support it.

## Teng Biao

Teng Biao experienced much of the same obstacles as Lin Qilei. Teng currently lives in exile in the US. He used to be a part time lawyer for Huayi law firm in Beijing and lecturer at the China University of Political Science and Law. He has defended many human rights cases involving both Chinese and Tibetan and has consulted on many human rights cases and multiple cases involving the death penalty. He was also the co-founder of the "Open Constitution Initiative", also known as Gongmeng, and the founder and President of 'China Against the Death Penalty' in Beijing.

As a result, in his career he had his lawyer's license revoked, his lecturing profession suspended, his passport confiscated and been placed under 'residential surveillance'. He had been abducted three times while in China and held in undisclosed locations where he faced severe torture.

> As long as a case involves government departments, government officials, or other official departments, it is impossible to expect the case to have a fair trial
>
> Teng Biao, Chinese Human Rights Lawyer

Teng emphasizes the highly politicized nature of Tibetan cases, which intimidates many lawyers. Chinese authorities create problems at every stage of the process when lawyers do accept these cases. "In political cases, judicial independence is even less, so it is impossible to

see judicial independence in majority of Tibetan cases. The judges are completely under the order of the higher authorities. The invisible power behind them is the power that makes the final decisions," he told TCHRD.[39]

"The biggest difficulty in representing Tibetan cases is that almost all Tibetan cases are excessively politicized. The authorities regard this as highly sensitive political case. Therefore, any case that dares to represent Tibetans, especially those human rights lawyers who publicly represent Tibetan cases are considered troublemakers and even dissidents."

Despite these difficulties, Teng believes that it is important to advocate for marginalized groups that has nobody to speak up for them, including Tibetans. In 2011, when Teng along with another lawyer, Zheng Jianwei attempted to represent Dawa, a teacher in Ngaba Tibetan Autonomous Prefecture, they could not meet with Dawa in the detention centre due to objections from authorities. Teng's abduction by public security authorities for 70 days led to his partner Zheng dropping Dawa's case due to pressure from the Justice Bureau.

"From the beginning, the Chinese court has been a part of the party-state apparatus. Chinese authorities have never regarded the court as a place for holding independent and fair trial. It is a tool of the Chinese Communist Party. Therefore, although there is a judicial system, some laws, including the constitutional powers of fair trial rights, and also some provisions to guarantee the fairness of the judiciary. But in reality these do not exist, and fair trial does not exist. The entire judicial system is not independent. It is completely controlled by the Communist Party or the government," said Teng.

### Liu Shihui

Liu Shihui worked as a lawyer in a law firm in Guangzhou for 10 years until 2009 when the Justice Bureau revoked his license to practice law. Liu currently lives in the US. He has been detained at least five times for his work on human rights advocacy in China. In 2011, he was abducted and held for 108 days in an undisclosed location, where the torture he endured resulted in a broken leg and two fractured ribs. Liu has never shied away from activism and continued to promote human rights despite no longer being a practicing lawyer.

Liu has never defended a Tibetan although he explains that this was not due to any reluctance on his part and if the opportunity arose, he would take it.[40]"Very few Chinese lawyers are willing to represent Tibetan defendants because Tibet is a so-called sensitive political issue in China. It involves the most sensitive issue of Tibetan independence." Recalling his attempts to sue some government departments in a

[39] Interview conducted by TCHRD Chinese researcher Sangjie Kyab on 27 July 2019
[40] Interview conducted by TCHRD Chinese researcher Sangjie Kyab on 24 July 2019

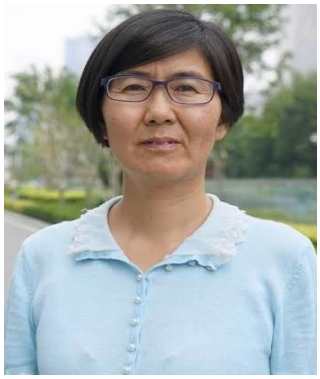
village recall case, Liu said, “I went to the court to sue the relevant departments. This resulted in the national security authorities interfering into the case from behind. They directed the Judicial Bureau and to put pressure on the law firm, and finally I was forced to withdraw from the case, and I even had to pay back all the fees to the party. Regarding this case, I once wrote an article called ‘Chinese Characteristics: Swallowing and Removing Like a Tiger’.”

When it comes to trial, Liu said he was rarely able to see the full case evidence file against his client and on top of that, permission to have evidence read before the court is not always granted. “At the trial stage, the right to read the evidence is often subjected to restrictions. For example, videos, and pictures, etc. cannot be accessed. In some sensitive cases, the complete case file is not made available for the defense lawyer. This is a customary practice by the Chinese government and is not limited to few cases.”

Liu notes that although torture is still prevalent in PRC, the use of physical torture such as beatings in ordinary criminal cases has declined. “However, in special criminal cases involving prisoners of conscience and political prisoners, torture is widespread and rampant. And it is not limited to beatings or corporal punishment, but also includes psychological torture, and personal insults, etc.

The vast majority of confession obtained through torture is used as evidence in court to issue judgments.”According to Liu, the Judicial Bureau and the Communist Party have enormous leverage over lawyers in the form of the annual license assessment. Often lawyers are being referred to the Justice Bureau for the opinions that they express in court and this trend is only getting worse for lawyers who represent political detainees. “It is like a sword hanging over the lawyer’s head and we know the black hands behind this are all secret service agencies.” Pointing out the lack of judicial independence in China, he said it was the Party and its agencies that had the final decision in cases, not the judge. “If a country does not have judicial independence, there can be no justice.”

## Wang Yu



Wang Yu was a lawyer who worked for the Fengrui law firm in Beijing. She was one of the many lawyers arrested in the ‘709’ crackdown and charged with “inciting subversion of state power” in 2015. Originally a commercial lawyer, shelater became a human rights lawyer after personally facing unfair imprisonment at the hands of the Chinese justice system in 2011. Since 2012, Wang Yu has represented several high-profile human rights cases including those involving the imprisoned Ugyhur intellectual Ilham Tohti, the ‘Feminist Five’ group, and Falun Gong practitioners. In 2016, she was awarded the prestigious Ludovic Trarieux International Human Rights Prize and was also honored the same year by the American Bar Association with its inaugural International

Human Rights Award. Although she was released in 2018 owing to international pressure, China's 'bravest female lawyer' remains under surveillance.[41]

In conversation with TCHRD, she highlighted the high incidence of extraction of confession by torture and ill treatment in criminal cases and the inability of the defence to exclude illegal evidence due to the power wielded by the court.[42] "The probability of torture is almost 95% in such cases and in most cases, the court will still accept the illegal evidence." Wang said all the criminal cases she had represented resulted in zero acquittal except for the 'bail pending trial' for several cases during the public security investigation stage.

Although she never received any requests to defend Tibetan clients, Wang said many Tibetan defendants cannot find suitable lawyers to represent them due to governmental control and the few lawyers that take up Tibetan human rights cases face intense pressure and constraints from the Judicial Bureau and the lawyers' association [All China Lawyers Association]. "In addition, a Tibetan case is not just an issue of human rights, but also concerns ethnic and religious belief issues. These issues are extremely sensitive issues in China and are viewed as special and complicated."

Calling most of the Chinese judges "neither independent nor fair", Wang Yu said many undergo strict political examination before becoming judges, resulting in a high number of brainwashed judges. "They themselves harbour extremely strong barbaric totalitarian thought. They have the desire to control and be controlled, which is why they completely obey their chiefs or superiors and do not have independent thoughts and personalities. They simply do not dare or just do not have the ability to handle cases independently. There are still some judges with independent thoughts or personalities and a little bit of conscience, but they only obey their boss to secure their own jobs."

**Judicial Independence**

The PRC's strong aversion to the right to a fair trial stems from the lack of an independent and impartial judiciary, which is the foundation of rule of law and must take precedence over the interests of the government. In its simplest form, judicial independence is where the operation of the courts is not contingent on the ideals and interests of the government or external influence. This definition is akin to the independence of judges. China's claims that the 2012 CPL would promote rule of law and protect human rights[43] have yet to become reality.

The practice of the 'Socialist Rule of Law with Chinese Characteristics' subjects the judiciary to a variety of internal and external controls that significantly limit its ability to engage in independent decision-making. At the 4th Plenary session of the 18th

[41] China's 'Bravest Female Lawyer' Describes Inhumane Torture in Chinese Prisons, The Epoch Times, 19 November 2019, available at https://www.theepochtimes.com/chinas-bravest-female-lawyer-describes-inhumane-torture-in-chinese-prisons_3146854.html

[42] Online interview conducted by TCHRD Chinese researcher Sangjie Kyab on 24 August 2019.

[43] Highlights of Criminal Procedure Law revision, China.org.cn, 12 March 2012, available at http://www.china.org.cn/china/NPC_CPPCC_2012/2012-03/12/content_24876541.htm

Central Committee of the Chinese Communist Party in October 2014, President Xi Jinping referred for the first time to the "Socialist rule of law with Chinese characteristics", recognising the concept of the rule of law as applying to the PRC but adding to the core concept to enable the Party to retain precedence. This does not result in absolute independence as understood internationally as there is no separation of power from the executive or legislature.

The rule of law of any country is dependent on the degree to which they conduct judicial independence. For without it, citizens can no longer adhere to the law and instead view the courts' judgment as an extension of the government. Rule of law accommodates the development of every nation, as it welcomes predictability, economic growth, social order, and a moral society. Essentially, the rule of law is where all citizens are entitled to the same benefits and standards of the law. Predictability is an important component as it promotes liberty through the removal of arbitrary decision-making at the hands of the government. Citizens can rely on consistent laws rather than the government's discretion. The ultimate benefit of rule of law is that it protects human rights, which leads to a moral and just society. This is declared in the UDHR: "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law".

The structure of the PRC judicial system does not comply with Article 14 of the ICCPR or with the UN Basic Principles on the Independence of the Judiciary and Guidelines on the Role of prosecutors. The PRC judicial system, comprising the court, procuratorate, and public security, emphasizes the independent administration of justice by courts as institutions rather than individual judges. The judicial process is overseen and subject to the Central Party Political-Legal Committee (CPPLC) that conduct routine supervision of the so-called "political-legal institutions" such as the courts, police, procuratorates, and justice ministry. The president of the Supreme People's Court (SPC) resides on this committee and the chief judge of the high court often remains a vice secretary. The committee also coordinates the work of the police, the courts, and the procuratorate at every level. At the same time, the chief procurator frequently becomes another vice secretary for the committee and the secretary general is recurrently the head of the PSB.

The procuratorate still has a dual role as prosecutor, supervisor of the legal process and also decision on the instigation and extension of pre-trial detention, which result in a serious conflict of interest and a lack of independent oversight. The CPPLC has branches established local Party institutions from the provincial down to county levels. Generally, the CPPLC main functions include judicial policy making; coordinating inter-institutional relations; and controlling decision-making in specific or sensitive cases.[44]

The dominance of specialised Party agencies in the judicial system will get more entrenched in the near future. The January 2019 regulations on political-legal work[45]

[44] Ling Li, Political-legal order and the curious double character of China's courts, Asian Journal of Law & Society Vol. 6(1), 2019.

[45] "Regulation on the Communist Party of China's Political-Legal Work," China Law Translate, 18 January 2019, available at https://www.chinalawtranslate.com/中国共产党政法工作条例/?lang=en.

declared the Party's "absolute leadership" over all political-legal institutions, indicating "a complete and unambivalent severance from the judicial independence framework".[46]

## Conclusion

An independent and impartial judiciary is fundamental to the protection of human rights. Judicial independence not only guarantees respect for the right to a fair trial but it is also an essential component in a country that has adopted the principle of the rule of law – accountability of government officials; clear and publicized laws; a fair process of enacting law; and justice delivered by an independent representative. International and regional human rights instruments guarantee the right to a fair trial on criminal, civil, disciplinary, and administrative matters before an independent and impartial court or tribunal. The PRC constitution provides for the rule of law, but the constitution also provides that the Party takes precedence and is above all else. The overarching requirement of the state security and social stability leads to the state intervention in the role of judges, impeding the ability of defence lawyers to act without fear of reprisal to uphold the human rights of their clients. Despite recent efforts to remove indictment and conviction rates from the list of performance indicators applied to judicial officials, it is likely that high conviction rates will continue given the lack of judicial independence, restrictions on defence lawyers and the overarching requirement to maintain stability. Likewise, calls for reform of the judicial system by the PRC's president and the Supreme People's Court will not address the central issue of judicial and lawyer independence given that the security of the state and the Party is paramount.

## Recommendations

The international community of UN member states and the larger civil society id urges to engage with and exert pressure on the PRC government to:

1. Ratify the International Covenant on Civil and Political Rights, and the International Convention for the Protection of All Persons from Enforced Disappearance.

2. Take substantive action to implement the trial-centered litigation system that is designed to ensure the legality of evidence obtained during the pre-trial process. And strengthen fair trial guarantees, such as providing for a public trial in all cases.

3. Introduce the right to silence, prohibit the admissibility of confessions obtained through torture, and establish the presumption of innocence.

[46] Ling Li, Analysis Of the Chinese Communist Party's Political-Legal Work Directive - First impressions, Chinese Politics and Law Blog, 20 January 2019, available at https://lilingsblog.blogspot.com/2019/01/highlights-of-chinese-communist-partys.html

4. Repeal all legislation and practice that enables extrajudicial detention, including 'residential surveillance' and the use of "black jails".

5. Release all Tibetans unjustly sentenced for peacefully advocating for human rights

6. Review, amend and repeal all legislation and practice that fetter the independence of the judiciary, in breach of international legal framework

7. Reform the Supreme People's Procuratorate to remove oversight of the judiciary and detention process

8. Enact changes in laws and regulations that protect the rights of lawyers to practice law in conformity with international standards, including by:
    - Adopting national legislation that protects the rights of lawyers
    - Amending the Criminal Law offences that are vague and open to abuse and use against individuals exerting their constitutional right and international human right to freedom of expression
    - Amending the lawyer licensing framework to ensure that the ability of a lawyer to obtain or retain his or her license is not tied to the type of case that he or she undertakes and affirm that lawyers are not identified with their clients or their clients' causes
    - Provide for the right of lawyers to form independent bar associations and mechanisms of support that they can join on a voluntary basis
    - Revise the Criminal Procedure Law to remove abuses to the right to a fair trial and adequate defence that impact lawyers, removing restrictions and delays on lawyers to meet with their clients promptly following detention, and to meet with clients in private regardless of the charge involved; Providing for notice of detention and arrest to family and legal counsel in all cases
    - Invite the United Nations Special Rapporteur on the independence of judges and lawyers for a visit to examine relevant laws, regulations, and practices, and make recommendations for improvement
    - Review individual cases of lawyers who are in detention and take immediate action to release from detention or residential surveillance all lawyers being held simply for carrying out their professional duties
    - Ensure that practices enabling abuses of power and extra-legal measures targeting defence lawyers cease immediately
    - All accusations and charges are discontinued against those whose actions relate to the representation of others, or criticism of government activity
    - All detainees are given access to lawyers, who are able to effectively provide a defence
    - Investigate the manner in which the arrested people were detained to ensure proper procedures were followed
    - No further arrest or detention takes place with regard to other lawyers, human rights defenders and their associates where their

activity relates to the representation of others or criticism of government activity, which remain fundamental human rights.

## Tibetan Political Prisoner Case Studies

In May 2019, Human Rights Watch released an updated list of 80 Tibetan political prisoners who had been subjected to arbitrary detention and arrests since widespread protests broke out in Tibet in March 2008.[47] The number represents just a fraction of the actual arrests and imprisonment since Chinese state media only reported some of the sentences in 2008 and have not provided additional details since then. It has become extremely difficult and risky to gather information from Tibetan areas because informants are routinely detained on the charge of 'leaking state secrets' or 'colluding with separatists'. Families of many of these detainees were not informed about the detention or whereabouts of their loved ones. Many have been hospitalized in emergency care due to relentless physical torture. Many were denied fair trial, as their trials were closed to the public due to the charges held against them, which ranged from "endangering state security" to "divulging state secrets" and arson in some cases. They also received no form of representation, with only one case notably having some sort of legal assistance. Almost a decade after their wrongful imprisonment, there is no definite information on their current condition and whereabouts.

That there has been no change in the intent and behaviour of Chinese authorities is clear when the abovementioned arbitrary detention cases are compared to those reported recently by TCHRD.

1. A-nya Sengdra, a Tibetan nomad and anti-corruption campaigner, was sentenced to seven years of imprisonment on 6 December, on the trumped-up charges of "picking quarrels and provoking trouble" and "gathering a crowd to disrupt social order".[48] He and eight of his associates were imprisoned for carrying out successful anti-corruption campaigns and uncovering the corrupt practices of local government authorities in Gade County. Mr Sengdra had been held in pretrial detention for more than 14 months with severely restricted access to his lawyer Mr Lin Qilei.
2. Tsegon Gyal, a prominent former political prisoner, was sentenced to three years on the charge of 'inciting separatism' on 10 January 2018 after being held for more than a year in pretrial detention in Tsojang (Ch: Haibei) 'Tibetan Autonomous Prefecture' (TAP).[49] Mr Gyal's parents and relatives were not invited to observe the closed-door trial. He was not provided any legal representation or other fair trial rights.
3. Twenty-one Tibetans were sentenced to prison in May 2019 as part of the nationwide campaign to eliminate 'black and evil forces' in Kyegudo (Ch: Yushu) Tibetan

[47] China: Free Tibetans Unjustly Imprisoned, Human Rights Watch, 21 May 2019, available at https://www.hrw.org/news/2019/05/21/china-free-tibetans-unjustly-imprisoned
[48] China: Tibetan anti-graft campaigners sentenced on bogus charges in a show trial, TCHRD, 16 December 2019, available at https://tchrd.org/china-tibetan-anti-graft-campaigners-sentenced-on-bogus-charges-in-a-show-trial/
[49] Prominent former political prisoner Tsegon Gyal sentenced to three years on charge of 'inciting separatism', TCHRD, 18 February 2018, available at https://tchrd.org/prominent-former-political-prisoner-tsegon-gyal-sentenced-to-three-years-on-charge-of-inciting-separatism/

Autonomous Prefecture.[50] Local Chinese authorities announced the sentencing on their websites alleging that the Tibetans had engaged in illegal activities but reliable accounts gathered from local Tibetan sources pointed to the criminalisation of grassroots environmental protection initiatives.

4. Nine Tibetans were sentenced to prison terms ranging from three to seven in Rebkong (Ch: Tongren) County, Malho (Ch: Huangnan) Tibetan Autonomous Prefecture, Qinghai Province.[51] The sentencing was carried out as part of the abovementioned campaign to eliminate 'black and evil forces' The nine Tibetans from Horgyal village namely Gendun Soepa, Choesang, Bhende Dorje, Tashi Tsering, Sonam Gyal, Dhargye, Shawo Tsering, Khajam Gyal, and Dukbum Tsering.
5. An anonymous monk's personal account of spending months in an extralegal detention centre run by Chinese authorities to conduct political re-education campaigns.[52]The monk was held in Sog (Ch: Suo) County, Nagchu Prefecture, TAR. He was among thousands of other monks and nuns forced to return home and abandon studies in monastic institutions located outside TAR in the past several years.
6. Pema Samdup, 26, was detained on 9 March 2019 in Lhasa. His family members neither received any formal notification about his arrest nor were they allowed to meet him. After being held in Lhasa for sometime, Samdup was handed over to the Public Security Bureau (PSB) authorities in Chamdo (Ch: Qamdo) Prefecture. The reason for his detention remains although relatives said he had been detained due to "political reasons" and for "sharing photos on his WeChat account".[53] His exact charges remain unknown and there is no information on his trial or whether he was allowed to hire a lawyer of his choice.
7. Wangchuk, 45, was detained in Shigatse (Ch: Xigaze) City around 8 March 2019.[54] Family members believe that he was likely detained for sharing illegal publications including books by His Holiness the Dalai Lama on his WeChat account. His family members however believe that he had been sentenced and imprisoned at Nyari Prison in Shigatse. His exact charges remain unknown and there is no information on his trial or whether he was allowed to hire a lawyer of his choice.
8. Sonam Palden, 22, was detained on 19 September 2019, outside a public bathhouse in Ngaba county town. The exact charges for which he was detained remains unknown although relatives speculate that he was likely detained for posting 'politically sensitive' views and a photo of the banned Tibetan national flag on his WeChat

[50] China: Stop the witch hunt in the campaign to crush 'black and evil' crimes; Release all Tibetans unjustly held in detention, TCHRD, 27 June 2019, available at https://tchrd.org/china-stop-the-witchhunt-in-the-campaign-to-crush-black-and-evil-crimes-release-all-tibetans-unjustly-held-in-detention/

[51] Nine Tibetans sentenced up to 7 years in prison under China's organised crime crackdown, TCHRD, 19 April 2019, available at https://tchrd.org/nine-tibetans-sentenced-up-to-7-years-in-prison-under-chinas-organised-crime-crackdown/

[52] Tibetan monk's account reveals torture and sexual abuse rampant in China's 'political re-education' centres, TCHRD, 28 May 2018, available at https://tchrd.org/tibetan-monks-account-reveals-torture-and-sexual-abuse-rampant-in-chinas-political-re-education-centres/

[53]Fears for the life of a Tibetan man detained for sharing photos ahead of sensitive political anniversary, TCHRD, 12 November 2019, available at https://tchrd.org/fears-for-the-life-of-a-tibetan-man-detained-for-sharing-photos-ahead-of-sensitive-political-anniversary/

[54]Tibetan man sentenced to prison for sharing books on WeChat, TCHRD, 7 November 2019, available at https://tchrd.org/tibetan-man-sentenced-to-prison-for-sharing-books-on-wechat/

account.[55] His exact charges remain unknown and there is no information on his trial or whether he was allowed to hire a lawyer of his choice.

9. Lobsang Dorjee, 36, was sentenced on 3 September 2019, following his detention in July 2018 on the suspected charge of 'disclosing state secrets' in Ngaba County.[56] He was detained in the middle of the night from his monastic quarter by public security officers and held in undisclosed location until his sentencing. His exact charges remain unknown and there is no information on his trial or whether he was allowed to hire a lawyer of his choice.
10. Lobsang Thabkey, 37, was sentenced to four years in prison on 30 July 2019 on unknown charges.[57] The monk from the local Kirti Monastery had been detained on an unknown date in 2018. Son of Mr Lokho from Lhade Gabma nomadic village, he had joined the Dialectics College at his monastery where he was pursuing the Uma (Madhyamika/Middle Way) course at the time of his arrest. No other details are available.
11. Thubpa, 32, a monk from Trotsik Monastery, was detained from his residence in late 2017 in Trotsik (Ch: Hezhi) Township in Ngaba County. Since then his whereabouts remains unknown.[58] He had earlier served an 18-month sentence in a 'Re-education Through Labour' prison for participating in a protest against Chinese government on 16 March 2008 in Trotsik.
12. Lobsang Dorjee, 36, was detained from his residence at Kirti Monastery in August 2018. His condition and whereabouts remain unknown.[59] Son of Mr Sangri from Chukle Gabma nomadic village in Ngaba County, he had earlier served a three-year sentence after his arrest in 2011.
13. Tibetan language advocate Tashi Wangchuk who was sentenced to five years imprisonment on the trumped-up charge of 'inciting separatism' in May 2018, continued to face barriers exercising his right to appeal the verdict. In August 2019, his lawyers Lin Qilei and Liang Xiaojung shared how local Chinese authorities had been resorting to illegal means to obstruct the appeal case filed by Tashi Wangchuk.[60]
14. Lodoe Gyatso, 57, and his wife Gakyi had been sentenced in secret to 18 years and two years respectively on an unknown date in 2018 in Sog (Ch: Suo) County, Nagchu (Ch: Naqu) Prefecture.[61]Gyatso has been held in secret detention since January 2018. The exact date for Gakyi's detention cannot be immediately confirmed. Gyatso was likely imprisoned for staging a protest in Lhasa 28 January 2018 and recording a protest video, which his wife helped to film. Their exact charges remain unknown and there is no information on their trials. An unnamed Chinese human rights lawyer

[55] Monk detained for criticising China's policy on Tibetan language at high risk of torture, TCHRD, 11 November 2019, available at https://tchrd.org/monk-detained-for-criticising-chinas-policy-on-tibetan-language-at-high-risk-of-torture/

[56] Monk sentenced to three years after more than a year of incommunicado detention, TCHRD, 6 September 2019, available at https://tchrd.org/monk-sentenced-to-three-years-after-more-than-a-year-of-incommunicado-detention/

[57] China: Cease political persecution and disclose information about missing Tibetan monks, TCHRD, 17 August 2019, available at https://tchrd.org/china-cease-political-persecution-and-disclose-information-about-missing-tibetan-monks/

[58] Ibid.

[59] Ibid.

[60]Imprisoned Tibetan language advocate continues to face barriers in appealing against unjust verdict, TCHRD, 2 August 2019, available at https://tchrd.org/imprisoned-tibetan-language-advocate-continues-to-face-barriers-in-appealing-against-unjust-verdict/

[61] Former Tibetan political prisoner sentenced to 18 years for protest; wife given 2 years for filming video, TCHRD, 15 March 2019, available at https://tchrd.org/former-tibetan-political-prisoner-sentenced-to-18-years-for-protest-wife-given-2-years-for-filming-video/

was quoted as saying that relatives of Gyatso had requested him to represent Gyatso but there was no follow-up. The lawyer believed that the relative's inability to follow through with the request was due to pressure from government departments since Gyatso's case is termed as a 'state secret'.[62]

15. Sangay Gyatso, 17, arbitrarily detained by local Public Security Bureau officers for staging a solo protest on the main street of Ngaba County.[63] The monk was severely beaten up before he was taken away to an undisclosed location. The monk's family members have no information about his condition and whereabouts.
16. Tenzin Gelek, 18, was arrested on 6 September by local security forces after he carried out a lone protest calling for "Freedom in Tibet" in Ngaba County.[64] He was arrested for posting two blogposts, 'Do You Think I Could Endure to Live?' and 'To the Communist Party of China', on his WeChat account that criticize Chinese policy for insidiously eroding Tibetan identity.
17. Dorjee Rabten, 23, a monk from Kirti Monastery, was detained on 5 September when he staged protest in Ngaba County town. There was another monk who was also detained several days before Rabten. The whereabouts and condition of both monks remain unknown.[65] They have been held in undisclosed location. There is no information on whether they were provided access to legal representation of their choice or other fair trial rights.
18. Woechung Gyatso and another unidentified monk were detained on 16 April from Tsang Monastery Ba Dzong or Gepasumdo (Ch: Tongde) County in Tsolho (Ch: Hainan) Tibetan Autonomous Prefecture for posting politically sensitive pictures and articles on WeChat.[66] While the unidentified monk was released after interrogation, Gyatso was held in an undisclosed location for further questioning. His whereabouts and condition remain unknown.

## *Appendix*

*Relevant extracts from UN Guidelines on the Role of Lawyers and Prosecutors, and Basic Principles on the Independence of the Judiciary*

### 1. Basic Principles on the Independence of the Judiciary

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.

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[62] Tibet Dissident's Long Jail Sentence Called 'State Secret', Voice of America, 5 April 2019, available at https://www.voanews.com/east-asia/tibet-dissidents-long-jail-sentence-called-state-secret

[63] Teen monk disappears into Chinese police custody after staging a solo protest calling for freedom in Tibet, TCHRD, 15 December 2018, available at https://tchrd.org/teen-monk-disappears-into-chinese-police-custody-after-staging-a-solo-protest-calling-for-freedom-in-tibet/

[64] Teenage monk and blogger detained at undisclosed location after staging solo protest, TCHRD, 25 September 2018, available at https://tchrd.org/teenage-monk-and-blogger-detained-at-undisclosed-location-after-staging-solo-protest/

[65] China: Release Tibetan monks from incommunicado detention, TCHRD, 25 September 2018, available at https://tchrd.org/china-release-tibetan-monks-from-incommunicado-detention/

[66] Chinese authorities detain two Tibetan monks for sharing 'illegal' contents on social media, TCHRD, 18 April 2018, available at https://tchrd.org/chinese-authorities-detain-two-tibetan-monks-for-sharing-illegal-contents-on-social-media/

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.

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.

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.
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.

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.

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**

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.

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.

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.

## 2. Basic Principles on the Role of Lawyers

### Access to lawyers and legal services

All 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.

Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities, and other resources.

Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

### Special safeguards in criminal justice matters

Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.

Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

**Duties and responsibilities**

The duties of lawyers towards their clients shall include:
(a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;
(b) Assisting clients in every appropriate way, and taking legal action to protect their interests;
(c) Assisting clients before courts, tribunals, or administrative authorities, where appropriate.

Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.

Lawyers shall always loyally respect the interests of their clients.

**Guarantees for the functioning of lawyers**

Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

Where the security of lawyers is threatened as a result of discharging their functions, the authorities shall adequately safeguard them.

Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.

Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal, or other legal or administrative authority.

It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.

Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

**Freedom of expression and association**

Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.

**Professional associations of lawyers**

Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.

**3. Guidelines on the Role of Prosecutors**

States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference, or unjustified exposure to civil, penal or other liability.

**Role in criminal proceedings**

The office of prosecutors shall be strictly separated from judicial functions.
Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.

Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

In the performance of their duties, prosecutors shall:

(a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;
(b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

(c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;
(d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.

When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspects human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

**Relations with other government agencies or institutions**

In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions.

**Observance of the Guidelines**

Prosecutors shall respect the present Guidelines. They shall also, to the best of their capability, prevent and actively oppose any violations thereof.

Prosecutors who have reason to believe that a violation of the present Guidelines has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.