

Human Rights in the Chinese Administration of Justice

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Abstract

In recent years, China has instituted a series of legal reforms that may be conducive to elevating the professional skills of actors in the judicial system, but the reforms fail to address chronic human rights violations in the Chinese administration of justice. This article discusses the institutional problems that pose challenges to the protection of human rights in this respect and focuses on notable cases and trends that occurred during 2018 as an illustration of ongoing human rights problems in China's justice system. These developments can be summarized as the following: First, public security agencies continue to wield unchecked powers of arbitrary detention and torture, even reaching beyond national borders to pursue dissidents abroad. Second, the newly launched National Supervisory Commission (NSC), China's top anti-graft agency, blurs the line between the party and the state. Its considerable investigative powers lack even basic due process protections for the more than 100 million persons under its jurisdiction. Third, the judiciary and lawyers, ostensibly independent actors in the system, are too constrained to check human rights abuses committed by the government.

In 2018, the Chinese Communist Party (CCP) launched the "Central Committee for Comprehensive Law-Based Governance" to further enhance the Party's control of the legal system. The concept of "Comprehensive Law-Based Governance," as articulated and practiced at present, is far different from the conventional idea of the "rule of law" that keeps public authorities in check. The Party-State's efforts to suppress the growth of an independent judicial system appear to come from a sense of insecurity about any challenge to the Party's monopoly over state power. Yet, facing multiplying social problems in China, with many involving controversies about public power, the government will find it difficult to resolve disputes between the state and the people without a fair justice system.

Keywords: human rights, justice, personal freedom, fair trial, rule of law, International Covenant on Civil and Political Rights

1. Introduction

The administration of justice—whether it operates in an impartial and independent manner to provide an effective avenue for redress—is a vital indicator of a country's human rights practice. Back in 1998, China signed the *International Covenant on Civil and Political Rights* (ICCPR), which provides for fundamental judicial protection of human rights. By signing the ICCPR, China is obligated to "refrain from acts which

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would defeat the object and purpose” of the covenant.¹ Over the past two decades, China has maintained on many occasions that it has been “creating conditions” to ratify the covenant. In 1999, China included in its constitution the objective to “rule the nation in accordance with the law” (*yifa zhiguo*), which has become a major policy thrust. In 2004, an amendment to the constitution introduced the language “The state respects and protects human rights.” In 2014, after Xi Jinping assumed leadership, the 18th National Congress of the CCP—under the banner of “rule by law” (*fazhi*)—passed a resolution about carrying forward this policy, launching a new wave of judicial reforms: implementing a “quota system” for judges and prosecutors, promoting judicial accountability, and minimizing undue influence on the justice organs from the administrative hierarchy and local politics. The wave of reforms sought to “make people experience justice in each and every judicial case” (Pang, 2013).

While the “quota system” is said to have helped recruit top talent to fill judicial positions, elevating overall judicial proficiency, there are still outstanding questions about each court’s ability to use that talent to enhance human rights protection. While some courts many enjoy a higher degree of autonomy than others (Ng and He, 2017:1-6), when viewed as a whole, the judicial protection of human rights in China is ineffective and judicial reforms in recent years have not addressed the root cause of routine violations in this respect, as discussed below.

There are a number of institutional problems that interfere with human rights protection in the justice system. First, the *Constitution* and the *Criminal Procedure Law* require that the three actors in the justice system—public security, the procuratorate [the prosecution] and the court—exercise “mutual cooperation and mutual checks” (*huxiang peihe, huxiang zhiyue*). The new NSC launched under the *Supervision Law* also has a similar mandate of exercising “mutual cooperation and mutual checks” with the other actors. But, in reality, there is plenty of “cooperation” (*peihe*) but very few “checks” (*zhiyue*). These four agencies seek to maintain a friendly relationship rather than challenging one another’s misdeeds (Cohen, 2019). China’s polity is a far cry from the “division of power” system enshrined in most modern characterizations of constitutionalism. When a Chinese government official or body violates human rights, mutual checks and balances among agencies cannot be relied upon to check that behavior.

A second institutional challenge is that in China’s political hierarchy, the public security branch typically commands more power than the court (Ng and He, 2017:10). The public security director of an area is often the head of the Party’s local political-legal committee, which takes the leadership role in designing and implementing legal policies in that locality. This effectively puts courts under the control of the police and the Party. The courts, compelled to succumb to political orders, cannot effectively curb the excesses or abuses of the executive branch.

Finally, China lacks an effective mechanism to sanction unconstitutional behavior. In the *Constitution*, the Standing Committee of the National People’s Congress (NPCSC) has the power to “interpret, and supervise the implementation of, the constitution,” but, in reality, the NPCSC has never declared any legislation or regulations that violate human rights unconstitutional. Moreover, ordinary courts

¹ *Vienna Convention on the Law of Treaties*, Art. 18.

cannot cite the constitution in their rulings. The reality is, then, that the constitutional protection of human rights receives no support from China's judicial institutions.

Recent political trends evidence that the CCP continued to tighten its grip on the policies and operations of the judicial system rather than enhancing the system's ability to check and balance state powers. Within the CCP, a new committee—the “Central Committee for Comprehensive Law-Based Governance”—was created in 2018 to ensure the Party's leading position in carry out the “ruling the nation by law” policy. In the Committee's first meeting, Xi Jinping, in his capacity as the Committee's chairman, repeatedly emphasized the significance of Party leadership. According to Xi, the Committee was to improve the system and mechanism for ‘ruling the nation by law’ under Party leadership and to institutionalize and legalize Party leadership in order to implement that leadership in all procedures and all aspects of “ruling the nation by law” (Wang and Huang, 2018).

Under Party leadership, the idea of “comprehensive law-based governance” seems far different from the conventional concept of the “rule of law” that seeks to protect citizens from arbitrary and abusive state power. China's “comprehensive law-based governance” requires the imposition of laws subject to the leadership of the Party-state rather than the preservation of autonomous and independent legal frameworks or a professional judiciary. Namely, the law does not keep in check the Party's power. On the contrary, the Party controls laws and their administration. In many cases, the law in China has been used as a tool in the service of politics. It tends to normalize and institutionalize human rights violations, instead of safeguarding people's rights.

Under this policy of “comprehensive law-based governance,” the year 2018 saw multiple trends of continuing human rights violations in the administration of justice: (1) The prevalence of arbitrary detention and torture; (2) the increasing number of cases of law enforcement targeting political dissidents overseas; (3) the lack of due process protection for people investigated by the Supervisory Commission; (4) the use of courts to silence dissent; and (5) many serious obstacles to the legal practice of lawyers and law firms. The root cause lies in the institutional challenges discussed above. Under the current power structure, China's courts and lawyers are expected to defer to the Party's political decisions instead of operating independently to counter abuses of state power.

This article uses the ICCPR as a benchmark to examine the protection of human rights in China's justice system. Although China has not ratified the ICCPR, as a signatory state, it is obligated to “refrain from acts which would defeat the object and purpose” of the covenant, as previously mentioned. The following discussion focuses on prominent problems and human rights violations in three aspects: (1) pre-trial criminal investigation, (2) trials, and (3) legal defense. Notable cases that arose during 2018 are discussed as well as relevant legislation, regulations and policies.

2. Pre-trial Investigation

Mishandled investigations may violate ICCPR Article 9 by harming personal freedom, Article 7 if torture is used, and/or Article 14 for failure to provide a fair trial. To safeguard these rights, the ICCPR requires sufficient legal grounds and due process before depriving individual freedom: the detained must be informed of the reason for arrest at the time it takes place, have access to judicial scrutiny of that arrest decision, and have the right to take proceedings before a court. To ensure a fair trial, the ICCPR

mandates the presumption of innocence. It also requires that pre-trial detention should be the exception rather than the norm; that the defendant be given a speedy trial and adequate time and facility for the preparation of his defense and to communicate with counsel of his own choosing; and that no one should be compelled to testify against himself or to confess guilt.

However, China's criminal justice practice excessively relies on confessions, and, in most cases, does not demand the court or the prosecution review detention decisions. Consequently, investigative agencies tend to keep the defendant in custody for repeated interrogations and often use torture to extract confessions. These pervasive practices do not meet ICCPR requirements.

2.1 The Police (Public Security)

2.1.1 Arbitrary Detention and Torture

China's public security authority has immense power to deprive personal liberty, in law and in practice. There is no right to habeas corpus and the detained is not entitled to a court process to promptly determine the legality of the detention (Chen and Cohen, 2019). The police have a panoply of measures at their disposal to effect the taking of one's liberty: (1) administrative detention (under 15 days, extendable to no more than 20 days) under the *Public Security Administration Punishments Law*; (2) compulsory hospitalization under the *Mental Health Law*; and (3) criminal detention (a maximum of 37 days before the prosecutor approves an arrest) or (4) residential surveillance (up to six months) under the *Criminal Procedure Law*. Public security officials wield great power without ex ante approval or ex post review by the court or prosecution. In the absence of third-party checks and balances, arbitrary detention is commonplace.

In particular, human rights advocates, petitioners, dissidents and even their relatives are regularly targeted. They can be subject to administrative procedures—such as administrative detention and compulsory hospitalization—as well as criminal detention that often is based on vaguely-defined “pocket crimes” (Congressional-Executive Commission on China, 2015), including “picking quarrels and provoking troubles,” organizing a crowd to disturb public order, running an illegal business, extortion, inciting subversion of state power, and subverting state power. Additionally, detentions occur that are entirely without any legal basis. Petitioners are often intercepted by local officials. In many cases people are “forced to travel” (taken away from their place of residence to far-off destinations by the police ahead of “sensitive” times). Some are simply kidnapped and their whereabouts are unknown to their family or friends for extended periods of time.

There were many high-profile incidents of arbitrary detention throughout 2018, impacting a range of defendants from varied socioeconomic and political backgrounds. Here are a few representative examples: (1) The “ink girl,” Dong Yaoqiong, became known for splashing ink on Xi Jinping's portrait hung on the outside of the Shanghai Haihang building. In July 2018, Shanghai public security sent her back to her hometown in Hunan province, and then local authorities placed her in a mental hospital for compulsory treatment. (2) Wang Quanzhang, a human rights lawyer was arrested during the July 2015 “709 Crackdown” (China Human Rights Lawyers Concerns

Group, 2016) and has been detained since that time² on the charge of subverting state power. Like many other defendants arrested in the 709 Crackdown, he was originally held under “Residential Surveillance at a Designated Place” (RSDL) in total isolation from the outside world and forced to take unidentified drugs when in custody. He was the last defendant arrested in the 709 Crackdown to have been put on trial. (3) In August 2018, students in a left-leaning youth group supporting Shenzhen Jasic Technology workers’ protest were taken away by authorities without any legal basis. (4) Liu Xia, wife of Nobel Peace Prize laureate Liu Xiaobo, was held under house arrest for eight years without charge starting in 2010. One year after her husband’s 2017 death, she was finally allowed to go to Germany, ending her 8-year involuntary seclusion. (5) When Meng Wanzhou, chief financial officer of Huawei Technologies, a China-based telecom equipment vendor, was arrested in Canada in December 2018, Chinese authorities swiftly detained two China-based Canadian citizens, Michael Kovrig and Michael Spavor, on the charges of endangering state security. In an additional—highly unusual—move, the Chinese court retried the case of Robert Lloyd Schellenberg, a Canadian citizen who had previously been sentenced to 15 years in prison for drug smuggling, and changed his punishment to the death penalty, presumably to pressure Canada to release Meng.

While China’s *Criminal Procedure Law* provides defendants some *de jure* protection, police act on interpretations unfavorable to the defendants (Cohen, 2019). For example, in non-RSDL cases the *Criminal Procedural Law* only allows three days for public security to hold a suspect before the prosecution grants an order for arrest, four more days in some exceptional situations. Only in three extraordinary circumstances can a criminal suspect be detained up to 30 days before the prosecution’s arrest approval.³ Yet, police routinely make the most liberal interpretation of legal clauses to allow themselves 30 days, the longest option (Chen and Cohen, 2019), without any court or procuratorate approval.

Another example is RSDL itself, the residential surveillance process redefined after the 2012 revision of the *Criminal Procedural Law*. Current law stipulates that, in principle, surveillance can only be conducted at the actual residence of the suspect or defendant. Residential surveillance may be carried out at an alternative “designated” location only when the charge falls within the three circumstances stipulated by the law (i.e., cases involving national security, terrorism or serious bribery) and when enforcement in the residence might impede the investigation. Yet, this exception has been turned into the norm in practice. In particular, “endangering national security” is an ill-defined concept under the interpretation of the police, who do not need external review to apply RSDL based on national security charges. The 2012 legal amendment has thus been transformed into an extended detention measure in disguise. Public security officials often impose RSDL on those who already have a fixed residence to facilitate investigation, detention and interrogation, sometimes deliberately without informing the family (Wang and Tian, 2018). This practice by public security forces is tantamount to giving “enforced disappearance” formalized legal status.

In many cases involving rights lawyers and activists, RSDL has become a norm

² In January 2019, Wang Quanzhang was convicted of “subverting state power” and sentenced to four and half years in prison, and deprived of civil rights for five years.

³ China’s *Criminal Procedural Law*, Article 91.

during investigation: defendants are held in an isolated, secret place (not a formal detention house) for long periods without legal counsel and subject to prolonged and repeated interrogations. There are no checks on police in wielding this extraordinary power, nor due process protection for the detainees (Caster, 2017).

Detainees in such cases, in long-term isolation, fall easy prey to torture and other cruel, inhuman, or degrading treatment or punishment. Well-known forms of torture include the following: repeated beating and verbal abuse, long-term sleep deprivation, prolonged restraint with shackles and cuffs, the “tiger bench/stool,” being tied to a chair and suspended from the ceiling in an agonizing position for a long time, electric shock, smoke in the eyes, being deprived of food and water, being force-fed unknown drugs, interrogation under fatigue and other injurious tactics (Teng, 2017).

Sometimes the detainee’s family or even his children are targeted for reprisal, forcing the detainee to admit to wrongdoing, to self-criticize and even repent on TV to protect his family (Dahlin, 2018). These admissions under duress often lead to eventual conviction. Even when a detainee is finally released, he is still under close watch by the government, never really free, a phenomenon that has been termed “non-release release” (Cohen, 2016).

2.1.2 Law Enforcement Targeting Dissidents Overseas

The year 2018 saw several Chinese refugees and dissidents abroad hunted down or harassed by the Chinese government. Take for example Jiang Yefei, a political cartoonist who had obtained United Nations refugee status in Thailand. Jiang was repatriated from Thailand to China in 2015 and forced to confess to crimes on Chinese TV. In July 2018, he was convicted of subverting state power and crossing a national border illegally and given six and half years in prison. As some dissidents have pointed out, in recent years Chinese rights advocates seeking asylum with the United Nations High Commission for Refugees in Thailand have been questioned, pressured, or even stalked, staked out, or intimidated by the Chinese embassy staff (CK, 2018). In September 2018, Yen Kefen and Liu Xinglian, Chinese nationals holding UN refugee documentation, sought asylum during transit at Taoyuan airport in Taiwan. Both of them also pointed out that many Chinese dissidents who went to Thailand for political asylum faced constant fear; some were pursued by Thai police and even unidentified individuals (Yao, 2018).

This situation was not exclusive to those residing in Thailand. Dissidents residing in other countries have also reported experiencing harassment and threats. Angela Gui, daughter of Gui Minhai, bookstore owner in Hong Kong’s Causeway Bay, was followed and photographed by three Chinese when she attended a book expo in Germany. Once abroad, dissidents are still vulnerable to government harassment of their relatives in China. This puts dissidents-in-exile under constant pressure, or fear for relatives’ safety, and is often effective in limiting their criticism of China even while abroad (Shen, 2017; Hilgers, 2018). In addition, Chinese police have been known to demand that some overseas Uyghurs provide information about their fellow Uyghurs in foreign jurisdictions. In response to a Chinese government request, Egyptian authorities repatriated a number of Uyghur youth studying there (An, 2017).

This cross-border law enforcement “long arm” traces back to at least the 2015 disappearance of the owners of the Causeway Bay bookstore in Hong Kong. All five

booksellers surfaced later in Chinese custody. One of them, Lee Bo, went missing from Hong Kong and later showed up on Chinese TV saying he had gone to China on his own initiative to aid a “judicial probe in mainland China,” but it was believed that he was actually abducted by Chinese law enforcement that must have illegally crossed the border to the Hong Kong Special Administrative Region (HKSAR). Another bookseller, Gui Minhai, who had Swedish citizenship, was snatched in Thailand (Kellogg, 2018:1215-42), but the Chinese authorities later claimed that Gui voluntarily returned to China. The disappearance of Causeway Bay booksellers triggered widespread outcry from Hong Kong media and around the world.⁴ In another case, Chinese tycoon Xiao Jianhua was taken away, after midnight and drugged, in a wheel chair by a group of plain-clothed strangers from his Four Seasons residence in Hong Kong. These cases serve to show that China’s arbitrary arrests have gone beyond its borders, breaking laws in other jurisdictions and making it impossible for targeted individuals to seek legal remedies there.

2.2 The National Supervisory Commission

The new NSC is a major institutional change in the administration of justice as well as the organization of the government. In March 2018, the Chinese *Constitution* was amended to include this supervisory (anti-graft) agency, for which the National People’s Congress soon enacted the *Supervision Law*. Subsequently, supervisory commissions were set up at the central and local levels with the mandate to investigate duty-related violations of the law and to combat government corruption. The Supervisory Commissions wield three powers: that of supervision (*jiancha*), investigation (*diaocha*) and discipline (*chuzhi*). In other words, they supervise disciplinary breaches, investigate duty-related violations of law and crimes, and make decisions on disciplinary actions for state employees who neglect their duties, violate laws or commit crimes.

At various levels, the Supervisory Commission works together with the Commission for Discipline Inspection in the same office and the consolidated organization is commonly referred to together as “*jiwei jianwei*.” This kind of institution that blends the party and the state is often called “one set of personnel, two different brand names” (*Liangkuai Paizi Yitao Renma*) arrangement: in reality, the local Secretary of the Commission for Discipline Inspection also serves as the head of the Supervisory Commission. The Supervisory Commission staff are pulled from the procuratorate (specifically, prosecutors that specialize in dereliction-of-duty-related crimes) as well as the Commission for Discipline Inspection and former supervisory agencies (Wang and Lü, 2017). Being a consolidated Party-state body, the Supervisory Commission has become the leading anti-graft agency in China.

In the past, the duty-related crimes of civil servants were the purview of the People’s Procuratorate. Under the new system, the Supervisory Commission takes over. It investigates relevant cases, prepares indictment suggestions, attaches the docket

⁴ These disappearances undoubtedly heightened worries of the Hong Kong people about the HKSAR Government’s 2019 proposed bill to amend the *Fugitive Offenders Ordinance* and *Mutual Legal Assistance in Criminal Matters Ordinance*, which, if passed, would have allowed Hong Kong authorities to extradite those suspected of a crime to Mainland China. The HKSAR Government was pressed to formally withdraw the bill in September 2019 after months of massive local protests.

materials and any evidence, and then sends to the prosecutor's office for review and formal charges. The Supervisory Commission has 12 investigative measures at their disposal, including *liuzhi* (retention in custody) that has replaced the Party-imposed *shuanggui* (Party disciplinary procedure and detention, referring to the questioning of Party members at a designated place and a designated time). Since the Supervision Commission was launched, Chinese media in 2018 covered many of the first applications of "*liuzhi*" and the Commission's indictment recommendations used in cases throughout the country.

Chinese authorities claim the *Supervision Law* contains more rigorous protections for the investigation processes and evidence collection than the former *shuanggui* procedure. In fact, however, the *Supervision Law* aggravates human rights abuse in the justice system. The Supervision Commission has a slew of compulsory measures for investigation that are intrusive and susceptible to abuse without any external review.⁵ In particular, the Commission's detention measure—*Liuzhi*—can persist as long as six months without court intervention or legal counsel. This constitutes a violation of ICCPR Article 9—procedural rights related to personal liberty, particularly Paragraph 3 of Article 9: "...[a suspect must] be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release." It also is a violation of Paragraph 3 of ICCPR Article 14: "...to have legal assistance assigned to him." Moreover, the *Supervision Law* stipulates *liuzhi* as an investigation measure without offering any less restrictive alternative measure, resulting in a suspect's long detention, contravening the presumption of innocence under Paragraph 2 of ICCPR Article 14.

The case of Meng Hongwei illustrates the problems of *liuzhi*. Meng, the former president of the International Criminal Police Organization (Interpol) and former deputy minister of China's Public Security Ministry, went missing after returning to China on September 25, 2018. On October 7, 2018, a short post appeared on the website of the Central Commission for Discipline Inspection (CCDI) and NSC, stating that Meng was "under the investigation of the NSC for suspicion of breaking the law (CCDI and NSC website, 2018)." His wife Grace Meng appealed to the international press claiming her husband was the target of political persecution. According to the *Supervision Law*, Meng must have been put under *liuzhi*. The family was kept in the dark about Meng's whereabouts or any information, pointing to the new procedure's lack of transparency and human rights abuses. This was the first *liuzhi* case to attract international attention since the implementation of the new law, and it did not assuage critics.

Another institutional implication of the *Supervision Law* is that it further blurs the line between the Party and the state. The past party disciplinary system largely emphasized, at least in principle, "separation of [party] discipline and [state] law" (*ji fa fen kai*). Furthermore, the Commission for Discipline Inspection could only target Party members. In contrast, the current system, under which "all state employees performing public duty" are now potential subjects of the Supervisory Commission's investigation, stresses "combination of discipline and law" (*ji fa he yi*), eroding the Party-state

⁵ These investigation measures are interview (*tanhua*), interrogation (*xùnwèn*), questioning (*xùnwèn*), inquiry (*chaxun*), asset-freezing (*donjie*), evidence collection (*diao chu*), confiscation (*chafeng*), seizure (*kouya*), search (*soucha*), inquisition and inspection (*kanyan jiancha*), appraisal (*jianding*), and retention in custody (*liuzhi*).

boundary. Take for example *shuanggui* versus *liuzhi*. The Commission for Discipline Inspection imposed *shuanggui*—restricting personal freedom without legal grounds—on Party members only (still not a small segment of the population, with over 90 million members). Now the list of potential subjects of *liuzhi* has greatly expanded to include all state employees performing a public duty, regardless of their party affiliation. A comparison between the two systems is in Table 1.

Table 1. Commission for Discipline Inspection versus Supervisory Commission investigation

	Old system Commission for Discipline Inspection	New System Supervisory Commission
Targeted behavior	Violations of Party discipline	Duty-related violations of law and Duty-related crimes
Potential subjects	Party members	State employees performing public duty
Investigation measures*	Interview, document review and copy, inquiry, seizure, asset freezing, requesting other agencies for technical investigation, and travel ban	Interview, interrogation, questioning, inquiry, asset freezing, evidence collection, seizure, impoundment, search, inquisition and inspection, appraisal, detention; requesting other agencies to impose measures of technical investigation, travel ban and arrest warrant etc.
Detention	<i>Shuanggui</i> No clear time limit	<i>Liuzhi</i> (Retention in custody) Three months, with the possibility to extend for another three months for a total of up to six months
Legal counsel	Not allowed	Not allowed

* Source: (Ye, 2018)

3. The Trial

3.1 Limited Judicial Intervention in Important Proceedings

Article 14 of the ICCPR safeguards the right to a fair trial, which is the essence of human rights in the administration of justice and mutually re-enforces the protection of personal liberty and prohibition against torture. Notably, under Paragraph 3 of ICCPR Article 9, any measure depriving personal freedom requires judicial control: “Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.” According to the Human Rights Committee, the treaty body of the ICCPR, the “judge or other officer authorized by law to exercise judicial power” refers to an “authority which is independent, objective and impartial.” Accordingly, “a public prosecutor cannot be considered as an officer exercising judicial power under paragraph 3” (Human Rights Committee, 2014). Obviously, neither China’s procuratorate nor police meet the requirement of a judicial authority in Paragraph 3. In addition, safeguarding the right to a fair trial relies on an independent, fair and effective judiciary. The ICCPR stipulates “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

China in recent years has engaged in a series of judicial reforms, including implementing the “quota system” (capping the number of judges in each court and selecting only the right candidates to serve as judges) to increase judicial professionalism and efficacy, trial-centered criminal justice reforms, and a judicial accountability system. Reforms have also been initiated to set up a new docketing procedure to resolve the problem of “difficulty in filing cases;” to publish some court decisions on-line and broadcast some trials to promote judicial transparency; and to continue to correct wrongful convictions (Chinese Supreme People’s Court, 2018). Despite these admirable endeavors, the reform campaign faces tremendous challenges, even besides prevalent corrupt practice (Li, 2012). The judicial protection of individual rights is confronted with at least two major challenges. First, the power structure limits the role of court intervention in important proceedings, and second, the Party’s control over the court makes it difficult for judges to independently check government power. The following sections turn to these issues.

3.1.1 Power Structure

Chinese courts have long been lacking autonomy: Chinese judges would be more accurately understood as part of the government machine, rather than an independent judiciary commonly envisioned by Western liberal democracies. Additionally, China’s justice process is centered on pre-trial investigation and dominated by investigative agencies. Chinese judges enjoy less political power than the police, as previously discussed. Although there have been some reforms in recent years to address police dominance of power,⁶ the overall power structure and power dynamics among

⁶ In some places, for example, the public security director no longer serves as the head of the Party’s political-legal committee.

the public security, the prosecution and the court have not seen major changes. Without changes in both the institutional power balance and the way most judicial actors accept the dominance of the public security organs, the current judicial reform campaign is unlikely to bring about a strong judiciary that can check government human rights abuses.

Take personal freedom as an example. Chinese law does not provide for habeas corpus and pre-trial criminal investigation does not need to be approved by the court, conditions that do not meet the requirement of Paragraph 3 of ICCPR Article 9. Media exposure in 2018 of Xinjiang's internment camps underlined the problem arising from lack of habeas corpus. In October 2018, the Standing Committee of the Xinjiang Uyghur Autonomous Region's legislature revised a regulation on "de-extremification" to provide for a basis for setting up "education and training centers" and to conduct "thought education for de-extremification, psychological correction and behavioral correction." This amendment purported to justify the on-going massive detention of Muslims, yet it has been pointed out that the local legislature lacked the legal authority to prescribe measures for detention because it violated Article 37 of the *Constitution*, which protects personal liberty, and Articles 8 and 9 of China's *Legislation Law*, which stipulate that the physical restriction of personal liberty is permitted only pursuant to statutes passed by the National People's Congress or its standing committee (Clarke, 2018). In other words, there is currently no legal ground whatsoever for the mass detention of Muslims in Xinjiang.

Although Chinese courts do not operate independently, were they allowed to exercise some modicum of judicial control, they still might have been able to place some restraints on the provincial legislature's power, which in turn could force the central government to pass what was bound to be a very unpopular law, at least internationally and in Xinjiang. The courts could have examined the legal authority of the regional government's detention; this judicial control might have injected more transparency to the process and led to a more limited use of the local government's detention powers. Moreover, fair court proceedings might have introduced legal counsel to assist the defendants. Unfortunately, China's courts have no such powers in proceedings where personal liberty is at stake.

3.1.2 Political Control

While China is engaging in reforms to improve judicial professionalism, the judiciary is, paradoxically, becoming further entrenched in politics. The Supreme People's Court has demanded that courts enhance political indoctrination to "staunchly safeguard the authority and the centralized, unified leadership of the CPC Central Committee with Comrade Xi Jinping as the core" (Chinese Supreme People's Court, 2018). Against this background, in cases considered politically sensitive, regardless of the fact of the case, the court must uphold party dictates even when they conflict with legal rights and responsibilities. In fact, judges in these circumstances serve as tools of political oppression rather than guardians of defendant's rights, failing to meet the ICCPR requirements of being independent, objective and impartial.

During 2018, the Chinese government continued to employ judicial processes to silence human rights lawyers and activists, including lawyer Wang Quanzhang (rounded up in the 709 Crackdown), lawyer Yu Wensheng (former counsel assisting 709 defendants), and Huang Qi (founder of 64tianwang.com to document suspicious

disappearances of people). In these cases, each defendant's right to a fair trial was violated in several ways: (1) the defendant was placed in prolonged detention and forced to make public confessions (not only on China's state-run media, but also broadcast in Hong Kong) (Dahlin, 2018:25); (2) government-appointed counsel were assigned to the case while the defendant and his family were not allowed to retain their own lawyers; (3) state-run media coverage assumed defendant guilt before the trial; (4) Family and rights activists were prevented from attending the court hearing by police; and (5) in some cases, there was no open trial at all.

3.2 The Death Penalty

Article 6 of the ICCPR protects the right to life and requires that capital punishment may be imposed only for "the most serious crimes." Although China has in recent years dropped the death penalty for some economic, non-violent crimes, the death penalty still applies to a total of 46 crimes, including some non-violent crimes. According to the report published by Amnesty International on the Death Penalty in 2017 (Amnesty International, 2018), while the total number of executions continued to decline around the world, there were still 23 countries carrying out capital punishment in 2017. China reportedly had the most executions.

China in recent years has taken measures to cut down that number, for example, abolishing the death penalty for some crimes, and having the Supreme People's Court conduct reviews for capital punishment cases. The number of capital punishment cases, however, remains a "state secret," off-limits to outsiders. To facilitate the correct assessment of China's death penalty reform, relevant data should be disclosed to the public.

Based on the online database managed by the China's Supreme Court, Amnesty International estimated that China probably had thousands of death penalty cases in 2018. It also indicated that the use of the death penalty in Xinjiang Uygur Autonomous Region was likely to be underrepresented in the Supreme Court's database, which only reported one case in Xinjiang.

4. Lawyers

One of the fundamental values in the "rule of law" lies in lawyers advocating their clients' rights against state power. Since China's "Reform and Opening" policy, the number of lawyers in China has grown rapidly to over 360,000. Their role has evolved from "legal workers" of the state to professional service providers to society. The first decade of the 21st century saw liberalism grow among lawyers, and for a time, judicial reform was considered a key to China's transformation. Many human rights lawyers and "die-hard lawyers" emerged to challenge government misconduct (Liu and Halliday, 2016).

China's judicial reform in recent years has put more emphasis on the role of lawyers. The Supreme People's Court and the Ministry of Justice are, for example, promoting the policy of "full coverage of defense lawyers in criminal cases" to offer free legal counsel to defendants in pilot projects. The goal is to eventually provide legal assistance to all criminal defendants, hence the term "full coverage." This program is designed to ease perennial criticism that few defendants receive proper legal representation. Other reform efforts include pilot programs offering duty lawyers and

lawyer-facilitated mediation. Over the years, various amendments have been made to the *Criminal Procedural Law* and *Lawyers Law* to try to resolve the challenges confronting defense lawyers, in particular challenges of meeting with detained clients, of reviewing case files, and of collecting evidence.

These efforts may have helped lawyers to better perform their duties, but have not exactly protected their autonomy. Quite the contrary, China has used a two-prong strategy: on one hand, tightening Party control of the legal profession by “party-building” (*dang jian*) in law firms to make ordinary lawyers toe political lines, and, on the other, oppressing human rights lawyers with harassment, persecution or disbarment to silence their voices.

4.1 Party-Building in the Legal Profession

Even when China’s legal practice was at its most liberalized state, it was not uncommon for a law firm to have an in-house Communist Party unit. Yet, in recent years, these Party units have become more prevalent—even compulsory—in the legal profession. In October of 2017, the CCP set up the National Legal Profession Committee (NLPC), which is tasked with rolling out a network of Party units in law firms across the country. Based on this policy, the All China Lawyers Association (ACLA) revised its charter in July 2018 to include the provisions of “resolutely follow the guidance of the Xi Jinping thought on socialism with Chinese characteristics for a new era and staunchly safeguard the authority and the centralized, unified leadership of the CPC Central Committee with Comrade Xi Jinping as the core.” The revised charter also requires the work of party-building, including that “the ACLA is to follow the leadership of NLPC to build party organizations within the legal profession.” Party disciplinary measures were also added to the ACLA charter. The revisions aimed to specify the leadership of NLPC over ACLA. The party-building policy seeks to further diminish the independence of lawyers associations, and it is made clear that lawyers who are Party members and law firms with Party units will be subject to party discipline if they fail to follow party rules.

In December, 2018, China’s Ministry of Justice announced newly-revised *Administrative Measures for Law Firms* to demand that law firms “resolutely follow the guidance of the Xi Jinping thought on socialism with Chinese characteristics for a new era” and “staunchly safeguard the authority and the centralized, unified leadership of the CPC Central Committee with Comrade Xi Jinping as the core.” The Measures require that a Party unit be established in any law firm with more than three Party members. Firms that do not have three Party members are still required to perform Party tasks by jointly establishing a Party unit with other law firms or through the guidance of “Party-building advisors,” assigned by higher-level Party units. The charter of each law firm is required to document operation of the Party unit including its format, status, operation, responsibilities, as well as mechanisms by which it will take part in the law firm’s decision-making processes and management as well as the measures to implement party-building. These revisions sought to make party-building mandatory to expedite the establishment of Party units in law firms.

The party-building policy is being carried out in law firms nationwide. According to the Ministry of Justice, 31 provincial-level regions and 435 cities have implemented relevant policies to reach the “full coverage” of Party units (Wei, 2018). Party units are intended to enforce party discipline and political guidance for Party members in the law

firm. In practice, some law firms have stipulated in their charter the importance of the Party's leadership, including provisions that new partners must be reviewed by the Party unit and that the director of the firm should be the secretary of the Party unit to ensure the firm's decision and development are consistent with that of the Party policy (Cai, 2018).

4.2 Suppression of Human Rights Lawyers

Despite the relatively small number of human rights lawyers in China, their undertakings are apparently perceived as a threat by the Chinese authorities. They take on cases considered "sensitive" by the government and high-profile cases that often expose official misconduct. On July 9, 2015, Chinese authorities began to detain, summon, interrogate, ban from travelling, or "disappear" hundreds of lawyers and human rights advocates in an operation later known as "the 709 Crackdown." The scale of this operation targeted against lawyers was unprecedented. Over 200 activists were questioned, many remain in detention and have reported being tortured. In some cases, they were forced to take unidentified drugs. Their families were also impacted: some were banned from leaving the country and subject to long-term surveillance (China Human Rights Lawyers Concerns Group, 2016). Several arrested lawyers were charged with "subverting state power." Some were tried in secret while cases of those willing to confess at court received widespread official media coverage (China Human Rights Lawyers Concerns Group, 2018). As of the end of 2018, a total of 14 of lawyers and activists arrested in the 709 Crackdown have been convicted and sentenced to up to eight years in prison. Some were released but still under close watch by the authorities without personal freedom.

The 709 Crackdown has effectively silenced most lawyers and weakened human rights advocacy. Nowadays, many rights lawyers are still under a wide variety of restrictions, with their space for practice diminished. Beijing human rights lawyer Cheng Hai, for example, had his license to practice law revoked by the Beijing Justice Bureau. Lawyer Lin Qilei was ordered to "rectify" his law firm. Several rights lawyers had their licenses revoked or annulled; including those who had ties to the 709 Crackdown.

Besides administrative measures revoking or annulling their professional licenses, defense lawyers in human rights-related cases have often faced procedural barriers to the zealous advocacy of their clients' claims. They are often denied docket review, refused the right to copy documents or relieved from duty for unknown reason. Lawyers' personal safety is often at risk in the line of duty. Sun Shihua (a Guangzhou lawyer and wife of rights lawyer Sui Muqing), for example, visited her client at a police station in September 2018 and ended up beaten by police and strip-searched by policewomen, followed by a 6-hour interrogation.

In September 2018, a dozen rights lawyers who had had their professional licenses revoked formed a "post-lawyers' club" with a plan to set up offices in major cities in order to offer legal counseling and to also cultivate more lawyers. The founders included Wang Yu, convicted after the 709 Crackdown, Sui Muqing, whose license was revoked in February 2018, and Wen Donghai, whose license was revoked in June of that year. However, a few months into its existence, this club was quashed by public security for "failing to register" (Gao, 2019). As it currently stands, rights lawyers have limited future prospects: no license to practice and no way to organize themselves

outside of the Party-dominated bar.

5. Conclusion

In recent years, China has promoted judicial reforms, arguably increasing judicial professionalism and improving the public's access to the judicial system, but it lacks the political will to tackle the intrinsic structural causes of the human rights violations described in this article. The technical, highly circumscribed judicial reform has fostered elite judicial personnel, but is incapable to check abuses of power.

Some may argue that, China's judicial reform is commendable—after all, the judiciary still has an important role to play in “non-sensitive” cases. However, there is no clear boundary between “sensitive” and “non-sensitive” cases. The line is drawn by the Party-state that dominates the administration of justice. The line can and does shift at the whim of the Party leadership at both the central and local levels. A case may be “non-sensitive” today but easily turn “sensitive” tomorrow, such as ordinary cases of forced eviction and claims of grieving parents demanding compensation in cases of poisonous infant milk. People can have no clear expectation that their cases will be considered “non-sensitive” and that they will receive justice from the courts.

For two decades China has continually maintained it is “creating conditions” to ratify the ICCPR it signed in 1998, with no definite plan or schedule for actually do so. But judging from the policies promoted in recent years, China seems to be creating more obstacles to ICCPR ratification, not less. Regarding judicial protection of human rights, public security agencies have been wielding unchecked powers that put people under arbitrary detention and torture and even go beyond national borders (and their jurisdiction) to harass overseas dissidents and/or return them from abroad. The National Supervisory Commission launched in 2018 operates without due process protections for people under its investigation. The scope of people under its jurisdiction is expansive and the line between the state and the Party responsibilities in exacting punishments unclear. Moreover, the court and the lawyers, ostensibly independent actors in judicial proceedings, are under increasing Party pressure to abstain from effectively countering public authorities' abuse of power. This course of movement is a far cry from the spirit of the ICCPR that safeguards personal liberty and the rights to a fair trial. Whatever road to reform China is currently on, it does not seem to lead to ICCPR ratification.

The Party's Central Committee for Comprehensive Law-Based Governance was launched in 2018 to enhance the Party-state's control of the legal system. At the Committee's very first meeting, Xi Jinping emphasized that China should “never take the path of Western constitutionalism, tripartite division of powers, and judicial independence” (Xi, 2019), highlighting his distrust of Western ideas of checks and balances and the judiciary. His concept of “law-based governance” is diametrically opposed to the idea of the “rule of law” that keeps public authorities in check.

The Party-state's efforts to silence dissent and to repress any potential discord in the legal system comes from a sense of insecurity about an independent judicial system and concerns over losing the Party's monopoly over state power. Yet, facing increasing social problems in China, with many involving controversies about public power, the government will find it difficult to resolve disputes between the state and the people without a fair and just judiciary, and more disruptions of social order will follow if

access to justice continues to be obstructed. China's mass incident protests and streams of petitioners demonstrate the need to have a just and effective system to respond to people's grievances. Unresolved conflicts often become resentments and eventually erupt into social unrest. The Chinese government may be able to stifle isolated discontent, but sooner or later, when denied justice in court, suppressed groups of people will find alternative fora to express their disapproval.

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