

# 人权卫士紧急救援协会

CHINESE URGENT ACTION WORKING GROUP

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## CONCERNING LEGAL INDEPENDENCE AND ARBITRARY PSYCHIATRIC COMMITMENT

The following submission has been prepared by the Chinese Urgent Action Working Group. Presentation and recommendations are based on the application of human rights instruments to which China is a party, and information and recommendations provided from field activists and defenders.

The Chinese Urgent Action Working Group (<http://www.china-action.org/>) (人权卫士紧急救援协会) is a China-based NGO working to strengthen Chinese rule of law by encouraging improved policy and strengthening the enforcement of the legal system. The organization specializes in providing rapid response legal assistance to rights defenders in need, supporting administrative lawsuits against unlawful actions targeting disadvantaged groups, and in training rural lawyers to more effectively provide legal aid to those who have suffered violations of their human rights.

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## INTRODUCTION

1. Since the 2009 UPR on China, the Chinese State has continued, and in a number of instances increased, the persecution of human rights defenders (HRDs) through both abusive legal and illegal methods. HRDs are subjected to a variety of forms of persecution, ranging from intimidation, surveillance, and house arrest to physical attacks, enforced disappearance and arbitrary detention, imprisonment and unnatural deaths in custody<sup>1</sup>. Despite Chinese government claims to having reached all its goals set out under the 2009-2010 *National Human Rights Action Plan*, and having launched a second plan for 2012-2015, the continued persecution of human rights defenders is a serious issue. Of particular concern is the ongoing impunity for local police to arbitrarily detain and physically abuse individuals and the maintained crackdown on lawyer's independence. Despite ongoing pressure the police and local government appear to be simply alternating or legalizing the forms of arbitrary detention they employ as opposed to halting its practice.

### A. Lawyers independence and 'Barefoot' Lawyers

2. A significant component of the persecution of human rights defenders has been proliferated by the cracking down on rights defense lawyers and legal independence, through the enforced establishment of 'party groups' within law firms<sup>2</sup> and the 2012 Ministry of Justice demand that all licensed lawyers must take a loyalty oath to the Communist Party<sup>3</sup>, placing that loyalty above that to their clients.<sup>4</sup> This has the possibility of leading to a considerable decrease in access to legal aid for victims of government abuses. However, because Chinese law<sup>5</sup> allows parties to either represent themselves or select their own legal representation (except in criminal cases), which does not have to be a 'licensed' lawyer, 'barefoot' lawyers have for a long time filled the gap left by the intimidation and persecution of licensed lawyers. They are also more economically viable compared to the prohibitive cost in the eyes of the rural population, migrant workers and different disadvantaged groups.

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<sup>1</sup> See Chinese Urgent Action Working Group Publication, *Deaths in Custody: The Police's free rein to abuse power in detention centers* available at: <http://china-action.org/PUBLICATIONS.aspx>

<sup>2</sup> See Chinese Urgent Action Working Group Publication, *Autonomy Under Fire: Lawyers and Law Firms in China* available at: <http://china-action.org/PUBLICATIONS.aspx>

<sup>3</sup> Edward Wong "Chinese Lawyers Chafe at New Oath to Communist Party" NYT <http://www.nytimes.com/2012/03/23/world/asia/chinese-lawyers-chafe-at-new-oath-to-communist-party.html?pagewanted=all& r=0>

<sup>4</sup> The Basic Principles on the Role of Lawyers 15 states that lawyers shall always loyally respect the interests of their clients.

<sup>5</sup> Article 58 (2) of the Civil Procedure Law states that grass-roots legal workers, lawyers, relatives, and communities or companies may be appointed litigant attorneys.

3. 'Barefoot' lawyers, or citizen lawyers, are unlicensed legal activists. Some 'barefoot' lawyers used to be fully licensed lawyers. The government's crackdown on licensed rights defense lawyers and license denial as retribution for taking rights cases, (Li Heping, Li Xiongbing, Cheng Hai, Li Subin)<sup>6</sup>, a contravention of The Basic Principles on the Role of Lawyers, has produced some 'barefoot' lawyers. Gao Zhisheng lost his license and was debarred for his work on freedom of religion; he has been held in almost continuous incommunicado arbitrary detention since 4 February 2009, five days before the 2009 UPR on China commenced. This is a direct result of the Ministry of Justice's control of the Bar Association, which by law should be self-governed by the licensed lawyers themselves. However, lawyers are bullied by the annual renewal of licenses used by the State to persecute and disbar lawyers who take on 'sensitive' cases.
4. Most 'barefoot' lawyers, however, are self-taught former petitioners and village activists such as Chen Guangcheng, who after years in prison and abusive house arrest famously escaped to the US in April 2012. While cases like his have generated considerable attention, they are unfortunately not the exception to the treatment of 'barefoot' lawyers, and new forms of persecution are being employed.
5. Although Chinese law provides that 'barefoot' lawyers may represent someone, the Police Law, the Law on Courts, and others, means that they are not afforded certain rights such as access to evidence or the right to speak with their client, which severely limits the type of cases they can manage. In general, these rules preclude them from working with criminal cases, but allow them to, at least theoretically, work effectively on administrative cases (such as suing against illegal government actions). Local authorities have however recently begun forcing courts to inappropriately apply the more limiting *civil procedure law* as opposed to *administrative procedure law* to impede their ability to operate and represent their clients. Such behavior and other direct actions to interfere are illegal by Chinese domestic law and contravenes international human rights law.<sup>7</sup>
6. Those who attempt to hold informal gatherings to teach Chinese law or human rights education to villagers (Hong Maoxian) or meet with other 'barefoot' lawyers or licensed lawyers are threatened, detained, and physically assaulted (Dong Qianrong, Wang Quanzhang, Zhang Wei). 'Barefoot' lawyers are often harassed and questioned by the police, (Ni Wenhua, Wang Jianfen), or beaten in response to the cases they take. This happened to land rights rights defender

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<sup>6</sup> See Chinese Urgent Action Working Group Publication, *Manipulation as Insulation: The non-renewal of weiquan lawyers' licenses in China*. Available at: <http://china-action.org/PUBLICATIONS.aspx>

<sup>7</sup> Particularly: The Basic Principles on the Role of Lawyers, and on the Independence of the Judiciary, articles 7, 8, 10, 11 of the UDHR, and article 14 of the ICCPR.

turned 'barefoot' lawyer Ni Yulan. She was beaten so severely as to be confined to a wheelchair in 2002 but continued her legal practice until she was sentenced in December 2008, and then again, shortly after her release from prison, again sentenced alongside her husband in April 2012 to two additional years of imprisonment for 'making trouble.' Not only is the persecution against 'barefoot' lawyers itself alarming, it represents a trend in constricting the avenues for addressing rights violations for their potential clients as well.

## B. An kang

7. During the 2009 UPR several countries put pressure on China to end arbitrary detention, with specific mention of Re-education through Labor (RTL), 'Black Jails' and the Ministry of Public Security administered custodial mental hospital network known as *An kang*. Although China rejected these recommendations in 2009, the government has ostensibly taken steps in the last year to address some of these issues, with a new Criminal Procedure Law, a growing debate concerning abolishing RTL, and releasing a first of its kind National Mental Health Law, which took effect 1 March 2013. There is still a long way to go.
8. The Mental Health Law falls seriously short in that it selectively refuses to cover the *An kang* system, thus highlighting the crux of the problem. China's two systems of mental health have created a structure where local police have full authority to label individuals as mentally ill and subject them to involuntary incarceration and forced treatment, amounting to arbitrary detention and torture.<sup>8</sup> Doctors and nurses have admitted to accepting individuals with no disabilities simply because the police instructed them to do so<sup>9</sup>, and with no independent oversight the Ministry of Public Security has full impunity to impose its will outside of the judicial process. Grounds for commitment are vague and there is no national standard. The Shanghai regulations, which serve as the closest thing to a national example, authorize police to forcibly commit individuals for, among others, 'creating a disturbance.' Involuntary commitment can last for years.
9. Although there are methods for filing appeal and reconsideration for wrongful commitment, they are often obstructed or disregarded by the authorities and the police regularly pressure the court in such cases, a contravention of the independence of lawyers and judges,<sup>10</sup> and the avenue for redress is not a

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<sup>8</sup> See Chinese Urgent Action Working Group Publication, *THOUGHT CRIMES: China's use of psychiatric institutions as detention centers*. Available at: <http://china-action.org/PUBLICATIONS.aspx>

<sup>9</sup> This represents a clear violation of the *Principles for the protection of persons with mental illness and the improvement of mental health care*, particularly Principle 4: Determination of mental illness

<sup>10</sup> See Universal Declaration on Human Rights Article 8, 10, 11; Basic Principles on the Role of Lawyers 1, 2, 7, 8, 9, 13(b); The Basic Principles on the Independence of the Judiciary 1, 2, 6; and the Guidelines on the Role of Prosecutors 4, 8, 10, 12, 13(a,b), 15, 16.

judicial process – none exists. As an administrative process, the police are both the executive of the system, as well as its own supervisor for handling appeals.

10. Patients who seek redress have been subjected to repeat arbitrary commitment. Wang Wanxing spent more than 12 years in a Beijing Ankang, for political activism, while Chen Miaosheng died in a Ministry of Health administered Beijing hospital after 13 years of commitment because his company refused to permit his release. The definition and power of guardianship is vague and allows for easy abuse, as was the case with Chen Miaosheng.
11. The Ankang system is also full of reports of torture. Involuntarily committed HRDs have been subjected to forced medication,<sup>11</sup> beatings, and electric shocks, such as Liu Xinjuan, Peng YongKang, Xu Lin Dong. Because there is no national law regulating its use, and because China has rejected calls for reform and rejected invitations of several independent investigators, and particularly due to the rate of abuse within *Ankang* facilities, the system in its present form contravenes a number of China's obligations to international law with particular note to arbitrary detention<sup>12</sup> and torture.<sup>13</sup>
12. Chinese Urgent Action Working Group and others have reported that the reliance on *Ankang* to arbitrarily detain and intimidate HRDs has increased and it is a concern that it will continue as an alternative to 'black jail' and RTL persecution unless concrete steps are taken.

### **C. Recommendations for the State under review**

#### Concerning Rule of Law, lawyers' independence and 'Barefoot' Lawyers

1. To issue a ministerial order ensuring the proper implementation of procedural rules for court proceedings, to prevent hostile courts in applying civil procedural matters regarding administrative legal matters, thus effectively reducing 'barefoot lawyers' to provide legal representation.
2. To allow for the proper implantation of the Lawyers law, thus making the Bar Association self-regulated by lawyers and not through control by the Ministry of Justice, as a means of preventing misuse of the annual renewal of licenses, currently used as a tool to punish lawyers and law firms taking on 'sensitive' cases.

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<sup>11</sup> A direct violation of Principles for the protection of persons with mental illness and the improvement of mental health care Principle 9,10, and 11.

<sup>12</sup> See Universal Declaration on Human Rights Article 2, 3, 7, 9, 12; ICCPR Article 9, 10, 12; ICPPED Article 2;

<sup>13</sup> See Universal Declaration on Human Rights Article 5; ICCPR Article 7; and Broadly the Convention Against Torture

3. Agree to a visit request by the Special Rapporteur on the Independence of Lawyers and Judges. Withdraw mandatory party affiliation in law firms.
4. Agree to a visit request by the Special Rapporteur on the Situation of Human Rights Defenders and immediately work to put an end to the arbitrary persecution of HRDs.
5. To remove the requirement for law firms to form 'party groups' within every law firm, to remove the current de-facto dual control system of lawyers and law firm's independence by both State and Party.
6. To adhere to the Basic Principles on the Role of Lawyers, thus issuing a clarification to statements by the Ministry of Justice concerning lawyers' primary loyalty being the Communist Party rather than their client and the law.
7. To also remove the oath of loyalty for lawyers to the Chinese Communist Party.

#### Concerning Arbitrary Detention and Ankaang

8. To bring the 'Ankaang' system under the Mental Health Law, or draft a new national law that regulates Ankaang.
9. To establish supervision of the 'Ankaang' system by the Ministry of Health, to ensure both execution and supervision is not in the sole domain of the Ministry of Public Security.
10. To establish judicial review (appeal structure) for all forms of detention and imprisonment, this is currently lacking for criminal detention.
11. To reform the current administrative penalty system, such as RTL and short-term administrative detention, abolish the system and bring relevant charges related to them under the criminal penalty system, and ensuring the existence of a judicial review (appeal) process.
12. To ratify the Optional Protocol of the Convention on the Rights of Persons with Disabilities, to establish an independent complaint mechanism.

#### Concerning general issues

13. To withdraw its reservations to the Convention against Torture's article 20, which establishes an individual complaint mechanism, and to ratify the Optional Protocol.
14. To ratify the International Covenant on Civil- and Political Rights, and its two Optional Protocols.