

New guidelines to ban coerced confessions will be tested in a case before China's top court, write **Jerome A. Cohen** and **Eva Pils**

# Rules and reality

**T**here really are “two Chinas” when it comes to criminal justice – and injustice. There is the China where thousands of law reformers – scholars, lawyers, legislative draftsmen, judges, prosecutors and officials – painstakingly labour for years to produce laws, interpretations and regulations designed to bring greater fairness and accuracy to a system that has long cried out for both.

In this China, the National People's Congress is about to reduce by almost 20 per cent the large number of offences that can lead to the death penalty; the Supreme People's Court (SPC) and central law enforcement agencies have just established procedural guidelines for excluding coerced confessions from all prosecutions and for granting special scrutiny to the evidence presented in death penalty cases; the SPC has recently resumed the herculean task of reviewing the many thousands of death sentences meted out each year by the lower courts; and a relatively new Lawyers' Law is supposed to

The Supreme People's Court has a golden opportunity to show that the new guidelines must be taken seriously

empower defence counsel to protect the rights of suspects and defendants.

Spurred by domestic outrage over tragic police abuses and judicial mistakes, and by foreign shock over the protean practice of torture and an unknown, but undoubtedly huge, number of annual executions, China's political leadership has gradually begun to move the administration of criminal justice to a higher place on its agenda. It is not ready to make the profound commitment to due process of law required by the International Covenant on Civil and Political Rights, which China signed in 1998 but has not ratified. But the leadership does seem interested in fulfilling the obligations China assumed when it ratified the United Nations convention against torture in 1988. It has also authorised steps to further reduce the number of death sentences, in the hope of bringing it down to perhaps 4,000 per year, from an estimated 10,000 to 12,000 – or even more. Some informed sources believe

that, if the number can be reduced to 2,000, the central government might then abandon its embarrassing efforts to maintain this vital statistic as a “state secret”.

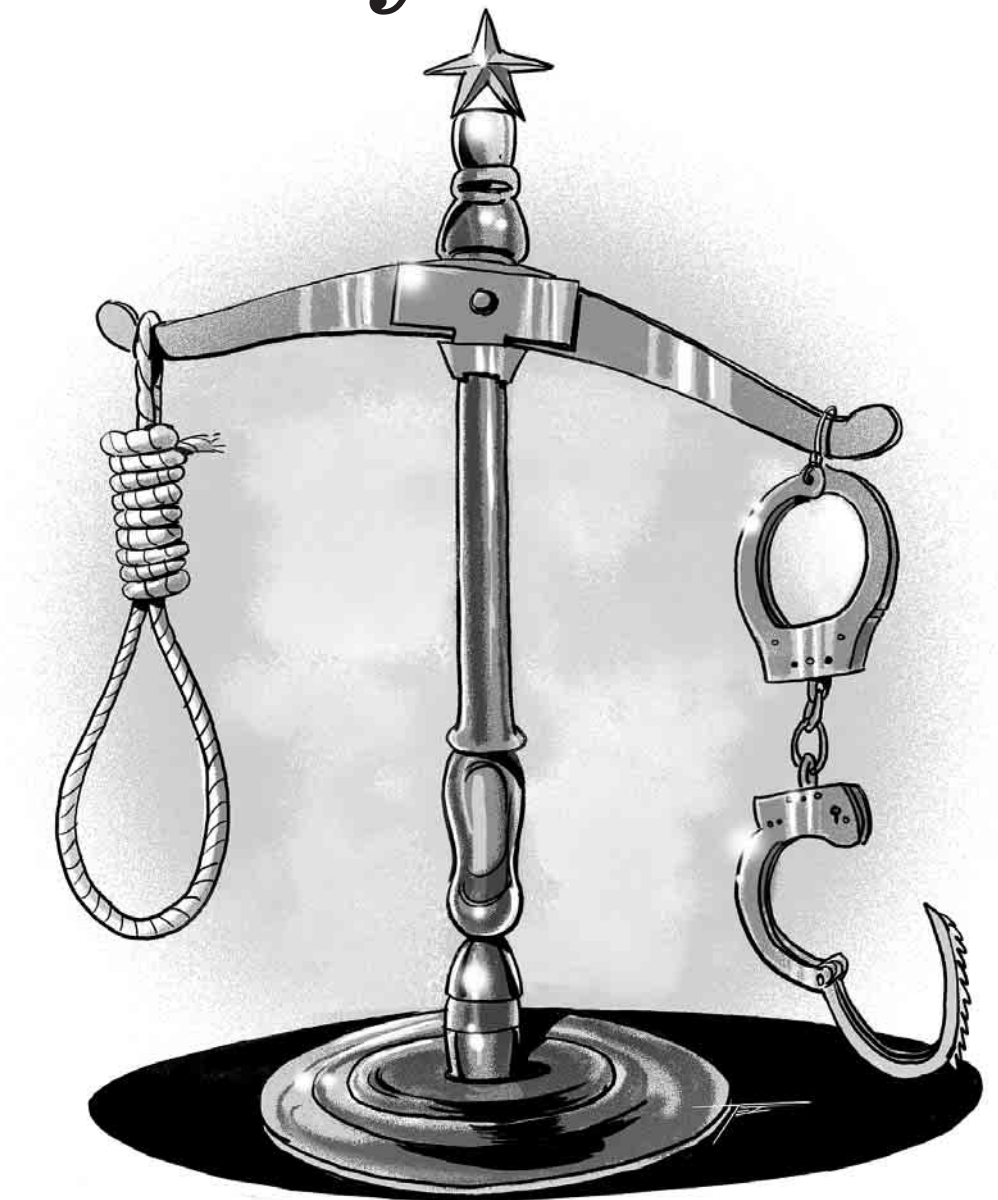
Yet, will the other China – not the China of improved published rules but of harsh, non-transparent reality – allow such goals to be achieved? This other China has a police-dominated legal system that, in confronting the country's very serious crime problems, does not comply with rules that restrict the pursuit of major investigation targets. This is especially true during periodic, high-profile anti-crime campaigns, such as the recurring “strike hard” movements and the recent effort to combat organised crime in the city of Chongqing (重慶).

The Chongqing government's very popular campaign to stamp out local mafia is the most current illustration of the clash between rules and reality. While the SPC and the central government law enforcement agencies were preparing new guidelines for the exclusion of confessions obtained in violation of the nation's long-standing prohibition against torture, Chongqing police were engaged in a systematic and lengthy torture programme that coerced suspects to confess to crimes they may not have committed.

The case of Chongqing construction entrepreneur Fan Qihang (樊奇杭), now before the SPC for final death sentence review, gives it a golden opportunity to demonstrate that the new exclusionary guidelines must be taken more seriously than previous attempts to ban coerced confessions. If the SPC should reverse Fan's conviction for murder and other offences on the grounds that it was based on evidence obtained through torture and send the case back for a fairer trial, this would be landmark progress in the administration of justice in China. If, on the other hand, it sends Fan to his death by allowing the conviction to stand, this will signal the continuation of business as usual.

Reversal of Fan's conviction would publicly confirm violations of China's Criminal Procedure Law by Chongqing's police, prosecutors and judges, not to mention the city's Communist Party chief, the powerful Bo Xilai (薄熙來). Bo has led the crackdown on mafia corruption but has dismissed accusations of human rights violations and belittled the defence lawyers who exposed them.

Fan's able Beijing lawyer, Zhu Mingyong (朱明勇), who failed to persuade Chongqing trial and appellate courts to exclude Fan's confession before the new exclusionary guidelines went into effect,



recognised that, even now, success at the SPC would be unlikely if he contented himself with conventional advocacy. He therefore took extraordinary steps to publicise the five months of excruciating and professionally administered torture suffered by Fan. In addition to media briefings that spared no gory details, Zhu submitted to the SPC and then released a video documentary that includes credible, secret footage of the detained Fan. It shows his still-vivid months-old scars from the shackles that cut into his wrists as they were used, for days on end, to suspend him from the iron grille of his torture chamber. Fan also displays the injuries to his head and the damage to his tongue that resulted from three attempts to end his ordeal through suicide.

Zhu's imaginative lawyering and daring public relations tactic required courage and independence. Beijing lawyer Li Zhuang (李莊), who had the temerity to defend another alleged mafia leader, has

already been scandalously imprisoned for supposedly inducing his client to make false torture allegations. Shortly after his sensational disclosures, Zhu vanished, perhaps to protect himself while the SPC deliberates. One hopes he has not been “disappeared” like China's most famous human rights lawyer, Gao Zhisheng (高智晟).

What will the SPC judges do? Many lawyers and reformers want them to bring the law in action closer to that on the books by reversing Fan's conviction and launching a general investigation of Chongqing's torture campaign. Yet that would require courage and independence equal to that of Fan's missing lawyer.

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