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The Function and Selection Criteria of “Guiding Cases”

CHINA GUIDING CASES PROJECT

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In theory, as for the “Guiding Cases” system itself, its direct functions should be mainly reflected in three aspects: first, to provide guidance in unifying the application of law; second, to fill gaps in the law; and third, to monitor the exercise of judicial power and maintain judicial justice.

In practice, when faced with difficult, complex cases, different courts often have divergent views of the nature of those types of cases or how the law properly applies to them. This divergence results from, among other things, excessively general legislation and conflicting norms. It is possible, therefore, to achieve greater uniformity in the application of law by using “Guiding Cases” as exemplary applications of the law. These cases can provide unifying “guidance” on how the law should apply to similar cases in the future.

In addition, China is a civil law country, where cases decided by judges do not possess the binding force as they do in Anglo-American legal systems. But, because promulgated legislation quickly lags behind the reality in China’s judicial practice, there are indeed cases to which no existing law applies. In these circumstances, a judge cannot refuse to adjudicate a case for lack of legal norms. To the contrary, it is the judge’s duty to adjudicate the case. In such a situation, the judge should issue a written judgment, based on an accurate understanding of legal principles and the spirit of the law, setting forth the relevant facts and legal reasoning underlying the judgment. The judge, through that written judgment, will show the society to whom “the law” applies, his or her reasoning, and the result. Ultimately, the judge will perform the functions of resolving disputes in the absence of legislation and filling gaps in the law. If cases of this kind are selected as “Guiding Cases,” the “judges’ interpretations” within them will be displayed to the society, serving not only as reference for how the law should be applied in the adjudication of similar cases in the future, but also as a foundation for future lawmaking.

Justice is the life and the highest value of the judiciary. To achieve judicial justice, it must—in addition to having an independent judicial power at the macro level—possess effective mechanisms for monitoring judicial power at the micro, or operational, level. Among various monitoring mechanisms, the requirement of a standardized written judgment is a very effective way to monitor and curb abuses of judicial power in the course of adjudicating a particular case. Therefore, when selecting “Guiding Cases,” the Supreme People’s Court should focus more on the writing of the judgment and its role in monitoring the exercise of the judicial power. This means that the Court should select cases for which the written judgment clearly states the claims of all plaintiffs and defendants, the facts of the dispute, the judge’s reasoning for adopting or rejecting the views of either party, the way evidence is used, the legal reasoning showing how the law applies, and any other factors potentially affecting the adjudication. Thus, through the public display of written judgments, the guiding cases system would enable the public to oversee the exercise of adjudicative power, thereby achieving judicial justice.

Based on the understanding above, two factors should be considered in the selection of “Guiding Cases”: first, whether the case is difficult, complex, and representative; second, whether the writing of the judgment meets the requirements that enable public oversight of the process by which judicial power was exercised in the case—that is, whether the written judgment
reflects basic understanding of the law and basic logical reasoning in adopting or rejecting the claims of all plaintiffs and defendants, in using evidence, in explaining how the law applies, and so on. Put simply, when given a written judgment, members of the general public (especially those with basic knowledge of the law) should be able to read the judgment and effectively monitor the adjudication process and the legal reasoning supporting the judgment. Through this monitoring, it will be possible to avoid some instances of judgment without real trials or judgment after trials of mere formality. As between these two selection factors, the requirement of a standardized written judgment is foundational and critical. If a judgment is written in the current simple format, lacking clear explanation of the parties' claims, the judge's use of evidence, and the legal reasoning supporting how the law was applied, then no matter how complex, difficult, or representative a case is, its “guiding capacity” will be largely diminished.

According to the Provisions of the Supreme People’s Court Concerning Work on Case Guidance issued by the Supreme People’s Court on November 26, 2010 (the “Provisions”), the original intention and purposes of releasing the guiding cases are “to summarize adjudication experiences, unify application of law, enhance adjudication quality, and safeguard judicial justice.”¹ According to Article 2 of the Provisions, the Guiding Cases are selected based on the following criteria:

i. are widely concerned by society;

ii. legal provisions are of relatively general nature;

iii. are of a typical nature;

iv. are difficult, complicated or are cases of new types; [or]

v. other cases that have a guiding effect.²

Clearly, these selection criteria fail to include a standard for written judgments, one of the basic elements of guaranteeing judicial justice. And, of the eight Guiding Cases the Supreme People’s Court has selected so far, almost none has entirely illuminated the trial process and the legal reasoning supporting how the law was applied. Rather, the judgments contain only a simple recitation of the facts, the relevant legal provisions, and the results of the adjudication; they do not comprehensively set forth the reasoning for adopting or rejecting specific evidence, for adopting or rejecting the opinions of the parties or their lawyers, or for applying the law in the manner it was applied. Thus, the judgments do not provide the public what it needs to effectively monitor the judicial process. The eight cases released so far are not complicated in terms of their facts or applicable law. They are neither of a new type of case nor are the legal


²Id. Article 2.
provisions of relatively general nature. In contrast, various cases in which novel technological issues have produced great divergence in the application of law—such as the XU Ting case, the QQ theft case and the QQ organized suicide case—have not yet been designated “Guiding Cases.”

Given the foregoing analysis, if the “Guiding Cases” are truly to guide judicial practice, there must first be a scientific understanding of the function of the judiciary—that is, to justly apply the law in order to resolve societal disputes. Further, the functions of “Guiding Cases” should be appreciated objectively; that is, it should be appreciated that “Guiding Cases” serve their “guiding” purpose in unifying the application of law, filling gaps in the law, enabling oversight of the exercise of judicial power, and preserving judicial justice. On this understanding, the selection criteria for “Guiding Cases” should encompass both “formal standards”—including the novelty of the case and whether it has produced divergent applications of law—as well as “substantive standards”—standards concerning the content of the written judgment itself. As a result, through judicial analysis of the nature of novel cases, as well as the application of law and underlying legal reasoning in those cases, guiding cases will be able to serve the valuable functions of interpreting and filling gaps in areas of the law for which existing law is lacking or the law has been disparately applied.

Indeed, regardless of the function to be served by a guiding case—whether it be interpreting the law, filling gaps in the law, or monitoring the exercise of judicial power to safeguard judicial justice—none is possible without standards for written judgments. Thus, if judicial justice is to be achieved, the detailed explanation of the specific process by which the judgment was rendered must be part of the standards for written judgments. If this criterion—this critical, substantive norm for adjudicative behavior—is overlooked and the focus is instead confined to the “formal standards” of whether the case itself is difficult, complex, and so on, then the guidance value of the “Guiding Cases” will be greatly diminished. Based on this understanding, the “Guiding Cases” system should favor not only cases that present novel issues or issues for which divergent applications of law exist, but also emphasize specific standards for the writing of judgments and should use these as bases for selecting guiding cases. By this approach, wherever existing law is lacking or subject to divergent application, “Guiding Cases” will serve the “guidance” function of interpreting and filling gaps in the law, setting examples that courts can use as reference in similar cases in the future. “Guiding cases” will also provide the documentary materials necessary for enabling effective public oversight of the judiciary, ultimately achieving its highest aspiration—judicial justice.

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5 QQ Organized Suicide Case，available at http://money.gucheng.com/201202/1744605.shtml. [CGCP Editor’s Note: The case number associated with this case is currently unknown.]