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The Growing Significance of Cases in China: The Guiding Cases System

CHINA GUIDING CASES PROJECT
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Ladies and Gentlemen:

It is my great pleasure to speak with you tonight on the growing significance of case law in the Chinese legal system and to respond to Judge GUO Feng’s thoughtful presentation on the compilation and application of Guiding Cases.¹ I would like to first thank Dr. Mei Gechlik for her innovative, important, and continuing work on the Guiding Cases System and for inviting me to speak. I also thank American University Washington College of Law for its hospitality and Judge Guo for his contributions to today’s discussion.

I. Introduction

President XI Jinping’s Outcome List, which was a result of his September 2015 state visit to the United States, contains the following goal: “to conduct high-level and expert discussions […] to provide a forum to support and exchange views on judicial reform and identify and evaluate the challenges and strategies in implementing the rule of law.”² I believe that today’s program will further our two countries’ joint commitment to evaluating strategies to implement the rule of law.

In the United States, we have very distinct notions of judicial reform and the various ways in which reforms help implement the rule of law. In participating in this dialogue, we need be careful to avoid superimposing our own notions of the role of precedential case law authority onto the distinctly Chinese system of Guiding Cases.

As Judge Guo has emphasized, the China Guiding Cases System has its own Chinese characteristics; it should not be, and will not be, a clone of a Western system of binding case precedents.

While decidedly not a common-law system of binding precedents, the Guiding Cases System has the potential to strengthen judicial autonomy and provide guidance regarding how the courts should rule on similar cases in the future. The Guiding Cases initiative will be, when fully employed, a significant step towards emboldening the Chinese judiciary to exercise judicial independence in transparently instituting the rule of law by rendering decisions that serve to unify China’s legal standards. Once a critical mass of Guiding Cases and citations to them in subsequent cases develop and, if Chinese courts consistently engage this body of law in rendering their decisions, the Guiding Cases System has the potential to become a self-perpetuating source of guidance for judges as well as for anyone who seeks access to the court system. The Guiding Cases System appears to be on its way to that end.

II. The Guiding Cases System & Its Forbears

It is important to realize that the case-based system that Judge Guo describes in his address did not spring full-blown into existence in 2010 with the publication of the *Provisions of the Supreme People’s Court Concerning Work on Case Guidance* (the “Provisions”).

A quarter of a century earlier, the Supreme People’s Court (the “SPC”) had begun to issue collections of decided cases as a means of guiding and presumably regulating the decision-making authority of lower courts. Within two years, the SPC began publishing “typical cases” in its official publication, the *Gazette of the Supreme People’s Court* (the “Gazette”). These “typical cases” were published alongside regulations, speeches, and judicial interpretations, and they carried some authoritative weight. Approximately two decades later, the SPC expanded its “typical cases” publication to include the legal rules it derived from each case. The SPC continues today to disseminate “typical cases” through the *Gazette*.

By the late 1980s, Chinese legal scholars had begun to debate the merits of adopting a system of “precedent” in order to evolve the “typical cases” system into a more compulsory source of judicial guidance. By 1999, the SPC began calling for “diligence” in formalizing such a system. It is, therefore, appropriate and useful to consider the “typical case” system as a precursor to the Guiding Cases System, operating in furtherance of Article 126 of the *Constitution of the People’s Republic of China*, which provides:

> The people’s courts exercise adjudication power independently, in accordance with the provisions of law, and not subject to interference by any administrative organ, social organization, or individual.

The Guiding Cases System itself is deemed to have commenced when the SPC Adjudication Committee issued the *Provisions* in 2010. Five years later, in 2015, the SPC issued

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6. See id.


the *Detailed Implementing Rules on the Provisions of the Supreme People’s Court Concerning Work on Case Guidance* (the “*Detailed Implementing Rules*”). The *Provisions* and the *Detailed Implementing Rules*, together with the Guiding Cases themselves, constitute the Guiding Case apparatus that today exists in China.

The *Provisions* state the ultimate purpose of the Guiding Cases System: to “summarize adjudication experiences, unify the application of law, enhance adjudication quality, and safeguard judicial impartiality.”

Although the Guiding Cases System has begun to evolve in earnest, a system capable of unifying a nation’s legal standards requires engaged civic participation.

### III. Political Impediments to Growth

Progress in implementing the Guiding Cases System, however, has been slow, in no small part for political reasons.

While the SPC had been expected to “issue regulations related to the case guidance system” as part of its *Second Five-Year Reform Plan of the People’s Courts (2004–2008)*, it did not do so, and the SPC’s *Third Five-Year Reform Plan of the People’s Courts (2009–2013)*, announced in 2009, made no mention of the Guiding Cases initiative. The SPC’s delay in formally implementing a Guiding Cases system can be attributed to politics—the National People’s Congress (the “NPC”), China’s highest legislative body, is arguably concerned that increased use of such a system will lead to greater judicial authority at the expense of the NPC’s legislative authority.

Any tension between the NPC and the SPC’s Adjudication Committee will be resolved in due course, but any delay in utilizing Guiding Cases in judicial decision-making due to that tension would undermine the efficacy of the Guiding Cases System. Fortunately, momentum appears to be building towards the kind of institutional transparency that best enables the exercise

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of independent adjudication power set forth in Article 126 of the Constitution of the People’s Republic of China, upon which the Guiding Cases System is predicated.

IV. Towards Judicial Transparency

In 2011, Beijing released the Twelfth Five-Year Plan of National E-Government Affairs, which emphasized principles of transparency, citizen participation, and collaboration with government. Generally, the plan focused on the principles of “open government” but did not mention the term.

The term “open government” first appeared in a government publication in the 2014 Notice Concerning Speeding Up the Implementation of Work Related to the Information-for-Citizens Project. The Chinese Government may have begun to prioritize its citizens’ access to the inner workings of governmental entities.

The Chinese judiciary has found itself included in this movement toward transparency. Such terms as “open adjudication system” and “judicial openness” have begun to appear in SPC publications. In 2008, then-SPC President WANG Shenjun announced that Chinese citizens “not only demand that adjudication results be fair but also look forward to the judicial process being open and transparent.” “Citizens,” said former SPC President Wang, “not only demand the right to know judicial activities, but also look forward to having the right to participate in and the right to supervise judicial activities.”

While the exercise of independence of adjudication power has emerged as an increasingly visible objective, as expressed through the Guiding Cases initiative, judicial transparency has similarly been referred to as a goal of court reform. The Fourth Five-Year Reform Plan of the People’s Courts (2014–2018) emphasizes a commitment to holding public trials for “cases that are outside of regular trial proceedings, including applications for retrials […]” Similarly, as provided for by the SPC’s publication initiatives, documents pertaining to judgments are becoming accessible to the Chinese public.

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16 Id.
17 Id. at 60.
18 Id. at 61.
19 Id. at 62.
21 Gechlik et al., supra note 15, at 87.
22 Id. at 67.
In order for this movement towards transparency to have genuinely transformative impact through the Guiding Cases System, Chinese jurists and lawyers, in addition to other members of the Chinese citizenry, must forthrightly engage the judicial process. Indeed, the Guiding Cases System, as constituted by the rules and provisions that govern its mechanics, seems to anticipate the meaningful contributions of what we in the United States call the “bench and bar”.

V. The Structure of the Guiding Cases System

To become a Guiding Case, a decision must be deemed to: (1) be “of widespread concern to society”; (2) concern “legal provisions [...] of relatively general nature”; (3) possess “a typical nature”; (4) be “difficult, complicated, or of new types”; or (5) otherwise have “guiding effect”. A Guiding Case must also be found to be one in which “facts are clearly ascertained, law is correctly applied, and reasoning for the adjudication is sufficient” such that the decision generates “good legal and social outcomes”.

Guiding Case recommendations are invited by the SPC not only from every level of the Chinese judiciary, but also from “[r]epresentatives of people’s congresses, members of committees of the political consultative conference, people’s assessors, experts, scholars, lawyers, and other people from all circles of society [...]”. Pursuant to the 2015 Detailed Implementing Rules, a Guiding Case recommendation may be made by any interested party directly to the SPC’s Office for the Work on Case Guidance.

If the Office for the Work on Case Guidance determines that a proposed Guiding Case satisfies the applicable criteria, it forwards the case to the SPC Adjudication Committee for review. Approved Guiding Cases are printed and distributed to each of the Higher People’s Courts and published in the Gazette of the Supreme People’s Court, in the People’s Court Daily, and on the SPC website, thereby enabling broad public access to all Guiding Cases, at least in theory.

Each Higher People’s Court is charged with the “supervision” of the use of Guiding Cases within its jurisdiction. Importantly, judicial personnel are encouraged—if not required—by the SPC to inquire into potentially applicable Guiding Cases even where the parties before them have not raised any. Correspondingly, when litigating parties cite to a Guiding Case as a “ground [for

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23 Provisions, supra note 3, Article 2.
24 Detailed Implementing Rules, supra note 9, Article 2.
25 Id., Article 5.
26 Id.
28 Detailed Implementing Rules, supra note 9, Article 8.
29 Id., Article 4.
30 Id., Article 11.
the prosecution [...] or defense”, judges are expected to explain their decision to rely or not to rely upon the cited Guiding Case in reaching a particular decision.\textsuperscript{31} The Guiding Cases System thus begins to resemble an apparatus that can be furthered only through a judiciary that is responsive to the cases raised by the litigating parties, whether by applying them or distinguishing them from the matter being decided, thereby elucidating the nuances and value of a given Guiding Case.

VI. Moving Guiding Cases Forward

At present, Chinese courts are not required to make genuine use of Guiding Cases and are, in fact, expressly discouraged by the SPC from basing decisions upon them—the Detailed Implementing Rules stipulate that a lower court “should quote the Guiding Case as a reason for its adjudication, but not cite [it] as the basis of its adjudication.”\textsuperscript{32} At this time, Guiding Cases are, therefore, not binding sources of law upon which a certain result must follow but merely sources of guidance via which an acceptable decision may be reached.

As Judge Guo explained in his address, Guiding Cases are to have “de facto binding effect on lower courts’ adjudication of similar cases.”\textsuperscript{33} Given this, the standards for determining “similar cases” should be made clear to judges. Indeed, as Judge Guo further explained, “[t]he effect of a GC lies in the “Main Points of the Adjudication” section. Summarizing and extracting the Main Points of the Adjudication are the essence of the compilation of GCs.”\textsuperscript{34} The Guiding Cases System would benefit greatly if individual judges were trained how to assimilate and apply a Guiding Case’s “main points”, not merely for the purpose of deciding a case based on identified, relevant Guiding Case(s) but also for the purpose of determining whether a pending case is similar to any Guiding Case.

Not only do judges need to be shown how to apply a Guiding Case’s main points, but as currently constructed these “main points” are too thin and too abstract to genuinely guide later judicial decision-making. As a judge, I need to be able to see the full context of a case, all the facts and circumstances surrounding it, in order to understand what happened, what the adjudication stands for, and how the case might be applied going forward.

VII. Lawyering in the Evolution of the Guiding Cases System

As previously noted, judges are encouraged to inquire into potentially applicable Guiding Cases even where the parties before them have not raised the applicability of a Guiding Case.\textsuperscript{35} Moreover, when litigating parties cite to a Guiding Case as a “ground [for the] prosecution [...] or defense”, judges should explain their treatment of the Guiding Case, regardless of whether they

\textsuperscript{31} Id.
\textsuperscript{32} Id., Article 10.
\textsuperscript{33} Judge GUO Feng, supra note 1, at 8.
\textsuperscript{34} Id. at 6.
\textsuperscript{35} Detailed Implementing Rules, supra note 9, Article 11.
have chosen to rely upon it, refer to it, or to ignore it in rendering a judgment.\textsuperscript{36} The parties appearing before the judge can and should attempt to influence this determination. Recent data strongly suggests that this is not happening nearly as often as it should be.\textsuperscript{37}

The reason for this unfortunate phenomenon is not difficult to ascertain. Just as the bar examination in the United States is designed to test the would-be practitioner’s capacity to practice law, the National Judicial Examination does the same in China. At present, however, the syllabus for the National Judicial Examination does not include any material whatsoever pertaining to Guiding Cases.\textsuperscript{38}

Making Guiding Cases a required component of the National Judicial Examination will not alone render young practitioners competent to employ them in practice. However, it would function to acclimate prospective lawyers to the existence and use of Guiding Cases before the lawyers enter practice, thereby enabling them to raise Guiding Cases in court where appropriate.

Ultimately, it is the province of the Chinese judiciary to adjudicate in light of Guiding Cases. But the system will benefit to the extent that practitioners bring to a court’s attention a relevant case that might provide adjudicative guidance to the court. Indeed, a court’s judgment is better for having been informed by as many similar judgments as possible.

\textbf{VIII. Toward a Critical Mass of Guiding Cases}

Guiding Cases represent a constructive step towards judicial autonomy and transparency. Although less than a decade old, the Guiding Cases System has the potential to move the Chinese legal system closer to the goal set in 1982 by the \textit{Constitution of the People’s Republic of China}—that “[t]he people’s courts exercise adjudicative power independently, in accordance with the provisions of law, and not subject to interference by any administrative organ, social organization, or individual.”\textsuperscript{39} The ultimate value and efficacy of the Guiding Cases System relies on continued participation from all stakeholders, including members of the bench, the bar, and academia.

To be certain, the term “Guiding Cases” is something of a misnomer—they are not “cases” as we know them but are, rather, decisions and cases that have been re-constituted into easily-digested adjudicative data. Chinese courts are not ultimately obligated to genuinely consider Guiding Cases in their judgments—they exist for reference, not as binding precedent—and practitioners before these courts are not obligated to cite Guiding Cases in the course of their representation. Indeed, as I previously mentioned, the \textit{Detailed Implementing Rules} prohibit a Chinese court from resting a decision solely on the strength of a Guiding Case, and the present composition of the National Judicial Examination means that neophyte Chinese lawyers most likely begin the practice of law with no—or little—familiarity with the Guiding Cases regime.

\textsuperscript{36} Id.
\textsuperscript{37} Gechlik et al., \textit{supra} note 15, at 73.
\textsuperscript{38} Id.
\textsuperscript{39} 《中华人民共和国宪法》(\textit{Constitution of the People’s Republic of China}), \textit{supra} note 8.

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I should think that the Guiding Cases concept cannot expand until Chinese courts are advised not merely how to invoke Guiding Cases in their judgments but, also, how to identify, evaluate, and apply them in practice. Similarly, young Chinese practitioners should be exposed to Guiding Cases from an early stage in their legal education, a worthy goal that can be partly achieved through inclusion of Guiding Cases in the National Judicial Exam curriculum.

As practitioners become more familiar with Guiding Cases, we can presume that they will raise them with greater frequency. As this happens, Chinese courts will become more accustomed to the concept of case law. This habit of the mind will come to be reflected in the judgments and decisions rendered by Chinese courts and, in turn, Chinese legal practitioners and perhaps even ordinary citizens will seize upon these decisions as bases to propose additional Guiding Cases. In time, a critical mass of Guiding Cases may emerge. Only once this critical mass of citations and use is achieved will the potential value of China’s Guiding Cases be realized.

Since 2010, when the SPC issued the Provisions, merely 87 Guiding Cases have been issued. It is therefore safe to say that China’s Guiding Cases cannot presently provide for the kind of breadth that is needed to ensure that like cases are treated similarly and that future litigations are resolved on the same bases as previous ones.

IX. Conclusion

What is my perspective on Guiding Cases as a United States District Judge?

First, the Guiding Cases System has the potential to enable courts to “exercise adjudicative power independently” as emphasized in Article 126 of the Constitution of the People’s Republic of China.

Second, the pace of issuing Guiding Cases has increased recently but needs to increase further still. Fewer than 100 Guiding Cases cannot possibly cover the broad array of legal areas that courts in China confront on a daily basis.

Third, the goal of independent adjudication by courts would be reached sooner through Guiding Cases if more practitioners and judges were exposed to the Guiding Cases regime. One way of accomplishing this, among many, would be the inclusion of the Guiding Cases rules and the procedures in the National Judicial Exam. Similarly, lawyers should be encouraged to raise Guiding Cases in their presentations to the courts.

Fourth, by the same token, judicial officers should be reminded on a continual basis of the value of Guiding Cases and the advisability of referring to them as a reason for adopting—or rejecting—a particular line of reasoning.

Fifth, as Judge Guo emphasized, “the Case Guidance System is a judicial system with Chinese characteristics […] to address the problem that ‘similar cases are adjudicated
I believe that this issue will be more readily addressed if the “Main Points of Adjudication”—the essence of the Guiding Cases—are made considerably fuller so as to better reflect the facts and contents of a given dispute.

Judge Guo stressed that SPC President ZHOU Qiang requested that case guidance “be treated as a strong hand in strengthening an impartial judiciary under the new circumstances of judicial reform.” It is fair to say that all of us join Judge Guo in that expectation.

I again express my thanks to those who made possible today’s event. I look forward to the continued evolution of the Guiding Cases System and to further participating in the mutually beneficial dialogue that has brought us here today.

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40 Judge GUO Feng, supra note 1, at 3.
41 Id.