

Retaining Judicial Professionalism: the New Case Guiding Mechanism of the Supreme People's Court¹

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Abstract

In 2011 and 2012 the Supreme People's Court (SPC) published its first "guiding cases". Guiding cases serve as decision-making models that must be taken into account by lower courts when deciding similar cases. This study argues that the establishment of such a national formal legal mechanism to improve consistency in adjudication across jurisdictions and geographical boundaries will strengthen judicial professionalism. The case guiding mechanism provides the SPC with an instrument to discreetly steer adjudication in lower courts, thereby allowing it to exercise significant influence in legal development. Given the complexity of cases, compared to law set out in statute, non-lawyers may have tremendous difficulty in understanding and assessing the effects of guiding cases, which in turn acts as a protective mechanism against extra-legal interference. The reform is an example of difficult manoeuvring of the Court to retain judicial professionalism in a hostile yet politically conservative environment. It reflects an attempt of the SPC to strengthen its position vis-à-vis other actors of the party-state and to consolidate the judiciary's function as an adjudicative institution that works on the basis of formal legal mechanisms.

Keywords: Supreme People's Court; judges; adjudication; professionalism; guiding cases, judicial reform

This study explores the SPC's attempt to improve consistency in judicial decision-making through a new mechanism called the case guiding system (anli zhidao zhidu 案例指导制度). According to the 2010 Guiding Cases Regulations the SPC selects and publishes guiding cases (zhidaoxing anli 指导性案例) that must be taken into account by lower courts when deciding similar cases.²

All legal systems must ensure certain consistency in the application of law. The hierarchical

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² "Zuigao renmin fayuan guanyu anli zhidao gongzuo de guiding" ("Regulations of the SPC on the work of guiding cases) of 26 November 2010.

organisation of the judiciary provides for a mechanism that guarantees consistent adjudication. Typically, the highest courts within a judicial system have appellate jurisdiction relating to appeals on points of law. If a higher court disagrees with the interpretation of the law by a lower court, it will quash or amend the decision or remit the case to the lower court to decide the case in the light of the law as stated by the higher court. The authority of the decisions of the highest courts within a judicial system has the effect of making the application of law consistent throughout the judicial system. In common law systems, a decision made by a superior court is binding precedent that all inferior courts are required to follow. In China, as in other continental legal systems, this doctrine of binding precedents is not applied. However, in legal systems that do not follow this doctrine, the appeal mechanism renders decisions of higher courts factually binding on lower courts. Lower courts follow the legal views of higher courts because their deviating decisions would be overturned on appeal by an appellate court. The Chinese four-level court system only allows one appeal to be made to a court of higher ranking, which minimises the impact of decisions of the provincial high courts or the SPC on decisions of lower level courts.³ Compared with the organisation of judiciaries in other countries, there appears to be a gap of formal legal control over lower courts by provincial high courts and the SPC. Guiding cases are designed to fill this gap, promote centralisation of the judiciary and strengthen the position of the SPC.

To advance the argument that the SPC is an institution that attempts to preserve its long-term interest in a professional judiciary rather than a mere pawn of the party-state, this study draws on literature that has investigated the role of courts in authoritarian regimes.⁴ Authoritarian judiciaries have been found to establish social control, promote regime legitimacy, control administrative agents, facilitate economic development and help to implement controversial policies.⁵ In order to fulfil those functions, particularly with regard to building regime legitimacy, the judiciary requires some true autonomy from other actors of the party-state.⁶ With regard to China, a recent analysis argues that the SPC has transformed into a “relatively

³ Article 158 “Zhonghua renmin gongheguo minshi susongfa” (“Civil Procedure Law of the PRC”) of 9 April 1991 and Article 6 “Zhonghua renmin gongheguo xingzheng susongfa” (“Administrative Litigation Law of the PRC”) of 4 April 1989. Pursuant to Article 179 No. 6 of the Civil Procedure Law the parties can apply for a retrial of the case on the grounds of wrong application of law. The “Zuigao renmin fayuan guanyu shiyong minshi susongfa shenpan jiandu chengxu ruogan wenti de jieshi” (“SPC interpretation on several questions of applying the adjudicative supervision procedure of the Civil Procedure Law”) of 1 December 2008 stipulates that retrials are in general heard by the court that is above the court that made the final decision. This factually adds an additional level of jurisdiction alongside the courts of first instance and the courts of appeal.

⁴ Ginsburg and Moustafa 2008.

⁵ *Ibid.*, 4-10.

⁶ However, if courts challenge the regime and the regime responds by openly interfering with the judiciary, courts lose their legitimizing function (the “legitimacy paradox”); Shapiro 2008, 334.

autonomous policy-making organization”. The expansion of the powers of the SPC originated from within the court and was driven by a combination of activism and professional values.⁷ Another analysis considers the SPC’s actions as primarily motivated by institutional self-interest and less influenced by party leadership or legal reform ideologies such as professionalism or populism.⁸

This analysis of the case guiding mechanism seeks to add another dimension to the literature on judicial reform in China. It strengthens the views of those who opine that the SPC continues to pursue the goal of judicial professionalism whilst accepting that the focus of judicial reform has shifted to develop a populist attitude of the judiciary. For the purpose of this study, “judicial professionalism” means that courts are staffed and operated by legally trained judges and the influence of non-lawyers or extra-legal concerns on adjudication is kept to a minimum. It is argued that the SPC develops guiding cases as a tool that serves to consolidate its status vis-à-vis other state organs and political directives of the Chinese Communist Party (CCP) as articulated by the Political-Legal Committee of the Central Party Committee (zhonggong zhongyang zhengfa weiyuanhui 中共中央政法委员会).

By way of introduction, this article commences with a debate on judicial reforms. It then explores the development of guiding cases and the scope of their authority. This article addresses form and structure of guiding cases and how they are drafted and adopted. The SPC’s motivations that underlie the introduction of guiding cases, its use of populist rhetoric to advance professionalism and the impact of guiding cases on the judiciary are then examined in this study.

Assessing the populist turn of judicial reform

Over the past two decades, courts have blossomed into specialized legal institutions that are staffed by legally trained judges. In line with the global trend towards judicialization, Chinese courts have expanded their jurisdiction and the caseload has proliferated significantly.⁹ Rather than existing as mere tools of the party-state, courts resemble more closely neutral fora of dispute resolution. Under SPC president Xiao Yang 肖扬 reform measures envisaged in the Five-Year Plans of 1999 and 2005 were designed to improve competence, fairness and efficiency of the judiciary. Reforms focused on trial procedures, rules of evidence, the requirements for re-trial, simplified trial procedures, internal court management and

⁷ Ip 2011, 374-75.

⁸ Zhang Taisu 2012, 1.

⁹ Peerenboom 2008, 7-10.

enforcement of judgments, legal training and performance assessment of judges.¹⁰ The introduction of a national judicial exam in 2002 has unequivocally contributed to the improved level of education of members of the judiciary, who are now required to possess bachelor degrees prior to sitting the judicial exam.¹¹ Greater competence of judges has led to well-reasoned judgements and to the development of professional identity. However, reforms have been noted to be less successful in certain areas, such as enforcement of judgements, where problems lie beyond the reach of courts. With their increased role in society, considerable pressure has been exerted upon courts by populist demands for justice by the media, petitions and protests.¹²

Following the 17th Party Congress in 2007 and changes in the leadership amongst the higher echelons of the SPC in 2008, which placed the Political-Legal Committee member Wang Shengjun 王胜俊 at the head of the court, the direction of previous court reforms changed. The Political-Legal Committee adopted a new document on judicial reform that set the tone for the third Five-Year Reform Plan of the Judiciary.¹³ The plan emphasises a “balanced development” of judicial institutions (public security organs, the procuratorate and the courts) and criminal justice policy. Rhetorically, all reform steps are tied to the “needs of the masses” in order to stress the judiciary’s responsiveness to popular demands. Emphasis on party leadership and political mobilisation of judges manifests itself in the slogan of the “Three Supremes”, according to which the supremacy of the CCP, the supremacy of the interest of the people and the supremacy of the constitution and law should be upheld. Judges are reminded of the need to consider the social and political consequences of their judgments. To achieve a “harmonious society” and social stability, mediation is regarded as a more adequate tool than litigation. In practice, this mediation first policy is implemented by an incentive based system that places judges under pressure to resolve disputes via mediation. However, courts have found ways to undermine the mediation policy by manipulating case statistics.¹⁴ Despite its turn to populism, the SPC did not abandon the aim of achieving “efficiency and

¹⁰ Liebman 2007, 11.

¹¹ Ahl 2006, 183-84.

¹² Liebman 2009, 25-26.

¹³ “Zhonggong zhongyang zhengzhi weiyuanhui guanyu shenhua sifa tizhi he gongzuo jizhi gaige ruogan wenti de yijian” (“Opinion of the Central Party Committee Political-Legal Committee on several questions of deepening reform of the judicial system and working mechanisms”) of 28 November 2008; “Renmin fayuan disange wunian gaige gangyao 2009-2013” (“Third Five-Year Reform Plan of the People’s Courts 2009-2013”) of 17 March 2009.

¹⁴ Fu and Cullen 2011, 53.

fairness”. Different layers of reformation with competing reform goals such as populism and professionalism make an assessment of the reform shift difficult. Some critics regard it as a “turn against law” that rejects judicial reforms of the past and attempts to replace formal law and court adjudication by Maoist-style mediation practices. Pursuant to this view the SPC strictly implements Party orders that are driven by social stability concerns.¹⁵ Others concede that under the conditions of a single-party state, reliance on ideology and strong party leadership can generate significant results in areas where legal professionalization alone cannot provoke change.¹⁶

It is more convincing to see the SPC’s shift to populism, not as resulting from true ideological commitment, but as a change in official rhetoric that helps the court to avoid criticism by other party-state actors. Adhering to mass-line rhetoric allows the SPC to pursue reform measures in other areas that serve its institutional self-interest.¹⁷ Renewed emphasis on mediation and the social effects of law is in line with revolutionary and pre-revolutionary traditions. However, the use of revolutionary language has more to do with strengthening legitimacy with the Party and the public than with the true revival of Maoist practices.¹⁸

Development of Guiding Cases

Judicial reform in China is predominantly carried out in a top-down manner. In designing the development of judicial reform in five-year plans, the SPC acts on the basis of guidelines of the CCP, which are determined for the field of law by the Political-Legal Committee. The Second Five-Year Plan of 2005 provided for the establishment of a case guiding system. According to the plan, cases with guiding character serve as a standard of unified legal application and offer guidance to lower courts in the course of adjudication. It is further stipulated that the SPC is primarily responsible for adopting normative documents to establish a system of guiding cases and the standards and procedures for selecting and editing such cases.¹⁹ As early as in 2005 the SPC Research Department (Zuigao renmin fayuan yanjiushi 最高人民法院研究室) began to conduct surveys on guiding cases and published a first draft in April 2006, which was circulated among judges and law professors. Since the end of 2007, drafts have also been submitted to the National People’s Congress Standing Committee in order to solicit views.²⁰ Finally, the SPC adopted the Guiding Cases Regulations in

¹⁵ Minzner 2011, 935-39.

¹⁶ Trevaskes 2011, 316.

¹⁷ Zhang Taisu 2012, 7-9.

¹⁸ Liebman 2011, 184.

¹⁹ “Renmin fayuan di’erge wunian gaige gangyao 2004-2008” (“People’s Courts Second Five-Year Reform Plan 2004-2008”) of 26 October 2005.

²⁰ Fazhi Ribao 2011a.

November 2010.

Though ancient Chinese law is generally associated with codified law, adjudicators also considered previous decisions in imperial China. For example, Qing dynasty collections of penal cases, which consisted mostly of cases decided at the central level by the Imperial Board of Punishments, were used in legal reasoning but did not evolve into binding precedents since it was considered that their binding force would have restricted imperial authority.²¹

When the SPC started to publish its official Gazette (Zuigao renmin fayuan gongbao 最高人民法院公报) in 1985, it also included “typical cases” (dianxing anli 典型案例) to guide lower courts’ adjudication. Before 1985 the SPC handed down cases to lower level courts in the form of documents with red letterheads (hongtou wenjian 红头文件), which were not published. It is argued that the typical cases already constituted a kind of case guidance mechanism.²² However, the contents of typical cases are often substantially changed and adapted to the needs of the education of inexperienced judges and in general the publication of typical cases are not intended to be for the purpose of interpreting the law.²³ Even if judges base their judgment on such cases, typical cases are not cited in court decisions.²⁴ Judges retain the discretion of whether to follow typical cases when they decide cases that raise the same issues of law.²⁵

About a decade ago, various local courts started to establish case guiding mechanisms including the High People’s Court of Tianjin (2002), the Zhongyuan District People’s Court of Zhengzhou (2002), the Intermediate People’s Court of Zhengzhou (2003), the Intermediate People’s Court of Chengdu (2003), the High People’s Court of Jiangsu (2003) and the High People’s Court of Sichuan (2004).²⁶ The Zhongyuan District People’s Court issued Regulations on the Realisation of the Precedent Decision System to be applied on the adjudicative work of all judges within this court. Pursuant to Article 4 of the Regulations, judges who decide similar cases have to make their decisions by “consulting precedent decisions”. If a judge is of the view that a precedent decision should not be consulted, the judge must submit the issue to the adjudication committee for decision. If ignoring a precedent decision without legitimate reason causes an incorrect decision, the behaviour of

²¹ Wang Zhiqiang 2005, 340-41, 343; for earlier practice of precedent see Ho 2010, 153-169.

²² Cui 2006, 146.

²³ Wei 1997, 99.

²⁴ Zhang Rong 2009, 25.

²⁵ Jin 2012, 150.

²⁶ Kuang and Yan 2009, 62; Feng 2010, 81.

the judge will be sanctioned.²⁷ Similar regulations of the Tianjin High People's Court provide that precedents (panli 判例) have “guiding” and not “regulating” character. Judges of all levels are required to consult precedents thoroughly when adjudicating civil or commercial cases but may not cite precedents as the basis of their decision in the judgement.²⁸ This experimentation with guiding cases in local courts is an example of horizontal interaction between judges and courts that in turn lead to bottom-up innovation and add a new dimension on the guidance provided to lower courts by the SPC.²⁹ It is not clear whether the SPC has actively encouraged these local experiments from the outset or has simply just tolerated them. Ultimately, in the SPC Opinion on the Relationship between Higher and Lower Courts of 2010 it is stated that Higher People's Courts can, within their jurisdiction, publish “reference cases” (cankaoxing anli 参考性案例) for lower courts.³⁰ The Guiding Cases Regulations do not recognize guiding cases adopted by courts other than the SPC. However, the 2011 SPC Notice on the First Set of Guiding Cases clarified that High People's Courts are permitted to provide guidance on the trial work of the courts within their respective jurisdictions by issuing “reference cases” or guidance in another form.³¹ The SPC accepts that High People's Courts do take measures towards consistent adjudication within their jurisdiction. At the same time, the SPC intends to establish a hierarchy between national “guiding cases” and local “reference cases”.

In order to adopt Guiding Cases Regulations and the first set of guiding cases, the SPC was forced to overcome certain resistance within the party leadership and other state organs. The five years that passed between the reference to guiding cases in the Second Five-Year Reform Plan for the judiciary of 2005 and the adoption of the Regulations by the end of 2010 indicate that the plan was shelved during the first years of the Wang Shengjun presidency. Eventually, the case guiding mechanism was not only established within the court system but also in the Supreme People's Procuratorate and the Ministry of Public Security.³² It is difficult to

²⁷ “Zhengzhou shi Zhongyuan qu renmin fayuan guanyu shixing xianli panjue zhidu de ruogan guiding” (“Several regulations of Zhengzhou Zhongyuan District People's Court on the realization of the precedent decision system”) of 25 July 2002.

²⁸ “Tianjin shi gaoji renmin fayuan guanyu zai minshangshi shenpan zhong shixing panli zhidao de ruogan yijian” (“Several views of the Tianjin High People's Court on the realization of guidance by precedents in the adjudication of civil and commercial cases”) of 9 October 2002.

²⁹ Liebman 2011, 169.

³⁰ Article 9 of the “Zuigao renmin fayuan guanyu guifan shangxiaji renmin fayuan shenpan yewu guanxi de ruogan yijian” (“Several opinions of the SPC on the regulation of the relationship of higher and lower People's Courts in adjudication”) of 28 December 2010.

³¹ “Zuigao renmin fayuan guanyu fabu diyipi zhidaoxing anli de tongzhi” (“Notice of the SPC on the release of the first set of guiding cases”) of 20 December 2011.

³² “Zuigao renmin jianchayuan guanyu anli zhidao gongzuo de guiding” (“Regulations of the Supreme People's Procuratorate on the work of guiding cases”) of 29 July 2010; Renmin Jiancha 2010.

imagine how guiding cases work outside of courts. Indeed, the decision to introduce guiding cases in all three branches of the judicial system reflects the reform principle of “balanced development” requiring the development of their institutional authority as a group and synchronicity under CCP leadership.³³ It was reported that the first set of cases to be adopted as guiding cases by the SPC Adjudication Committee was submitted in February 2011.³⁴ Yet it took the SPC until December 2011 to publish the first four guiding cases. The tardy progress of selecting and deciding on the cases indicates that the SPC again encountered resistance to its reform project. It was pointed out that members of the National People’s Congress (NPC) procrastinated because they feared that the power of the SPC to select and publish guiding cases would interfere with the law-making power of the legislature.³⁵ Compared to the Regulations on Guiding Cases, the language of the Notice to which the first set of guiding cases was attached is more politicised as it refers to a case guiding system with “Chinese characteristics”, emphasising the “unity of legal and social effects of court decisions” and refers to “social stability and harmony”. The politicised tone of the Notice seems to be intended to appease the critics of the case guiding mechanism. The difficulties that the SPC was forced to overcome in establishing the case guidance system indicate that the Court had to manoeuvre considerably in order to acquire the political support for this reform initiative.

Scope of Authority of Guiding Cases

The core feature of guiding cases is their “effect” or “scope of authority”. The SPC can only achieve its goal of consistent interpretation of law throughout the court system if it vests guiding cases with binding authority, irrespective of whether they become legally or factually binding on lower courts. Without binding authority, guiding cases would not be any different from “typical cases” and the effort of introducing a new mechanism would be in vain. However, the SPC faces great difficulty in attaching binding authority to guiding cases, which is why their authoritative function is yet unclear.

The Guiding Cases Regulations provide in Article 7 that “people’s courts at all levels shall consult guiding cases issued by the SPC when hearing similar cases.” To “consult” (canzhaohao 参照) appears to indicate a lesser degree of authority than that of a legally binding precedent. Such a conclusion can be drawn by analysing this term in other statutory contexts. For

³³ Trevaskes 2011, 318.

³⁴ Fazhi Ribao 2011a.

³⁵ The SPC had to make several submissions to the NPC Standing Committee before the Standing Committee approved the establishment of the case guiding mechanism. Wang Quanbao 2012.

example, the Administrative Litigation Law uses this term in Article 53 (1).³⁶ The provision states that courts shall consult administrative rules (xingzheng guizhang 行政规章) when trying administrative cases. In contrast, courts shall apply laws, administrative regulations and local regulations as a basis in administrative cases.³⁷ In Article 53 (1), the term “to consult” connotes that courts are not strictly bound by administrative rules in the sense that they may examine whether the relevant administrative rules conform to higher ranking legislation. Only if the legality of an administrative rule is confirmed, may courts apply administrative rules as a legal basis.³⁸ “Apply” does not empower courts with that option. In the context of the Administrative Litigation Law, “consult” is contrasted with “apply” and indicates a lesser authority of administrative rules. Although the context of the Guiding Cases Regulations is quite different, applying the specific terminology indicates that guiding cases are not legally binding.

Most legal scholars endorse the official terminology of “cases with guiding character.” Some do this simply for the reason that the term “guiding case” is “safe” because it is easily accepted by decision-makers and fits “Chinese circumstances” (guoqing 国情).³⁹ However, some authors criticise the term “case” (anli 案例) as too wide and prefer instead the notion of “precedent” (panli 判例) which specifically relates to a legal dispute decided by a court.⁴⁰ The term “precedent” is normally associated with binding precedents as applied in common law legal systems, where cases are sources of law and can be directly referred to as a legal basis of a court decision. Hence the particular adoption of the term “case” clarifies that the SPC does not intend to establish a system of binding precedents in that sense. The use of the adjective “guiding” is intended to connote that guiding cases belong to the realm of application of law and not to law-making.⁴¹ The aim of establishing a Chinese case guiding system is to “learn from useful elements of the binding precedent system in order to complement the existing system of statutory law” and to concord with the continental legal tradition.⁴² The opposing view postulates that guiding cases can be applied as the legal basis of a decision. It is argued that the legal principle that is embedded in a “guiding case” (caipan guize 裁判规则) must be observed by judges. Judges of higher ranking courts can either change the decision or remit it for retrial if judges make decisions without taking into account

³⁶ “Zhonghua renmin gongheguo xingzheng susongfa” (“PRC Administrative Litigation Law”) of 4 April 1989.

³⁷ Article 52 (1) of the Administrative Litigation Law.

³⁸ Yao 2008, 53-57.

³⁹ Li 2009, 60.

⁴⁰ Xia and Wu 2010, 137

⁴¹ Sun 2010, 81; Liu Zaihui 2008, 41.

⁴² Liu Zuoxiang and Xu 2006, 28.

the relevant guiding case.⁴³

The majority view among legal scholars is that guiding cases are not legally binding on lower courts applying the rationale that they do not constitute a source of law. However, this does not exclude the possibility that guiding cases are factually binding on lower courts, i.e. court decisions will be overturned by a higher level court if decisions do not properly take into account guiding cases. Court decisions can only be quashed on appeal or retrial due to ignoring or to misinterpreting guiding cases if judges are required to indicate, at least in the reasoning part of the judgment,⁴⁴ why they followed or did not follow a certain interpretation of the law.⁴⁵ Citing guiding cases in the decision part of a judgment would indicate that it should be treated like a source of law; to cite it in the reasoning part does not make this implication.

The imperative question is whether judges are actually permitted to cite guiding cases in the reasoning part of judgments. In general, Chinese courts do not cite court decisions or scholarly writings in their judgments. In 2009 the SPC issued Regulations on the Citation of Legal Documents in Judgments.⁴⁶ Neither the Citation of Legal Documents Regulations nor the Guiding Cases Regulations provide an express rule on this issue. The Citation of Legal Documents Regulations contains a catch-all clause that applies to “normative documents” other than those mentioned in the Regulations. Such “normative documents” can be taken as a basis of reasoning in a ruling according to the specific needs of the trial and in circumstances where the court affirms that the relevant normative documents comply with higher ranking legislation.⁴⁷ However, “normative documents” denote abstract rules and exclude individual decisions by courts. The court is either required to construct “normative documents” broadly that they encompass guiding cases or otherwise the SPC adopts a clarifying notice that obligates courts to cite guiding cases in the reasoning part of their decisions.

Official statements from the SPC send conflicting signals. To illustrate further, in 2007 the director of the SPC Research Department Shao Wenhong 邵文红 affirmed that guiding cases are not binding precedents and judges are not allowed to cite them in their judgments,⁴⁸

⁴³ Jiang and Chen 2008, 35.

⁴⁴ Chinese judgments distinguish between a decision part and a reasoning part. The decision part includes the applicable sources of law and the reasoning part gives the detailed grounds of the decision. The reasoning part typically starts with “this court is of the opinion...” (benyuan renwei 本院认为).

⁴⁵ He Xuxu 2008, 75; Huang and Zhao 2009, 63.

⁴⁶ “Zuigao renmin fayuan guanyu caipan wenshu yingyong falv, fagui deng guifanxing wenjian de guiding” (“Provisions of the SPC on the citation in judgments of such normative legal documents as laws and regulations”) of 26 October 2009.

⁴⁷ Article 6 of the Citation of Legal Documents Regulations.

⁴⁸ As cited in Zhou 2009, 143.

whereas a representative of the SPC Research Department explained in an interview in December 2011 that judges are allowed to cite guiding cases in the reasoning part of judgments.⁴⁹ Yet it is not sufficient to allow lower courts to cite guiding cases in order to achieve consistent adjudication within the judiciary; there must be an express obligation to do so.

There are various reasons why the SPC is reluctant to take an unambiguous stance on the scope of authority of guiding cases. First, there is the expectation of cultural conservatism that requires presenting legal reforms as innovations that build on Chinese legal traditions and which forbids portraying reforms as legal transplants originating in the west. This makes it very difficult for the SPC to insist on specific effects of guiding cases. Any clearly binding authority of guiding cases would imply a development towards common law systems and indicate an “Americanization” or “Westernization” of Chinese law. Second, the SPC has so far been very careful to avoid appearing as an advocate of judicial activism. In 2001 the SPC attempted to judicialize the constitution in the Qi Yuling case.⁵⁰ Though the SPC had not claimed the power to conduct constitutional review of legislation, an SPC judge publicly compared the decision with the American case of *Marbury v. Madison* of 1803.⁵¹ The SPC decision in the form of a “reply” to a High People’s Court was repealed in 2008. The SPC’s experimentation with the judicial application of the constitution eventually failed because it was regarded as a threat to the power of the NPC and the supremacy of the CCP.⁵² If the SPC insisted on the binding authority of guiding cases, it may easily be regarded as a usurpation of the NPC’s law-making power and an attempt to fundamentally change the constitutional power structure.

Adoption and Form of Guiding Cases

According to the Guiding Cases Regulations, the following broad criteria apply when the SPC selects guiding cases: it must be a court decision that has taken legal effect and is (1) of general concern in society, (2) the legal provisions are rather general, it is (3) of a typical nature, it involves (4) complex and difficult or new types of issues or (5) other cases which should have a guiding function.⁵³ It is deemed sufficient that a case fulfils one of the five listed conditions in order to be qualified as a guiding case.

⁴⁹ Fazhi Ribao 2011b.

⁵⁰ “Zuigao renmin fayuan guanyu yi qinfan xingmingquan de shouduan qinfan xianfa baohu de gongmin shou jiaoyu de jiben quanli shifou ying chengdan minshi zeren de pifu” (“Reply of the SPC on whether civil liabilities shall be borne for infringement of a citizen’s constitutionally protected basic right of receiving education by means of infringing on the right to a name”) of 24 July 2001.

⁵¹ Yu 2009, 119-120.

⁵² Tong 2010, 669-679.

⁵³ Article 2 of the Guiding Cases Regulations.

The Guiding Cases Office (anli zhidao gongzuo bangongshi 案例指导工作办公室) of the SPC is responsible for the selection, examination and reporting of guiding cases.⁵⁴ Guiding cases are adopted by the SPC Adjudication Committee and are then published in the Gazette of the SPC, the website of the Court as well as in the People's Court Daily.⁵⁵ The trial divisions of the SPC may recommend their own decisions or the decisions of local courts at various levels to the Guiding Cases Office. High People's Courts may also make such recommendations of their own decisions or the decisions of the local courts within their respective jurisdiction.⁵⁶ Intermediate courts may only recommend decisions via high courts and basic level courts may do so only through intermediate courts and high courts.⁵⁷ The specific group of persons who are qualified to recommend cases includes persons from all levels of society who are interested in the adjudication and enforcement work of courts. The judicial interpretation lists, as examples, members of People's Congresses and People's Political Consultative Conferences, legal scholars and lawyers. However, those persons may only submit their recommendation to the particular court that actually issued the relevant decision.⁵⁸

The SPC published the first guiding cases as an annex to the Notice of December 2011, a second batch of four guiding cases was adopted in April 2012.⁵⁹ The Notice contains a preamble, a first part entitled "accurately understanding the spirit of guiding cases", a second part on "effectively using guiding cases" and an annex with the four edited cases. The preamble points out that the case guiding system implements reform measures of the CCP Central Committee and that it has "Chinese characteristics". The first part makes a brief introduction of the four guiding cases. Within the introduction of each case, the first sentence sets out the facts of the case. The second sentence commences with "as affirmed in this case" and lays down the principle of law that has been applied to the facts. The introduction concludes with a brief reasoning part that defines the objectives of the principle of law that

⁵⁴ Article 3 of the Guiding Cases Regulations.

⁵⁵ Article 6 of the Guiding Cases Regulations.

⁵⁶ Articles 4 (1) and (2) of the Guiding Cases Regulations.

⁵⁷ Article 4 (3) of the Guiding Cases Regulations.

⁵⁸ Article 5 of the Guiding Cases Regulations.

⁵⁹ "Zuigao renmin fayuan guanyu fabu diyipi zhidaoxing anli de tongzhi" ("Notice of the SPC on the release of the first set of guiding cases) of 20 December 2011. The second group of guiding cases was published on the website of the SPC "Zuigao renmin fayuan fabu di'erpi zhidaoxing anli" ("SPC publishes the second set of guiding cases"), 13 April 2012, http://www.court.gov.cn/xwzx/fyxw/zgrmfyxw/201204/t20120414_175938.htm. Accessed on 1 September 2012. The English translations of guiding cases are available online at the Stanford University's China Guiding Cases Project website: <http://cgc.law.stanford.edu/guiding-cases/>. Accessed on 1 September 2012.

has been affirmed in the case.⁶⁰ The second part instructs the courts of all levels to organize the study of guiding cases by judges. Though the Notice requires judges to apply “scientific trial methods” and to “refer strictly to guiding cases” when trying similar cases, it does not elaborate on the specific methodology that judges should apply when referring to guiding cases. Pursuant to academic literature, courts are not required to refer to guiding cases if there is an applicable rule that is clear. However, if there is no rule that can be applied, if there are various rules that contradict each other or if the rule is unclear, guiding cases shall be used as a legal basis or as a reference. The next step consists of identifying an applicable guiding case and requires a judge to determine whether the cases are similar. In the final step, the rule contained in the guiding case must be determined and applied to the case at hand.⁶¹

Guiding cases are published according to the date of adoption by the SPC Adjudication Committee. They list keywords, key points of the judgment, relevant legal provisions, basic facts, result of the decision and the reasoning of the judgment. The text of the guiding cases is not identical with the original judgments but is heavily edited and shortened by the SPC in order to fit the standard format of guiding cases and to clarify the key points of the judgment.

The small number of eight guiding cases adopted so far, in addition to the nature of cases that were selected, is a clear indication that the SPC proceeds with utmost caution. The first set of guiding cases deals with two issues of civil law and procedure, disputes on contracts with multiple property agencies and the relation between enforcement of judgments and settlement agreements. The other two cases of the first set of guiding cases are criminal law cases and deal with the crime of accepting bribes and the restriction of commutation of sentence in a death penalty case. The second batch of guiding cases includes two cases on administrative penalties, one case on a construction project contract and one on a corporate dissolution dispute. The choice of cases is balanced in terms of the outcomes of the cases and the areas of law they were selected from. There is also no obvious connection to populist justice in the sense that the law is interpreted in response to the “needs of the masses”.

Guiding cases are drafted in technical legal language, have complex structures and substantial contents, which makes them quite different from policy directives or statutory rules. Guiding cases can only be properly understood and applied by legally trained professionals; they are a

⁶⁰ The first guiding case is “Shanghai Zhongyuan wuye guwen youxian gongsi su Tao Dehua” (“Shanghai Centaline Property Consultants Limited v. Tao Dehua”), a dispute on an intermediation contract with a property agency. In the introduction to this case the objectives include the protection of the lawful rights and interests of real estate agencies, the promotion of the sound development of the intermediary service market and good faith in transactions, fair competition between real estate agencies, improvement of service quality and protection of consumer rights.

⁶¹ Fang and Lin Men 2010, 65; a similar view is put forward by Wang Liping and Lin Zhixiong 2009, 123.

means of communication between legal professionals, which excludes non-lawyers. There is no doubt that working with guiding cases on a daily basis will improve the professional capacity of judges in lower level courts and will in particular strengthen analytical and argumentation skills.

The Problem of Deciding Like Cases Differently

The central narrative to justify the adoption of guiding cases is that they avoid the principle that “like cases are decided differently” (tong an butong pan 同案不同判). The requirement of a “unified judiciary”, the consistent application of law by courts, is derived from the precept that everyone is equal before the law.⁶² Inconsistent application of law is seen as the main reason of popular dissatisfaction with the judiciary and has led to the perception that court decisions are arbitrary and unfair.⁶³ In late 2009 the CCP Politburo Standing Committee member Zhou Yongkang 周永康, the leader of the political-legal system (zhengfa tixi 政法体系), said that the guiding cases system should be established for such cases in which the “enforcement of law is inconsistent” and to which the “reaction of the masses is relatively strong”.⁶⁴

Media and legal scholars regard the following cases as examples of inconsistent decision-making: In 2002 the Intermediate People’s Court of Qujing sentenced He Peng 何鹏 on charges of theft to life imprisonment for withdrawing 429,700 RMB in total from an ATM although he only had deposited ten RMB in his bank account. The High Court of Yunnan Province affirmed the judgment on appeal. In 2007 the Intermediate People’s Court of Guangzhou sentenced Xu Ting 许霆 to life in prison for theft. He had taken advantage of a technical defect of the ATM that only charged one RMB to his account for every 1000 RMB of cash that he withdrew. In total, he withdrew 175,000 RMB from a number of ATMs. The High People’s Court of Guangdong Province quashed the judgment on appeal and remitted the case. The Intermediate Court sentenced Xu Ting to five years of imprisonment.⁶⁵ Another group of cases are concerned with the area of tort law, particularly the calculation of compensation for personal injury and death. Decisions that have held that the amount of compensation that surviving dependants receive for the deaths of family members depends on

⁶² Article 33 (2) “Zhonghua renmin gongheguo xianfa” (“PRC Constitution”) of 4 December 1982: “All citizens of the PRC are equal before the law.”

⁶³ Zhang Xiaoyan 2010, 181; Wang Xuanwei 2010, 2-6.

⁶⁴ Jiancha Ribao 2010.

⁶⁵ Nanfang Zhoumo 2008. The academic discussion of the two cases has been elaborated on the retroactive effect of guiding cases and the retrial of criminal cases, where a subsequent decision stipulating milder punishment is elevated to a guiding case.

the household registration (huji 户籍) of the victim have been severely criticised. A court in Beijing's Chaoyang district awarded compensation in a judgment of 13 April 2006 to the family members of two victims of a car accident. The family of the victim with a permanent registration in the countryside received 170,000 RMB whereas the family of the victim who was permanently registered in the city received an amount of 410,000 RMB.⁶⁶

On closer scrutiny of the cases it appears questionable that the perceived unjust outcomes are due to incorrect interpretation and application of law. The circumstances in the two theft cases are indeed different, which may justify differing sentences, although the difference between five years and life appears to be far too extreme to be justified by those circumstances. It must be noted that sentencing has been inconsistent across geographical regions and it changed due to policies such as the "strike hard" campaigns.⁶⁷ The SPC together with the High People's Courts of the relevant provinces have adopted sentencing guidelines for theft that stipulate different sentences according to the damage caused and the relevant geographical region.⁶⁸ The regional differences in sentencing are intended and appear to be justified, given different stages of economic development throughout the country. In the cases where the decisions have discriminated according to different household registrations, the legal basis for awarding different amounts of compensation is Article 29 of the Compensation for Personal Injury Interpretation.⁶⁹ The provision stipulates that "compensation for death shall be calculated for 20 years in light of the per capita disposable income of the urban residents or the per capita net income of the rural residents at the locality of the case-accepting court of the last year." It is clear from this provision that the judges in the relevant cases simply applied substantive rules that are as such discriminatory.

It can be argued with some plausibility that the courts decided the cases in precisely the same way that the law and the relevant instructions of higher courts required them to be decided. Consequently, the introduction of a system of guiding cases will hardly improve the popular perception of these unjust court judgments.⁷⁰ In the cases discussed above, the judiciary assumes the blame for unjust outcomes that were caused by law-makers who designed the

⁶⁶ Yang 2010, 273.

⁶⁷ Trevaskes 2002, 673-693.

⁶⁸ "Guanyu shenli daoqie anjian juti yingyong falv ruogan wenti de jieshi" ("Interpretation on several questions of specific application of law in theft trials") of 17 March 1998 and "Guanyu queding daoqie anjian shu'e biao zhun wenti de tongzhi" ("Notice on the problem of determining standards for amounts in theft cases") of the High People's Court of Guangdong Province of 2 May 1998.

⁶⁹ "Zuigao renmin fayuan guanyu shenli renshen sunhai peichang anjian shiyong falv ruogan wenti de jieshi" ("Interpretation of the SPC on several issues concerning the application of law for the trial of cases on compensation for personal injury) of 4 December 2003.

⁷⁰ Wang Quanbao 2011.

rules in a way that produce unjust outcomes. The judiciary could only mitigate unjust results and correct policy decisions that were taken somewhere else in the system if courts acquired a more proactive and powerful role within the constitutional system. However, such “judicial activism” is exactly what the political leadership wants to avoid. This example demonstrates that the SPC uses the rhetoric of responding to the “needs of the masses”, the perceived inconsistent application of the law, where in fact guiding cases may not be able to guarantee just outcomes. It is not however suggested that inconsistent adjudication is not a problem and that guiding cases will not lead to more consistent decisions. Yet, improvements in consistency are expected to take place on a doctrinal or technical legal level, which will hardly result in sensible application for the general public. Thus guiding cases are not the best suited instruments to respond to popular sentiments. As a formal legal mechanism that is embedded in a complex statutory and doctrinal context, the case guiding mechanism also lacks the flexibility that is required by a populist justice approach of adjudication.

The Impact of Guiding Cases on the Judiciary

Court reforms of the Xiao Yang era were largely technical in nature and they were the most successful where professional competences of judges were concerned. However, the improved knowledge of law by judges implies a certain increase in autonomy and authority of courts. While reforms did not fundamentally change the judiciary’s power vis-à-vis other state actors, courts were better positioned to resist certain forms of external pressure⁷¹ and court work had become less politicised.⁷² As a formal legal mechanism, guiding cases do not possess the required flexibility in order to respond swiftly to day-to-day developments and policy changes, i.e. they cannot and are not intended to replace the control of courts by extra-legal measures. On the contrary, they can shield against extra-legal influence. Organs of the CCP, the procuratorate, the relevant higher level court, the People’s Congresses and government organs of the relevant administrative level all can influence lower courts’ decisions.⁷³ The judicial disciplinary system, criteria for assessment of court performance and other aspects of the bureaucratic environment also have an important impact on adjudication.⁷⁴ Although there are informal channels through which interested actors can influence adjudication, such channels are not exclusively available to the SPC for guidance towards consistent decision-making but are open to accommodate different kinds of local interests, which often contradict the aim of consistent adjudication. Guiding cases would create a new channel of

⁷¹ He 2010, 180-195.

⁷² Liebman 2007, 36.

⁷³ Peerenboom 2010, 69-94.

⁷⁴ Minzner 2009, 63-87; He 2009, 1-27.

steering lower court adjudication, which is exclusively open to the SPC.

The guiding case mechanism is also fundamentally distinct from other formal instruments that are at the disposal of the SPC such as abstract judicial interpretations or “replies” (pifu 批复) to requests of high courts relating to the application of law to specific cases.⁷⁵ Judicial interpretations and replies are legally binding on lower courts.⁷⁶ Judicial interpretations fill gaps in statutory legislation and provide detailed rules that clarify and often go beyond the wording of statutes. Through the extensive practice of adopting judicial interpretations, the SPC has acquired a powerful quasi-legislative function. Against this background the concern of NPC delegates of guiding cases interfering with the NPC’s legislative powers is difficult to understand. Yet judicial interpretations may be acceptable for the NPC provided that its members are formally involved in the drafting procedure.⁷⁷ Though delegates of the NPC can propose cases to be adopted as guiding cases,⁷⁸ the Regulations do not provide for further participation of the legislature. Eventually, the legislature and other actors of the party-state have less formal control over the adoption of guiding cases than over the enactment of judicial interpretations.

Whereas under the Judicial Interpretations Regulations delegates of the NPC can submit drafts of judicial interpretations directly to the SPC;⁷⁹ pursuant to the Guiding Cases Regulations even representatives of other state organs cannot recommend certain cases directly to the SPC but are required to turn to the court that issued the relevant decision. A representative of the SPC has explained that the objective of this provision is to put the SPC in a position where it can receive full information on the background of the case and its effects on society, which can only be achieved if the court that actually made the judgment submits the case to the SPC.⁸⁰ Since the SPC could always request such information directly from a lower court, it appears to be a pre-textual argument. In fact, this provision intends to take pressure off the SPC, strengthen the authority of the SPC and the judicial system as a whole in relation to other actors of the party-state.

Whereas judicial interpretations are enacted in a lengthy procedure that normally includes

⁷⁵ Keith and Lin 2009, 223-255; Wei 1997, 87-112.

⁷⁶ Article 5 of the “Zuigao renmin fayuan guanyu sifa jieshi gongzuo de guiding” (“Regulations of the SPC on the work of Judicial Interpretations”) of 26 March 2007.

⁷⁷ Pursuant to Article 18 of the SPC Regulations on Judicial Interpretations, the SPC has to submit drafts of interpretations to the special committees of the National People’s Congress or the working divisions of the Standing Committee for consultation of views.

⁷⁸ Article 5 of the Guiding Cases Regulations.

⁷⁹ Article 10 of the “Zuigao renmin fayuan guanyu sifa jieshi gongzuo de guiding” (“Regulations of the SPC on the work of Judicial Interpretations”) of 26 March 2007.

⁸⁰ Fazhi Ribao 2011b.

consultations with other state organs,⁸¹ the procedure of selecting guiding cases is far more flexible. The SPC does not need to draft legal texts from scratch and take into account, similar to a legislator, the interests of all concerned parties. The court can simply select from the rich material of decided cases and promote any court decision to the rank of a guiding case. This puts the SPC in a position to react promptly to legal developments with a formal instrument that is more suitable to solve complex legal problems than judicial interpretations. Moreover, guiding cases allow the SPC to discretely promote legal developments that follow its own long-term institutional interests rather than frequently changing party policies. Given the complex contents of guiding cases, it will be very difficult for non-lawyers to understand and assess their effects. Therefore, the mechanism will be relatively well protected against extra-legal control. The guiding case mechanism will strengthen the SPC, improve its status on the national level, serve as a tool to expand control over lower court adjudication and promote the centralization of the judiciary. Given the historical experiences of Japan, Korea and Taiwan, where the development of the judiciary into independent institutions was linked to their functioning as unified national bureaucracies,⁸² guiding cases may facilitate a similar development in China. Strengthened supervision over lower courts by the SPC in turn will promote judicial professionalism in so far as it reduces the influence of other bodies that are not staffed by legally trained personnel.

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⁸¹ Article 17 and 18 of the "Zuigao renmin fayuan guanyu sifa jieshi gongzuo de guiding" ("Regulations of the SPC on the work of Judicial Interpretations") of 26 March 2007.

⁸² Ginsburg 2010, 247-259.

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