

# Case-Law adopted by China?

**VB** [verfassungsblog.de/caselaw-adopted-china/](http://verfassungsblog.de/caselaw-adopted-china/)

Guest Blogger Mo 30 Jan 2012

By RUIYI LI

*This post was originally posted on UK Constitutional Law Group's [Blog](#) and his reposted here with thanks.*



On the 26<sup>th</sup> of November 2011, the Supreme People's Court of China (SPCC) announced the first set of 'guiding cases': two civil law cases and two criminal cases. This marks the establishment of the guiding cases system in China. What is a guiding case? A guiding case is a judgement selected by the SPCC from judgments already handed down by courts – both lower level courts and the SPCC itself. Once the judgment has been selected by the SPCC as guiding case, the lower courts in the Chinese legal system are then required to take account of it. This introduces something comparable to, but distinct from, the Common Law doctrine of precedent into the Chinese system, and may lead to a profound shift from previous practice. Generally speaking, China has adopted the model of a civil law legal system, without a doctrine of precedent. This is because, in part, the primacy of the National People's Congress, the principle legislative body in China, is taken to exclude a doctrine of precedent. Only the National People's Congress can create law. If the Courts can make law in their judgments through the interpretation of legislation, such interpretation would encroach upon the sovereignty of the NPC. As this note will explain, the solution of the 'guiding case' attempts to preserve this feature of the Chinese Constitution, whilst giving some power to shape the law to the judicial branch.

Art. 2 of [the Work Rules in Regard to Guiding Cases](#) (Work Rules) provides a definition of the type of case that may be chosen by the SPCC as part of the guiding case system. The judgment of the guiding case must be already in force, that is, it must have already been decided by a court, and the case must possess at least one of the following features: (1) the case has received broad social attention, (2) the legislation applied in the case itself has been drafted in very broad terms, (3) the type of dispute is a paradigm, (4) the case raises difficult, complicated, or new issues, (5) or, finally, a case that does not fall within any of the former four but nevertheless merits a guiding function.

## Four guiding cases

Four judgments were chosen by the SPCC in the first round of the guiding case system.

[Centaline Property Agency Ltd. China. Shanghai v. Tao Dehua](#) concerned a disputed brokerage contract arising in the dealing of second-hand properties. This judgment held that a property sale contract is invalid if the purchaser who has committed to a brokerage contract tries to exclude the agent who organised the deal and buy direct from the seller. The Court allowed an exception to this rule where the same housing stock information had been released by more than one agency – in this instance, the purchaser is entitled to deal with the one who offers the lowest price and best service. The Court aimed to protect the lawful rights and interests of the brokering agency, promote the healthy development of brokering service market, maintain the dealing in good faith, encourage fair competition among brokering agencies, enhance the quality of service, and protect consumers' lawful rights and interests.

The second case is [Wu Mei v. Meishan Xicheng Paper Co., Ltd. of Sichuan Province](#). It deals with legal effect of settlement agreements signed by the parties outside of the court over a disputed contract of sale. The Court held that if the litigants have reached a settlement agreement before the judgment is delivered in the trial of second

instance, the settlement agreement is binding. If one party does not perform the settlement agreement or performs it partly, the other side can appeal to the court to enforce the judgment given in the trial of first instance. In this way, the freedom of disposing the object in issue enjoyed by litigants has been respected, whilst those rules of abiding by the agreement reached have been emphasized and the authority of the first court's judgment has been preserved.

No. 3 guiding case *PAN Yumei and CHEN Ning, A Bribe-Accepting Case* concerns corruption, expanding the offence to include some new situations: the position of civil servants who receive bribes indirectly by being registered as a co-founder of a company without contributing anything to its establishment, or who receives bribes directly but either does not act on those bribes or subsequently returns the money. Such indirect means, or delayed honesty, does not affect the verdict of corruption.

The last decision of *WANG Zhicai, An Intentional Homicide Case* concerns death sentence reprieves. In this case the defendant had murdered the victim after she refused his offer of marriage. The defendant was initially sentenced to death by the Higher People's Court. But all death sentences cases must be reviewed by SPCC before execution. After the SPCC reviewed his case, the murderer was awarded a reprieve. Because the killing was undertaken in a moment of passion, the death penalty was not appropriate. Considering the emotion of victim's family, SPCC also decided that para. 15 of the 8<sup>th</sup> amendment of Criminal Law is applicable in the case which requires a minimum tariff of twenty years for murder. The SPCC explained why this case was significant. On three occasions the SPCC cited the importance of the role of the criminal law in achieving social harmony. The emotions of the victim's family and other ordinary people should be considered by the court. Whilst the death sentence should be commuted, the murderer would still be subject to severe punishment.

### **Three steps to establishing the guiding case system.**

The SPCC has been preparing for the introduction of a guiding cases system for a very long time. The guiding cases system was first announced in the 2<sup>nd</sup> Five-Years Reform Outline for People's Court (2004-2008) (2<sup>nd</sup> Reform Outline) on the 26<sup>th</sup> of October 2005. The aim of this reform was to ensure the unified application of legislation, using a system of guiding cases to produce coherence between courts. Proposal Number 13 of the 2<sup>nd</sup> Reform Outline says:

*“Establishing and improving the guiding cases system: Recognising the role that guiding cases can play in unifying the application of legislation – by directing the lower courts’ operation, enriching and developing their jurisprudence and so on – the SPCC shall lay down the decisions in regard to guiding cases system, and shall determine the standard for, and the process of, cases selection, the way to release guiding cases and guiding rules and so on.”*

The Work Rules was issued by the SPCC on the 26<sup>th</sup> of November 2010. It may be seen as the second step to the establishment of the guiding cases system. The Work Rules specify the mechanism through which the guiding cases are selected. The SPCC is the only body with authority to determine which cases should be guiding cases and to promulgate them (Art. 1 of the Work Rules). Based on Art. 3 of the Work Rules, a Guiding Cases Affairs Office (GCAO) has been set up, which is an office of the SPCC. The GCAO is in charge of selecting and investigating guiding cases. All the divisions of SPCC can recommend cases to GCAO directly, but other bodies can also suggest cases to the GCAO. The Higher People's Courts (HPC) and the Liberation Army Military Court (LAMC) can recommend cases to GCAO after HPC or LAMC's judicial committee discusses their significance. The Intermediate People's Court (IPC) and Basic-level People's Court (BPC) only can recommend cases to GCAO indirectly via referral through their superior courts. Individuals may recommend any case which they think should be guiding case to the Court which delivered that case. After selection by GCAO, the GCAO then reports its opinions on the merits of the case to the Judicial Committee of SPCC which will finally decide which one should be

guiding case.

The third step toward the new system was taken by the SPCC by issuing an order to lower courts on 20<sup>th</sup> of December 2011. This order made two points. The first part seeks to ensure that all the courts accurately understand the guiding spirits, the *ratio*, of the four cases. This part sets out the four cases and specifies the guidance provided by each case. The second part requires that the lower courts should bring the guiding cases into play, setting out the duties of the lower courts in the guiding case system. In particular, the Supreme Court limits the capacity of the Higher People's Court to promulgate guiding cases. By referring to the guiding cases system, the HPC may release some cases to guide its lower courts, but may not use 'guiding cases' or similar phrases to avoid confusing the cases announced by HPC with cases announced by SPCC. This measure introduces a limited form of something like a hierarchy of judicial precedent into the system. Both the SPCC and HPC have some power to pick cases that influence lower courts, but the decisions of the SPCC are given higher legal status than those of the HPC. Following this order, the guiding cases system has been established in China

## The nature of guiding case

The guiding cases system established in China is different from the Common Law understanding of precedent. Guiding case and precedent are different, not only in their expression but also in their nature. Art. 7 of the Work Rules provides that all courts should *refer* to guiding cases when they adjudicate similar cases – but this is the only provision that concerns the effect of guiding cases. Guiding cases must be referred to by the lower court, but they are not, in themselves, authoritative. In other words, the *ratio decidendi* of guiding cases cannot be the legal ground of the lower court's judgment, but it can be cited as a reason for explaining the judgment. The possible legal bases of judgment are not expanded: the text of the Codes is still the only binding legal authority. The judgment of guiding case is more like an interpretation of specific provisions, through which the higher courts clarify vague provisions and fill in legal loopholes.

The differences between the guiding case system and precedent are rooted in the constitutional settlement contained in the Constitution of China. The National People's Congress (NPC) enjoys complete sovereignty. Courts in China have no power to review primary legislation or secondary legislation, let alone the power to change or modify legislation. Thus, under the Constitution of China it is impossible for the judges to make law, whilst law-making is the essence of the Common Law tradition. Guiding cases system is a judicial reform, but any reform must still be accord with this constitutional settlement. For this reason, the SPCC created a *guiding case system* instead of *precedent* which, crucially, does not formally empower the SPCC to change or develop the law. This constitutional concern might be another reason why the SPCC avoided using the sensitive word *precedent* in setting out the new system.

## Challenges of the new system

The new system attempts to secure the advantages of both the Common Law and civilian systems. The guiding cases system may bring some benefits to China's legal system, perhaps by enhancing the faith of the masses in the judiciary, but it is a radical departure for the judiciary in China. The first challenge is how the lower courts will use the guiding cases. Some commentators are worried that the judges may try the cases mechanically. There is no detailed guideline of how to determine which guiding cases to follow and precisely what significance these cases should be given, a lack of guidance which increases the practical difficulties for a judiciary that has been trained in the context of civil law. Normally judgments handed down by Chinese courts are very brief, and this is also true of the judgments of the four guiding cases. Thus, there is actually not much content in the judgments for the lower courts to referred to.

The selection of the guiding cases has also been criticized. Some cases that are more typical and more significant than the four handed down have not been selected to be guiding cases. The HPCs recommend 20 cases in total to

the SPCC, but only four were selected. This demonstrates that the SPCC is being very cautious in the beginning. Furthermore, the guiding cases system will not extend to interpretations of the Chinese Constitution. The Constitution of China only can be interpreted by the Standing Committee of NPC, the legislature, and cannot be adjudicated on by the judges. Therefore, there are no judicial decisions on constitutional law in China.

Finally, there is a tension inherent in the new system. As analyzed previously, law-making by judges is constitutionally impossible. It might be argued that the judges are only interpreting the legislation in the judgments – but it is impossible to avoid creation when judges interpret legislation. The creative aspect of interpretation may be translated into a familiar word: *law-making*. Under the surface of the guiding case system is a potential challenge to the constitutional settlement. To avoid this happening, judges may write judgments more rigidly than before, for example adopting the approach of rigid Originalism to interpret the legislation. But if the interpretation very mechanical how will the guiding cases succeed in play a guiding role?

*Ruiyi Li is a post-doctoral researcher at the Law School of Tsinghua University, China.*

---

LICENSED UNDER CC BY NC ND

SUGGESTED CITATION , : *Case-Law adopted by China?*, *VerfBlog*, 2012/1/30, <http://verfassungsblog.de/caselaw-adopted-china/>.