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China: An International Journal, Volume 14, Number 2, May 2016, pp.
44–70 (Article)

Published by NUS Press Pte Ltd

DOI: <https://doi.org/10.1353/chn.2016.0015>



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Functional Analysis of China's Guiding Cases

DENG Jinting

This article starts from the essential differences between the effects of China's guiding cases and precedents of the US Common Law system. Then, it makes a factual study of what guiding cases have achieved in relation to the well-known functions of case law, and finds that guiding cases similarly function to adapt law to social needs and strengthen judicial autonomy. Following that, it adopts a cost-benefit approach to analyse differences in relation to the realisation of those functions, and finds that they can be explained in that approach. It concludes with the understanding that guiding cases serve as a tool of the Supreme People's Court of China, and that there are limitations to their functions and Chinese characteristics.

INTRODUCTION

From 1985 onwards, the Supreme People's Court of China (SPCC) published cases in its gazette for reference by lower courts. Later, it started to compile *Cases of the People's Courts* and *Guide Books of Judicial Cases in China* for all courts to study. Subsequently, various departments of the SPCC, local People's Courts and scholars have produced many treatises and articles about these cases. This forms the foundation on which the guiding case system was formally established. On 26 November 2010, the SPCC issued the Provisions on Case Guidance (hereafter the Provisions), announcing the establishment of the guiding case system in mainland China. Since then, the SPCC has published 44 guiding cases¹ in nine sets. Unlike other cases, guiding cases "should be referred to when adjudicating similar cases" in order to "summarise adjudication experiences, unify application of law, enhance adjudication quality and safeguard judicial justice".²

There are many studies on China's court system and its reform, from judicial independence, autonomy, corruption and horizontal constitutionalism to concrete institutions, including judicial committees and judicial mediation, to gradual legal

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¹ Until 13 April 2016, the SPCC has already published 56 guiding cases. This article studied the first 44 guiding cases issued before the end of 2014. Please also note that the SPCC has issued the Implementation Rules on Case Guidance on 13 May 2015, detailing the rules in the Provisions.

² Article 7 and the Preface, the Provisions on Case Guidance.

reforms brought about by economic transformation.³ Contrary to the previous broad generalisations and stereotypes, nuanced and empirical research is recommended now.⁴ Drawing on existing studies regarding the general legal system, the historical common law in China, the specific guiding case system⁵ and the comparative functional approach,⁶ this article first analyses the differences between the guiding case system and the US Common Law system. It then carries out a factual study of what guiding cases have done in relation to the well-known functions of case law, and finds that guiding cases similarly function to adapt law to social needs and strengthen judicial autonomy. Following that, it uses a cost–benefit approach to find that any differences can be explained in relation to the realisation of the functions. It concludes with a holistic perspective to understand guiding cases as one of the many tools used by the SPCC to realise its functions, and indicates the limits and future developments of guiding cases.

CHARACTERISTICS OF THE US COMMON LAW SYSTEM

The Common Law system was originally formed in England around the 12th century. It was then taken to America in the 18th century. Now, many countries around the world have adopted it. As these systems have evolved differently in many aspects, it is hard to summarise the characteristics of all these systems. Thus, this article only examines the US Common Law system and compares it with the guiding case system in China. Several characteristics are commonly considered necessary and essential for the US Common Law system. First, it is characterised by case law, which is law developed by judges through decisions of the courts. Court decisions are considered to have the same legal force as statutes. Second, it is established on the *stare decisis* principle, which holds that if a similar dispute has been resolved in the past, the court is usually bound to follow the reasoning used and the decision reached in the prior case. Normally, decisions by appellate courts are binding on lower courts in the same jurisdiction, and on future decisions of the same appellate court. Third, courts have the authority to make law where no legislative statute exists.

³ Randall Peerenbeem, *Judicial Independence in China* (Cambridge: Cambridge University Press, 2009); Li Ling, “The ‘Production’ of Corruption in China’s Courts: Judicial Politics and Decision Making in a One-Party State”, *Law and Social Inquiry* (Fall 2012); Fu Hualing, “Chapter 7: Autonomy, Courts and the Politico-Legal Order in Contemporary China”, in *Routledge Handbook of Chinese Criminology*, ed. Cao Liquan, Ivan Y. Sun and Bill Heberton (Abingdon, Oxon: Routledge, 2013); He Xin, “Black Hole of Responsibility: The Adjudication Committee’s Role in A Chinese Court”, *Law and Society Review* (December 2012).

⁴ Randall Peerenbeem, “Introduction”, in *Judicial Independence in China*; Li Fenfei and Deng Jinting, “The Limits of Arbitrariness in Anticorruption by China’s Local Party Discipline Inspection Committees”, *Journal of Contemporary China* 25, no. 97 (January 2016): 75–90.

⁵ Su Yigong, “Discovering the Chinese Common Law: The Formation of the Loan Contract in Qing Dynasty”, *Frontiers of Law in China* 10, no. 2 (June 2015): 365–98; Eric C. Ip, “The Supreme People’s Court and the Political Economy of Judicial Empowerment in Contemporary China”, *Columbia Journal of Asian Law* (Spring 2011): 409–11.

⁶ Mathias Reimann and Reinhard Zimmermann, eds., *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006).

DIFFERENCES BETWEEN CHINA'S GUIDING CASES AND US COMMON LAW

In identifying the differences, a factual approach has been adopted to study the actual activities concerning the generation and the effect of guiding cases rather than the manifest functions and purposes. The author discovered that China's guiding case system appears to be different in several respects from the US Common Law system.⁷

First, although both are based on cases and real judgements concerning specific factual situations, guiding case decisions become binding towards the general public only after being selected and reissued by the SPCC, while precedents in the Common Law system become law upon being issued by the trying court, either the trial or the appellate courts. In China, when the trying court issues the judgement, it is only effective towards the parties of the case. After that, the court or certain types of outsiders can recommend the decision as a guiding case candidate level by level up to the SPCC. The SPCC has to select from these recommendations by way of the two-tier standard provided in Article 2 of the Provisions.⁸ Currently, only the SPCC has the authority to issue guiding cases; other courts are not authorised to do so. Then, only when the SPCC has selected and reissued the judgment as a guiding case, it can become binding towards the public.

Based upon the author's interview with a judge working at the SPCC research office,⁹ as the guiding case system has been established for only three years, there is no exact statistical analysis on the selection rate. Roughly speaking, the cases submitted to the SPCC as guiding case candidates range from dozens to hundreds in each selection round. Although the trial departments of the SPCC may also recommend their own cases, these are very few and far in between. Most came from lower courts. But the quantity of recommended cases is only one factor in deciding the number of guiding cases. The quality is another factor. Sometimes, when the quality is low, even if there are hundreds of cases recommended, very few could be considered for inclusion as guiding cases.¹⁰ The interview indicates that the SPCC has not received a large number of recommended cases. Sometimes it may only have several cases to select. It may also have difficulty getting lower courts to recommend cases, as it increases workload without much benefit, and requires the ability and skill to find meaningful

⁷ For an introduction, see Deng Jinting, "The Guiding Case System on Mainland China", *Frontiers of Law in China* 10, no. 3 (September 2015): 449.

⁸ Article 2 provides the selection standard: the selected guiding case must: (i) already be in force; and (ii) possess at least one of the following features—(a) having attracted wide public attention; (b) having concerned the very principled legal provisions; (c) being representative; (d) involving difficult, complicated or new issues; or (v) having other features that have a guiding value.

⁹ The interview was conducted over the telephone by the author in Beijing on 16 March 2015. The judge being interviewed works at the SPCC Research Office that oversees the SPCC Case Guidance Office.

¹⁰ Interview conducted on 16 March 2015.

cases and draft them according to the guiding case style.¹¹ In the meantime, lower courts are still required to recommend other kinds of cases, such as typical cases and gazette cases. Thus, currently, lower courts tend to recommend the same cases for all kinds of cases and the SPCC can decide which cases could become guiding cases first.¹²

All cases are submitted to the SPCC Case Guidance Office, which then categorises them and transfers them to respective SPCC's trial departments. The trial departments will next select qualified case candidates and submit them for approval by the SPCC Judicial Committee. Such approval meetings will be held every three or four months. Thus, the selection by the trial departments is essential. Once they have been selected by the trial departments, the candidates are highly probable to become guiding cases. The selection criteria are roughly established in the Provisions.¹³ The judge at the Research Office said that there is no clearer internal selection standard than the current published one already in place.¹⁴ However, he noted that normally two kinds of cases are considered.¹⁵ First, cases that concern laws that several judges have reflected as having problems, disputes or contradictions in their meanings. Second, cases that are new, with no precedent law being drafted to handle such scenario. In other words, they can serve to fill statutory gaps.

This type of generation results in three major differences. First, the SPCC's case decisions do not imply these cases would become guiding cases automatically, while the US Supreme Court's decisions are binding once made. Second, some trial courts' judgements in China can become guiding cases and thus bind courts in other provinces and cities, though ordinary trial courts' decisions in the United States cannot bind courts in other jurisdictions. Third, only the SPCC can make guiding cases, whereas US appellate courts can also issue binding decisions.

Another difference is that guiding cases need to have certain statutory grounding. If there is no statute, guiding cases cannot be made. All 44 current guiding cases are linked to legal articles that constitute the basis for court decisions. The relevant legal articles are a necessary part of guiding cases. This is because the judiciary cannot make laws in China. They can only apply existing laws made by the legislature and the authorised agencies. They cannot find or declare laws from customary or natural law. However, at present, such a difference has little significance. The statutory system in China is relatively complete, and as the statutes contain broad principles, pure statutory gaps hardly exist. For example, in Guiding Case No. 15, an apparent statutory gap still finds its roots in the good faith principle established in the Company Law. The judiciary can therefore legitimately fill these gaps by referring to the broad principles.

¹¹ This is consistent with the comments made by the judges interviewed by the author, and who work at local intermediate courts. The interviews were conducted by the author in Jiangxi and Beijing from late February to early March 2015.

¹² Ibid.

¹³ Article 2, the Provisions.

¹⁴ Interview conducted on 16 March 2015.

¹⁵ Ibid.

A third difference is that guiding cases are not “law” with the same force as statutes. Article 7 of the Provisions provides that lower courts “shall refer to” rather than “must follow” the guiding cases when trying similar cases. Hu Yunteng, director of the SPCC Research Office, wrote in an article published in the official journal of the SPCC that he explicitly declines to consider guiding cases as a new form of law and further argues that they cannot be cited in the judgements as the basis for a ruling.¹⁶ In real practice, the author could not find any recent case that cites any of the 44 guiding cases as a basis. Very few counsels have relied on guiding cases to formulate their arguments, and even fewer have received responses from the courts.¹⁷ One court clearly held that guiding cases are only for the sake of reference and courts are not bound to follow them.¹⁸

FUNCTIONAL SIMILARITIES BETWEEN CHINA'S GUIDING CASE SYSTEM AND THE US COMMON LAW

After a functional study of what the SPCC has actually decided in guiding cases, and in light of the well-known functions of the US Common Law system—in (i) adapting law to social needs; (ii) incrementally developing law; (iii) strengthening judicial autonomy; (iv) protecting democracy; and (v) interpreting constitutions—the author argues that the guiding case system has equivalent functions to the Common Law in adapting law to social needs, strengthening judicial autonomy and supplementing existing statutory law. The SPCC has adapted law to the needs of social harmony and economic development by extending the protection of weak parties in the market, reinforcing the responsibilities of shareholders and restricting the interventions of local administrative agencies. It has strengthened judicial autonomy by strengthening the SPCC's control and establishing judicial review of regulatory and local rules, and by expanding judicial review of agency activities. Furthermore, both functions have been realised through guiding cases supplementing the existing statutory laws.

Adapting Law to Social Needs

Extending protection of weak parties in the market

In Guiding Case No. 18 (hereafter No. 18), the SPCC has narrowly interpreted Article 40 of the Labour Contract Law (2012) to restrict employers' ability to terminate labour contracts without compensating the employee. Article 40 rules that if the

¹⁶ Hu Yunteng et al., “‘Guanyu anli zhidao gongzuo de guiding’ de lijie yu shiyong” (For Understanding and References of ‘Provisions on Case Guidance’), *Renmin sifa* (People's Judicature), no. 3 (2011): 36.

¹⁷ The author was only able to find nine cases in which counsels had referred to guiding cases to support their claims, and only four of them had responded to such references.

¹⁸ The court declined to be bound by the guiding case. See the case: Shanghai Xiongmiao Jixie (jituan) Youxian Gongsi v. Beijing Xiongmiao Hengsheng Jixie Shebei Youxian Gongsi gudong zhiqing quan jiufen shangsu an (The Appellate Case on the Shareholders' Right to Information between Shanghai Xiongmiao Jixie Group Ltd. Co. and Beijing Xiongmiao Hengsheng Jixie Equipment Ltd. Co.), Beijing No. 1 Intermediate Court, 7 November 2012.

employee has not made any mistakes, the employer can still fire him if he is not competent to do the job after being trained or moved to another position. However, the evaluation of the standard of competence is unclear in the law. In practice, some courts have relied on the employer's own internal evaluation to judge competence,¹⁹ while others have required the employer to prove the existence and/or the objectivity of internal evaluations,²⁰ and some others have emphasised the need for a second chance (through training and role adjustment) before termination.²¹ Although slightly different, they all nevertheless agree that the employer can legitimately fire an employee on the basis of internal evaluation. However, the SPCC has disallowed such internal evaluation as the basis for dismissing an employee by issuing No. 18. In No. 18, after the employer has proved that the employee has been internally evaluated as incompetent and, even after being transferred to another position, the employee has again been evaluated as being incompetent, the court has still held that such an evaluation of incompetence cannot satisfy Article 40. Thus, the SPCC has extended the protection of employees by narrowly interpreting the notion of incompetence to exclude a major way in which an employer can legitimately fire an employee. This is in response to a recent emphasis on building harmonious labour relations. Labour-related problems, including migrant workers' wage arrears, work-related injury compensation and illegal termination, have become serious issues and would easily give rise to mass disturbances, resulting in social instability.²² Among the administrative cases resolved in all courts in 2012, labour-related ones comprised around 10 per cent of the total.²³ Correspondingly, the Labour Contract Law was amended in 2012 and the SPCC has also issued a fourth judicial interpretation of labour-related cases. Both have generally increased the obligations of the employer in labour relations and strengthened the protections of the employee. The No. 18 supplements this trend.

In Guiding Case No. 17 (No. 17), the SPCC has broadly interpreted fraudulent sale in Article 55 in the Law on the Protection of Customer Rights and Interests (2013) to cover the seller's failure to notify the buyer of product defects. Article 55 rules that if the seller engages in fraudulent activities in providing products or services,

¹⁹ See these cases: Yuehaifan v. Xuzhou City Pengcheng Wujiaohua youxian zeren gongsi laodong zhengyi jiufen shangsu an (The Appellate Case on Labour Disputes between Yuehaifan and Xuzhou City Pengcheng Wujiaohua Ltd. Co.), 13 September 2013; Zhao Moumou v. Shaanxi Qinchu Qichecheng touzi youxian gongsi et al. laodong zhengyi jiufen shangsu an (The Appellate Case on Labour Disputes between Zhao Moumou and Shaanxi Qinchu Qichecheng Inv. Ltd. Co. et al.), 25 June 2013.

²⁰ See cases: Duanxiangjing v. Nanjing Xinshu jixie youxian gongsi laodong zhengyi jiufen an (The Trial Case on Labour Disputes between Duanxiangjing and Nanjing Xinshu jixie Ltd. Co.), 29 July 2013; Beijing Mou Youxian Gongsi v. Chen Mou laodong zhengyi jiufen shangsu an (The Appellate Case on Labour Disputes between Beijing Mou Ltd. Co. and Chen Mou), 10 July 2013.

²¹ See case: Shen Mou v. Moumou (Shanghai) guoji maoyi youxian gongsi laodong hetong jiufen an (The Trial Case on Labour Contract Disputes between Shen Mou and Moumou (Shanghai) International Commercial Ltd. Co.), 26 July 2013.

²² "Laodong hetongfa shishi wunian xin leixing anjian luxu yongxian" (New Types of Cases Spring Up after Five Years of Implementation of Labour Contract Law), *Fazhi ribao* (Legal Daily), 28 December 2013.

²³ "The 2012 Annual Report of China's Rule of Law Construction", *China Law Society*, 2013.

punitive compensation shall be paid to the customer. However, what constitutes fraudulent sale is not clearly defined in the law. In practice, some courts rely on the Industrial and Commercial Bureau's Regulation on Punishment of Customer-Cheating Activities, which require the customer to prove the seller's intention to cheat the customer.²⁴ Some have required the customer to prove the seller's false representations.²⁵ However, the SPCC has inferred the intention to cheat from the seller's failure to notify the buyer of product defects, and No. 17 has placed the burden on the seller to prove that he has notified the customer. In the case in question, a customer bought a car from a seller. The customer claimed that the seller cheated her by omitting to mention the fact that the car had been repaired. Despite the ordinary evidence rule that the one making the claim has the responsibility to provide proof, the court put the burden on the seller to prove that there was no omission of such a fact, and upheld the customer's claims after having found that the seller failed to prove so. Thus, the SPCC has strengthened the protection for customers by removing the burden on the customer to prove the existence of the seller's cheating. This responds to the need to strengthen consumer protection in a market economy, especially in light of many product defect torts concerning basic rights. Consumers often face difficulties in collecting evidence to prove the wrongful practice of a business, and these disputes could easily cause social instability. Correspondingly, in 2013, the Law on the Protection of Customer Rights and Interests received its first amendment in 20 years, and has benefited the customer by providing a reversed burden of proof on a business for product defects and increasing the punitive compensation in fraudulent sales.²⁶ The SPCC issued the relevant notice immediately after its passage and requires courts to use the burden of proof to increase the cost of illegal business activities and reduce the cost of protection of customers' rights.²⁷ The No. 17 supplements such developments by extending reversed burden of proof to the notification of known product defects and broadly interpreting fraudulent sales.

Reinforcing the responsibilities of shareholders

In Guiding Case No. 15 (No. 15), the SPCC extended the responsibilities of shareholders in Article 20 of the Company Law (2005) to cover related companies. Article 20 rules that if a shareholder has abused the independent status of a legal person or

²⁴ See case: Xuxiangyang v. Nanjing lizhixing qiche zixun fuwu youxian gongsi maimai hetong jiufen shangsu an (The Appellate Case on Purchase-Delivery Contract Disputes between Xuxiangyang and Nanjing lizhixing Car Consultation Service Ltd. Co.), 16 September 2013.

²⁵ See case: Qin Mou v. Shanghai Moumou maoyi youxian gongsi maimai hetong jiufen an (The Trial Case on Purchase-Delivery Contract Disputes between Qin Mou and Shanghai Moumou Commercial Ltd. Co.), 6 September 2013.

²⁶ See Articles 23 and 55, the Law on the Protection of Customer Rights and Interests, passed on 25 October 2013, effective from 15 March 2014 onwards.

²⁷ The SPCC's Notice on Learning and Implementing the Amendment of Law on the Protection of Customer Rights and Interests, 26 December 2013.

his limited liabilities and has caused damage to the company or its creditors, the corporate veil is pierced and the shareholder shall be jointly liable. This rule does not cover the case of related companies. However, No. 15 has ruled that the ambiguity concerning related companies would also subject them to be jointly liable for external debt, and has provided several factors to be used in deciding whether the ambiguity is constituted.²⁸ The court has argued that according to Article 3 of the Company Law, a company shall have independent property and be liable for debts with all of its property. Thus, if a company's property is indistinguishable from that of related companies, the basis for independent liability will disappear. This is similar to the ambiguity between company and shareholder. Thus, by referring to Article 20, the ambiguity due to related companies shall similarly subject all related companies jointly liable for external debt. This is in response to an important social need in regulating related companies. China's Company Law is designed for single companies, without taking into consideration related companies, and thus a definition of "related companies" is lacking. However, more and more legal problems appear and deepen as companies develop and grow. Related companies are often used by shareholders to hide and transfer properties that are damaging to creditors' interests. Although the corporate's veil piercing system was implemented in 2005, it does not cover the related companies. Thus, as statutory rules become outdated and with a slow rate of change, the SPCC has incrementally reformed Company Law by using No. 15 to regulate related companies.

In Guiding Case No. 9 (No. 9), the SPCC has reinforced the responsibility of shareholders to liquidate a company as stipulated in Article 18 of the SPCC's Second Judicial Interpretations on the Company Law (2008) in a timely manner, so as to protect the creditors' interests. Article 18 rules that the shareholders shall liquidate the company in a timely manner after its licence is revoked, or otherwise shall assume liability. However, if an untimely liquidation is due to "actual controllers", who are not shareholders but actually control the company, then the "actual controllers" shall be liable. However, it is unclear whether the shareholders are still also liable for untimely liquidation due to "actual controllers". In practice, many shareholders have evaded debt by failing to liquidate after dissolution, causing significant damage to creditors and disrupting the market order. Some shareholders have used the "non-actual controllers" principle, i.e. they do not actually control the company, as a defence to shield them from fulfilling liquidation obligations; and the courts have derived diverse findings on this issue.²⁹ The No. 9 filled this gap by invalidating the "non-actual-controller" defence, and also used a strict textual interpretation of Article 18 to arrive at such invalidation. As Article 18 first requires that all shareholders have timely

²⁸ The SPCC Case Guidance Office, "Zhidaoli 15 hao de cankao yu lijie" (Reference and Understanding of Guiding Case No. 15), *People's Judicature (Application)* 15 (2013): 35.

²⁹ The SPCC Case Guidance Office, "Zhidaoli 9 hao de cankao yu lijie" (Reference and Understanding of Guiding Case No. 9), *People's Judicature (Application)* 3 (2013): 25.

liquidation obligations, and makes no explicit exception for shareholders who are not actual controllers, then all shareholders are still under the liquidation obligation. It could have argued that an exception was made implicitly by making actual controllers liable for damages, but it chose not to so as to strengthen shareholders' responsibility. Problems related to company resolutions, including the liquidation obligations of shareholders, have already been systematically dealt with in the Second Judicial Interpretation on Company Law. Without No. 9 filling this gap, there would be a long wait for another judicial interpretation or statutory amendment. Thus, guiding cases help fill those scattered gaps in statutes and judicial interpretations to adapt to social changes.

Restricting interventions of local administrative agencies

The Guiding Case No. 6 (No. 6) has restricted agency interventions by increasing the agency's cost of intervening. It has expanded the scope of the hearing requirement of Article 42 of the Administrative Punishment Law to cover the forfeiture of comparatively large amounts of property. Article 42 rules that a hearing can be requested if an administrative penalty involves ordering the suspension of production or business, the rescission of business permit or licence, the imposition of a comparatively large fine, etc. However, it is unclear whether such a list in Article 42 is exhaustive, and courts have also reached diverse findings.³⁰ In No. 6, the agency confiscated 32 of the other party's computers, the monetary value of which exceeded the standard of a comparatively large fine, and it made the decision without granting the right to a hearing. If such forfeiture is included in Article 42, then the procedure to make it without a hearing is illegal, and the forfeiture decision should be revoked. Unlike the strict textual interpretation in No. 9, No. 6 has used an intentional interpretation of Article 42 to expand its scope. It argues that the legislative intention of requiring a hearing was to prevent abuse of agency power and to protect the other party's interests. Due to efficiency considerations, only those agency decisions that may significantly influence the other party's interests are subject to a hearing, such as the three kinds of agency punishments listed in Article 42. Thus, the list should not be read as exhaustive. Since the forfeiture of a comparatively large amount of property has a similarly large influence as the three listed punishments on the other party's interests, the forfeiture should also be included in the scope of a hearing. The interpretation in No. 6 is consistent with the SPCC's previous views expressed elsewhere. The SPCC has clarified that the word "etc." in administrative law denotes an open list,³¹ and that

³⁰ The SPCC Case Guidance Office, "Zhidao anli 6 hao de cankao yu lijie" (Reference and Understandings of Guiding Case No. 6), *People's Judicature (Application)* 15 (2012): 52.

³¹ "Guanyu shenli xingzheng anjian shiyong falü guifan wenti de zuotanhui jiyao" (The Minutes of Meeting on Administrative Case Trials), cited from Zhang Zhiyuan, "Fading xingzheng chengxu de kuozhangxing jieshi jiqi xiandu—zuigao renmin fayuan liuhao zhidao anli zhi pingxi" (The Expansion Interpretation and Limitations of Legal Administrative Procedures: Comment on the No. 6 Guiding Case of SPCC), *Zhejiang shehui kexue (Zhejiang Social Sciences)*, no. 1 (2013): 65.

in Article 42 the list shall be interpreted openly to include forfeiture of a large amount of property.³² Although No. 6 reiterates these views, the No. 6 case shall not be taken as meaningless and redundant of the SPCC's previous expressions, because the previous expressions are not binding to all courts, while No. 6 is binding to all courts.

In Guiding Case No. 5 (No. 5), the SPCC has restricted agency intervention by limiting local agencies' ability to establish new kinds of administrative licences and penalties. It has narrowly interpreted the situations in which a local agency may establish new administrative licences in Article 15 of the Administrative Licence Law (2003) and new penalties in Article 13 of the Administrative Penalty Law (1996). Both Articles 15 and 13 rule that local agencies may establish new administrative licences or penalties only if there is no law or administrative law on this area. Some local agencies have narrowly interpreted the existence of such law, holding that even if there is a general law in this area, as long as it does not specifically rule on the specific licences or penalties, it is still recognised as having no law. In other words, silence means consent or permission. The establishment of a new licence for transporting salt and a new penalty for transporting salt without such a licence in the Regulations on the Salt Industry of Jiangsu Province in No. 5 were based on such a narrow interpretation, as there is already a State Council regulation on the salt industry, which is an administrative law but does not rule specifically on that kind of licence or penalty. However, No. 5 has discounted such a narrow reading, arguing that since there is already a national regulation on the salt industry, the failure to establish a licence for transporting salt implies that the State Council intends no such licence. Here, silence means the state of forbidden. It further argues that according to Article 79 of the Legislation Law, as administrative law is of higher authority than local laws, courts shall not apply inconsistent lower laws, such as the Jiangsu salt regulation, and so local agencies cannot establish such licences or penalties. The No. 5 responds to a pressing situation in which existing legal rules are outdated, local rules are inconsistent with the development of the national uniform market, and resistance to the reform or passage of relevant statutes is strong.³³ It has helped incrementally reform laws to overcome strong resistance.

³² Replies on Questions of whether the case of Forfeiture of Properties Should Hold Hearing and Activities Forfeiting Commercial Medicines, Zhang Zhiyuan, "Fading xingzheng chengxu de kuozhangxing jieshi jiqi xiandu" (The Expansion Interpretation and Limitations of Legal Administrative Procedures), p. 65.

³³ There is no national statute dealing with the salt industry. The only governing administrative law is the 1990 Regulations on the Salt Industry by the State Council. In contrast, there are over 20 local congressional laws and over 30 local governmental regulations on the salt industry. Many of these local rules have required a licence for the sale and transportation of salt within their jurisdictions and penalised the unlicensed sale or transportation of salt. Courts have diversified views on the validity of these local rules requiring licences and penalties. See the SPCC Case Guidance Office, "Zhidao anli 5 hao de cankao yu lijie" (Reference and Understanding of Guiding Case No. 5), *People's Judicature (Application)* 15 (2012): 49.

*Strengthening Judicial Autonomy**Establishing judicial review of regulatory and local rules*

The Guiding Case No. 21 (No. 21) has implicitly used Articles 22 and 48 of the Civil Air Defence Law (1996) to review and qualify two administrative regulations, i.e. Article 16 of the State Council's Opinions on Resolving Housing Difficulties of Low-Income Urban Residents (2007) and Article 8 of the Seven Ministries' Regulations on Affordable Housing (2007). Article 22 rules that air-raid shelter basements shall, in accordance with the relevant state regulations, be constructed in new urban civilian buildings. Article 48 further rules that for buildings that are not suitable for the construction of such basements, an agency fee shall be paid to build such basements elsewhere. However, both Articles 16 and 8 rule that all agency fees shall be exempted for affordable housings. In No. 21, the builder built affordable urban civil-use housing without air defence basements, although it would have been feasible to build such basements in this context. Thus, according to Article 48, as the building was erected without such basements, an agency fee should be paid to build alternative ones elsewhere, while according to Articles 16 and 8, such an agency fee should be exempted, as it is an affordable housing development. Thus, there is a conflict between the statute and the two regulatory rules. The No. 21 rationalises that as Article 22 requires the building of such basements and Article 48 simply creates an exception to that requirement, the failure to build the required basement when it is feasible to build it is illegal. It further argues that the intention of the two regulations should not be interpreted as one to protect illegal activities; if the agency fee is exempted, the building cost without the requisite basements would be less than the cost of similar buildings with the requisite basements, which would then encourage non-conformity with the statute. Thus, it concludes that Articles 16 and 8, the regulatory articles, shall not be applied to buildings that are inconsistent with statutory Articles 22 and 48. It has therefore resolved this conflict in such a way that it has implicitly and actually established an elementary judicial review of regulations.

Again, No. 5 has also disabled the application of the Regulations on the Salt Industry of Jiangsu Province due to its inconsistency with the Administrative Licence Law (2003) and Administrative Penalty Law (1996). Although it has not explicitly invalidated the local regulations, it has clearly held that if local regulations establish administrative licences or penalties that are inconsistent with statutes or administrative laws, courts shall not apply the regulations in administrative trials. However, the power of legal interpretation is vested in law-making entities according to Section Four of the Legislation Law (2000). Article 53 of the Administrative Procedure Law (1989) rules that if the SPCC finds local regulations to be inconsistent with administrative laws, the SPCC has to report to the State Council for explanation or decision, rather than decide on the inconsistency itself. However, in the official article clarifying the meaning of No. 5, the SPCC argues that Article 79 has given the judiciary the power

to select the “right” laws to apply,³⁴ and when deciding whether a law is right, it relies on the Constitution and the Legislation Law.³⁵ Thus, such a review has some slight characteristics of a constitutional review. The SPCC has strategically identified a conflict between Jiangsu’s regulation and the State Council’s, and then established a judicial review of local regulations by resolving it in No. 5. Its conclusion is cautiously drafted to limit only conflicts to those between local and national laws. However, the reasoning leaves room for expanding such a review of conflicts between other kinds of laws and other kinds of conflicts based on other constitutional provisions.

Expanding judicial review of agency activities

The Guiding Case No. 22 (No. 22) has expanded the judicial review of agency activities authorised in Article 11³⁶ of the Administrative Procedure Law (1989) by narrowly interpreting Article 1³⁷ of the Judicial Interpretation on Administrative Procedure Law (2000). Article 11 rules that only concrete agency activities³⁸ towards specific parties that have actually affected the interests of ordinary people or organisations listed therein can be sued. Article 12³⁹ excludes several kinds of agency activities for judicial review, within which the third one, i.e. Article 12(3), is “internal decisions”. Article 1 of the judicial interpretation further expands Article 12’s list to exclude six other activities, within which the sixth one, i.e. Article 1(6), is “those activities that have no actual influence on people’s rights and obligations”. In No. 22, the activity of concern is a superior “approval and reply” (*pifu*) to subordinates to take back state-owned land use rights of certain areas that cover plaintiffs’ houses. The subordinates directly carried out the reply without giving plaintiffs a concrete decision on taking back their houses. As such, a reply is only an internal decision that has no actual influence on plaintiffs, and as it is not included in Article 11 and excluded by Article 1, it shall be non-reviewable in the courts. However, No. 22 argues that since the decision had been

³⁴ The SPCC Case Guidance Office, Reference and Understandings of Guiding Case No. 5, p. 51.

³⁵ Ibid.

³⁶ China’s Administrative Law was amended and revised on 1 November 2014 with substantive revisions. The comparable article to Article 11 in the amended version is Article 12, which greatly expands the scope of Article 11.

³⁷ Following the amended Administrative Law, the SPCC issued another Judicial Interpretation of Amended Administrative Law on 20 April 2015. The article comparable to Article 1 is Article 3, and that of Article 1(6) is Article 3(8).

³⁸ Concrete agency activities is a terminology used in China’s administrative law, referring to activities that specific agency conducts towards specific people, other than rule-making or policymaking activities of agencies towards the non-specified general public. The amended Administrative Law, issued on 1 November 2014, has deleted the expression of “concrete agency activities”, but still treats agency acts towards specific parties different from agency acts that establish rules and regulations.

³⁹ The comparable article to Article 12 in Amended Administrative Law is Article 13, which is unchanged. Although the amendment has expanded the old Administrative Law, Guiding Case No. 22 is still useful and the issue in No. 22 remains unchanged.

directly carried out by subordinates, it had become externalised to actually influence the plaintiffs' interests. It then held that such externalised internal decisions are reviewable in the courts. This route of reasoning broadens the judicial review scope in two ways. First, it makes the Article 1(6) a "restrictive" clause rather than a "save" clause.⁴⁰ If Article 1(6) was interpreted as a "save" clause, it would work to save all other agency decisions that do not fall into the previous categories in Article 1 from review if they do not have any actual influence. Now the SPCC has adjusted the interpretation of the Article 1(6) such that even if the activity falls into the previous categories, i.e. Article 12 and Article 1(1)–(5), as long as it does not have an actual influence, it is still reviewable. Second, the reasoning in No. 22 holds that Article 11 is not the sole standard to determine reviewability; and that even if the agency conduct is not included in Article 11, the agency conduct may still be reviewed if it has actual influence. This is in response to the emergent need to protect residents' property rights during governmental demolition—regulating such demolition will help prevent severe conflicts and maintain social harmony.⁴¹

Supplementing Existing Laws

Both the objectives to adapt law to social needs and to strengthen judicial autonomy have been realised by supplementing the existing laws, including statutes, statutory amendments and judicial interpretations. In this perspective, the functions of all guiding cases can be categorised into five groups.

The first group consists of guiding cases that were issued immediately after or before relevant laws to strengthen their application. Guiding Case No. 4 and No. 12 have strengthened the enforcement of death penalty, with reprieve and restrictions on commutation that were established by the Eighth Amendment of Criminal Law (2011) passed shortly before the issuance of No. 4 and No. 12; Guiding Case No. 7 reinforces the approval of withdrawal of protested cases by the interested party, in relation to Article 6 of the Provisions on Cases Protested by Procurators through Trial Supervision Procedures (2011); Guiding Case No. 14 applies the prohibition punishment of the Eighth Amendment of Criminal Law (2011) and the Provisions Concerning Prohibition (2011); Guiding Case No. 17 applies Article 55 of the amended Law on Protections of Customer Interests and Rights (2013); and Guiding Case No. 18 concerns the newly passed amended Labour Contract Law.

The second group of guiding cases are those that have clarified issues of existing laws: Guiding Case No. 3 explains what constitutes "taking advantage of duty

⁴⁰ The "save" clause here refers to a clause, usually at the end of a list in the law, that includes all other cases not covered by previous listed examples.

⁴¹ The amended Administrative Procedure Law was finally passed on 1 November 2014 and entered into force on 1 May 2015. The amendment has incorporated the rules in No. 22 and expanded the scope of reviewable agency conduct.

authorities” and “profits under the name of joint company” of Articles 1 to 3 in the Opinions on Issues Concerning Bribery Crimes (2007); Guiding Case No. 8 explains what “serious difficult operations” constitutes a “company deadlock” that allows legal dissolution under Article 1 in the Second Judicial Interpretation on the Company Law (2008); Guiding Case No. 10 explains what kind of company resolutions are revocable under Article 22 of the Company Law (2005); and Guiding Case No. 18 addresses the meanings of “incompetent for the job” in Article 40 of the Labour Contract Law.

The third group of guiding cases comprise those that have plugged the scattered gaps in existing laws. Guiding Case No. 1 resolves the effects of the brokerage contract’s *tiaodan* article (a standard clause that forbids broker circumvention in the real estate brokerage contract); Guiding Case No. 2 resolves the effects of settlement outside of court during appeal by referring to the settlement achieved when implementing judgement of Article 230 in the Civil Procedure Law (2012); Guiding Case No. 9 invalidates the non-actual-controller defence to fill a gap in legislation; Guiding Case No. 19 and No. 20 resolve issues that existing criminal and patent laws have not made any provision for.

The fourth group of guiding cases are those that have worked to incrementally reform outdated statutes to overcome strong resistance. No. 5 reforms the national administrative regulation to forbid local licensing of transporting and sale of salt; No. 15 reforms Article 20 of the Company Law to cover related companies; No. 21 reforms Articles 8 and 16 of the regulations to exclude buildings that are built for affordable housing and inconsistent with the laws; and No. 22 reforms administrative laws to make reviewable those inter-agency replies that have an actual impact on the interests of the external parties.

The fifth group of guiding cases are those that have reiterated rules already elaborated in the SPCC’s previous minutes of meetings or in the SPCC’s replies to specific questions. Minutes and replies are not binding to all courts, and there are inconsistencies in these minutes and replies. So these guiding cases function to make clarifications, and reaffirm the rules that the SPCC stipulates to be correct and require all courts to follow. Guiding Case No. 6, No. 11 and No. 13 belong to this category.

A FUNCTIONAL APPROACH TO ANALYSING THE DIFFERENCES BETWEEN THE GUIDING CASE SYSTEM AND US COMMON LAW

Several factors described in the earlier section distinguish the guiding case system from Common Law. However, having discussed the equivalent functions of the guiding case system and the US Common Law, these differences can be seen as variations that help the guiding cases adapting to China’s legal system to realise equivalent functions as the US Common Law.

Differences Operating for the Realisation of the Function to Adapt Laws to Social Needs

To understand the guiding case system's function in adapting laws to address social needs, we analyse along the following two factors: (i) efficiency, which determines how quickly an uncovered or newly evident social need can be responded to; and (ii) selectability, which affects the scope of social needs that can be covered by guiding cases.

Efficiency

As evident in previous viewpoints, if the Supreme Court's decisions become legally binding automatically without further selection procedures, the additional cost of selecting guiding cases can be saved and the number would increase greatly, thus increasing the efficiency in adapting laws to society. The author, however, wants to challenge this hypothesis from a cost-benefit perspective.

First, even if the SPCC's cases are not selected as guiding cases, such decisions are quasi-legally binding. In contemporary China, because of the internal judicial evaluation system, the SPCC instructions bind lower courts in terms of appointment and dismissal authority and the authority to overturn a lower court's decision through the retrial system. This is confirmed by the author's interviews with several district and intermediate court judges.⁴² They eagerly seek superior instruction in order to save time and energy, and to avoid retrial and the situation of having their decision overturned. However, the SPCC judgements were never published in the past, and due to the fixed-term tenure of the SPCC president and the leader responsibility system, such SPCC's judgements could not bind the SPCC and could be easily overturned by policy changes. Thus, they did not constitute reliable and ready instructions for lower courts. However, the situation has changed recently. Now, all SPCC decisions are published on its website and also on the website known as Judicial Opinions of China.⁴³ It is mandatory to publish the decisions publicly within seven days of coming into effect.⁴⁴ Such publication makes SPCC case decisions harder to change if there are appointment changes in the president, directors or judges, and political policies. The general public and litigants plan their contracts, business or lives, and formulate their arguments according to such decisions. Accordingly, the lower courts follow these decisions when applying laws. Such quasi-binding force is similar to that in guiding cases. Hence, the benefits of making all SPCC decisions automatically guiding cases are insignificant.

⁴² The judges interviewed were from Beijing Haidian District Court, Beijing Chaoyang District Court, or Beijing No. 1 Intermediate Court. The interviews were conducted in March 2014 in Beijing.

⁴³ See <<http://wenshu.court.gov.cn>> [6 April 2016].

⁴⁴ Articles 8 and 12, SPCC's Regulations on the Publication of Judicial Opinions on Internet by People's Courts, effective on 1 January 2014.

Second, it is more efficient to select guiding cases than to admit automatically all SPCC cases as guiding cases. An easily ignored reality is that even in the United States, Supreme Court judgements have often been revised several times before they become publicly binding.⁴⁵ The revisions are to ensure that the reasoning and rationale are as correct and clear as possible for the benefit of future reference—this is similar to the SPCC's approach in selecting guiding cases. Unlike the US Supreme Court, the SPCC spends far less time and energy on deriving its decision for each ordinary case—the written decisions are usually less than 10 pages in length, averaging only about three to five pages for most cases. By contrast, the US Supreme Court's decisions are more than 15 pages long, with a large proportion of the cases around 18 to 20 pages long. The SPCC resolves around 10,000 cases annually.⁴⁶ The increased cost per case multiplied by its caseload would probably far exceed the additional cost of selecting guiding cases. As the benefits are insignificant, there is a perceived imbalance in the costs and benefits. It is therefore inefficient for China to immediately include all of SPCC cases as precedents.

Another difference between China and the United States is that in China's case, only the SPCC can issue guiding cases. It would be more efficient if more courts could be authorised to issue guiding cases within their own jurisdictions. However, this may not hold true.

In contemporary China, it does not seem to help if all intermediate courts are authorised to select guiding cases with immediacy. Currently, intermediate courts come under heavy influence from local governments as the finances and personnel of the courts are still controlled by local governments, although there are reform plans to decrease such local influence.⁴⁷ Even after decades of judicial reforms, low-level courts in cities and counties in less developed areas remain heavily dependent upon local governments. If they are authorised to issue guiding cases, they may adapt to the interests of local governments rather than national needs, such as expanding judicial review and restricting agency intervention in local markets. If they issue cases overlapping with or not covered by SPCC guiding cases, district courts within the jurisdiction of these intermediate courts will follow their cases. These local guiding cases would remain effective until the SPCC explicitly invalidated them. This would increase the SPCC's costs in reviewing them and clearing guiding cases. Thus, due to the control of local agencies over intermediate courts, the potential benefit that more lower courts may issue appropriate and larger number of guiding cases to adapt to social needs may not be realised practically, and the costs that the SPCC would incur to unify these local guiding cases, as well as the need for society to adapt to different local rules, would be increased.

⁴⁵ The US Supreme Court's own prescriptions, at <<http://www.supremecourt.gov/about/justicecaseload.aspx>> [7 March 2015].

⁴⁶ The 2014 Annual Work Report of the SPCC, 20 March 2015, at <http://www.gov.cn/xinwen/2015-03/20/content_2836615.htm> [23 March 2015].

⁴⁷ Eric C. Ip, "The Supreme People's Court and the Political Economy of Judicial Empowerment in Contemporary China", pp. 405, 414–5.

In fact, this has happened before. When the SPCC implicitly allowed local courts to issue judicial interpretations, the situation turned messy in the end, and the SPCC had to revoke the grant of authority by explicitly forbidding local courts to issue judicial interpretations.⁴⁸ In the case of the United States, as all appellate court decisions are binding, a major portion of Supreme Court decisions concern issues where local high and appellate courts differ in order to ensure uniform legal markets and to avoid forum-shopping. However, local diversity is far less discerned in the United States than in China as US local courts do not come under heavy influence from local agencies and local interests do not conflict much with national needs. Hence, it is inefficient if intermediate courts in China are allowed to issue guiding cases.

However, the SPCC encourages high courts to issue guiding cases since it is more efficient and because local protectionism is not strong in high courts. The SPCC issues a notice, entitled Notice of the First Set of Guiding Cases by SPCC, calling on high courts to publish referenced cases to instruct the judicial work of lower courts under their jurisdiction.⁴⁹ Many provincial high courts have started to publish reference cases for the lower courts within their jurisdiction.⁵⁰ Some high courts used to publish guiding cases under different titles, including “guiding cases”, “model cases” and “reference cases”, but now need to clear the cases and reissue them under the title “reference cases”.⁵¹ Although reference cases are subordinate to guiding cases, they function similarly to guiding cases within their own jurisdictions. They are all discussed and adopted by the judicial committees of the issuing courts. They are also all redrafted with the addition of key points by the issuing courts, and are similar to guiding cases. Some high courts overtly order lower courts to follow reference cases,⁵² while some do so implicitly.⁵³

⁴⁸ Articles 1 and 2, The Notice of SPCC and SPPC on Prohibiting Local People's Courts and Procuratorates from Issuing Local Judicial Interpretations, effective on 18 January 2012.

⁴⁹ The Notice of the First Set of Guiding Cases by SPCC, first paragraph.

⁵⁰ Until March 2015, several high courts have already issued rules on issuing reference cases and many have published several reference cases, including Beijing, Liaoning, Chongqing, Anhui, Henan, Shanghai and Hainan. See the Tentative Rules on Case Reference by Beijing Courts, Beijing High People's Court, 18 June 2013; see <<http://lnfy.chinacourt.org/public/detail.php?id=6971>>; <http://rmfyb.chinacourt.org/paper/html/2013-02/21/content_58295.htm>; <http://news.ifeng.com/a/20140515/40316129_0.shtml>; <http://www.ha.xinhuanet.com/hnxw/2013-09/11/c_117320839.htm>; <http://www.360doc.com/content/15/0220/21/21979639_449662376.shtml>; <http://news.xinhuanet.com/legal/2014-12/09/c_1113579686.htm> [7 March 2015].

⁵¹ The High People's Courts of Sichuan, Tianjin, Shaanxi and Jiangsu, the Intermediate Courts of Chengdu and Shenyang and the District Court of Zhongyuan District of Zhengzhou City published reference cases long before the Provisions was issued. See Chen Yuefeng, “Gongbao anli dui xiaji fayuan tonglei anjian panjue de keguan yingxiang” (Objective Influences on Lower Courts' in Decisions Made on Similar Cases of SPCC's Gazette Cases), *Zhongguo faxue (China's Legal Science)*, no. 5 (2011): 176, fn.1; the Opinions on Improving Case Guidance, Shenyang Intermediate Court, 18 March 2007; the Notice on Publication System of Reference Cases, Shaanxi High Court, 1 July 2006.

⁵² See the Opinions on Improving Case Guidance, Shenyang Intermediate Court, 18 March 2007; the Notice on the Publication System of Reference Cases, Shaanxi High Court, 1 July 2006.

⁵³ See the Tentative Rules on Reference Cases by Beijing Courts.

There are some intermediate courts in developed areas that are not heavily influenced by local agencies because they are more advanced and transparent, such as the intermediate courts in Beijing, Shanghai and Shenzhen. However, to date, the SPCC has not specifically authorised any of these intermediate courts to issue reference cases. Although having certain intermediate courts that are less influenced by local agencies onboard to issue reference cases is likely to boost efficiency in adapting the law to social needs, it is not an easy task to decide which intermediate courts are independent enough to issue good reference cases. The standard for selecting qualified intermediate courts is therefore difficult to establish.

However, recent judicial reforms are directed at eliminating local agencies' control and protecting local courts' independence. According to the newly issued SPCC Opinions on Comprehensively Deepening the Reforms of People's Courts (the Fourth Five-Year Reform Plan), three reforms are of significance in preventing local protectionism.⁵⁴ First, judges of intermediate and basic-level courts are to be nominated and recruited solely by high courts.⁵⁵ Second, the personnel, funding and properties are to be regulated solely by provincial governments.⁵⁶ Third, circuit courts and cross-area courts that traverse multiple administrative areas are to be established to try special cases, including food safety disputes and serious administrative cases.⁵⁷ These circuit courts and cross-area courts do not rely on local governments for personnel, funding and properties, and can maintain judicial independence. If these reforms can be carried out successfully, local agencies' influence on intermediate courts should be very limited. If local control is decreased, local guiding cases should better adapt to serve local social needs. It would be efficient to authorise these circuit and cross-area courts to issue quasi-binding cases within their jurisdiction. Thus, giving local courts the authority to make guiding cases should keep pace with the reform of the judicial autonomy of local courts.

Selectability

In the United States, Supreme Court precedents are generated when it decides cases that fall within its jurisdiction or that come in through the grant of certiorari. If a case concerns meaningful issues that the Supreme Court wants to resolve, it would grant certiorari to review it. The review would go through normal appellate procedures. However, for guiding cases, only effective decisions can be selected. In other words, if a candidate case concerns important issues on which the SPCC wants to give guidance

⁵⁴ More judicial reform plans have been issued since then. The three reforms are executed in alignment with the reform plans. More research is needed to fully understand the reform plans.

⁵⁵ Articles 50 and 54, SPCC's Opinions on Comprehensively Deepening the Reforms of People's Courts (the Fourth Five-Year Reform Plan), issued on 26 February 2015, at <<http://www.chinacourt.org/law/detail/2015/02/id/148096.shtml>> [7 March 2015].

⁵⁶ Article 63, SPCC's Opinions on Comprehensively Deepening the Reforms of People's Courts.

⁵⁷ Article 2, SPCC's Opinions on Comprehensively Deepening the Reforms of People's Courts.

to lower courts, but the case is decided differently from the SPCC's required decision, then in that situation the SPCC cannot change the original decision because it is already effective. Besides, another difference is that, in China, the general public can only recommend guiding cases through the lower courts, whereas in the United States, individuals or parties can directly request a review by the Supreme Court. Thus, these differences will narrow the scope of selection of guiding cases. However, a cost-benefit analysis contradicts this.

On the one hand, the US model cannot benefit the SPCC in China. First, a potential benefit of the US model is that it gives the Supreme Court an opportunity to decide the cases that have important issues the way it wants. However, the SPCC already has several means to ensure that a case it cares about is decided the way it wants. The SPCC may instruct an intermediate court to review it, or request a high court to retry it, or review it directly through appeal, or it can directly review it through the retrial correction procedure. Thus, this potential benefit is actually not beneficial to the SPCC. Second, another potential benefit of the US model is that the Supreme Court can write its own opinion if it presides over the case, rather than select the judgements issued by the original courts. However, the SPCC can redraft these judgements when reissuing them as guiding cases. The factual information is trimmed and simplified, retaining information that is relevant and essential to the case resolution; reasoning and rationales are also rewritten for clarity. Moreover, certain facts may be omitted intentionally because the SPCC wants to "make up" a case for a predetermined judgement.⁵⁸ Thus, this benefit again means little to the SPCC in China.

On the other hand, it is advantageous to have a selection process in place. Through the selection process, trial court decisions can also become guiding case candidates. The selection pool for the US Supreme Court is rather limited, as only cases that have exhausted all local remedies can be reviewed. Although the American public is allowed its voice to directly reach the Supreme Court—a contrast to China's SPCC which hardly allows such voices from the Chinese public to reach it whether by means of direct or indirect channels—it takes a long time for a case to reach the US Supreme Court. By then, most of the cases are settled before getting to the Supreme Court. This implies that the Supreme Court does not have the opportunity to review many of these issues. However, for guiding cases, all of the cases from various courts are in the pool as long as the judgements are determined and finalised. Through selection rather than by directly trying the case, the SPCC encourages lower courts to develop their capability to make decisions, reason and write judgements; it also standardises the judgement style and promotes judicial reasoning.

⁵⁸ See Tang Wenping, "Lun zhidaoxing anli zhi wenben jianji—you yi zhidao anli yihao weili" (On Text Editing of the Guiding Cases—Take the First Guiding Case as an Example), *Fanzhi yu shehui fazhan* (Law and Social Development), no. 2 (2013).

Adopting the Common Law method would increase SPCC's costs incurred in reviewing cases, which entails opening trials, hearing oral arguments, deliberating and issuing decisions. If lower courts have a highly independent stance and the issues being dealt with are complex, there is a low probability that lower courts would produce a decision that is in compliance with the SPCC's requirement, which means there is a high likelihood that the SPCC has to retry the case itself finally. However, the reality is that the SPCC has several ways to influence lower courts' decisions, and require the cases that may be selected later as guiding cases to be drafted in a very simple manner. Thus, it is highly likely that lower courts could produce good candidates of guiding cases for consideration. The selection process saves the SPCC from retrying the case. Moreover, if the SPCC opts to take heed of the voice from the general public directly, it would have to review far more candidate cases. China's guiding case method allows all effective cases to be recommended, whereas in the United States, only concerned parties can request for a review of cases. To put things in perspective, there are around 10 million cases in all of Chinese courts annually, and cases from previous years can also be recommended as guiding cases. Therefore, weighing the costs and benefits, the US method is currently not appropriate for China.

Differences Operating for the Realisation of the Function to Strengthen Judicial Autonomy

A noteworthy difference that concerns judicial autonomy of guidance cases is that they do not have formal legal status, as explained in the earlier section of this article. They are not considered "law" in China, while precedents are regarded as law in the United States. Although it would be beneficial to judicial autonomy in two respects if guiding cases were accorded formal legal status, such a difference would become less and less significant as time goes on.

According guiding cases with formal legal status could reduce local agency intervention and judicial corruption

First, if guiding cases are given formal legal status, they will have stronger binding effect, which would strengthen the SPCC control of local courts. Thus, it would be more difficult for local governments to affect the local judiciary, and the local judiciary could become more independent. As guiding cases have brought about incremental legal improvements, this has facilitated the SPCC to require courts to rule against local agencies or to review their activities in specific circumstances in guiding cases, such as No. 5, No. 21 and No. 22, rather than to formally establish judicial review which is impossible due to strong local resistance. If guiding cases are accorded formal legal status, all courts have to follow the guiding cases and the decisions, and cannot argue otherwise—a viewpoint as posited by the Beijing No. 1

Intermediate People's Court arguing that because the guiding case is not law, they are not required to follow it.⁵⁹

Second, formal legal status would strengthen judicial autonomy by decreasing the probability of judicial corruption. As Eric C. Ip explains, the SPCC has been establishing judicial autonomy via judicial interpretations.⁶⁰ It has issued hundreds of judicial interpretations to date, covering all kinds of statutes. However, there are still some statutory articles that need further explanation, but are not covered or are not suitable for resolution by judicial interpretation, such as in Guiding Case No. 9 and No. 15. Both cases have adversely affected the interests of companies and shareholders. As the prevailing statutes are ambiguous, and the companies or shareholders are usually strong and knowledgeable parties in the market, they tend to influence judges to obtain a favourable judgement, thereby increasing judicial corruption. If the two cases are passed as and become law, then courts would be required to follow concrete decisions and corruption would be less likely.

The effects of guiding cases are weak now, but would become increasingly important

The reasoning above depends upon how strong the effects of guiding cases are without formal legal status. The author conducted an empirical study based on the judgements collected in Beida Fabao, the biggest legal database in China. Until January 2015, the author found that there were only nine judgements that recorded that parties had used guiding cases, and that only in four of them the courts responded, with one of the four declining to follow the case. Thus, obviously, the effects of guiding cases are very weak.

The author further examined whether some courts have actually implicitly followed the guiding cases without citing them. As some guiding cases simply reiterated or re-emphasised certain rules of the previous judicial interpretations, it is difficult to distinguish the effects of guiding cases from these judicial interpretations. Thus, the author selected Guiding Case No. 1, No. 4 and No. 5 that have new, clearly articulated rules, which will either fill a gap in legislation or provide a concrete standard in applying previous laws. Then, by studying the specific terminologies, the reasoning and the holdings in the following cases that have similar facts as the guiding cases, the author analysed whether these courts considered relevant guiding cases to be legally binding. Research has shown that while several courts have ignored guiding cases, some have considered them legally binding.

⁵⁹ Shanghai Xiongmao jixie (jituan) youxian gongsi v. Beijing Xiongmao Hengsheng jixie shebei youxian gongsi gudong zhiqing quan jiufen shangsu an (The Appellate Case on the Shareholders' Right to Information between Shanghai Xiongmao Jixie Group Ltd. Co. and Beijing Xiongmao Hengsheng Jixie Equipment Ltd. Co.).

⁶⁰ Eric C. Ip, "The Supreme People's Court and the Political Economy of Judicial Empowerment in Contemporary China", pp. 394–405.

Guiding Case No. 1 concerns the validity of the standard clause that forbids broker circumvention in the real estate brokerage contract. It provides a standard to evaluate the validity of such a clause if it prevents the principal from evading commission after benefiting from the information provided by the broker. Until January 2015, the author found 10 cases that had such a standard clause, seven of them that still adhered to Article 40 rather than the standard provided in No. 1,⁶¹ and three that had applied the standard.⁶²

Guiding Case No. 5 holds that the local administrative licence and penalty on transporting salt are inconsistent with the State Council's regulation and shall not be applicable. Until January 2015, the author found three cases concerning such penalties before the issuance of No. 5.⁶³ In all of the three cases, the courts held local regulations valid and applied them accordingly. There are variations among the courts following the issuance of No. 5. The author also found three subsequent cases concerning the

⁶¹ See these cases: Shanghai Mou fangdichan jingji youxian gongsi v. Moujia jujian hetong jiufen an (The Trial Case on Brokerage Contract Disputes between Shanghai Mou Real Estate Ltd. Co. and Moujia), 15 February 2012; Beijing Lianjia fangdichan jingji youxian gongsi v. Wangmou Jujian hetong jiufen shangsu an (The Appellate Case on Brokerage Contract Disputes between Beijing Lianjia Real Estate Ltd. Co. and Wangmou), 16 November 2012; Shanghai Moumou fangdichan jingji shiwusuo v. Fu moumou jujian hetong jiufen an (The Trial Case on Brokerage Contract Disputes between Shanghai Moumou Real Estate Firm and Fu moumou), 24 January 2013; Shanghai A fangdichan jingji youxian gongsi v. Li XX jujian hetong jiufen an (The Trial Case on Brokerage Contract Disputes between A Shanghai Real Estate Ltd. Co. and Li XX), 15 January 2013; Jia v. Shanghai Yi fangdichan jingji youxian gongsi jujian hetong jiufen shangsu an (The Appellate Case on Brokerage Contract Disputes between Jia and Shanghai Yi Real Estate Ltd. Co.), 8 January 2013; Zhengzhou shihang fangdichan yingxiao cehua youxian gongsi di er fengongsi v. Gaoweimei jujian hetong jiufen an (The Trial Case on Brokerage Contract Disputes between the Second Branch Office of Zhengzhou shihang Real Estate Ltd. Co. and Gaoweimei), 4 May 2012; Dongguan City shiji huihuang wuye daili youxian gongsi v. Wuzhitang jujian hetong jiufen shangsu an (The Appellate Case on Brokerage Contract Disputes between Dongguan City shiji huihuang wuye Brokerage Ltd. Co. and Wuzhitang), 18 April 2013.

⁶² See cases: Chongqing moumou fangdichan jingji youxian gongsi v. Luomoumou jujian hetongjiufen an (Brokerage Contract Dispute Case between Chongqing moumou Real Estate Ltd Co. and Luomoumou), 28 September 2012; Shanghai moumou fangdichan jingji youxian gongsi v. Zhangmou et al. jujian hetong jiufen an (Brokerage Contract Dispute Case between Shanghai moumou Real Estate Ltd Co. and Zhangmou), 20 August 2013; Nantong Aixin fangdichan daili youxian gongsi v. Chenchangjiang jujian hetong jiufen shangsu an (An Appellate Brokerage Contract Dispute Case between Nangong Aixin Real Estate Ltd. Co. and Chenchangjiang), 22 May 2013. See also Deng Jinting, "Meiguo panli tixi jingyan de goujian jingyan—yi jujian hetong wei li" (Experiences from American Common Law Construction—Take the Rules on Brokerage Contract as an Example), *Huadong zhengfa daxue xuebao* (*Journal of Huadong Political and Law University*) 2 (2014): 132–44.

⁶³ See cases: Foshan City chengqu gonglian maoyi bu v. Guangdong Sheng Foshan shiyan zhuanmai ju xingzheng qiangzhi cuoshi, xingzheng peichang jiufen shangsu an (An Appellate Administrative Compensation Dispute Case), 18 September 2003; Liuyang City Youmao Yanhua maoyi youxian gongsi v. Hunan Sheng Luanlingxian yanwu guanli ju xingzheng chufa jiufen an (An Administrative Penalty Dispute Case), 11 February 2012; Nanhua Yanye youxian gongsi anyang fengongsi v. Anyang City gongshang xingzheng guanli ju gongshang xingzheng guanli an (Administrative Regulation Dispute Case), 28 June 2011.

same kind of licence and penalty.⁶⁴ Two of them considered No. 5 effective—one distinguished its case from No. 5⁶⁵ and the other followed exactly the terminology of No. 5 to invalidate such licence and penalty.⁶⁶ However, the third court applied the local rules directly, ignoring No. 5.⁶⁷

Guiding Case No. 4 provides a concrete standard in applying the death penalty with reprieve and restrictions on commutation (DPRRC)⁶⁸ for intentional homicide in disputes regarding love, marriage, family and neighbourhood (LMFN) issues. Until January 2015, the author found 13 subsequent cases of intentional murders committed arising from LFMN issues and that share similar facts as No. 4, where one person was murdered, a confession was obtained, and no forgiveness was granted by the relatives.⁶⁹ Only one case applied the DPRRC,⁷⁰ while the others applied the

⁶⁴ See cases: Yuangao Zhengzhou Haiwang gongye xiaoshou youxian gongsi v. Beigao Zhongmuxian yanwu guanliju bufu xingzheng chufa an (Administrative Penalty Dispute Case), 8 October 2012; Wenzhou Mou Yanye jinchukou youxian gongsi v. Moushi yanwu guanliju yanye xingzheng qiangzhi jiufen shangsu an (Administrative Coercive Measures Dispute Case), 19 June 2012; Huzhou Moumou Yinran youxian gongsi v. Zhejiang Sheng Moumoumoumou guanliju yanye xingzheng chufa jiufen shangsu an (An Appellate Administrative Penalty Dispute Case), 31 July 2013.

⁶⁵ See Yuangao Zhengzhou Haiwang gongye xiaoshou youxian gongsi v. Beigao zhongmuxian yanwu guanliju bufu xingzheng chufa an (Administrative Penalty Dispute Case).

⁶⁶ See Wenzhou Mou Yanye jinchukou youxian gongsi v. Moushi yanwu guanliju yanye xingzheng qiangzhi jiufen shangsu an (Administrative Coercive Measures Dispute Case).

⁶⁷ See Huzhou Moumou Yinran youxian gongsi v. Zhejiang Sheng Moumou moumou guanliju yanye xingzheng chufa jiufen shangsu an (An Appellate Administrative Penalty Dispute Case).

⁶⁸ The DPRRC is designed to adjust and correct the deficiency of China's criminal penalty system whereby the life sentence is considered too light and the death penalty is too harsh. For a detailed discussion of this issue, see Chen Xingliang, "Sixing shiyong de sifa kongzhi" (The Judicial Control over the Death Penalty), *Faxue (The Jurist)* 2 (2013): 43–57. However, the rules in China's criminal law are very principled and provide only that previous serious death-penalty-with-reprieve cases or previous light death-penalty-with-instant-execution cases shall be sentenced with DPRRC, which do not give clear guidelines in judicial application. See Article 4, Para. 2, The Eighth Amendment of China's Criminal Law, 1 May 2011.

⁶⁹ See cases: Liutianming guyi sharen an (Liutianming Intentional Homicide Case), Anhui High Court, 27 December 2012; Wangyong guyi sharen an (Wangyong Intentional Homicide Case), Anhui High Court, 22 May 2012; Sunheng guyi sharen an (Sunheng Intentional Homicide Case), Anhui High Court, 14 August 2012; Lizhiwen guyi sharen an (Lizhiwen Intentional Homicide Case), Anhui High Court, 2 August 2012; Zhangconghe guyi sharen an (Zhangconghe Intentional Homicide Case), Anhui High Court, 18 September 2012; Wumoumou guyi sharen an (Wu moumou Intentional Homicide Case), Shanghai High Court, 22 March 2013; Zhourongfu guyi sharen an (Zhourongfu Intentional Homicide Case), Guangdong High Court, 4 July 2012; Yuzhouyang guyisharen an (Yuzhouyang Intentional Homicide Case), Guangdong High Court, 1 June 2012; Leiwenxing guyi sharen an (Leiwenxing Intentional Homicide Case), Guangdong High Court, 18 July 2012; Yuxiongfeng guyi sharen an (Yuxiongfeng Intentional Homicide Case), Guangdong High Court, 18 September 2012; Libin guyi sharen an (Libin Intentional Homicide Case), Henan Kaifeng Intermediate Court, 19 January 2012; Zhang Moumou guyi sharen an (Zhang Moumou Intentional Homicide Case), Shaanxi High Court, 9 March 2012; Chengwenyou guyi sharen an (Chengwenyou Intentional Homicide Case), Shaanxi High Court, 22 March 2012.

⁷⁰ The first case in fn. 68.

death penalty with reprieve.⁷¹ Thus, it is evident that only one court may have followed No. 4.

Therefore, the empirical study of the three guiding cases shows that many courts have ignored guiding cases when they preside over similar cases, while a few have considered guiding cases binding and followed them or differentiated their own case from them. Thus, there is indeed significant room to strengthen the binding effects of guiding cases. Therefore, granting formal legal status for guiding cases would be advantageous in strengthening judicial autonomy.

However, an immediate authorisation of formal legal effects for guiding cases is difficult in China's statutory legal system, which strongly holds that cases should not be considered as laws. Nevertheless, it is possible that guiding cases will have formal legal force in the future as judicial interpretations. The SPCC took over 15 years to explicitly authorise formal legal effects for judicial interpretations in 1997⁷² from the first issuance of judicial interpretation in the early 1980s.⁷³ Before such measures as formal authorisation was put into practice, the SPCC gradually established the authority of judicial interpretations by increasing the quantity, content and timeliness. From 1980 to 1988, there were 617 judicial interpretations, most of which were in response to factual questions raised by lower courts.⁷⁴ The total number doubled during the next nine years from 617 in 1989 to 1,226 in 1997, and the proportion of abstract judicial interpretations increased by six times to 2.2 per cent (two out of 617 vs. 27 out of 1,226). While replies to factual questions have narrow applicability and limited effects on society, abstract judicial interpretations provide generalised prior-designed rules for non-specific future activities, with much broader applicability and greater effects on society. The abstract judicial interpretations are more important because people could make their contracts, business or life plans accordingly. The SPCC currently publishes abstract judicial interpretations immediately after important statutes or statutory amendments are issued. Such abstract judicial interpretations contain important information to better understand and apply statutory laws, thus becoming necessary parts of these statutory laws.

This is the incremental approach that can be applied to establish the authority of guiding cases by providing new rules, either filling a gap in legislation, providing a concrete standard, or altering statutory meanings. For example, both No. 19 and No. 20 have resolved issues that existing laws had not been able to, and No. 18 clarifies the standard of "incompetence". No. 17, No. 21 and No. 22 have altered the original meanings of existing laws.

⁷¹ The other cases in fn. 68.

⁷² Provisions on Judicial Interpretation Work of SPCC, effective on 1 July 1997 and invalidated by SPCC's Provisions on Judicial Interpretation Work, effective on 1 April 2007.

⁷³ The Decision on Strengthening Judicial Interpretation Work of the National Congress Standing Committee, effective on 10 June 1981.

⁷⁴ This is based on judicial interpretations collected in Beida Fabao's Laws and Rules database.

Additionally, the SPCC has taken measures to build and explicate the effects of guiding cases. It frequently holds meetings with all lower courts and requests them to apply guiding cases and build case databases. It issues official articles immediately after each guiding case to clarify the meanings and scope.⁷⁵ Moreover, some high courts rule that lower courts shall cite relevant guiding cases in their logical reasoning of the case.⁷⁶ Legal scholars have proposed to include a “guiding case citing rate” as a gauge in an internal evaluation system, which is under consideration by the SPCC.⁷⁷ Therefore, from an incremental perspective, the underlining difference in guiding cases that they do not have formal legal status, for which precedents in US Common Law are accorded, may become less significant as the factual effects of the guiding cases become increasingly important.

CONCLUSIONS AND DISCUSSIONS

A holistic study on the SPCC has demonstrated that the SPCC has consistently upheld its two functions—adapting law to social needs and strengthening judicial autonomy. First, the SPCC continues to issue many judicial interpretations. Some were issued with new statutes or statutory amendments, some provided important standards to unify understandings of previous statutes, and some strengthened the internal regulations and improved judicial procedures. The SPCC also clarifies earlier inconsistencies.⁷⁸ Second, the SPCC enhances the transparency of judicial documents, and has issued the Provisions on Publication of Judgements by People’s Courts on the Internet (2013), requiring lower courts to publish their judgements in a uniform manner on the website run by the SPCC since 1 January 2014.⁷⁹ Such openness increases the transparency of judicial work and keeps judicial corruption in check, making it more difficult to happen. It also opens the door for good cases to gain authority and for bad cases to be examined and discussed publicly. Third, the SPCC has continued to strengthen the professionalism of the judiciary by selecting and appointing senior SPCC judges from legal scholars and lawyers. Fourth, the SPCC has tried to build a diversified range of institutions to respond to different kinds

⁷⁵ Until now, all guiding cases are documented with articles entitled “reference and understanding of Guiding Case No. X” to explain their selection process, background, applicable scope and meanings by the SPCC in its official journal.

⁷⁶ The Beijing High People’s Court allows lower courts to cite guiding cases in the reasoning part of the judicial process. Article 15, Beijing High Courts’ Rules on Case Reference.

⁷⁷ Chen Canping, “Anli zhidao zhidu zhong caozuoxing nandian wenti tantao” (An Academic Probe into Judicial Operation of Cases Guiding System), *Faxue zazhi* (Law Science Magazine), no. 3 (2006): 102.

⁷⁸ See SPCC’s Decision on Invalidating Several Judicial Interpretations and Judicial Interpretative Documents from 1 July 1997 to 31 December 2011, effective on 8 April 2013; and SPCC’s Decision on Invalidating Several Judicial Interpretations and Judicial Interpretative Documents from 1 January 1980 to 30 June 1997, effective on 18 January 2013.

⁷⁹ SPCC’s Provisions on Publication of Judgments by People’s Courts on the Internet (2013).

of disputes to strengthen its capability in resolving such disputes, improving the importance of the judiciary and thus its autonomy. These include the re-emphasis of court mediation, the promotion of big mediation systems and circuit courts in some rural areas.

Thus, guiding cases can be seen as one of the SPCC's many tools to make all of the judiciary better instructed and regulated. They have their own advantages over other tools. Abstract judicial interpretations take longer and have to undergo more complicated procedures, and hence usually resolve issues systematically; replies to questions only resolve specific issues and do not require general attention. In contrast, guiding cases are much easier to issue and are more generally applicable. They can fill scattered gaps in existing legislation, clarify the meanings of scattered existing articles, and incrementally reform outdated or inconsistent existing laws. Additionally, guiding cases may also help establish the rules of statutory interpretations. In No. 9, the SPCC took a strict textual reading of statutory articles, while in No. 6 and No. 17 it took an intentional approach in interpreting law.

In the future, there will probably be more guiding cases. As emphasised in the Fourth Five-Year Reform Plan, the function of the guiding case system should be further improved.⁸⁰ Compared with the 22 guiding cases published from late 2011 to 2013, 22 more were published in just 2014. Cases previously published by the SPCC in its gazette are being cleared and reissued as guiding cases, increasing the generation rate of guiding cases.⁸¹

Before guiding cases came into force, the SPCC has published typical cases, reference cases and gazette cases. It hoped to unify local courts' decisions and restrict their discretionary power. Obviously, courts have not followed them and thus they failed to unify judicial decisions. Within the current systematic restrictions of the judiciary, guiding cases can be seen as a further step to push lower courts to follow at least some SPCC decisions and so strengthen its control over lower courts. At present, however, only a few courts have actually followed guiding cases. Lacking formal legal force does affect the function of guiding cases. Courts do not need to worry about being overruled by higher courts if they do not follow guiding cases, because that cannot be a reason to overrule their decisions. Neither can parties appeal based upon guiding cases. However, if courts become quite independent from local governments, there would be no strong reason for them not to follow guiding cases. Then, if guiding cases contain valuable and authoritative instructions filling statutory gaps and vagueness, lower courts will want to follow them in deciding cases. As more and more courts and litigants become used to citing and following guiding cases, the resistance to announcing formal legal status for guiding cases will reduce, as with judicial interpretations. Guiding cases might then achieve formal legal status.

The guiding case system also represents a form of "rule of law with a Chinese characteristic". The Decision of the Fourth Plenum of the Communist Party of China's

⁸⁰ Article 23, SPCC's Opinions on Comprehensively Deepening the Reforms of People's Courts.

⁸¹ Such as the ninth set of guiding cases, all of which are previous gazette cases.

(CPC) Central Committee on the Rule of Law has comprehensively designed a framework to implement the idea of the “rule of law with Chinese characteristics” and explains several of these important characteristics. One is to ensure judicial justice and promote judicial credibility, in which guiding cases are specified as one way to unify the standard of legal applications so that laws can be applied fairly.⁸² Based upon the framework, the SPCC recently elaborated the plan in the Fourth Five-Year Judicial Reform Plan, declaring the intention to further reform the guiding case system to better unify legal application and improve the reasoning of judgements.⁸³ Thus, guiding cases are recognised as one characteristic of China’s rule of law system. Their main mission is to unify judicial decisions. But unlike precedents, which rely on litigants to function, guiding cases are a tool of the SPCC to control lower courts, which explains why they are specified as a way to distribute power within courts.⁸⁴ This fits into China’s situation and reflects current reform ideas that citizens are weak and the central government is strong.

Many characteristics of the guiding case system also reflect Chinese characteristics in the rule of law that although laws and the constitution need to be followed, the leadership of the CPC is paramount and the central government remains strong. Thus, only the SPCC can issue guiding cases. The way to harmonise the rule of law and party authoritarianism is to build strong internal supervision to ensure that the CPC and government activities follow laws and the constitution, and act fairly. Thus, internal supervisory institutions, including guiding cases, are the major part of the SPCC’s reform plan. Although public supervision is emphasised, the control of it is also strong. Hence, the general public can only recommend guiding cases through the deciding courts. It is unclear whether such a reform can work out and if the harmonisation can last. What further reforms the CPC leadership may implement also remain to be seen.

ACKNOWLEDGEMENTS

This article was funded by the Social Science Fund of Beijing, Youth Project “Research of Venue-Change System and Criminal Sentence Standard in Beijing’s Corruption Cases”, 15FXC043; and the Program for Young Innovative Research Team in Renmin University of China Law School. The author is very grateful for the assistance and suggestions provided by Alexandra Grey at Macquarie University, Australia, in the editing of this article, and would also like to thank the anonymous reviewers for their valuable insights and suggestions. The views presented here are the author’s alone.

⁸² Para One, Section Three, Part Four, the Decision of the Fourth Plenum of the CPC’s Central Committee on Rule of Law, at <<http://stock.sohu.com/20141028/n405552348.shtml>> [7 March 2015].

⁸³ Articles 23 and 34, SPCC’s Opinions on Comprehensively Deepening the Reforms of People’s Courts.

⁸⁴ Part Three, Article 23, SPCC’s Opinions on Comprehensively Deepening the Reforms of People’s Courts.