

CHINA'S EVOLVING CASE LAW SYSTEM IN PRACTICE

Susan Finder*

Table of Contents

I. CASE LAW PRACTICE.....	247
A. Judiciary	247
1. The Supreme People's Court	247
2. Lower courts.....	251
B. Procuratorate	253
C. Lawyers and in-house Counsel	254
II. POLICY BACKGROUND	255
III. RECENT DEVELOPMENT	256
IV. CONCLUSION.....	258

* Distinguished Scholar in Residence, School of Transnational Law, Peking University and author of www.supremepeoplescourtmonitor.com. In 1993, the author published the first comprehensive study in English of the Supreme People's Court.

CHINA'S EVOLVING CASE LAW SYSTEM IN PRACTICE

Susan Finder

One of the many judicial reforms designated in the latest round of judicial reforms is developing China's case law system. This reform was among those highlighted in the Central Committee of the Communist Party Decision concerning Several Major Issues in Comprehensively Advancing Governance According to Law (4th Plenum Decision) and Opinion of the Supreme People's Court (hereinafter the "SPC") on Deepening Reform of the People's Courts Comprehensively (4th Five-year Court Reform Plan) (further described below). It further builds on many years of discussions within the courts, the initiative of Judges Hu Yunteng and Jiang Huiling and others affiliated with the SPC's Institute of Applied Jurisprudence in the middle 2000s¹ as incorporated into previous judicial reforms.

The conventional wisdom among both foreigners and some Chinese scholars writing about case law is that with the exception of a small number of guiding cases approved by the SPC, previous cases do not have any precedential value. Those closer to the world of practice in China know that previous cases, or some portion of them, are indirectly shaping the development of Chinese law. The guiding and non-guiding cases constitute what is sometimes described as the case guidance mechanism (案例指导机制).

The non-guiding cases are not directly binding, may not be cited in court judgments, and do not have precedential value. They can be used as a source of reference (参考). In practice, however, they form a type of soft precedent frequently used by Chinese legal professionals in a variety of ways, with the intellectual property courts taking the lead. Senior judges involved are careful to distinguish China's case law system from the Anglo-American precedential system.

This article will first describe how Chinese legal professionals are using cases, other than those approved as guiding cases, as "soft precedent," explain why they are doing so, the role of the SPC in this development, and what this portends for the evolution of China's case law system.

¹ Hu Yunteng (胡云腾), *Yige Dafaguan yu Anli de 38 Nian Qingyuan* (一个大法官与案例的38年情缘) [*A Judge's 38-year Affection for Cases*], 20 MINZHU YU FAZHI [民主与法制] (DEMOCR. & LEGAL SYST.) 13-17 (2017), available at <https://mp.weixin.qq.com/s/JvDzGELr3vueXqkDQnVz1Q>. Jiang Huiling (蒋惠岭), *Renzhen Duidai Zuowei "Dongtai Fadian" de Anli* (认真对待作为“动态法典”的案例) [*Treat Cases Seriously as a "Dynamic Code"*], RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S CT. DAILY], Aug. 1, 2005.

I. CASE LAW PRACTICE

Careful observation and discrete inquiries reveal the following use of case law among different parts of the Chinese legal profession.

A. Judiciary

1. The Supreme People's Court

The SPC and its affiliated institutions, the institutions driving the development of the case system, use cases themselves in their work and also select and publish cases. The latter is part of the statutory role of the SPC to supervise and guide the lower courts.²

In practice, when SPC judges consider cases, they (or more likely, their clerks or judicial assistants) search prior cases. The term “consider cases” is meant broadly, to cover various types of disputes that come before the SPC, be they appeals, applications for retrial, review of lower court rulings relating to foreign or foreign-related arbitration under the Prior Approval system, or death penalty reviews. The cases may be those specially selected by the SPC or its affiliated institutions (described below), those found on Peking University's Chinalawinfo (北大法宝), China Judgments Online (裁判文书网) or other case databases, such as Faxin (法信) and Itslaw (无讼). Judges considering cross-border matters may look to leading Hong Kong or foreign cases. Before the China Judgments Online site was established at the beginning of 2014, it was much more difficult for SPC judges to access court decisions easily, even within the SPC. However the practice of looking to prior cases seems to date back to at least 2005, at which time an internal database existed.³ As to how these prior cases are being used, it appears that judges will consider what the line of prior cases are, whether the reasoning in the prior cases is applicable to the case before them, or whether there are factual, legal or policy reasons to take another approach (or take an approach consistent with one or another line of cases).⁴

Another situation where SPC judges use prior cases is drafting judicial interpretations. Judicial interpretations most often address a series of issues regarding which the SPC itself or lower courts have been unsure of or split in their approaches. Among the many sources that SPC judges rely on is a search of cases published in China Judgments Online (or its counterparts) as well as by doing fieldwork in local courts which involves the review of local court judgments.

The SPC, carrying out its function to supervise and guide the lower courts, unify the application of law, and improve the quality of justice, selects and publicizes certain of its own cases and those of lower courts in a variety of forms. Guiding cases, about which there

² Fayuan Zuzhi Fa (法院组织法) [Organic Law of the People's Courts] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 31, 2006, effective Jan. 1, 1980) (2006) art. 16 (Chinalawinfo).

³ Jiang, *supra* note 1; correspondence with the author.

⁴ Correspondence with the author.

is a rich literature in Chinese and English, rank first.⁵ As noted above, this article focuses on the role of non-guiding cases and therefore the principal forms through which the SPC makes known non-guiding cases are listed below.

- Cases published in the monthly SPC Gazette (最高人民法院公报), which take two forms: selected judgments (裁判文书选登) and cases (案例), generally totaling 20-30 annually. The first type are cases decided by various trial divisions of the SPC and reflect their views on certain issues, while the second are model cases submitted by the local courts (through the provincial high courts), which have been reviewed by various divisions of the SPC. The cases, which have been edited, contain a summary of the important points of the case (裁判摘要). However, there are no formal publicly-available criteria for selection. These cases are now accessible on the SPC's website, at <http://gongbao.court.gov.cn/>.

- Cases published by publications of the SPC such as:

- * Selection of People's Court Cases (人民法院案例选), a monthly publication of the China Institute for Applied Jurisprudence, affiliated with the SPC;

- * China Case Trial Highlights (中国审判案例要览), an annual publication of the National Judicial College and the Renmin University of China Law School.

- China Court Annual Cases (中国法院[2016]年度案例), a publication of the National Judicial College's Case Development Research Center, now with an online platform (<http://anli.court.gov.cn/static/web/index.html#/index>). The cases that the editorial team from the National Judicial College selected for publication in China Court Annual Cases are also edited and contain an added section called "important points (要旨) following the theory that readers would prefer something easy to read and useful"⁶.

- People's Justice: Cases (人民司法——案例). People's Justice is a biweekly publication affiliated with the People's Court Daily (人民法院报), but the Cases section is published monthly. The cases published in the Selection of People's Court Cases are edited and contain a summary of the "important points (要点)" of the case.

⁵ See Mark Jia, *Chinese Common Law? Guiding Cases and Judicial Reform*, 129 HARV. L. REV. 2213 (2016); Björn Ahl, *Retailing Judicial Professionalism: The New Guiding Cases Mechanism of the Supreme People's Court*, 217 CHINA Q. 121 (2014); Deng Jinting, *A Functional Analysis of China's Guiding Cases*, CHINA (forthcoming Aug. 2016); Chen Xingliang, *China's Guiding Case System*, 1 PEKING U. L.J. 215 (2014).

⁶ Guojia Faguan Xueyuan Anli Kaifa Yanjiu Zhongxin (国家法官学院案例开发研究中心) [Case Develop and Res. Center in Nat'l Judges C.], *Zhongguo Fayuan 2016 Niandu Anli: Hunyin Jiating yu Jicheng Jiufen (中国法院2016年度案例：婚姻家庭与继承纠纷)* [China Court Annual Cases 2016: Marriage, Family and Inheritance Disputes] Introduction (Cao Shibing (曹士兵) eds., China Legal Publishing House, 2016).

- Trial Guides edited and written by the trial divisions of the SPC (最高法院各审判业务庭编写的审判指导丛书): The People's Court Press publishes a series entitled China Trial Guide (审判指导丛书), with separate publications by various trial divisions of the SPC. Among the divisions issuing Trial Guides include the case filing, administrative, civil, environmental, and criminal divisions. These publications often contain cases from the lower courts. For the #4 civil division's Trial Guide, cases (in the form of a response to a request for instructions) that have been reported to that division for review under the Prior Reporting system. The practice of publishing cases in this series does not seem to be uniform. Publications from the #2 civil division set out the "important points (要旨)" in selected cases (full judgment) while publications from the #4 civil division include cases without comments. The SPC's criminal divisions publish Criminal Trial Reference (刑事审判参考), very popular among criminal justice legal professionals.

- Handbooks published by the People's Court Press such as the Collection of the Supreme People's Court's Judicial Rules (Collection of Judicial Rules) (最高人民法院司法观点集成) published by the People's Court Press now in its 2nd edition, intended to aid lower courts in quickly determining the applicable legal rules. Cases are among the sources drawn upon, but, according to the editors, are not as authoritative as other types of documents. Those documents include the following, in order: a. judicial interpretations; b. the essence of judicial policy (conveyed in speeches by the SPC president and vice presidents responsible for the substantive area); c. responses (答复) issued by the various divisions of the SPC to requests from the lower courts; d. opinions (意见), answers, (解答), trial case handling guidance (审判办案指南), research opinions of the research office (研究意见) and other guidance issued by the various divisions of the SPC and speeches given by the heads of those divisions at national court conferences; e. guiding cases, SPC cases, SPC bulletin cases.⁷ Those cases usually include a summary of the "important points" (裁判要旨).

- Weekly case page published in the People's Court Daily.

- Model/typical cases as published by the SPC: The SPC has been more systematically issuing model (typical) cases (典型案例) since the spring of 2014, although the practice itself dates back to the 1980s. Various divisions of the SPC select these cases and they are edited by the SPC general office. However, there is no official guidance for selection. It is understood that these cases are selected by the research offices of higher people's courts and then reported to the SPC. Another route for model cases to reach the SPC is through field research that SPC researchers undertake when preparing judicial interpretations or regulations. These cases are heavily edited

⁷ Zuigao Renmin Fayuan Sifa Guandian Jicheng (最高人民法院司法观点集成) [Collection of the Supreme People's Court's Judicial Rules] Introduction (Liu Dequan (刘德权) eds., People's Court Press, 2014).

and contain a section discussing their significance as a model case (典型意义). These cases can be found on the SPC's official website.

- Case Summaries (案例要旨): In September, 2016,⁸ after obtaining approval from a conference of Northeast Province Administrative Division judges, the Second Circuit Court of SPC issued a case summary of 20 cases it had reviewed. In March, 2017, the WeChat account of the Second Circuit Court described the summary as a new type of case guidance.⁹ The term, however, dates back over 10 years, as it was initially used by the Institute of Applied Jurisprudence when editing cases for *Selection of People's Court Cases*.¹⁰

For the legal community outside the court system, the relative authority of these different types of non-guiding cases is unclear, although it is generally recognized that the SPC Gazette cases have higher authority than others. Several persons currently affiliated with the court system have set out the ranking of different types of cases.

- As cited in an article by Judges Jiang Huiling and Yang Yi of the Institute for Applied Jurisprudence, highlights the list set out in "The Beijing IP Court Guiding Case Work Implementation Methods (Draft)"¹¹:

- * SPC guiding cases
- * SPC annual cases
- * other SPC cases
- * High People's Court model cases
- * High People's Court reference cases
- * Other prior cases from High People's Courts
- * Intermediate People's Court precedent
- * High People's Court reference cases
- * Other prior cases from High People's Courts
- * Intermediate People's Court precedent
- * Basic-level Court precedent
- * Foreign (non-mainland) case precedent.

- Set out in an article published by Judge Wang Jing, a senior Nanjing Intermediate People's Court judge, whose articles have been published (and re-published) in a number of prestigious WeChat

⁸ Wang Jian (王健), "Anli Yaozhi" *Jiangou Shenpan Xin Zhinan* ("案例要旨" 建构审判新指南) [*"The Important Points of Guiding Cases" Constructs New Compass of Judgment*], DEMOCRACY AND LEGAL SYSTEM (Mar. 8, 2017), <http://www.mzyfz.com/index.php/cms/item-view-id-1256423?verified=1>.

⁹ *Id.*

¹⁰ Hu, *supra* note 1.

¹¹ Jiang Huiling & Yang Yi (蒋惠岭, 杨奕), *Beijing Zhishi Chanquan Fayuan: Yi Xianli Panjue Zhidao Shenpan Gongzuo Zhidu de Chuanxin Shijian* (北京知识产权法院: 以先例判决指导审判工作制度的创新实践) [*Beijing Intellectual Property Court: Innovation in System Using Precedents to Ghttp://www.iolaw.org.cn/showNews.aspx?id=54956uide Trial Work*], LEGAL DAILY (Apr. 6, 2016), http://www.legaldaily.com.cn/zfzz/content/2016-04/06/content_6554639.htm?node=54621.

public accounts, including the account of the Shandong Higher People's Court is similar, with some small differences.¹²

2. Lower courts

Higher and sometimes intermediate courts also issue model cases and case analyses, under their authority set out in 2010 regulations¹³. Some high courts publish their own gazettes, such as the Jiangsu Higher People's Court Gazette, which publishes cases decided by that court and model/typical cases from the lower courts. Higher people's court generally do not have the wide range of publications of the SPC and tend to use other types of documents — rather than individual cases — to guide the lower courts.

- Beijing Intellectual Property Court

The Beijing intellectual property court (Beijing IP court) is taking the lead in piloting the use of case law and has released data on its use of precedents.¹⁴ The SPC has designated the Beijing IP court as an IP law research base. The Beijing IP court is piloting a case law system, or what it calls a “system of using prior judgments to guide trial work” (先例判决指导审判工作的制度). The SPC supports the pilot. As to why the Beijing IP court is the pilot court, Mark Cohen of the blog Chinaipr.com has identified some of the factors.¹⁵ The Beijing IP court is located in one of China's wealthiest cities, with a sophisticated legal and IP community, and considerable foreign interaction. Other factors the author would add include the relatively non-political and technical nature of IP issues, as they are not seen as affecting social stability.

In his January, 2017 report, Chief Judge Su Chi of the Beijing IP Court, devoted a section to explaining the system and how it has worked so far.¹⁶ The Beijing IP Court Guiding Case Work Implementation Methods (Draft) mentioned earlier appears not to have been released publicly, but some of its principles must have been made known to the practitioner community and are visible from Judge Su's report. Among those principles are encouraging advocates to submit relevant precedents, considering precedents as *de facto* binding, and permitting judges to cite precedents in their judgments

¹² Wang Jing (王静), *Anli Naxie Shi'er* (案例那些事儿) [*Those Things about Guiding Cases*], republished at ZHONGGUO RENMIN DAXUE LVSHI XUEYUAN (中国人民大学律师学院) [LAWYER COLLEGE RENMIN UNIVERSITY OF CHINA], (June 24, 2015), <http://lawyer.ruc.edu.cn/html/lvshijie/20150624/3875.html>

¹³ Guanyu Guifan Shangxijai Renmin Fayuan Shenpan Yewu Guanxi de Ruogan Yijian (关于规范上下级人民法院审判业务关系的若干意见) [The Several Opinions on Regulating the Trial Work Relations between the People's Courts at Different Levels] (promulgated by Sup. People's Ct., Dec. 28, 2010, effective Dec. 28, 2010) (Chinalawinfo).

¹⁴ Mark Cohen, *Spring Time for IPR Case Law in China*, CHINAIPR.COM (Mar. 12, 2017), <https://chinaipr.com/2017/03/12/spring-time-for-ipr-case-law-in-china/>.

¹⁵ Su Chi (宿迟), *Beijing Zhishi Chanquan Fayuan Liangzhounian Gongzuo Qingkuang Tongbao* (北京知识产权法院两周年工作情况通报) [*The Report on 2-year work of Beijing IP Court*], CHINAIPRLAW.CN (Jan. 13, 2017), <http://www.chinaiprlaw.cn/index.php?id=4592>, summarized in Cohen, *supra* note 14.

¹⁶ Su, *supra* note 15.

(坚持先例“事实上的拘束力”，在裁判理由部分援引和遵循先例)。According to Judge Su's report, the Beijing IP court cited 279 case precedents in 168 cases since the time the precedent base until October 2016, with parties citing cases 121 times, and judges finding cases 47 times. In total, 117 cases relied on precedent in their decisions. Of the 168 cases, there were 51 instances where cases were not relied upon because the facts were different, and reversal of an earlier precedent was obtained. The cases cited were as follows: 31 from the SPC, 132 from High Courts (predominately (117) from the Beijing High Court), and the remaining ones from local courts.¹⁷ Mark Cohen extrapolated the data to the full year: “if this data was further compared to the 8,111 cases concluded by the Beijing IP Court in calendar year 2016, the citation rate was a minimum of 2.1% based on the data provided through October, which is considerably higher than the guiding cases effort”. Practitioners at the Beijing IP court have commented that using precedent is the normal practice there.¹⁸

- Other lower courts

As no nationwide studies have been done on the use of cases by Chinese courts, particularly non-guiding cases, it is difficult to accurately assess the extent to which lower courts are looking to prior cases to supplement statutory law and judicial interpretations. Several studies, including those from Sichuan Province and others from the Zhuhai (Guangdong), Xi'an (Shaanxi) and Fengtai (Beijing) courts, show the percentage of judges looking to prior cases varies from close to 70% to 95%.¹⁹ Additionally, based on the author's discrete inquiries and research, the higher people's courts (higher courts), intermediate courts, and basic level courts (and it seems, also the specialized courts) use cases in multiple ways.

According to the author's inquiries, some lower court judges (or their support staff) search case databases regarding a particular issue to find out how the SPC, and possibly other higher courts have decided this particular issue or set of related issues. They will look to the SPC sources mentioned above, particularly cases published in the Trial Guides, as those cases often reflect the current issues the courts are facing. The higher courts that are most persuasive are those in the same jurisdiction as the court considering the case. This can be seen from two articles published on WeChat by two different judges in Jiangsu province: the first one, by a county level judge, on mental distress compensation in a civil suit incidental to a criminal traffic

¹⁷ Cohen, *supra* note 14.

¹⁸ Interview by the author.

¹⁹ Yu Tongzhi (于同志), Anli Zhidao Ruyi Fasheng (“案例指导”何以发生) [How Does Case Guidance Occur], 10 FALV SHIYONG (法律适用) [J. LAW APPLICATION] (2017), available at <https://mp.weixin.qq.com/s/x0kCZSDRLdE8RsOr73IMPw>.

accident prosecution;²⁰ and the second by a higher people's court judge, on the same topic. The research set out in these articles likely arises from the cases that they have heard.

Several judges commented that this will be done only for cases considered major, difficult or complicated, particularly when they feel the law is unclear, rather than for ordinary cases and basic level judges, faced with large numbers of legally straight forward cases are less likely to do so. Other judges will not search cases at all. Other judges will not search cases at all. Others will do so and use cases to bolster their views in internal discussions. One judge suggested that some judges use cases to show prior practice when in discussions to coordinate views on an issue with other criminal justice authorities held under the auspices of the local Party political-legal committee. As for the specialized courts, the practice in the more internationally oriented maritime courts appears to be different from the more traditional military courts. Several maritime judges mentioned that advocates submit precedents in their submissions, and they themselves would search for similar precedents, with one commenting that this was a more general trend. A former military court judge indicated that lawyers might submit prior cases, but judges themselves were unlikely to search for them. His view was that the usefulness of cases was limited because Chinese criminal law and criminal justice policy changed so rapidly.

B. Procuratorate

Like the judiciary, the Procuratorate is evolving its own case law system. In 2010, the Supreme People's Procuratorate (hereinafter the "SPP") issued its Case Guidance Provisions.²¹ These 2010 provisions established a guiding case system for the procuratorate, analogous to that of the courts, although less developed than the courts. Before these provisions were issued, there was professional debate on whether supplementing statutory law with case law was appropriate for China, with senior SPP officials explaining that the intention was not to import the Angle-American system to China²² but to create a system appropriate for China. The concept of case guidance includes guiding as well as non-guiding cases. As could be expected, there seems to be some variation as to the extent to which local procurators

²⁰ Zhou Tianbao (周天保), *She Jiaotong Zhaoshi Fanzui Qingxing xia Jingshen Sunhai Fuweijin de Peichang* (涉交通肇事犯罪情形下精神损害抚慰金的赔偿) [Compensation for Spiritual Damage in Case of Traffic Accident Crime], SHENPAN YANJIU (审判研究) [STUDY ON TRIAL] (May 22, 2017), <https://mp.weixin.qq.com/s/Rl74aqBEp5qrXmpqtOlemA##>.

²¹ Zuigao Renmin Jianchayuan Guanyu Anli Zhidao Gongzuo de Guiding (最高人民法院关于案例指导工作的规定) [The Case Guidance Provisions of the Supreme People's Procuratorate] (promulgated by Sup. People's Ct., July 30, 2010, effective July 30, 2010) (Chinalawinfo).

²² Zuigao Renmin Jianchayuan Yanjiushi Zhuren Chen Guoqing — Jiancha Jiguan Anli Zhidao Zhidu de Goujian (最高人民法院研究室主任陈国庆——检察机关案例指导制度的构建) [Chen Guoqing, Research Office Director of the Supreme People's Procuratorate — Construction of the Procuratorate Case Guidance System], LEGAL DAILY (Jan. 5, 2011), http://www.legaldaily.com.cn/bm/content/2011-01/05/content_2427559.htm?node=20739.

search prior cases. Inquiries with some local procurators suggest that procurators often search prior cases as well, especially when the law is unclear or they are unsure of what the law is. However, it seems safe to assume that some do not search cases at all.²³ For those who do so, they may use an internal database, the SPC's database, or make inquiries with the courts. One local procurator remarked that the SPP was taking the case law system seriously, but because the coastal province in which she worked generally encountered difficult issues first, so that her jurisdiction was less likely to find useful precedents, or the precedents that she found differed too much to be useful.²⁴ She noted that she and her colleagues sometimes use cases to support their views in discussions with other criminal justice authorities in political legal committee sponsored coordination meetings. Given the paucity of data, it is difficult to make an accurate determination of the extent to which the case system is being used. The case law system of the court has captured the attention of the procuratorate, as is clear from those writing from the profession.²⁵

C. Lawyers and in-house Counsel

Lawyers and in-house counsel make the broadest use of prior cases. They use them both in contentious and non-contentious matters, as described below.

- Lawyers sometimes submit relevant court judgments or rulings when making a submission in an administrative proceeding, such as to the Trademark Review and Adjudication Board to support their client's legal position;
- Lawyers sometimes submit relevant court judgments or rulings to a court, or mention prior court decisions in court hearings (as mentioned above in passing). The practice is that lawyers will submit cases decided by courts superior to the court where they are litigating, so that a lawyer litigating in a Beijing district court may attach a relevant case decided by the Beijing Higher People's Court, for example, and less often, judgments decided by courts in other jurisdictions. The thinking is that a lower court is likely to be persuaded that the superior court will rule similarly if the case is appealed;
- Lawyers search prior cases when considering the most appropriate jurisdiction to file a lawsuit, for example, considering the

²³ Correspondence with the author.

²⁴ Interview by the author.

²⁵ Pan Zhonghua (潘仲华) & Fu Hongmei (付红梅), *Chuantong yu Chaoyue: Anli Yinzheng Zhidu de Goujian Tansuo (San)* (传统与超越：案例引证制度的构建探索(三)) [*Tradition and Advancement: the Exploration of the Construction of Case Citing System (Part 3)*], SHANGHAISHI PUDONG XINQU RENMIN JIANCHAYUAN (上海市浦东新区人民检察院) [SHANGHAI PUDONG DISTRICT PEOPLE'S PROCURATORATE] (Oct. 14, 2014), <http://www.shpudong.jcy.gov.cn/pdjc/llyd/7300.jhtml>.

amount of damages generally awarded, or whether a court interprets a law or regulation in a way favorable to the litigant's position;

- Lawyers also search prior cases to assessing the likelihood a claim will succeed, client's legal position, as well as the latest position of the courts on particular issues. This practice is reflected in WeChat articles written for the legal profession summarizing the legal rules that can be found in SPC judgments or rulings in a particular area. For example, a well-known WeChat public account has published a series of articles analyzing SPC cases and other cases on a range of Company Law issues, such as:

The editors of this series note in their commentary on the drafting of cooperative real estate development contracts that their last step in drafting is to search cases relating to that particular type of contract, to determine where these real estate development deals fail.²⁶

It is for these reasons that a number of legal services companies, such as Itslaw (无讼)²⁷, are training young lawyers in case searching and retrieval (guiding and non-guiding cases), using keywords analogous to Westlaw's and LexisNexis' products.

II. POLICY BACKGROUND

The developments described above are tied to policy statements in the October, 2013 judicial reform plan, 4th Plenum Decision and 4th Five Year Court Reform Plan. The October, 2013 judicial reform plan that was published flagged the importance of case law in this phrase:

Fully expand the important role of guiding cases and cases for reference.²⁸

²⁶ Tang Qinglin, Li Shu & Yang Wei (唐青林, 李舒, 杨巍), *Zuigao Fayuan: Mingwei Hezuo Kaifa Fangdichan Shiwei Tudi Shiyongquan Zhuanrang de 10 Ge Dianxing Panli Ji Caipan Guandian* (最高法院:名为合作开发房地产实为土地使用权转让的10个典型判例及裁判观点) [*The Supreme People's Court: 10 Model Cases and Judgment Viewpoints Concerning Cases That Are in Name a Cooperative Real Estate Development Contract but in Nature a Transfer of Land Use Rights*], FAKE DIGUO (法客帝国) [EMPIRE LAWYERS] (Mar. 14, 2017), http://mp.weixin.qq.com/s?_biz=MzA5MjkxNjlxMQ==&mid=2649651479&idx=2&sn=3ce8e67f65ac40833db5794263a5c871&chksm=887f098bbf08809d1cad984fa0bb72bbe44ec149d2e0cc22fdeb3fe4efbbea7ca01c8b601ca&mpshare=1&scene=5&srcid=0327xqicpfqoMW9s48DaDdi5#rd.

²⁷ For example, see the promotion of Itslaw online training at <http://detail.youzan.com/show/goods?alias=4d3nw888&v2/goods/4d3nw888>.

²⁸ *Zuigao Renmin Fayuan Guanyu Qieshi Jianxing Sifa Weimin Dali Jiaqiang Gongzheng Sifa Buduan Tigao Sifa Gongxinli de Ruogan Yijian* (最高人民法院关于切实践行司法为民大力加强公正司法不断提高司法公信力的若干意见) [Several Opinions of the Supreme People's Court on Effectively Practicing "Justice for the People", Vigorously Strengthening Judicial Justice and Continuously Improving Judicial Credibility] (promulgated by Sup. People's Ct., Sept. 6, 2013, effective Sept. 6, 2013) (Chinalawinfo).

The Communist Party leadership expressed its approval for case law in the 4th Plenum Decision in the following phrase:

Strengthen and standardize judicial interpretation and case guidance, and unify standards of applicable law (加强和规范司法解释和案例指导，统一法律适用标准).

The 4th Five Year Court Reform Plan sets out the latest policy statement:

23. Improve mechanisms for the uniform application of law. Improve the Supreme People's Court's methods of trial guidance, increase the standardization, timeliness, focus and efficacy of judicial interpretations and other measures of trial guidance. Reform and improve mechanisms for the selection, appraisal and release of guiding cases. Complete and improve working mechanisms for the uniform application of law.²⁹

III. RECENT DEVELOPMENT

Under a recent SPC policy document that has become effective on 1 May, 2017, the prevalent practice described above that judges search a particular issue to see how other courts have decided a particular issue or the elements to which they have looked when deciding a particular issue, has become a required practice. The SPC's Opinions on Putting a Judicial Responsibility System in Place and Improving Mechanisms for Trial Oversight and Management (Provisional) contains the following phrase:

6. All levels of people's courts shall give full play to the professional judges' conferences and adjudication committee's roles in summarizing trial experience unifying judgment standards; and on the foundation of improving working mechanisms such as consulting similar cases and judgment guidance; a mechanism is to be established requiring the search of similar cases and relevant cases, to ensure a uniform

²⁹ Zuigao Renmin Fayuan Guanyu Quanmian Shenhua Renmin Fayuan Gaige de Yijian—Renmin Fayuan Disige Wunian Gaige Gangyao (2014-2018) (最高人民法院关于全面深化人民法院改革的意见——人民法院第四个五年改革纲要 (2014-2018)) [Opinions of the Supreme People's Court on Comprehensively Deepening the Reform of the People's Courts—the Fourth Five-year Reform Outline of the People's Courts (2014-2018)] (promulgated by Sup. People's Ct., Feb. 4, 2015, effective Feb. 4, 2015) (Chinalawinfo).

judgment standard for similar cases, and the uniform application of law.³⁰

This requires judges to do what many of them have been already doing — searching the case databases for prior cases that raise the same or similar issues and other issues related to the principal one(s). This principle will be applicable to judges hearing all sorts of cases — civil, criminal, administrative, enforcement, and intellectual property. However, in most areas it will not be evident to the reader of a Chinese judgment or ruling that precedent has been considered because non-guiding cases may not be cited, with the exception of the Beijing IP Court.

Requiring a search of prior and related cases is an important step in the evolution of the Chinese case law system. That system (as the author wrote recently³¹), supplements and informs judicial interpretations. Judicial interpretations often take years to be finalized. National legislation (by the National People's Congress and its Standing Committee) is hopelessly inadequate for the needs of the court system. Case law is needed to fill in the gaps. Judges, who are assuming greater individual responsibility for their decisions, need case law for more specific guidance.

In her remarks in November, 2016 focused on intellectual property, Justice Tao Kaiyuan revealed the thinking of the SPC leadership:

The construction of the case guidance system [Chinese case law] is not to create a new legal source, but to ... uncover the broader consensus of the industry, to further refine legal rules and to provide better law for society. It is also expected to lay the foundation for the drafting of judicial interpretations... [T]he function of the intellectual property case guidance system is to enhance the predictability of the judiciary by establishing an intellectual property case guidance system to promote the unity of judicial standards.³²

³⁰ Zuigao Renmin Fayuan Guanyu Luoshi Sifa Zerenzhi Wanshan Shenpan Jiandu Guanli Jizhi de Yijian (Shixing) (最高人民法院关于落实司法责任制 完善审判监督管理机制的意见 (试行)) [Interpretation of the Supreme People's Court on Putting a Judicial Responsibility System in Place and Improving Mechanisms for Trial Oversight and Management (Provisional)] (promulgated by Sup. People's Ct., Apr. 12, 2017, effective May 1, 2017) (Chinalawinfo).

³¹ See Susan Finder, *How the Supreme People's Court Uses Case Law & Other Sources When It Guides the Lower Courts*, Supreme People's Court Monitor (Mar. 8, 2017), <https://supremepeoplescourtmonitor.com/2017/03/08/how-the-supreme-peoples-court-uses-case-law-other-sources-when-it-guides-the-lower-courts/>.

³² *Tao Kaiyuan Qiangdiao: Lizu Anli Yingyong Goujian Zhongguo Tese Zhishichanquan Anli Zhidao Zhidu* (陶凯元强调：立足案例应用 构建中国特色知识产权案例指导制度) [*Tao Kaiyuan Stresses: Based on Case Application, Constructing Case Guidance System of Intellectual Property Rights with Chinese Characteristics*], JUDICIAL PROTECTION FOR INTELLECTUAL PROPERTY IN CHINA (Nov. 25, 2016), <http://www.chinaiprlaw.cn/index.php?id=4517>.

IV. CONCLUSION

The 2014 establishment of China Judgments Online, the Chinese judgments database, has sparked its use by a broad range of Chinese legal professionals. It appears that initially the SPC did not expect the case database to be so widely used a source by legal professionals. Section 23 of the 4th Five Year Court Reform Plan flags that case law is recognized as a useful supplement to judicial interpretations to guide the lower courts, with guiding cases as the most authoritative. Given the rapid pace of social and economic change in China, long delays in promulgating or amending legislation, and considered tempo for drafting judicial interpretations, the use of prior cases as a form of soft precedent can be expected to increase in the foreseeable future.

The fact is that the drafting process for judicial interpretations is a slow one. It can easily take several years for an interpretation to be finalized, particularly in the area of civil and commercial law, because SPC judges working on these interpretations must take into account comments from a large variety of interested parties. Moreover, the rules set out in judicial interpretations must be able to stand the test of time, including changes in government policies. Case law, both guiding and non-guiding cases, is seen as needed to fill in the gaps. As several other scholars and the author have pointed out,³³ the case database is incomplete, with only half of the available cases uploaded, some with considerable delay, and major regional disparities. Researchers have noted that cases disappear from the database for no apparent reason, while the more sensitive cases are rarely included. Mediated cases, which could be an important source of legal practice, are also excluded. However, even with these caveats, the use of case law is clearly on the increase, including in judicial training.³⁴ A comprehensive empirical assessment of the extent to which judges and procurators are looking to prior cases, will need to await a future study, although the data cited above indicates the practice is widespread.

How China's case law system will further evolve relates to and will depend on a number of factors, some of which are not technical. On the technical side, it is unclear whether the SPC will find it useful to evolve firmer legal rules concerning the relative authority of different types of cases. Another question is whether the SPC will

³³ Susan Finder, *Big Data On China's Case Database* (Nov. 13, 2016), <https://supremepeoplescourtmonitor.com/2016/11/13/big-data-on-chinas-case-database/>. Jeremy Daum, *The Curious Case of China's Guiding Cases System* (Feb. 21, 2017), <http://www.chinalawtranslate.com/the-curious-case-of-chinas-guiding-cases-system/?lang=en>.

³⁴ *Chongqing Fenyuan Juban Quanshi Qingnian Faguan Gupan Peixunban* (重庆分院举办全市青年法官骨干培训班) [*Chongqing Branch Held Training Courses for Excellent Young Judges in the City*], NAT'L JUDGES C. (May 10, 2017), <http://njc.chinacourt.org/article/detail/2017/05/id/2853493.shtml>

mandate situations in which the use of case law will be required or alternatively will not be required.³⁵ For example, it appears that in the hearing of simple cases (as defined by a 2016 policy document), reference to earlier cases will not be required.

Finally, case law continues to be controversial in China, as it has for over ten years, with some suggesting that judges are making law (法官造法) or are seeking to import a Western practice to China. Therefore, the SPC emphasizes that it is creating a case law system with Chinese characteristics. Judges Jiang and Yang revealed that there are plans to expand the principles derived from the Beijing IP Court pilot to a national scale, in 2018-19. Whether the practice of the Beijing IP court, which looks more clearly derived from international practices, will be extended beyond the IP courts is unclear. If history is any guide, rules on the use of cases as “soft precedent” are likely to reflect a consensus of usual court practice, with Chinese characteristics. When Justice Hu describes case law as an “unstoppable torrent,” the role of cases in guiding the thinking of legal professionals in China will only grow.³⁶

³⁵ Zuigao Renmin Fayuan Guanyu Jinyibu Tuijin Anjian Fanjian Fenliu Youhua Sifa Ziyuan Peizhi de Ruogan Yijian (最高人民法院关于进一步推进案件繁简分流优化司法资源配置的若干意见) [Interpretation of the Supreme People's Court on Further Promoting Case Diversion and Optimization of Judicial Resource Allocation] (promulgated by Sup. People's Ct., Sept. 12, 2016, effective Sept. 12, 2016) (Chinalawinfo).

³⁶ Hu, *supra* note 1.