

# “Legal Precedents” with Chinese Characteristics: Published Cases in the Gazette of the Supreme People’s Court

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## I. INTRODUCTION

The publication of decided cases, beginning in 1985, in the Gazette of the Supreme People’s Court of the People’s Republic of China [hereinafter the Gazette]<sup>1</sup> has attracted much attention from Western scholars. Some have regarded it as a valuable tool for understanding developments in the Chinese legal system in post-Mao China.<sup>2</sup> Some scholars commented, on the one hand, that the Gazette is “[p]robably the most important new publication on law” in China,<sup>3</sup> since it is the first time that the People’s Republic has published its decided cases. On the other hand, they expressed serious doubts as to “whether these cases have the force of precedents,” and “will be cited by judges in their decisions.”<sup>4</sup> The conclusion these scholars reached was that “[t]hese published decisions do not . . . carry the force of precedent. They will be used only as models to help less experienced judges learn methods of legal reasoning.”<sup>5</sup>

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1. Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan Gongbao.

2. See Hsia & Zeldin, *Recent Legal Developments in the People's Republic of China*, 28 HARV. INT'L L.J. 249, 276 (1987). See also Hsia & Johnson, *Law Making in China*, E. ASIAN EXEC. REP., Aug. 15, 1987, at 9.

3. Hsia & Zeldin, *supra* note 2, at 276.

4. *Id.* at 259.

5. *Id.*

This article will show that decisions reported in the Gazette may actually carry force as precedents, depending on the comments the Court makes as well as on the sensitivity of the issues involved. Notwithstanding the fact that the published opinions are heavily edited, that they are not allowed to be cited in lower court decisions, and that they usually include little or no legal reasoning, decisions reported in the Gazette may shape the development of the law by providing "guidance" to lower courts in adjudicating cases with similar factual situations or with similar issues of law. To borrow a phrase the late Justice Jackson used to describe the function of precedents in the United States, the decisions reported in the Gazette may function in the Chinese context as "a weather vane showing which way the judicial wind is blowing."<sup>6</sup> This is so even though the judicial wind in China is hardly forceful outside legal circles.

Part II of this article briefly examines the historical role played by judicial decisions, both before and after the founding of the People's Republic. Part III examines the dispute over whether cases reported in the Gazette merely provide "guidance" or serve as binding "precedents." Following a description of the way court decisions are chosen, edited, and eventually printed in the Gazette, this article analyzes the actual function such decisions play in the Chinese judicial process. It then concludes with a discussion of the way in which future evolution of case law in China is likely to be decisively influenced by institutional developments in the broader political-legal arena.

## II. COURT DECISIONS IN CHINA'S HISTORY

It seems warranted to examine the role of judicial decisions in Chinese history before commencing analysis of issues surrounding the reported cases in the Gazette. While the People's Republic has undergone significant substantive changes in political structure since China's imperial past, centralization of authority in the hands of a strong administrative power, with the judiciary at the periphery, has been a dominant political feature throughout Chinese history. This partly explains the Chinese legal system's development into a statutory law system rather than a case law system. This historical continuity has particular relevance for understanding the respective roles that judges and politically powerful people have traditionally played in

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6. R. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 13 (1955).

shaping the Chinese legal system, and also sheds much light on the role that published cases in the Gazette are supposed to play in today's China.

Before beginning the discussion, it is necessary, as a point of reference, to explore the meaning of "precedent" as a term of art. Black's Law Dictionary defines "precedent" as:

An adjudged case or decision of a court, considered as furnishing an *example* or *authority* for an identical or similar case afterwards arising or a similar question of law. Courts attempt to decide cases on the basis of principles established in prior cases. Prior cases which are close in facts or legal principles to the case under consideration are called precedents. A rule of law established for the first time by a court for a particular type of case and thereafter referred to in deciding similar cases.<sup>7</sup> (emphasis added)

Under this definitional concept, a precedent may possess three elements: 1) the court decision must be considered as an *example* or *authority*; 2) its applicability must be limited to similar facts or legal issues; and 3) as a rule of law it must have been a case of first impression. It is recognized that even within this definitional contour, there may be differences in the legal authority and the binding force of precedents in legal systems.

#### A. Before 1912

China has had a long history of using decided cases as legal precedents. As early as the Western Zhou Dynasty (11th Century to 771 B.C.), the practice of "try[ing] cases by precedents without prior enactment of statutes" (*yishiyizhi buweixingpi*) was recorded.<sup>8</sup> These precedents, moreover, were often inscribed on the surfaces of tripods for preservation.<sup>9</sup> In subsequent dynastic periods the use of decided cases as precedents became an important part of China's judicial practice. Examples of the use of case law include *tingxingshi* in the

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7. BLACK'S LAW DICTIONARY, 1176 (6th ed. 1990)

8. See Wu Shuchen, *On the Role of Precedents in the Construction of the Legal System in Our Country*, 1986 FAXUE, No.6, at 26.

9. *Id.*

Qin Dynasty (221 B.C. — 206 B.C.),<sup>10</sup> *jueshibi* in the Han Dynasty (206 B.C. — 220 A.D.),<sup>11</sup> *xuyiqianju* in the Tang Dynasty (618 A.D. — 907 A.D.),<sup>12</sup> and *yilicongshi* in the Song Dynasty (960 A.D. — 1297 A.D.).<sup>13</sup> All of these terms refer to the practice of following previously decided cases.

The role that decided cases played in China's more distant history did not develop evenly, but rather took a haphazard course due to China's changing political climate. Court decisions exerted stronger or weaker force as legal precedents in different dynasties. Traditional China, like modern China, should be considered mainly as a statutory law country.<sup>14</sup> Unlike common law countries in the West, precedents generally played a supplementary role in China's history, while statutes occupied the dominant position. This phenomenon began in the Han Dynasty (206 B.C. — 220 A.D.), when decided cases were officially authorized to have the effect of binding precedents and at the same time were assigned a less authoritative position in relation to other legally binding instruments.<sup>15</sup> There were four forms of law in the Han Dynasty: *lu*, *ling*, *ke*, and *bi*. The first three may be roughly described as written statutes. Only the last one, "*bi*," referred to decided cases. *Bi* is the abbreviation of *bifuyuan*, meaning to follow similarly decided cases by analogy. Use of *bi* was allowed because statutes proved incomplete as sources on which courts could base their judgments. But *bi* were required to have the emperor's approval before they could go into effect.<sup>16</sup>

Professor Brian E. McKnight traced the general development of precedents in the Song Dynasty (960 A.D. — 1279 A.D.) in his article "From Statute to Precedent: An Introduction to Sung Law and Its Transformation."<sup>17</sup> He wrote that "[t]he Sung period has been characterized as an era during which the legal system passed first from

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10. For a detailed discussion, see Chen Guangzhong & Xie Zhengquan, *Some Observations on the Question of the Establishment of a Case Law System in China*, 1989 ZHONGGUO FAXUE, No.2, at 86.

11. *Id.* at 87. See also Cui Min, "Panli Fa" Shi Wanbei Fazhi de Zhongyao Tujing ("Precedent" Is an Important Way to Perfect the Legal System), 1988 FAXUE, No.8, at 8, 11.

12. See Wu, *supra* note 8, at 27.

13. *Id.*

14. See Xu, *Establishing a System of Private International Law with Chinese Characteristics*, 15 REV. SOCIALIST L. 333, 343 (1989).

15. See Cui, *supra* note 11, at 11.

16. *Id.*

17. See LAW AND THE STATE IN TRADITIONAL EAST ASIA: SIX STUDIES ON THE SOURCES OF EAST ASIAN LAW 111 (Brian E. McKnight ed. 1987). "Sung" is the Wade-Giles spelling for "Song" in the *pinyin* system.

a dependence on Statutes to a dependence on Edicts, and then to a dependence on Precedents.”<sup>18</sup> He also briefly discussed some special features of precedents at that time: (1) the term “precedents” referred to imperial decisions on specific issues (whether made by the emperor or in his name);<sup>19</sup> (2) because of the supreme authority of precedents set by imperial decisions, precedents could be used to subvert the law (*fa*);<sup>20</sup> and most importantly, (3) those precedents applied in criminal matters were cited as legal grounds for subsequent decisions in the judicial hierarchy and were therefore perhaps closest in character to precedents as used in the Anglo-American legal tradition.<sup>21</sup> Chinese scholars tend to hold similar views on the role of precedents in China’s history, although they seem to give more emphasis to the second feature mentioned, calling it “*yili puofa*” (to break or override statute with precedent), suggesting that precedents could change a statute, or even create a new law.<sup>22</sup>

Thus, it would be a mistake to consider decided cases always as the least important element of the imperial legal process in China. *Yili puofa* clearly provided a striking countercurrent to the primacy of statutes for, under this doctrine, courts could change preexisting statutes by creating new precedents. Because most of the cases were decided with the emperor’s approval, the decisions in such cases assumed an authoritative force of law for courts to follow, even if the precedent established by such decisions might have conflicted with a preexisting statute.<sup>23</sup> “*Dagao*” in the Ming Dynasty was a collection of cases compiled under the direct guidance and supervision of Emperor Zhu Yuanzhang himself.<sup>24</sup> Emperor Zhu specifically ordered that judges follow the decided cases in “*Dagao*” in their adjudication.<sup>25</sup> Although such a collection greatly increased the importance of royal precedents, it hardly improved the status of judicial decisions, apart from those of the emperor himself. This seems to be incongruous with the general modern concept of case law precedents in the West. It also appears quite different from the idea of an independent judiciary, which is embodied in today’s Western constitutional philosophy.

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18. *Id.*

19. *Id.* at 116.

20. *Id.*

21. *Id.* at 115.

22. See Kong Xiaohong, *Precedents: A Comparison And Some Reflections*, 1988 XUEXI YU TANSUO, No.1, at 90, 96. See also Chen & Xie, *supra* note 10, at 87.

23. See Kong, *supra* note 22.

24. For a detailed discussion, see Chen & Xie, *supra* note 10, at 87.

25. *Id.*

## B. 1912 — 1949

During the period of the Republic of China (1912 — 1949), a system of legal precedents was established based directly on Western practice.<sup>26</sup> Decided cases (*panli*) and interpretations of particular provisions (*jieshili*) by the court were treated as legal precedents in the judicial process.<sup>27</sup> The *Dali Yuan* (Supreme Court) had its own reporter, The Collection of Decided Cases of the Dali Yuan. Interestingly, the Gazette resembles its forerunner in many ways. However, one conspicuous difference remains. Unlike the Gazette, which has a deliberately vague mandate for “guidance,” the decided cases published by the *Dali Yuan* were officially used as legal precedents by lower courts.<sup>28</sup> Taiwan still follows this system of legal precedents.<sup>29</sup>

## C. After 1949

### 1. During the Maoist Era

In 1949 when the communist government took over China, it considered itself to be entirely different from any preceding regime in China's history. The “people's democratic dictatorship” was established,<sup>30</sup> and the laws and judicial system that existed before 1949 were declared null and void *in toto*. This change of government also swept away all elements of the system of legal precedents that had developed thus far. Teaching the laws of the Republic of China in law schools was prohibited.<sup>31</sup> The People's Republic was set on developing its own legal system with its own ideological underpinnings. It

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26. *Id.* at 88.

27. *Id.*

28. For example, Judgment No. 35 in COLLECTION OF DECIDED CASES OF DALI YUAN (1919) enunciated, *inter alia*, a rule that “Special law precedes common law and common law applies where there is no special law.” This rule was followed by lower courts in later cases. See Chen & Xie, *supra* note 10, at 88.

29. See Chen & Xie, *supra* note 10, at 88.

30. The people's democratic dictatorship roughly divides the Chinese population into two major classes: the people and the enemies. This presupposes a new Chinese state where the people are supposed to be in possession of political power over their enemies such as landlords, rich peasants, counter-revolutionaries, bad elements and rightists. During the Cultural Revolution, the proletarian dictatorship expanded the previous five categories of enemies to also include traitors, spies, capitalists and bourgeois intellectuals. See YAO MEIZHEN, FAXUE ZHISHI SHOUCE (Handbook of Legal Knowledge) 153-56 (1983).

31. See YU JIANPING, ZHAO KUNPO, WANG KEQIN, & DAI XIA, JIANGUO YILAI FAZHI JIANSHE JISHI (Events Pertaining to the Construction of the Legal System Since the Founding of the People's Republic of China) 1 (1986).

is interesting to note that even during the early period after 1949, decided cases were compiled by some authorities in the People's Republic for the purpose of educating both Chinese law students and judicial personnel.<sup>32</sup> However, these compilations were mostly for internal use, rarely accessible to the outside world.<sup>33</sup>

Until Chairman Mao's death in 1976, political campaigns were a way of life in China. Hundreds of thousands of people were attacked and executed as enemies. On March 22, 1962, the late Chairman instructed:

Not only criminal law but also civil law is needed. At present there is neither law nor authority (*wufa wutian*). It won't do without law. Both criminal law and civil law must be enacted. Not only should statutes be enacted, but also *decided cases* should be compiled (*bian anli*). (emphasis added).<sup>34</sup>

Mao's real motive for the instruction is not clear, but the instruction does seem to suggest that Mao, after ruling thirteen years with an obsession for political struggle, was contemplating using law as a tool to achieve his political ambition and effectively to suppress "the class enemy." Mao's emphasis on legislation and on creating precedents from court decisions could hardly be said to have been a conscious attempt to establish rule of law in lawless China. However, it may be seen as an endeavor more effectively to implement Party policy. Whatever his intentions, his commitment to the use of law in any form was short-lived. In 1966, Mao himself initiated, in outright violation of the Constitution, the Cultural Revolution, the most lawless political campaign in China's history.<sup>35</sup>

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32. Decided cases were compiled by higher courts as well as by Chinese law schools. See SHAO-CHUAN LENG, JUSTICE IN COMMUNIST CHINA 85-86 (1967).

33. Professor William Jones while teaching at the Department of Law of Wuhan University obtained texts of some cases decided by Chinese courts, which he translated into English and made available to Western readers. See W. Jones, *Collection of Cases on General Principles of the Civil Law*, in 18 CHINESE LAW AND GOVERNMENT, Nos. 3 & 4 (1985-86).

34. See Yu, *supra* note 31, at 163.

35. See generally YAN JIAQI, WENHUA GEMING SHINIAN SHI (Ten-Year History of Cultural Revolution) (1986).

## 2. After Mao

Only in the last decade or so has the People's Republic seriously undertaken to build serious legal institutions. Most of the important statutes in effect today were enacted during this recent period of hopeful development. Beginning in 1983, the Supreme People's Court (hereinafter "the Court" or "the Supreme Court") began to issue collections of decided cases to lower courts. But until publication of the Gazette, decided cases only reached lower courts through "internal channels," and were only used to provide for internal regulation. They were not accessible to the public.<sup>36</sup> During the campaign for "rapid adjudication and severe punishment" in 1983, for example, the Court issued a number of decided cases to lower courts in this internal manner to "guide" their judgments in the campaign.<sup>37</sup> Even after the Court began to publish decided cases in the Gazette in 1985, it continued distributing decided cases to lower courts through "internal channels."

## III. "GUIDANCE" OR "PRECEDENTS"

When the Court's spokesman announced the publication of the Gazette in May 1985, he identified the purpose thereof as being to "provide better guidance to local courts for correctly applying laws and decrees."<sup>38</sup> He was intentionally vague and unclear in the use of the term "guidance." Mr. Zheng Tianxiang, then President of the Court, also used this vague terminology in his 1986 annual report to the National People's Congress (NPC), when describing his vision of the role reported cases would play:

[T]o grasp typical cases and to expound the law *based on them (jiu'an jiangfa)*. . . in order to help [people] understand the distinction between legitimacy and illegitimacy as well as the difference between valid, invalid and sham economic contracts. Law should become a weapon in the hands of the

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36. For more information about the "restricted channels," see Liu, *An Ignored Source of Chinese Law: The Gazette of the Supreme People's Court*, 5 CONN. J. INT'L L. 271 (1989).

37. See Chen & Xie, *supra* note 10, at 88.

38. China Daily, May 26, 1985, at 1. See also Foreign Broadcast Information Service-Daily Report, China [hereinafter FBIS—China], May 30, 1985, at K12. Based on this announcement, Hsia & Zeldin wrote: "The aim of publishing the Gazette is to provide better guidance to local courts in applying the law." *Supra* note 2, at 258, 259.



masses and be used to regulate their economic activities. The Supreme People's Court will select and compile decided cases in this regard to enhance *specific guidance* in economic adjudication. (emphasis added).<sup>39</sup>

In appearance, terminology such as "guidance" or "specific guidance" carries with it the notion that the decided cases are not intended to be legally binding and that much discretion seems to be left to a lower court in deciding how much weight should be given to the reported cases. In reality, however, little room for choice is allowed to the lower courts. The Gazette is divided into three parts: Court decrees and opinions, judicial interpretations, and decided cases.<sup>40</sup> That the Court's decrees, opinions and interpretations carried in the Gazette are binding to lower courts has been generally recognized, although they are not permitted to be cited in judgments.<sup>41</sup> The issue of whether case published in the Gazette carry the force of precedents should be examined both by how precedents work their way through the legal process and by how reported cases provide "guidance" for the Chinese judiciary.

#### A. *How Cases Get Reported in the Gazette*

There seems to exist some mistaken belief that the cases published in the Gazette have been decided by the Supreme Court itself. This is not true. The Court seldom tries cases itself.<sup>42</sup> Most of the cases reported in the Gazette are from decisions of lower courts, which reach the Supreme Court through "the internal reporting channel." Traditionally, every lower court, particularly every highest provincial court, is supposed to submit to the Supreme Court those of its decisions which

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39. For the original Chinese version, see 1986 GAZETTE, No. 2, at 3, 10. In his 1991 Report to the NPC, Ren Jianxin, the current President of the Court, also used the term "guidance" to describe the role that the reported decisions are intended to play. Renmin Ribao (Haiwai Ban), April 13, 1991, at 3 [hereinafter RMRB-HB].

40. For a discussion of documents in the GAZETTE, see generally Liu, *supra* note 36.

41. See Xu, *supra* note 14. See also Peng Weide, *Bushi Jingji Jiufen Ershi Jingji Fanzui* (It Is Not Economic Disputes but Economic Crimes), 1986 FAXUE PINGLUN, No.4, at 82. Tian Zhongmu & Cui Zhengjun, *Guanyu Jingji Hetong Zhong Weifa Fanzui Wenti de Diaocha* (An Investigation into Law Violations and Crimes Concerning Economic Contracts), 1986 FAXUE PINGLUN, No.1, at 38, 40, and Ling Qiang, *Dui Limou Tanwuan de Tonganren Yinggai Ding He Zui* (How to Determine the Offense of the Accomplice in Li's Embezzlement Case), 1989 FAXUE ZAZHI, No.5, at 45. All treat documents and interpretations in the Gazette as binding opinions from the Court.

42. See Liu, *supra* note 36.

involve either important or complex issues.<sup>43</sup> It must be noted that these submissions to the Court are not required by law, nor do decisions reach the Court by way of appeal or review.

The Court does not simply publish verbatim what it regards as the important opinions of lower courts. Instead, the Court, after selecting desirable cases, will substantially edit or rewrite most of the selected cases in order to make them understood and followed the way the Court wants. It requires no imagination to recognize that such liberal editing and rewriting, both in substance and in style, provide the Court with an opportunity to channel down the judiciary hierarchy its own opinions and positions on various issues.<sup>44</sup> Even where a lower court opinion is reported without any alteration by the Supreme Court, it is no less reflective of the Court's views than one heavily edited. One may reasonably conclude that the decisions reported in the Gazette, though not the Court's own opinion *per se*, do amount to its own view of the law.

One cautionary note is that the decisions eventually published in the Gazette constitute no more than a fraction of the cases the Court transmits to the lower courts as guidance in their decisions. Besides the open channel of publication in the Gazette, the Court continues to use a traditional "internal channel" as a kind of supplement. Former Court President Zheng Tianxiang recognized the practice in his annual report to the NPC in 1988, but avoided giving a rationale for the practice.<sup>45</sup> Cases transmitted to the lower courts through this "internal channel," both before and after the publication of the Gazette, are also mostly not the Court's own decisions, but are selected from lower court opinions and edited or rewritten by the Court.

The differentiation made among cases in deciding whether they will eventually be disseminated through either of the two channels seems largely dependent upon: (1) whether the cases are "mature" (*chengshu*) enough for the Court to give an opinion on the issue and let it serve as a "weather vane" for the general public and/or (2) whether the cases are nationally "representative" (*daibiaoxing*) or typical enough to warrant such publicity and uniformity. The internal channel is more likely to be used to relay cases that are less signifi-

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43. This reporting system was established as early as 1950, the year after the Chinese Communists took over political power. See Yu, *supra* note 31, at 8.

44. A Chinese scholar has challenged the Court's editing and rewriting on the grounds that sometimes the Court changes some important facts in order to fashion the type of fact situation the Court desires. See Sun Zhenquan, *What Kind of "First Case"?* 1988 MINZHU YU FAZHI, No.10, at 9.

45. For the Chinese version of his report, see 1988 GAZETTE, No. 2, at 11.

cant, have little national impact, or are more tentative in nature. Sometimes cases selected for temporary and special purposes are also sent through the internal channel. Examples of such cases are those that the Court issued as enlightenment on the 1983 campaign for "severe punishment and prompt adjudication of criminals who seriously endanger public security."<sup>46</sup>

## B. "Guidance" or "Precedents"

### 1. The Range of Current Chinese Legal Opinions

As mentioned earlier, an intentional vagueness has been injected into the force of published cases in the Gazette due to the statement that reported cases are intended "to provide guidance to lower courts." This vagueness has created quite a bit of confusion among scholars about the authoritativeness of the reported cases, especially regarding the issue of whether they carry the force of precedent. Some scholars have even gone so far as to say that their publication carries no more than "educational value."<sup>47</sup>

In Chinese legal circles, scholars are divided on the legal force both of published cases in the Gazette and of cases issued "internally" by the Court.<sup>48</sup> A number of scholars doubt their equivalence to precedents, contrasting them with the standards for precedent in case law countries, although the scholars recognize that the Court's publication of cases in the Gazette constitutes an important move toward the goal of treating the cases as precedents.<sup>49</sup> The chief argument these scholars give is that the reported cases are never cited in lower court decisions as the authority relied upon.<sup>50</sup>

Some other scholars have divided the reported cases in the Gazette into three categories according to their treatment by the Supreme Court: (1) cases only slightly edited with no comments from

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46. See Decision of NPC Standing Committee Regarding the Severe Punishment of Criminals Who Seriously Endanger Public Security (adopted and promulgated Sept. 2, 1983), *trans. in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (1983-1986) 32 (1987) [hereinafter PRC LAWS 1983-86]; Decision of NPC Standing Committee Regarding the Procedure for Prompt Adjudication of Cases Involving Criminals Who Seriously Endanger Public Security, (adopted and promulgated Sept. 2, 1983), *trans. in* PRC LAWS 1983-86, *id.* at 35.

47. See Margaret Y.K. Woo, *The Right to a Criminal Appeal in the People's Republic of China*, 14 YALE J. INT'L L., 118, 135 (1989).

48. For the meaning of "internally," see Liu, *supra* note 36.

49. See Cui, *supra* note 11, at 11.

50. *Id.*

the Court; (2) cases in which the Court has rendered its own opinion in appellate jurisdiction; and (3) cases in which the Court has clearly instructed lower courts to follow the reported decision, by way of editorial comments in the Gazette.<sup>51</sup> These scholars think that lower courts should "treat the first two categories of reported decisions earnestly and follow them as reference (*canzhao banli*)," whereas the last category must be strictly followed.<sup>52</sup> A growing number of scholars do not draw such distinctions between the categories, but treat all decisions published in the Gazette as carrying the same force as precedents.<sup>53</sup>

## 2. An Argument in Favor of Precedent

There is evidence to show that, with very limited exceptions, cases published in the Gazette may be intended by the Court to carry the force of precedent. Their value does not seem to be solely referential, especially in those cases in which the Court has rendered opinions in its own jurisdiction. Other cases which the Court edits or rewrites are probably also intended as precedents, with the possible exception of the few reported decisions involving sensitive political issues. These decisions should not be taken at face value when the Court itself has shown hesitation about their political underpinnings.

The cases published in the Gazette are undoubtedly judicial decisions, although they may not have been decided by the Supreme Court itself either via its review or appellate jurisdiction or its first instance jurisdiction, and may have been edited or rewritten by the Court before publication. It should be clear that these reported decisions meet the definition of "precedent" as judgments mostly by lower courts of competent jurisdiction, which are conclusive as to the claims adjudicated. The Supreme Court's involvement in editing and rewriting is both for the purpose of publication and ultimately for the purpose of "guiding" lower courts in adjudicating cases with similar facts or similar issues of law. In this sense, the Gazette somewhat resembles a regulatory effort, a governing vehicle more commonly used by the administrative branch than the judiciary. However, through publication in the Gazette, the Court seems primarily to be trying to emulate case law methods for guiding the judiciary.

One factor which may seem to blur the guidance effect of

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51. See Chen & Xie, *supra* note 10, at 90.

52. *Id.*

53. See Wu, *supra* note 8.

reported cases is the different treatment that the Court accords to the decisions. Some opinions are reported with notations while others are not, and there are various types of notations. On the one hand, such treatment should indicate the Court's intention for different cases to have different force as precedents. On the other hand, even decisions that have been reported without any notation from the Court still should have some role as in general guidance. It is reasonable to look at the differences in treatment of the reported cases as the Court's effort further to fine-tune the effect of each case within the broad spectrum of guidance. Some decisions published with notations might be intended to serve as binding precedents, while decisions published without notations might not. This is because lack of notation may indicate some uncertainty on the part of the Court about the law as it pertains to the particular fact situations. These decisions nevertheless serve as guiding examples in their own right once published in the Gazette.

Whether published with notations or not, the precedential force that the reported decisions are intended to have should not be challenged. The decisions are made more forceful by their publication in the Supreme Court's Gazette. Furthermore, regional cases are made applicable nationwide. This last point is true because of the Chinese Supreme Court's monopoly on publication of decided cases. No lower courts are allowed to publish their decisions.<sup>54</sup> Therefore, this practice of nationalization also effectively centralizes the precedents in one locus. Only decisions that the Supreme Court approves by publication in the Gazette or by passage through the internal channels may be given binding force as precedents. Having discussed the definitional aspect of "precedents," this article will next examine what "guidance" the Chinese authorities might have intended the Gazette cases to provide to lower courts in adjudication of similar cases.

### 3. The Meaning of "Guidance"

The choice of the word "guidance" by the Court may very well have been the result of awareness of its own status under article 126 of the current Constitution, which mandates that courts "exercise

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54. See Lower Courts at Different Levels Should Not Issue Any Documents Concerning Judicial Interpretations, 1987 GAZETTE, No. 2, at 19. Although some lower courts, especially some high provincial courts, do issue collections of decided cases (*anli huibian*), such collections cannot be made available to the public. For more information, see Liu, *supra* note 36.

judicial power independently, in accordance with the provisions of the law." But the power to interpret laws is delegated to the NPC Standing Committee under article 67(4) of the Constitution. It bears remembering that decided cases are supposed to play only a *supplementary* role in China. That is, strictly speaking they can be used as precedents only if there is no statute to apply, or the applicable statute is not clear enough, although this may not always be true in practice.

How should a court tackle an issue that involves statutory interpretation in adjudicating cases under such a division of powers? To avoid potential conflict in such circumstances, the Organic Law of the People's Courts authorizes the Supreme Court "to interpret questions concerning specific application of laws and decrees in judicial proceedings."<sup>55</sup> This delineation between legislative and adjudicative interpretive roles was further fine-tuned by the NPC Standing Committee in 1981 as follows:

Where the limits of articles of laws and decrees need to be further defined or additional stipulations need to be made [the Standing Committee] shall provide the interpretations or make the stipulations by means of decrees. . . . Interpretation of questions involving specific application of laws and decrees in court trials shall be provided by the Supreme People's Court.<sup>56</sup>

Even with the authority accorded to it under this contemplated functional division of the power to interpret laws and decrees, the Court must overcome a number of its own concerns as well as potential challenges from others before it will be in a position to publicly announce that cases reported in the Gazette are "precedents." Issues may arise concerning the constitutionality of the "precedents," their possible effects on unreported lower court decisions, and the implication of their use for characterization of the legal system.

On the other hand, the Constitution designates the Court as the highest judicial organ of the state, with power to "supervise the

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55. Organic Law of the People's Courts of PRC, art.33 (adopted July 1, 1979, promulgated July 5, 1979) [hereinafter Organic Law] *trans. in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (1979-1982) 71, 77 (1987), [hereinafter PRC LAW 1979-82], *amended by* Decision of the Standing Committee of NPC Regarding the Revision of the Organic Law of the People's Courts of PRC, (adopted and promulgated September 2, 1983) *trans. in* PRC LAW 1983-86, *supra* note 46, at 37.

56. Resolution of NPC Standing Committee Providing [sic] an Improved Interpretation of the Law (adopted June 10, 1981), *trans. in* PRC LAWS 1979-82, *supra* note 54, at 251.

administration of justice by the people's courts at various local levels."<sup>57</sup> As a practical matter, the Supreme Court understands, as do the lower courts, that the Gazette constitutes a legal source with binding force within the judiciary, despite the fact that the Court specifically forbids the lower courts to cite the reported decisions in their judgments.<sup>58</sup> The term "guidance" used by the Court may be seen as a gesture of compromise toward other political branches, but there is no compromise within the judicial hierarchy itself. Mention should also be made here concerning the common understanding of the term "guidance" in a hierarchical structure in China. From a practical standpoint, the distinction between "guidance" and "precedent" has little effect on the degree to which a decision binds subordinate entities.

In addition to decided cases, the contents of the Gazette also include two other kinds of materials: the Court's regulatory documents and its interpretations of statutes. It seems that Chinese scholars and lower courts generally recognize the absolute binding force of these materials as regulatory instruments.

Apart from the above-mentioned competing constitutional claims, and the Court's declaration that the cases serve a "guidance" function, a further issue surrounding reported cases in the Gazette concerns the legal effect, if any, of the presence or absence of editorial notations or comments to these cases by the Court. Such notations or comments of the Court often consist of simple sentences indicating the decision is "absolutely correct," or is "to be followed by reference" (*canzhao zhixing*). Obviously, a comment like "absolutely correct" by the Court is strong enough to convey the Court's position on the issue and to imply how the case would be handled by the Court were it ever appealed. The Court's instruction to the lower courts to comply with reported decisions by reference (*canzhao zhixing*) seems to carry equal weight with the Court's unambiguous declaration that a decision is

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57. ZHONGHUA RENMIN GONGHEGUO XIANFA (Constitution of the People's Republic of China) art. 127 (1982) [hereinafter PRC CONST.]; Organic Law, *supra* note 54, art.30, at 76.

58. In one of its internal documents, the Court clearly instructed that its opinions are not allowed to be cited in the lower courts' legal reasoning. See *infra* note 60 and accompanying text. For a detailed discussion, see Liu, *supra* note 36. Apart from the possible reasons given *supra* for not designating reported cases in the Gazette as precedents, there might have been other motivations behind the prohibition, such as not tying up the hands of the lower courts in cases where discretion of the lower courts may be warranted, or making it easier for the Supreme Court to reverse lower courts decisions as needed in specific cases.

"absolutely correct."<sup>59</sup> Some Chinese scholars have also considered lower court decisions published in the Gazette without editorial comment by the Court to have the force of precedents.<sup>60</sup>

#### 4. A Word on Citation

Should the inability of the lower courts to cite reported cases affect in any material degree the precedential effect of the reported decisions? It is true that citation of authority serves the useful purpose of notifying affected parties as to the authority the court is relying upon when adjudicating their disputes, as well as allowing them to evaluate the reasonableness or unreasonableness of the court's position on the issue. But there are multiple concerns, both judicial and extrajudicial, that hinder the Supreme Court from allowing lower courts to cite its opinions. In one of its internal documents dated October 28, 1986, the Court said: "All opinions and instructions given by the Supreme People's Court on the application of laws shall be followed, but it is not appropriate, however, to cite them directly."<sup>61</sup>

#### C. Case Illustrations

The legal force as precedents of decisions reported in the Gazette may be illustrated by two cases, *Procuratorate v. Zuo Chenghong et al.*<sup>62</sup> and *Procuratorate v. Li Ronghui*.<sup>63</sup> Both cases involved the criminal activity of making and selling poisonous liquor, which caused the death of twenty-five customers. Capital punishment was inflicted upon the three defendants, and various imprisonments were imposed

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59. It is said that the Chinese Military Court has recently issued some collections of decided cases to its lower military courts with the same notation "*canzhao zhixing*" to indicate the legal effect of these collected cases. Based on their personal experiences, Zhou Jian and Xu Qiping, both working in a Chinese military unit, pointed out that such reported cases do in fact carry the force of de facto precedent in practice within the military tribunal. Zhou & Xu, *Junshi Panlifa Shi Junshifa de Zhongyao Yuanyuan* (Decided Military Cases: An Important Source of Military Law), in 1989 FAXUE ZAZHI, NO.3, at 34 (1989).

60. Chen and Xie, *supra* note 10, at 88-90. The authors think that some progress has been made toward a case precedent system.

61. Zuigao Renmin Fayuan Guanyu Renmin Fayuan Zhizuo Falu Wenshu Ruhe Yingyong Falu Guifanxing Wenjian de Pifu (Reply of the Supreme People's Court Concerning How People's Courts Should Utilize Normative Legal Documents when Providing Legal Documentation), fa yan fu 1986 (document code literally: Law Research Reply 1986), No.31, reprinted in 96 STUDY MATERIALS FOR ADJUDICATION 165 (Beijing High People's Court ed. 1987).

62. 1985 GAZETTE, No. 3, at 37.

63. *Id.* at 39.



on their accomplices. The Court rewrote the two opinions by the lower courts which eventually appeared in the Gazette. Accompanying the two reported decisions was the Court's own brief opinion on review proceedings, which said that given the especially grave consequences of the offenses and the especially odious circumstances of the two cases, "Zuo and Li and others should be severely punished" and that the imposition of capital punishment upon some of the defendants "is correct."<sup>64</sup>

Professor Wu Shuchen saw the reporting of the two decisions in the Gazette as "a great development with both current and historical significance" to the construction of China's legal system. He especially welcomed the publishing of the two criminal cases as a sign that the Court is beginning publicly to use decided cases as precedents for the first time in the history of the People's Republic of China.<sup>65</sup> According to Chinese law and practice, one cannot be prosecuted unless the prosecution is based on a particular charge (*zuiming*) provided in the Chinese criminal code. But the code was silent on the offenses involved in these two cases,<sup>66</sup> and thus no charge could be found to apply directly. Professor Wu's argument for the binding force of the two reported decisions as precedents was grounded not only on the fact that the Court rewrote and published them in its Gazette, thus imbuing the decisions with the approval of the Court, but, more importantly, on the presence of the Court's own opinions upholding the lower courts' decisions.

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64. *Id.* at 40, 41.

65. Wu, *supra* note 8. Professor Wu wrote:

It is a great development with both contemporary and historical significance in the construction of the socialist legal system in our country that the two cases have been made public by the domestically and internationally circulated Gazette of the Supreme People's Court of the People's Republic of China (No.3, 1985). The two cases involve the criminal offense of making and selling poisonous liquor causing human death and bodily injury. The contemporary significance of the decisions lies in the fact that the two decisions effectively implement the spirit of the Joint Circular by the Supreme People's Court, the Supreme People's Procuratorate, Ministry of Justice and Ministry of Public Security about the 'severe punishment (*yanda*)' by overcoming the weakness existing in the Criminal Law which has no mention of making and selling poisonous liquor causing death and/or injury. The two decided cases as *precedents* created this new charge and the standards for punishment, thus providing the legal ground for the prosecution of similar offenses. The historical significance is that the publication of decided cases indicates a new way, i.e. application of precedents (*yunyong panli*), to strengthen the construction of the socialist legal system in our country. (emphasis added). *Id.* at 8, 26.

66. See Criminal Law of PRC, art.106 (adopted July 1, 1979, promulgated July 6, 1979), in PRC LAWS 1979-82, *supra* note 55, at 87, 105 [hereinafter Criminal Law].

Another example in this respect is the case of *Li Fuyong*, a copy of which is appended to this article. Defendant Li was convicted of sabotaging electric power equipment and sentenced to death. At trial, the lower court was faced with the difficulty of choosing the appropriate statutory provision to apply. The Criminal Law had three provisions that were applicable to this case, but they required different charges and provided for three drastically divergent maximum punishments: ten-year imprisonment, twenty-year imprisonment, and the death penalty. The case was appealed to the highest provincial court after Li had been sentenced to death by the lower court. The judgment was upheld by the highest provincial court as the final judgment. The decision was reported to the Supreme Court, which rewrote the lower court's opinion and published it in the Gazette in 1985 with a brief comment as follows:

[T]he offence of sabotaging electric power facilities is currently a serious crime which causes harm to the security of society and to the construction of socialist modernization, and it should be met with speedy and severe punishment. The severe punishments that were given by the High Court of Hebei Province and the Intermediate Court of Henshui District to Li Fuyong, Liu Jianxin and others were absolutely correct.<sup>67</sup>

In 1986, the year after the case was published in the Gazette, a similar case was decided by a lower court in a different jurisdiction. Defendant Zhang Tianwen was prosecuted on the same charge — sabotage of electric power equipment. The circumstances involved were substantially similar, and the case proceeded under the Court's instruction given in its comment on *Li Fuyong* for "speedy and severe punishment" of like cases. Accordingly, Zhang was charged with the same offense and under the same provision as Li, and not surprisingly, was sentenced to capital punishment as well.<sup>68</sup> The precedential effect of the decision in *Li* on the sentencing in *Zhang* is also noticeable. Even if Zhang had been convicted of sabotage under Article 110 of

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67. *Li Fuyong*, Appendix A attached to this article, paragraph 13.

68. See *Zhang Tianwen Being Executed For His Crime of Sabotaging Equipment*, Renmin Ribao, May 13, 1986, at 4.

the Criminal Law,<sup>69</sup> instead of being convicted of the two lesser offenses, there were three different punishments available for the courts to select from: not less than ten years of imprisonment, life imprisonment, or death.<sup>70</sup> The statute was not specific on how the punishment should be meted out, but largely left it to the discretion of the court under Chapter IV of the Criminal Law "Concrete Application of Punishments."<sup>71</sup> The Supreme Court did not attempt to refine or set forth any further implementing standards to "guide" adjudication in such cases. But the Court had held that it was "absolutely correct" to give the death penalty for "the kind of crimes" in *Li Fuyong*, and that holding seems to have had a substantial influence on the lower court's sentencing in *Zhang*.

A second case attached to this article, *Zhao Hengdong*, arose out of the new economic relationships that emerged under China's open policy. This case raised an issue typical of those that concern intellectuals. The dispute involved the tension between activities called "economic crimes" in China and entrepreneurship. The essential facts involved in the litigation were straightforward. Defendant Zhao, a computer engineer with an official position in a government computing research institute, together with roughly twenty colleagues, used his off-duty time to translate personal computer manuals into Chinese and produced enormous income for the institute by selling the manuals. The issue before the court was whether defendant Zhao and his colleagues' allocation of 30% of the total profits from sales of manuals as consulting fees for themselves constituted an act of corruption and abuse of their official positions. With quasi-amicus briefs from both the government and the Party, the Shenyang Intermediate People's Court eventually ruled against the procuratorate. When this decision was channeled to the Court, it rewrote the opinion and published it in the Gazette without comment. Should any significance be attributed to such silence in relation to its force as precedent?

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69. See Criminal Law, art.110, *supra* note 65, at 106. Article 110 provides:

Whoever sabotages a means of transport, transportation facilities, electric power or gas facilities, or inflammable or explosive equipment and thereby causes serious consequences shall be sentenced to fixed-term imprisonment of not less than ten years, life imprisonment or death.

Whoever negligently commits the crime mentioned in the preceding paragraph shall be sentenced to fixed-term imprisonment of not more than seven years or criminal detention.

70. *Id.*

71. See Criminal Law, *supra* note 65, arts 57-78.

It should be recognized that the case of *Zhao Hengdong* involved a new issue where there was no statute directly applicable. Traditionally, government employees, whether blue or white collar, were not allowed to engage in odd jobs to earn extra money, although this had become a regular practice for more and more people, especially for intellectuals and technicians. It was the vast social changes engendered by the open policy that made the case of *Zhao Hengdong* controversial. In the absence of an applicable statute, the Shenyang court relied on Party documents to uphold economic activities that "violate no technological rights or economic interests" of the defendant's unit.<sup>72</sup> It construed the Party policy according to its own understanding and applied it to the case in a way acceptable to the Supreme Court under the prevailing political situation.

The Court's silence may have created some vagueness regarding what effect the case should have in "guiding" the lower courts in practice. It is hard, however, not to recognize in its efforts to rewrite and publish the opinion in the Gazette the Court's intention to have the case provide a guiding precedent. In his 1987 annual report to the NPC, Mr. Zheng Tianxiang, former President of the Court, referred to the decision of *Zhao Hengdong* as a good judgment, on the grounds that the defendant was "engaged in socialist reform, making contributions to the development of social productivity and becoming rich by legitimate means."<sup>73</sup> Two prosecutions involving similar factual circumstances, one in Shanghai and the other in Wuhan, were likewise dismissed.<sup>74</sup> By the same reasoning, Xiling People's Procuratorate exercised its judicial supervision power to correct an already effective court judgment involving similar facts.<sup>75</sup> It seems likely that there would have been no such corrections had *Zhao Hengdong* not been published in the Gazette.

However, the Supreme Court's silence on reported cases in the Gazette does not always promote unanimity, especially in cases that have traditionally been controversial. Cases which in the United States would involve First Amendment issues provide a good illustration. In

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72. See Appendix B attached to this article, paragraph 14.

73. 1987 GAZETTE, No.2, at 10.

74. See Luo Ping, *Lun Huiluo Zui* (On the Offence of Bribery), reprinted in 5 FALU 81, 84 (1985) (Reprinted materials from newspapers and magazines edited by the People's University of China).

75. RMRB-HB, Sept. 19, 1988, at 4. Provisions on judicial supervision by the procuratorate are contained in articles 129 and 130 of the PRC Constitution (1982), article 18 of the 1979 Organic Law of the People's Procuratorates as amended, and article 149 of the 1979 Criminal Procedure Law.

1988, the Supreme Court published a rewritten opinion by a lower court in the Gazette without comment or notation, *Du Rong v. Shen Yafu & Mou Chunlin*.<sup>76</sup> It was a defamation case involving some correspondents of the popular legal magazine *Minzhu yu Fazhi* (Democracy and Law), who wrote a report on how plaintiff Du Rong forced his wife to pretend to be a mad woman in order to create a customarily acceptable ground for his job transfer from Wuhan to Shanghai. The court of first instance gave judgment for the plaintiff, and the appeals court affirmed on grounds that although the 1982 Constitution clearly protected freedom of speech and of press,<sup>77</sup> such freedom could not be exercised "to infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens."<sup>78</sup> The appellate court also relied on the constitutional prohibition of "[i]nsult, libel, false accusation or false incrimination directed against citizens by any means."<sup>79</sup>

The Supreme Court rewrote the opinion, and so there seems to be no dispute that the published decision largely reflected the Court's position on the issue. But the Court's omission of additional comment may have been due to its lack of any clearer or more specific views on this broad and sensitive issue. This reported decision encouraged more lawsuits against the press. It was reported that from the publication of *Du Rong* in the Gazette to the early part of 1990, more than two hundred lawsuits against individual correspondents or press institutions were instituted.<sup>80</sup> However, due to lack of a clear standard, inconsistencies in lower court judgments have not been rare. In Shanghai, the jurisdiction in which *Du Rong* was decided, many cases with similar facts were reportedly decided in favor of the plaintiff.<sup>81</sup> In Beijing, however, courts were somewhat reluctant to follow such cases, and some decided for the defendants.<sup>82</sup>

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76. For the original Chinese text, see 1988 GAZETTE, No.2, at 42.

77. PRC CONST. art. 35.

78. *Id.* art. 51.

79. *Id.* art. 38.

80. See *Xinwen Baodao Guansi Duo* (Suits Against the Press Abound), *Shijie Ribao* (World Journal), March 24, 1990, at 21. See also Zhen Xiuhe, *Baodao Shishi yu Feibang* (Untrue Reporting and Libel), 1 *FALU SHUIE* 15 (1989).

81. "Feibang Zui" Maozi Mantian Luanfei Gedi Liuxing "Konggao Jizhe Re" (Accusations of "Libel Offense" Are Rampantly Flying Around and Everywhere there is a "Fad to Sue the Reporters"), *Zhong Bao* (Central Daily News) (U.S. national edition), Nov. 29, 1988, at 9.

82. See, e.g., "Beijingshi Fayuan Gongzuo Huiyi Dui Mingyuquan Anjian Buneng Mangmu Li'an" (Judicial Work Conference of Beijing Municipality Cautions Against Blindly Accepting Cases Involving the Right of Reputation) 10 *MINZHU YU FAZHI* 12 (1988); See also Xu Jingen, *Shouyao de Gongneng Yingdang Shi Baohu* (Primary Function Should be to Protect).

It should be pointed out that the proliferation of litigation and divergence in court opinions regarding this issue may be natural in any jurisdiction. The Supreme Court can hardly be expected to provide definitive solutions for all cases and situations before they arise as real controversies. But the Court has no reason to be silent if it decides fully to undertake its responsibility to administer justice independently under the 1982 Constitution. The Court's use of such discretion on certain reported cases but not on others seems inconsistent with the purpose of publishing decided cases in the Gazette. If, as the spokesman of the Court made very clear, the purpose of publishing decided cases in the Gazette is to "provide better guidance" to lower courts, how can the Court fulfill such purpose if it chooses to be silent?

## VI. CONCLUSION

Publication of the Gazette signals a development and a change in the way the Chinese judicial hierarchy is administered. It is doubtless a significant event given the prospect that the Gazette has for further growth and the potential it may have for shaping the future of China's legal system. But it should be recognized that the purposes and underlying rationales for following judicial precedents in the Chinese context and the effects such practice may have on the general power structure within and without the written Constitution have not fully unfolded and need to be further explored. Mr. Zheng Tianxiang, former President of the Court, described the purpose of such practice in his 1988 annual report to the NPC as follows:

Over the past five years, the Supreme People's Court has officially released 293 decided cases.<sup>83</sup> The principal purpose is to achieve *uniformity* (*tongyi*) in sentencing standards for important and complex criminal cases, to provide models for determining criminality and sentencing standards in newly emerged criminal cases, and to provide models for civil and economic cases that have arisen recently from activities under the policy of reform and openness. (emphases and footnote added)<sup>84</sup>

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*Id.*

83. This figure appears to include cases issued through "internal channels."

84. 1988 GAZETTE, No. 2, at 11.

Economic reform and open policies have engendered the practical need for more predictability, certainty and consistency in judicial decision-making. On the other hand, the Party and government may still want to preserve their traditional powers over decision-making as well as maintain a considerable degree of flexibility in their policies. The time-honored power distribution among these entities certainly undercuts severely the extent to which the Court can assert the force of precedent in the published cases in the Gazette.

It could be argued that the binding force of reported decisions is elastic, depending upon the existing political need. Without a clearer constitutional restructuring, the transparency of judicial adjudication will always be dependent on political utility as determined by China's political leaders. But the historical development of China over the years should be properly understood as an internal evolution of a large nation as it looks outward in striving for modernization and democracy. In spite of its arguable legal status, the practice of publishing decided cases in the Gazette by the Supreme Court should be understood as an effort to find a proper place for precedent in China's burgeoning legal system.

## APPENDIX A

*Procuratorate v. Li Fuyong, Liu Jianxin And Yang Wengao*<sup>85</sup>

(1) Defendant, Li Fuyong, male, 32 years old, peasant, resided at Kongzhongwang Village, Monan Township, Xian County, Hebei Province. On July 21, 1984, he absconded when he was about to be apprehended under warrant for sabotaging electric power equipment. On June 29, 1985, he was apprehended again for sabotaging electric power equipment.

(2) Defendant, Liu Jianxin, male, 23 years old, peasant, resided at Kongzhongwang Village, Monan Township, Xian County, Hebei Province. He was apprehended on June 29, 1985.

(3) Defendant, Yang Wengao, male, 38 years old, peasant, resided at Kongzhongwang Village, Monan Township, Xian County, Hebei Province. He was apprehended on June 29, 1985.

(4) Defendant, Song Rushe, male, 33 years old, resided at Xilingxiao Village, Xicun Township, Shen County, Hebei Province. He was apprehended on June 29, 1985.

(5) From Spring 1983 to April 1985, defendant Li Fuyong, in collusion with defendant Liu Jianxin, went to nine villages including Hefang and Dongzhaoshi in Raoyang County and cut out 1,920 meters of 10,000 voltage electricity transmitting wire and 24,075 meters of low voltage electricity transmitting wire. Li Fuyong, in collusion with defendant Yang Wengao, cut out 8,210 meters of low voltage electricity transmitting wire in six villages including Xiaohe and Qinzhongwang in Xian County and Weilou Village in Xiaoning County and ripped off and took away 24 ammeters and 9 transformers in eleven villages in Suling and Xian Counties. Li Fuyong, in collusion with defendant Luo Tongxiu (under separate trial), cut out 1,260 meters of low voltage electricity transmitting wire in Yechang Village of Xian County and 4,080 meters of low voltage electricity transmitting wire in the three villages of Dongduan, Xiaoju and Yechang in Xian County. Li Fuyong, together with Zhao Shuanzhu (under separate trial), cut out 2,340 meters of low voltage electricity wire in the village of Lisanjiaoluzhuang in Xian County.

(6) Defendant Liu Jianxin, from January to April of 1985, cut out

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85. For the original Chinese text, see 1985 GAZETTE, No. 4, at 30. Footnotes in the two Appendices are the author's.



3,180 meters of low voltage electricity transmitting wire by himself in Nanshiqin Village and Hewou Village in Raoyang County, and 25,995 meters of high or low voltage electricity transmitting wire in cooperation with Li Fuyong.

(7) Defendant Song Rushe bought from defendants Li Fuyong, Liu Jianxin and Yang Wengao more than 30,000 meters of electricity transmitting wire with knowledge that he was purchasing stolen goods. He further instructed his father and brother to resell the wires and illegally made profits from the booty.

(8) Defendants Li Fuyong, Liu Jianxin and Yang Wengao committed forty-eight offenses in all and cut and stole more than 45,000 meters of electricity transmitting wires (including therein 1,920 meters of high voltage wires) at a value of Renminbi 16,051 *yuan*. Consequently, due to lack of electricity, 101 well-pumps in 32 villages of Xian, Suning and Raoyang Counties could not be used to irrigate the fields. Agricultural yields were seriously reduced in more than 5,900 *mu* of land, and great difficulties were caused to people in drinking water supply, lighting, and milling.

(9) On September 7, 1985, after reviewing the case, the Hengshui Intermediate Court in Hebei Province held that defendant Li Fuyong successively committed 35 offenses of sabotaging power transmission wires and other electric equipment. As a result, it caused grave harm to public security and serious damage to the production in the affected villages and to the lives of the people thereof. The particularly perilous circumstances and particularly grave consequences call for severe punishment. Defendant Liu Jianxin committed 23 successive offenses of sabotaging power transmission wires and should also be severely punished given the perilous circumstances involved. Defendant Yang Wengao took part in sabotaging electricity equipment in 19 counts and should be subject to punishment. The acts of the three defendants above violated Article 110 of the Criminal Law of the People's Republic of China on the offence of sabotaging electric power facilities. Defendant Song Rushe bought and resold wires that he clearly knew had been stolen by Li Fuyong, Liu Jianxin and Yang Wengao and thus committed the offence of selling criminally obtained goods. In order to maintain the security and order of society and to protect the people's property from being violated, defendant Li Fuyong, for his offence of sabotaging electric power facilities, is hereby sentenced to death and further deprived of political rights forever in

accordance with Article 53(1) of the Criminal Law.<sup>86</sup> Defendant Liu Jianxin is hereby sentenced to death with a two-year suspension of the execution and further deprived of political rights forever according to Article 53(1) of the Criminal Law. Defendant Yang Wengao, for the offense of sabotaging electric power facilities, is hereby sentenced to twelve years of imprisonment and further deprived of his political rights for five years in accordance with Article 52. Defendant Song Rushe, for the offense of selling criminally obtained goods, is hereby sentenced to three years of imprisonment.

(10) After announcement of the above judgment, defendant Li Fuyong appealed to the High Court of Hebei Province claiming that he did not intentionally sabotage electric power equipment when he cut the wires and petitioned for mitigation of the sentence.

(11) On October 28, 1985, the High Court of Hebei Province reviewed the entire case in accordance with Article 134(2) of the Criminal Procedure Law of the People's Republic of China and held as follows: Appellant Li Fuyong sabotaged electric power facilities on many occasions, for a long time and in great quantity, resulting in serious consequences. Appellant escaped in 1984 when an arraignment for sabotaging electric power facilities was pending and continued to commit criminal offenses thereafter. He should be given a severe punishment. Li Fuyong lived in the countryside, knew the function of low and high voltage electric wires and facilities used in the countryside, and understood the consequences of his acts of cutting off the wires and tearing away the equipment. His claim that he did not intend to sabotage electric power facilities was not tenable. The judgment below was based on clear facts and solid evidence. The court below accurately determined the nature of the offense, appropriately meted out the sentencing, and lawfully observed the relevant procedures. In accordance with Article 136(1) of the Criminal Procedure Law, the appeal was dismissed and the judgment appealed from was affirmed.

(12) The High Court of Hebei Province reviewed and approved Li Fuyong's sentence of immediate execution with the deprivation of

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86. It might be difficult to understand the relevance of depriving a dead person of his or her political rights. Articles 52 and 53 of the Criminal Law provide such "supplementary punishment" against counter-revolutionaries and criminals who are sentenced to death or to life imprisonment. Article 50 of the Criminal Law defines the deprivation of political rights to include (1) right to vote and to stand for election; (2) right to freedom of speech, correspondence, the press, assembly, association, procession, demonstration, right to freedom to strike, and right to "Sida" under Article 45 of the 1978 Constitution; (3) right to hold positions in a state organ; and (4) right to hold a leading position in any enterprise, institution or people's organization.

political rights forever, in accordance with Article 146 of the Criminal Procedure Law and the decree of the Supreme People's Court authorizing the high courts in regard to approval of certain death sentences. The High Court also approved the death penalty of Liu Jianxin with a two-year suspension of execution, and deprivation of his political rights forever.

(13) At its 237th meeting convened on November 29, 1985, the Judicial Committee of the Supreme People's Court, in compliance with Article 11(1) of the Organic Law of People's Courts of the People's Republic of China, summed up judicial experience, during which the Committee expressed the opinion that the offence of sabotaging electric power facilities is currently a serious crime which causes harm to the security of society and to the construction of socialist modernization, and it should be met with speedy and severe punishment. The severe punishments that were given by the High Court of Hebei Province and the Intermediate Court of Henshui District to Li Fuyong, Liu Jianxin and others were absolutely correct.

## APPENDIX B

*Procuratorate v. Zhao Hengdong*<sup>87</sup>

(1) Defendant, Zhao Hengdong, male, 47 years old, was an engineer in the Academic Office of Shenyang Computing Technology Research Institute of Chinese Academy of Sciences, and a Deputy Secretary General of the Institute of Computers of Liaoning Province. He was arrested on January 14, 1986.

(2) Defendant Zhao Hengdong, being charged with embezzlement, was prosecuted by the People's Procuratorate of Shenyang City of Liaoning Province, in Shenyang Intermediate People's Court on April 29, 1986. The Intermediate Court returned the case to the People's Procuratorate of Shenyang on the ground of incomplete evidence for additional investigation. On June 22, 1986, the People's Procuratorate of Shenyang resubmitted the case to Shenyang Intermediate People's Court.

(3) The offenses that Zhao Hengdong is accused to have committed as recognized in the bill of prosecution are as follows:

(4) From December 8, 1984 to March 20, 1985, the defendant, taking advantage of his position of being in charge of translating, publishing and marketing certain Chinese data for personal computers (hereinafter "PC Data") at the Institute of Computers of Liaoning Province, transferred funds in the amount of *Renminbi* 350,505 *yuan* to the accounts of Liaoning Science and Technology Consulting Center and Intellectual Development Center by selling the PC Data for Liaoning Institute of Computers to 16 units including the Factory of Scientific Instruments of the Chinese Academy of Sciences, Corporation for Servicing Science and Technology Appliances of the Shenyang Branch of the Chinese Academy of Sciences, and a factory affiliated with Shenyang Computing Technology Research Institute. The defendant also took advantage of his position as the keeper of the official seal and withdrew and transferred on ten occasions to himself as allowances and bonuses, funds totalling *Renminbi* 99,756.80 *yuan*, by using the official seal without authorization and imitating the signature of Zhang Zhenyu, Director General of the Institute of Computers of Liaoning Province.

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87. For the original Chinese text, see 1987 GAZETTE, No.1, at 14.

(5) In December of 1984, the Institute of Computers of Liaoning Province sold 15 personal computers for Wuyi Economy and Technology Development Company of Fujian Province and received *Renminbi* 25,396 *yuan* as agency fees. The defendant then transferred these monies into the accounts of the Science and Technology Consulting Center by concluding a contract for "scientific and technological consultation," and thereafter on four occasions withdrew *Renminbi* in the aggregate of 7,200 *yuan* as his own allowance and bonus by once again using the official seal without authorization and imitating the signature of Zhang Zhenyu.

(6) Zhao Hengdong deposited in his or his wife's name the above embezzled funds of *Renminbi* 106,956.80 *yuan* in seven bank branches located in three different districts and has withdrawn interest thereof in the amount of *Renminbi* 1,903.55 *yuan*.

(7) Shenyang Intermediate People's Court exercised jurisdiction over the case and appointed special persons to conduct serious and careful review and deliberation on the alleged offenses as listed in the bill of prosecution by Shenyang People's Procuratorate. The group spent seven months reviewing the case and has found the following:

(8) In April of 1984, defendant Zhao Hengdong was informed that more than 100,000 personal computers had been imported nationwide but with limited number of accompanying foreign language manuals. In addition, information contained in those manuals was very sketchy. Many users strongly desired to have a set of relatively comprehensive material in Chinese. In order to satisfy the needs, Zhao Hengdong consulted with Director General Zhang Zhenyu and together decided to collect original PC Data and organize, in the name of the Institute of Computers of Liaoning Province, a group of professionals with good English skills and science background to translate the PC Data in their spare time. On June 14, 1984, Zhao Hengdong got together 22 translators with Liu Xumin as the group representative and concluded an agreement with them concerning the translation of the PC Data. The agreement specified the requirements of translation, the deadline for submission and the standard of royalties. The agreement remained silent on how to distribute the profits. In order to resolve the fund shortage, Zhao Hengdong solicited advance payments from subscribers of the PC Data in 28 provinces, municipalities and autonomous regions. After the translation was completed, Zhao Hengdong consulted with Zhang Zhenyu and decided to print 7,000 sets. 1,805 sets were immediately sold as they came off the printer, plus receipt of advance subscriptions of 1,185 sets. The accounting office of Shenyang Computing Technology Research Institute in charge of the financial

affairs of the operation received *Renminbi* 346,996 *yuan* in total. During the period, Director General Zhang Zhenyu was to be transferred to a new job and thus took up with Zhao Hengdong the issue of distribution of royalties. Zhao Hengdong drew up a distribution plan and withdrew 279,889.08 *yuan* from the accounting office to cover the payment of printing expenses of 219,304.75 *yuan*, shipping expenses of 22,266.44 *yuan*, royalties of 26,362.50 *yuan*, and utilities of 11,955.39 *yuan*. In order to get to the customers the remaining PC Data that had already been printed but not yet sold, Zhao Hengdong together with Director General Zhang Zhenyu, with permission of the Managers of Science and Technology Consulting Center of Liaoning Province, represented the Liaoning Province Institute of Computer Science and Technology Consulting Services as contracting party, and through the Science and Technology Consulting Center of Liaoning Province and the Intellectual Development Center of Liaoning Province concluded five contracts for scientific and technological consultation with PC Data users, successfully selling them 5,195 sets of PC Data (including the previously subscribed 1,185 sets) for a total contract price of 360,505 *yuan*. In December of 1985, Zhao Hengdong signed another contract of scientific and technological consultation with Wuyi Economic and Technological Development Company in Fujian Province to help the latter sell 15 personal computers. Pursuant to the contract, Wuyi Company paid 25,395 *yuan* as technical consulting fees, which funds were transferred into the account of the Science and Technology Consulting Center of Liaoning Province. From March, 1985 to August 10 of the same year, Zhao Hengdong at different times obtained as technical consulting fees and bonuses in accordance with the contract, a total of 106,956.80 *yuan* from the Science and Technology Consulting Center and the Intellectual Development Center of Liaoning Province, 30% of the total earnings of the PC Data project. Due to the large amount of monies so obtained, due to the fact that the distribution plan had not yet been decided and the whole project had not been completed, and also for fear of accidental loss, Zhao Hengdong deposited the monies in ten different banks in Shenyang either under his own name or his wife's name. Zhao Hengdong recorded every transaction on the funds showing the specific time and amount of each deposit and withdrawal. On November 11, 1985, Zhao Hengdong withdrew interest on his deposit totalling 600 *yuan* and immediately deposited it in a different bank. On November 22 of the same year, Zhao Hengdong once again withdrew interest on the deposit in the amount of 1,228.42 *yuan*, which, together with the remainder of the previous interest withdrawal of 75.13 *yuan*, was put in the closet in his

office. Zhao Hengdong carried this cash with him the day before he was arrested in order to deposit it into a bank, but before he could do so, it was seized when he was arrested. The above monetary items were reviewed and audited by accountants and were found to be in complete order. Zhao Hengdong had never used the money.

(9) The methodology that the prosecution alleges Zhao Hengdong has employed to effect the embezzlement was found to be as follows:

(10) On the charge that "the defendant took advantage of his position as the keeper of the official seal and used it without authorization," this court has found that Liaoning Institute of Computers was founded not long ago and that, apart from the Director General, Zhao Hengdong was the only person involved in the daily work of the Institute throughout the period when Zhao Hengdong organized the above-mentioned consulting work on science and technology. He was furthermore the Deputy Secretary General of the Institute and was in charge of the whole PC Data project. The accusation of "using the official seal without authorization" was found groundless.

(11) On the charge that "the defendant imitated the signature of Zhang Zhenyu, Director General of the Institute," the court has found that the writing of Zhang Zhenyu's name was not intended as an imitation of Zhang's signature as confirmed by Zhang Zhenyu himself. The defendant simply wrote the name in his usual handwriting. This fact was supported by the result of the technical test on the handwriting. The allegation of imitation by the procuratorate was contrary to the facts. Witnesses Yu Xuehong, Guo Tingshu and He Sujuan, all being staff members of the Science and Technology Consulting Center or the Intellectual Development Center of Liaoning Province, testified that whenever Zhao Hengdong went to them to withdraw funds and was about to sign his own name both as the person who performed the transaction and as the responsible person of the Institute, Yu Xuehong would ask Zhao whether the Institute had multiple persons in charge. Zhao would answer that Zhang Zhenyu was the other person in charge. Then Yu would ask Zhao to write down Zhang Zhenyu's name on the withdrawal slip. The witnesses also testified that Zhang Zhenyu's withdrawal conformed with the provisions of the contracts, and that, with the official seal attached, the procedure for the transaction was complete.

(12) As regards the question of deposit of the funds in the name of either Zhao Hengdong or his wife Wang Rongfang, the court has found the following: On a morning in late May of 1985, Zhao Hengdong withdrew more than 51,000 *yuan* from the accounting office

of Liaoning Science and Technology Consulting Center. Considering that it was close to noon and that banks were closed in the afternoon, and thinking that the considerable amount of cash should warrant deposit with personal seal,<sup>88</sup> Zhao Hengdong took his wife's seal in a hurry and deposited the money in the bank. Wang Rongfang had no knowledge of the transaction. As for the issue of depositing money in Zhao Hengdong's own name, it was legitimate for him to deposit whatever consultation fees he was entitled to, for Zhao was in charge of the PC Data project, was one of the responsible officials of the Institute and was the only staff member in the Institute.

(13) In summary, Shenyang Intermediate People's Court held the following:

(14) First, it was legitimate for Zhao Hengdong to withdraw a 30% consulting fee. On February 15, 1982, the Chinese Scientific Association and the Ministry of Finance jointly issued a Document No.024 (82) Ke Xie Fa Zi Zi, which says that "scientific and technological consulting service is a new development, and an important task to spur the Four Modernizations." It is "a form of socialization of science and technology," where "the necessary expenses and compensation should gradually be borne by the host or requesting unit through contracting." This document also includes "provision of technical consultation for imported foreign technology and equipment" in "the scope of technical consulting service." The 1985 Liaoning Province Science and Technology Consulting Center Tasks and Scope of Business listed "technical consulting service" and "translation of materials on science and technology" as falling within the scope of business. Document No.57 (85) issued by the Shenyang Branch of the Chinese Academy of Sciences, Document No.41 (83) issued by Liaoning Science and Technology Association, and Document No.30 (1985)

jointly issued by the Shenyang Communist Party Committee and Shenyang People's Government,<sup>89</sup> all contain provisions mandating that science and technology personnel participating in consulting projects may take no more than 30% of the net earnings. Therefore,

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88. Signature is generally considered by individual depositors to be sufficiently protective of their funds in a bank in relation to possible withdrawal by forged signature. When deposits reach certain amount, it is usual in China to see the depositor take further precaution in requesting the depository bank to keep a print of the depositor's personal seal and to check against the signature as well as the seal when processing any withdrawal from the account.

89. It is a common practice at all levels in China that a Party committee co-issues a document with an administrative body to show the elevated importance of the matter discussed in the document.



it was legitimate for Zhao Hengdong to organize people to use their spare time to translate, print and sell the PC Data pursuant to contracts lawfully concluded, and to take a 30% consulting fee.

(15) Second, Zhao Hengdong had no intention of embezzling the 100,000 *yuan* in fees. Zhao Hengdong recorded in his working diary his proposals on how to deal with the earnings. He wrote,

This sum is so large that I find it difficult to deal with. We have to deposit it in a bank and draw up the solution around the end of the year in light of the situation then. If necessary, some may be given to the Institute, and some to the Science and Technology Association of Liaoning Province for distribution as rewards to those who made outstanding contributions to their work. How much I myself will get is to be decided by my unit.<sup>90</sup>

And Zhao also wrote:

My personal opinion is to give 100,000 *yuan* to the Institute, to be distributed to the participants in the project in accordance with the rules of the Institute governing consultation. What is left of the funds might be used to purchase a car with title held by Shenyang Computing Technology Research Institute and with the Institute having a right to its use.

Zhao Hengdong reported his above-mentioned opinions to Deputy Directors of the Computing Technology Research Institute, Lan Guixing, Liu Guangdi, Zhang Zhenyu and others. Zhao Hengdong also discussed his opinions with a number of people at different times and in different places. There are witnesses ready to testify to all these occurrences as asserted.

(16) Third, Zhao Hengdong committed no act of embezzlement. Although he deposited the funds in banks under his, as well as his wife's name, he kept a clear record of transactions in relation to the account. Furthermore, the contracts for consulting services were concluded in the open, and the taking of 30% in consulting fees as permitted by relevant regulations was well known to the public. Zhao Hengdong was on the staff of the Computing Technology Research

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90. The term "unit" (*danwei*) has a particular connotation in China. It usually refers to the organization one works in, which controls almost everything about an employee, politically and economically. Zhao here used "unit" to refer to the officials of the Institute.

Institute although he also held a concurrent post as Deputy Secretary General of the Institute of Computers. Therefore, the relevant rules of the Research Institute had an effective check and restriction upon the way that Zhao Hengdong disposed of the funds. Although Zhao Hengdong was in charge of the translation and printing of the PC Data, all financial accounts in relation to the operation were kept by the accounting office of the Research Institute, and transactions thereon were likewise subject to supervision of the accounting office.

(17) Finally, the consulting fees that Zhao Hengdong received constitute legitimate compensation that science and technology personnel are entitled to for work they perform in their spare time. The Criminal Law provides that the immediate object on which the offense of embezzlement may be committed must be public property, and there is thus no embezzlement absent encroachment on public property. Zhao Hengdong organized about twenty science and technology personnel to translate the PC Data in their spare time and the 30% in consulting fees that they received as a result were reasonable, given the provision the Central Government adopted during the reform of the science and technology system that "science and technology personnel may engage in and receive compensation for technical work and consulting service in their spare time so long as they have fulfilled their responsibilities or assignments in their respective units and would violate no technology rights and interests and economic interests of their own units by their engagement in such spare-time activities."

(18) In light of the foregoing analyses, Shenyang Intermediate People's Court held that Zhao Hengdong's act did not violate the Criminal Law, nor did it constitute the offense of embezzlement. In accordance with Article 10 of the Criminal Law of the People's Republic of China and Article 11 paragraph (1) subparagraph (1) [*sic*] of the Criminal Procedure Law of the People's Republic of China, defendant Zhao Hengdong was acquitted and released by order.