

## 2010 Reforms in the Chinese Courts: Reforming Judicial Committees

*Susan Finder, Attorney*

In January, 2010, the People's Republic of China's (the "PRC") Supreme People's Court issued regulations<sup>1</sup> (the "New Regulations"), which regulate the operation of a core institution within the Chinese courts: the judicial committee (also known as the adjudication committee). Several inter-related regulations were amended at the same time.<sup>2</sup> Judicial committees are an institution peculiar to the Chinese courts and critical to the operation of the Chinese courts, but are little known to the foreign business community. These regulations provide important insight into the operation of the Chinese judicial system.

Chinese courts at all levels, from the Supreme People's Court down to the village or district level basic level courts, have judicial committees. Throughout the history of the PRC, court legislation<sup>3</sup> has stated that these committees "practice democratic centralism" and that their task is to "sum up judicial experience and to discuss important or difficult cases or other issues relating to judicial work." The three major procedural laws add inconsistent detail.<sup>4</sup> Curiously enough, the Criminal Procedure Law is the only law out of the three that outline the basic mode by which judicial committees operate by providing that "with respect to a difficult, complex, and major case, regarding which the collegial panel [three judge panel that hears most cases in the Chinese courts] considers it difficult to make a decision, the collegial panel shall refer the case to the president of the court, for him to decide whether to submit the case to the judicial committee for discussion and decision. The collegial panel shall implement the decision of the judicial committee."<sup>5</sup>

Over the past 15 or more years, the merits (and defects) of and necessity for judicial committees have been debated within China and abroad. For example, in its 2005 report, the Congressional Executive Commission on China noted that:

Judicial authorities are considering structural reforms to the system of court adjudication committees. These committees of court presidents and other administrative personnel are the highest authority in Chinese courts, but their practices challenge principles of judicial independence. They often are the vehicle for outside pressure to reverse decisions in individual cases, for court officials to overrule the decisions of trial judges, or for trial judges

---

© 2010 Bloomberg Finance L.P. All rights reserved. Originally published by Bloomberg Finance L.P. in the Vol. 3, No. 5 edition of the Bloomberg Law Reports—Asia Pacific. Reprinted with permission. Bloomberg Law Reports<sup>®</sup> is a registered trademark and service mark of Bloomberg Finance L.P.

The discussions set forth in this report are for informational purposes only. They do not take into account the qualifications, exceptions and other considerations that may be relevant to particular situations. These discussions should not be construed as legal advice, which has to be addressed to particular facts and circumstances involved in any given situation. Any tax information contained in this report is not intended to be used, and cannot be used, for purposes of avoiding penalties imposed under the United States Internal Revenue Code. The opinions expressed are those of the author. Bloomberg Finance L.P. and its affiliated entities do not take responsibility for the content contained in this report and do not make any representation or warranty as to its completeness or accuracy.

to seek internal advisory review of cases before them. Officials and scholars currently are divided over different plans for reforming these committees.<sup>6</sup>

Judicial committees have been a feature of the people's courts since the early 1950's, and derive from systems instituted before 1949 in Communist controlled areas to establish Communist Party ("Party") control over the judiciary and deal with critical cases too difficult for Party cadres without legal training to decide.

The New Regulations have been under consideration for over 10 years, and were approved by the highest political authorities, the Party Central Committee, because of the political sensitivity and importance of judicial committees in focusing and guiding the work of the courts. Until the New Regulations were issued, the provisions in national law mentioned above were supplemented by a few Supreme People's Court interpretations and long-standing court practices and guidelines issued for internal use by local courts at various levels.

The New Regulations do not make radical structural changes, such as abolishing judicial committees, as has been proposed by some scholars and other critics. These regulations do not change the fundamental nature of judicial committees, the Party led judiciary, and the cooperative relationships among criminal justice institutions in China. What the regulations deal with is practical issues in the operation of judicial committees. The New Regulations codify, on a national basis, some of the prior practices and internal regulations, to provide more consistency and structure to the operation of these committees. Among the important areas covered in the New Regulations are the membership, jurisdiction, and operation of judicial committees, as well as their inter-relationship with local procuracy offices. However, the core guiding principles of judicial committees, and their inherent contradictions with principles of judicial autonomy, remain unchanged.

#### *The Core Principle of Judicial Committees*

Court legislation flags the core principle of judicial committees by stating, before addressing anything else, that judicial committees "practice democratic centralism." According to the Party Constitution, its operations are based on democratic centralism. The Party Constitution provides that democratic centralism includes the principles that: "individual Party members are subordinate to the Party organization, the minority is subordinate to the majority, the lower Party organizations are subordinate to the higher Party organizations, and all the constituent organizations and members of the Party are subordinate to the National Congress and the Central Committee of the Party"<sup>7</sup> and "Party committees at all levels function on the principle of combining collective leadership with individual responsibility based on division of work. All major issues shall be decided upon by the Party committees after discussion in accordance with the principle of collective leadership, democratic centralism, individual consultations and decision by meetings."<sup>8</sup> Because the judiciary is a critical institution, as explained below, these principles continue to be operational, although refined to take account of the increasing technical complexity facing the courts.

### *Membership of Judicial Committees*

Court legislation states that "members of judicial committees of local people's courts at various levels are appointed by and removed by the standing committees of the people's congresses at the corresponding levels, upon the recommendation of the presidents of these courts."<sup>9</sup> The New Regulations now specify which court officials are members of the judicial committee, namely: the court president, vice presidents, division heads and some specialist committee members, who are described as judges who are more experienced, qualified, and politically reliable, but lack a specific title within the court structure. Most of these judicial committee members will be members of the Court Party Committee and will consider the promotion of judges. Following administrative practice, court vice presidents generally are responsible for one or more substantive divisions. In an interview conducted by the author, one retired judge who wished to remain anonymous, noted that in her experience, not all division heads may be judicial committee members, but generally those of the more critical divisions will be appointed by the court president. Knowledgeable commentators have described specialist committee members as judges of a bureaucratic rank equivalent to a vice president, but without such rank in the court. This provision summarizes what court practice had been in many courts, using specialist committee members to drawing on the experience and knowledge of senior judges within a court.

### *Consideration of Cases by Judicial Committees*

In addition to functions related to the "summing up of judicial experience," the New Regulations provide more detail on the involvement of judicial committees at various levels in the decision of cases. Decisions by judicial committees in cases are binding upon the judges who have heard the cases, because judicial committees are designated as the "highest judicial organ" within a court and implement the principle of democratic centralism.

Certain cases are required to be submitted to the judicial committee:

- a.) Difficult, complex and major cases, and cases in which the collegial panel is having difficulties reaching a decision;

The concept of "difficult, complex, and major cases" appears, to the outside observer, to be vague, and has been criticized by both Chinese and foreign commentators as such. According to former judges, however, the concept is supplemented by court internal guidelines, as well as practices, and is well understood by those within the system. The concept includes cases which are difficult because they are controversial (or politically sensitive) either locally, nationally, or internationally, have a major impact on the locality, or is difficult substantively because of the involvement of a leading institution or individual. Such cases include those in which such institutions or individuals are pressuring the judges involved to come to a certain decision.

- b.) Difficult cases in which it is proposed that the court ask the higher court for instructions.

For most of the history of the courts, lower courts have sought instructions from higher courts in difficult cases, which may be legally, politically, or institutionally difficult. This procedure is used both within the Party and state

organs. This requirement is imposed so that the view of the lower court leaders concerning the issues raised by the case is made clear (and also to resolve the case, if possible, at the same level).

c.) Several types of cases which concern the relationship between the courts and procuracy (and in which the procurator of the same level may participate in the consideration by the judicial committee):

- Cases in which the procuracy has protested the case (under Chinese law, the procuracy can apply to re-open a legally effective judgment, either criminal, administrative or civil);
- Criminal cases in which the court is intending to declare the defendant innocent;
- Criminal cases in which the court is intending to exempt the defendant from prosecution or impose a sentence lighter than that provided by law; and
- Cases in which it is proposed to impose the death sentence;

The Judicial Committee Regulations and the Attendance Regulations provide additional structure to the vague language in the People's Court Law, "the chief procurators of the people's procuratorates at the corresponding levels may attend such meetings without voting rights."<sup>10</sup> The Attendance Regulations require the court to notify the procurator and provide materials for his review, and specify his role during judicial committee meetings.

Commentators have suggested that the first three types of cases are considered by the judicial committee (and involve participation by the procurator) to resolve institutional issues behind closed doors, and reflects a limited concept of "judicial independence." Death penalty cases are considered by judicial committees because of the seriousness of the penalty, although now final approval of the imposition of the death penalty has been brought back to the Supreme People's Court.

In certain other cases, the collegial panel may, in its discretion, submit the case to the court president for discussion by the judicial committee:

1. The collegial panel has major differences and is having difficulty in reaching a decision;
2. Relevant legislation is unclear or there are difficult issues in the application of law;
3. The results of the case may have a major effect on society;
4. A new type of case that will set an example for future cases.

The final category of cases that are considered by judicial committees are those required to be submitted by the superiors of the collegial panel, the division leadership or responsible vice president. This reflects the limited autonomy of judges and the hierarchical nature of the Chinese courts.

### *Operational Procedure*

The New Regulations put further substance and procedure into the practice of judicial committees making decisions on major issues "by meetings," the practice of which at some time in the past involved merely an oral report by the judge in charge of the

case. The New Regulations require the collegial panel to prepare a full written report on the trial of the case, which reviews the facts and evidence in the case, the positions of the parties, issues in controversy, views of the collegial panel members, as well as a proposed decision. The report is required to be provided to judicial committee members before the meeting.<sup>11</sup> Additionally, the New Regulations require all members of the collegial panel and leaders of the relevant court division to attend the meeting. The judge in charge of the case delivers the report, which is supplemented by other panel members. Court legislation provides that the presidents of the people's courts preside over meetings of judicial committees of the people's courts and the New Regulations repeat this requirement. This requirement to have all collegial panel members attend gives judges with differing viewpoints a chance to voice their views. This had not always been the practice. Thereafter, the court hierarchy discusses their views, and eventually the resolution is put to a vote by the committee. It would not be unusual for a judicial committee to send a case back for further consideration of the evidence or law, if necessary. Substantive law is the concern of judicial committees, more than procedural law.

### *An Evaluation of the Merits of Judicial Committees*

The author's discussions with former judicial personnel suggest that the results of judicial committee consideration are as good as the leadership convening the meeting and those framing the questions. If the collegial panel has not done a good analysis of the facts or law, the reviewing judicial committee may not properly analyze the case. What is critical to the successful operation of a judicial committee, is the quality (and honesty) of the court leadership convening the meeting—whether they hear out differing viewpoints or impose their view (for personal, political, or other reasons), on the rest of the committee members, who may be reluctant to offend their boss.

Judicial committees may or may not be a vehicle for outside pressure to reverse decisions in individual cases. They are sometimes used as a vehicle to combat outside pressure on the collegial panel to make a decision. They may be a vehicle for court officials to overrule the decisions of trial judges, or it may be a case in which the trial judges are unsure of the correct analysis, and are grateful for guidance to avoid reversal or claims for compensation. Judicial committees may promote or prevent judicial corruption, depending upon the collegial panel and the court leadership involved. The basic issue remains, however, that the persons deciding the case have not heard the case themselves, have not heard the arguments of the lawyers, and have not considered the evidence themselves. As to whether judicial committees achieve a better result than the collegial panels would themselves, veterans of the Chinese judiciary suggest that a better substantive result is achieved more often than not at this stage in the development of the judiciary.<sup>12</sup>

### *Conclusion*

For the foreseeable future in China, judicial committees will continue to operate according to Communist Party principles of leadership to decide cases that are too difficult or important for an individual judge or judicial panel to decide, to ensure the optimal substantive result (as seen from the institutional perspective of the courts). It is possible that judicial committees will become more specialized and that their operations will be further regularized. Judicial committees continue also to serve as an institution by which differences between major criminal justice institutions are

resolved. The drawbacks of judicial committees will continue to plague the Chinese judiciary. It is possible that there will be increased tension between judicial committees and pressure by a more professionalized judiciary to have a greater scope of judicial discretion. Foreign companies and subsidiaries of foreign companies litigating in the Chinese courts will have to consider the involvement of the judicial committee if their cases are major, difficult, or important enough.

*Susan Finder advises business and non-profit clients on investment opportunities and operations in China. She has worked for some of the top U.K. and U.S. law firms, focusing on China related matters including investment structuring, litigation in the Chinese courts, foreign investment enterprises, intellectual property and financial services. Prior to private practice, Susan taught at the City University School of Law in Hong Kong. She frequently publishes articles in legal journals. Susan is a qualified lawyer in New York and the District of Columbia. She is fluent in Mandarin, Russian and German.*

---

<sup>1</sup> Implementing Opinion on the Reform and Improvement of the System of Judicial Committees in People's Courts, Supreme People's Court, 11 January 2010 ([http://www.law-lib.com/law/law\\_view.asp?id=312469](http://www.law-lib.com/law/law_view.asp?id=312469)).

<sup>2</sup> Implementing Opinion Concerning the Participation of Procurators in Judicial Committee Meetings of People's Courts ("Attendance Regulations"), Supreme People's Court and Supreme People's Procuratorate, January 12, 2010 [[http://www.law-lib.com/law/law\\_view.asp?id=312468](http://www.law-lib.com/law/law_view.asp?id=312468)].); Regulations on Strengthening the Responsibilities of Collegial Panels (Collegial Panel Regulations), Supreme People's Court, January 11, 2010. See: [http://www.law-lib.com/law/law\\_view.asp?id=306935](http://www.law-lib.com/law/law_view.asp?id=306935).

<sup>3</sup> The Organizational [Organic] Law of the 'People's Courts (People's Courts Law)', available at: [http://www.novexc.com/organic\\_law.html](http://www.novexc.com/organic_law.html).

<sup>4</sup> This is not unusual in Chinese legislative drafting. The Criminal Procedure, Civil Procedure, and Administrative Procedure (Litigation) Law (the "Three Procedural Laws") requires the application of a party for removal of the court president to be considered by the judicial committee. The Three Procedural Laws also require cases in which the president of a court has found "definite error" in a legally binding judgment or order of his court to submit the case to the judicial committee for further handling.

<sup>5</sup> Article 149, available at: <http://www.cecc.gov/pages/newLaws/criminalProcedureENG.php>.

<sup>6</sup> See: [http://www.cecc.gov/pages/annualRpt/annualRpt05/2005\\_5c\\_judicial.php](http://www.cecc.gov/pages/annualRpt/annualRpt05/2005_5c_judicial.php).

<sup>7</sup> See "Full text of Constitution of Communist Party of China", 17<sup>th</sup> CPC National Congress (dated October 25, 2007), available at: [http://news.xinhuanet.com/english/2007-10/25/content\\_6944738.htm](http://news.xinhuanet.com/english/2007-10/25/content_6944738.htm).

<sup>8</sup> Id.

<sup>9</sup> Art. 11, People's Court Law.

<sup>10</sup> Id.

<sup>11</sup> One retired judge commented that in her experience the reports were provided in ring binders, with the legislation and relevant evidence or other materials in separate tabs.

<sup>12</sup> See one thoughtful discussion of judicial committees by Randall Peerenboom, "Judicial Independence in China: Common Myths and Unfounded Assumptions", SSRN paper, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1283179](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1283179).