

PUSHING THE ENVELOPE: APPLICATION OF GUIDING CASES IN CHINESE COURTS AND DEVELOPMENT OF CASE LAW IN CHINA

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Abstract: The modern Chinese legal system has at least two notable features. First, bearing the civil law tradition, Chinese courts do not follow precedent. Second, under the people's congress system, the Chinese judiciary has no power to make law. In recent years, however, the Supreme People's Court of China began building a guiding case system in the Chinese judiciary. The application of guiding cases implicates (a) an expansion of the power of the Chinese judiciary into the field of law-making; and (b) development of case law in China.

Chinese guiding cases differ from the common law cases in many aspects, and their legal role and status is still to be addressed and tested. The key issue is whether the compulsory reference imposed by the Supreme People's Court on the application of guiding cases would make the guiding cases a source of law. Behind the issue is the question of whether the Chinese judiciary should have any role to play in the law-making arena. No matter what the answer may be, the establishment of the guiding case system will inevitably result in changes for the Chinese legal landscape.

I. INTRODUCTION

China is known as a civil law country where the judges do not have law-making power and the courts generally do not follow precedent.¹ Although the Chinese legal system carries the distinctive heritage of its thousand-year legal history, the law in modern China has been reshaped to bear the civil law tradition ever since 1840, when Western countries invaded China during the Opium War.² In the past decades, however, a trend has emerged to incorporate common law elements into both legislation and judicial practice.³ A notable phenomenon that represents such a trend is the establishment of a guiding case system in people's courts—a system that focuses on the role of cases in judicial proceedings.

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¹ See generally JOHN H. MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION*, 1–38 (3rd ed., 2007).

² See Mo Zhang, *Socialist Legal System with Chinese Characteristics: China's Discourse for the Rule of Law and A Bitter Experience*, 24 *TEMPLE INT'L & COMP. L.J.*, 1, 27–32 (2010); See also, Percy R. Luney, Jr., *Tradition and Foreign Influence: System of Law in China and Japan*, 52 *LAW & CONTEMP. PROB.* 129, 130–34 (1989).

³ In both Chinese Contract Law (1999) and Torts Law (2009), for example, there are many concepts that are actually taken from the common law system. See MO ZHANG, *INTRODUCTION TO CHINESE TORTS LAW* (2014).

The guiding cases are the cases selected nationwide and published periodically by the Supreme People's Court, the highest court of the nation. The primary purpose of the publication of selected cases is said to help guide the lower courts in their adjudication of the same or similar cases. As a matter of fact, case publication by the Supreme People's Court began as early as 1985 when the *Gazette of Supreme People's Court* was first published.⁴ At that time, the publication of cases was considered part of China's judicial reform to promote judicial efficiency and transparency, and it was aimed mainly at providing references for the lower courts.⁵ In the late 1990s, to foster the reform, the Supreme People's Court launched a series of five-year reform programs called Five-Year Judicial Reform Outline. The first outline took effect in 1999.⁶

In its Second Five-Year Reform Outline that began in 2004 (2004 Outline), the Supreme People's Court made a bold move and formally announced the employment of guiding cases in people's courts. According to the Supreme People's Court, given the on-going judicial reform, it is necessary to "put in place a guiding case system to help improve judicial justice."⁷ The goal of the Supreme People's Court was to utilize guiding cases to help "unify the standard of application of law, direct the adjudicative work of the lower courts, and enrich and develop legal theories."⁸ The 2004 Outline sent a clear signal that the Supreme People's Court wanted to create a legal framework of applying guiding cases in the Chinese judiciary.

However, ever since the Supreme People's Court started to publish cases in the mid-1980s, there have been debates on what legal effect the

⁴ The *Gazette of the Supreme People's Court* is an official publication of the Supreme People's Court and it is published monthly. Prior to the publication of the *Gazette*, the Supreme People's Court had already started compiling cases. But the compilation was issued in the form of internal documents within the courts. In 1983, for example, the Supreme People's Court compiled 75 selected criminal cases and sent them to the lower courts for reference. From 1983 to 1989, the total number of cases compiled reached 293. See Hu Yunteng & Yu Tongzhi, *Study on Several Important and Complicated Issues Concerning the System of Case Guidance*, 6 JURISPRUDENCE RESEARCH 3 (2008).

⁵ See Deng Jinting, *The Guiding Case System in Mainland China*, 10 FRONTIERS OF LAW IN CHINA 1, 1-2 (2015).

⁶ Notice of Issuance of the Five-Year Reform Outline of the People's Court (promulgated by Sup. People's Ct., October 20, 1999), <http://sifaku.com/falvfagui/39/zcff03a163ec.html>. In the Notice, the Supreme People's Court made it clear that the reform of people's court was an important component of the judicial reform of the country.

⁷ See Notice of Issuance of the Second Five-Year Reform Outline of the People's Courts (promulgated by Sup. People's Ct., October 26, 2005), <http://www.66law.cn/tiaoli/2915.aspx> (covering the second reform period of 2004 to 2008).

⁸ *Id.*

cases published by the Supreme People's Court should have. The debates were further intensified by the Supreme People's Court's effort to establish a guiding case system. Although the Supreme People's Court seemed to carefully use the term "reference" to describe the application of the guiding cases, it is unclear the extent to which the published guiding cases should be referred to in adjudicating the same or similar cases at the people's courts. The highly contested issue is whether the guiding cases should have the effect of binding people's courts. In addition, there was also a concern about the process by which the Supreme People's Court selects cases for guiding purposes because the 2004 Outline was silent on the case selection process.

In response to the debates and concern, the Supreme People's Court in November 2010 issued the *Provisions Concerning the Work of Guiding Cases* (Guiding Case Provisions), aiming to systemize the application of guiding cases in Chinese judiciary.⁹ The Guiding Case Provisions intended to set forth the standard and procedures for the selection of guiding cases. An important effort taken under the Guiding Case Provisions was to select and publish guiding cases periodically. The first set of guiding cases, which consisted of four cases, was published by the Supreme People's Court on December 20, 2011.¹⁰ As of January 3, 2017, the Supreme People's Court published 15 sets of guiding cases, containing a total of 77 cases.¹¹

According to the Supreme People's Court, the building of the guiding case system in the people's courts would help unify the application of law, enhance the quality of adjudication, and maintain judicial justice.¹² With regard to the legal effect of the guiding cases, however, the Supreme People's Court was very cautious in addressing it, given the constitutional restraint on its power to make law. Under Article 7 of the Guiding Case Provisions, the people's courts at all levels shall refer to the guiding cases

⁹ See (最高人民法院关于案例指导工作的规定) [Provisions of the Supreme People's Court Concerning Work on Case Guidance] (passed by the Adjudication Comm. of the Sup. People's Ct. Nov. 15, 2010, issued and effective Nov. 26, 2010), CHINA GUIDING CASES PROJECT, English Guiding Cases Rules, June 12, 2015 Ed., <http://cgc.law.stanford.edu/guiding-cases-rules/20101126-english/>. [hereinafter *Supreme People's Court, the Guiding Case Provisions*].

¹⁰ See Notice of Release of the First Set of Guiding Cases, (promulgated by Sup. People's Ct.), <http://old.chinacourt.org/html/article/201112/21/472164.shtml>.

¹¹ See Zuigao Renming Fayuan Guanyu Fabu Di 13pi Zhidaoxing Anli De Tongzhi (最高人民法院关于发布第 13 批指导性案例的通知) [Notice of the Supreme People's Court on the Issuance of the Thirteenth Instance of Guiding Cases] (promulgated by Sup. People's Ct., June 6, 2016, effective July 5, 2016) P.R.C. LAWS & REGS. [hereinafter the Thirteenth Set of Guiding Cases]. The thirteenth set of guiding cases was published on June 30, 2016, and there were four cases in it. The publication of the 13th set guiding cases is available at http://www.law-lib.com/law/law_view.asp?id=537301.

¹² See *supra*, Introduction.

when adjudicating similar cases.¹³ The issuance of the Guiding Case Provisions is considered a significant step of establishing a guiding case system in the Chinese judiciary because it not only formally makes the compilation of guiding cases routine work of the Supreme People's Court, but also mandates the use of guiding cases in trials.¹⁴ Unfortunately, since Article 7 of the Guiding Case Provisions does not define "shall refer to" and "similar cases", confusions occur due to the vagueness of these two terms.¹⁵

The latest development in the establishment of the guiding case system was the Supreme People's Court's adoption of the Detailed Rules for the Implementation of the Guiding Case Provisions (Detailed Rules) on June 2, 2015 under its power of judicial interpretation.¹⁶ As it will be discussed below, the Supreme People's Court's power of judicial interpretation derives from the Chinese Constitution, which is different from the legislative interpretation that is vested with the National People's Congress and its Standing Committee.

The Detailed Rules are designed to provide the judges with instruction on how to refer to guiding cases in case adjudications. The most important provision in the Detailed Rules is Article 10 where the Supreme People's Court intends to deal with the "shall refer to" issue. Under Article 10, when referring to the guiding cases during the adjudication of similar cases, the courts at all levels shall cite the guiding cases in their judgment reasoning, but may not use the guiding case as the legal basis for their judgments.¹⁷ The underlying notion of Article 10 is that the guiding cases are to play a unique role in the adjudication of cases at the people's courts. In addition, to emphasize the necessity for adopting the guiding case system in the Chinese judiciary, the Supreme People's Court in the Detailed Rules reiterates that the ultimate goal of the use of guiding cases is to make attainable the uniformity of application of law and the achievement of judicial justice.¹⁸

¹³ See Provisions of the Sup. People's Ct. Concerning Work on Case Guidance *supra* note 9, at art. 7.

¹⁴ See *id.* at art. 7.

¹⁵ See *id.*

¹⁶ See ((最高人民法院关于案例指导工作的规定)实施细则) [Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"] (passed by the Adjudication Comm. of the Sup. People's Ct. Apr. 27, 2015, issued and effective May 13, 2015), STANFORD LAW SCHOOL: CHINA GUIDING CASES PROJECT, June 12, 2015, <http://cgc.law.stanford.edu/guiding-cases-rules/20150513-english/> [hereinafter Detailed Rules].

¹⁷ See *id.* at art. 10.

¹⁸ *Id.* at art 1.

The Detailed Rules also require that the guiding cases follow certain formality¹⁹ The purpose is to make guiding cases the model cases that contain the typical practices of people's courts in adjudicating similar cases and help apply the law in the way that is desired to achieve uniformity. In this respect, many consider the issuance of guiding cases as an alternative to, and a practical form of, the judicial interpretation by the Supreme People's Court.²⁰ It is also believed in the Chinese legal community that the requirement of citing to the guiding cases in the judgment reasoning clearly goes beyond the normal scope of reference because it makes citing the relevant guiding cases mandatory.²¹

Despite the Supreme People's Court's efforts, questions remain widely open in respect to the legal effect of guiding cases. The most troublesome issue is where the guiding cases should stand in the Chinese judicial system. More specifically, the issue involves two basic questions. First, since the citation of guiding cases is required in the judgment reasoning, it becomes questionable whether a guiding case has the effect of precedent or remains merely as a reference. Related to this question is whether a judgment can be deemed erroneous in the application of law and thus is appealable if it differs from an applicable guiding case. Second, given the role of guiding cases in shaping the judgment, a question that would necessarily be raised is whether the guiding cases may become a source of law because the traditional notion is that a judgment is binding only on the parties involved in the particular case. Put differently, the core issue is about the law-making power of the Chinese judiciary.

This Article will discuss the features and impacts of the guiding cases, and analyze the issues that emerge from the adoption of the guiding case system. In Part II, the Article will begin with a review of the power of the Chinese judiciary under the current government structure in China, and the discussion will focus on the lawmaking power and the function of the Chinese judiciary. Part III will take a look at the sources of law in China and the role of people's courts. It will discuss the nature of judicial interpretation and the guiding case initiative. Part IV will analyze the substance of the guiding cases and the procedures for their selection. The

¹⁹ *Id.* at art. 3.

²⁰ See SHEN DEYONG, EXPLORING TO ESTABLISH THE GUIDING CASE SYSTEM WITH CHINESE CHARACTERISTICS UNDER THE TRUTHFUL, PRACTICAL, REFORMATIVE, AND INNOVATIVE SPIRITS, in SHEN DEYONG, ET AL, STUDIES ON THE GUIDING CASE SYSTEM WITH CHINESE CHARACTERISTICS 1 (2009).

²¹ See Wang Limin, *Study on Several Issues Concerning the Guiding Case System of China*, 1 LEGAL SCI. 71, 75-76 (2012).

center of the analysis will be the major characters of the guiding cases and the required content. Part V will turn to the application of guiding cases. It argues that the guiding case system as desired by the Supreme People's Court will eventually change the Chinese judicial landscape because it has an effect of creating a *de facto stare decisis* in the Chinese legal proceedings. In its conclusion, the Article will point out that the guiding case system, although requiring much more improvement, clearly implicates China's move toward utilizing case law and demonstrates a growing expansion of the power of the Chinese judiciary in making the law.

II. LIMITED POWER OF THE CHINESE JUDICIARY UNDER THE PEOPLE'S CONGRESS SYSTEM

China does not have a separation of powers in the nation's political structure, and its government is framed under the people's congress system. The people's congress is the legislative body and its relationship with both the judiciary and the executive is not horizontal but vertical. On the top of the government structure, the people's congress is in the position to check and supervise the work of the judiciary and the executive, but not vice versa. Institutionally, the people's congress is divided at the central and local levels. At the national level is the National People's Congress ("NPC"). According to the 1982 Chinese Constitution (as amended in 2014), the NPC is the highest organ of state power and its permanent body is the Standing Committee of the NPC.²² The local people's congresses at various levels are local organs of state power.²³ Currently, all provinces, municipalities directly under the Central Government, counties or cities, municipal districts, townships, nationality townships, and towns have a people's congress,²⁴ but the standing committee of the people's congress is formed only at or above the county or city level.²⁵

The Chinese Constitution mandates that the Supreme People's Court, as the State judicial body, be supervised by the NPC.²⁶ Each year, the Supreme People's Court is required to deliver an annual work report to the General Assembly of the NPC. The same is true at all local levels. The NPC has the authority to amend the Constitution, supervise the enforcement of the Constitution, and enact or amend basic laws governing criminal

²² See XIANFA art. 57 (1982), http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm.

²³ See *id.* at art. 96.

²⁴ See *id.* at art. 95.

²⁵ See *id.* at art. 96.

²⁶ See *id.* at art. 3, 128.

offences, civil affairs, the State organs, and other matters.²⁷ The NPC also has the power to elect and remove the President of the Supreme People's Court (equivalent to the Chief Justice of U.S. Supreme Court).²⁸ The local people's congresses at various levels, in addition to ensuring the observance and implementation of the Constitution, other laws, and the administrative regulations in their respective local areas,²⁹ are empowered to adopt local regulations that do not contravene the Constitution, laws, and administrative regulations.³⁰ In addition, the local people's congresses have the power to elect and remove presidents of people's courts at their respective levels.

An important feature of the Standing Committee of the NPC is its power to enact and interpret law. Under Article 67 of the Constitution, the Standing Committee of the NPC has the authority to interpret the Constitution and supervise its enforcement, to enact and amend laws other than those that should be enacted by the NPC, and to interpret laws.³¹ The Standing Committee of the NPC may also partially supplement and amend laws enacted by the NPC when the General Assembly of the NPC is not in session.³² Another feature of the Standing Committee of the NPC is its appointment power. It is provided in the Constitution that the Standing Committee of the NPC has the power to appoint or remove, upon the recommendation of the President of the Supreme People's Court, the vice-presidents, judges of the Supreme People's Court, and the members of its judicial committee.³³ Under Article 128 of the Constitution, the Supreme People's Court is responsible to the NPC and its Standing Committee, and all local people's courts at various levels are responsible to their respective people's congresses.³⁴

It is important to note that the judicial committee (also known as trial committee) is a unique entity within Chinese courts. The judicial committee is a controlling body inside the people's courts with regard to trials because as a general practice, no judgment will be handed down without passing the judicial committee's screening. Thus, in most cases the judicial committee

²⁷ *See id.* at art. 62.

²⁸ *See id.* at art. 62–63.

²⁹ *See id.* at art. 99.

³⁰ *See id.* at art. 100. But all local regulations are required to report to the Standing Committee of the National People's Congress for the record.

³¹ *See id.* at art. 67.

³² *See id.*

³³ *See id.*

³⁴ *See id.* at art. 128.

actually determines the outcome of the trials behind the scene.³⁵ Under the Law of Organization of the People's Courts of China, people's courts at all levels shall form a judicial committee. The primary function of the judicial committee is "to discuss important or difficult cases and other issues relating to the judicial work."³⁶ In general, the judicial committee consists of the president, vice presidents and chiefs of various divisions or chambers of the court, and all of them are senior judges.³⁷ Members of judicial committees of local people's courts at various levels are appointed and also can be removed by the standing committee of the people's congress at the corresponding level, upon the recommendation of the president of that courts.³⁸ Members of the judicial committee of the Supreme People's Court are appointed or removed by the Standing Committee of the NPC, upon the recommendation of the President of the Supreme People's Court.³⁹

Although the Supreme People's Court is the highest judicial body of the nation, it does not have direct control over lower courts' budgets and appointments.⁴⁰ The Chinese judiciary consists of four levels of courts, namely the Supreme People's Court, the provincial High People's Court, local intermediate people's courts, and basic people's court (also known as trial courts). At present, there are 32 high people's courts (excluding Hong Kong and Macao), 409 intermediate people's courts, and 3,117 people's courts at the basic trial level.⁴¹ Under the Constitution, the Supreme People's Court is empowered to supervise the adjudicative work of people's courts at various local levels, and the people's courts at higher levels have the authority to supervise the work of the courts at lower levels.⁴²

A recent development in the structure of the Chinese judiciary is the creation of the circuit courts. The birth of the circuit courts was a result of

³⁵ The trial committee is being criticized as an obstacle to fair trial and independence of trial. For more discussion, see CAO JIANMING, *STUDIES ON THEORETICAL ISSUES CONCERNING THE REFORM ON THE TRIAL METHODOLOGIES OF CHINA* 249–76 (2000).

³⁶ See The Law of Organization of the People's Courts of China, (promulgated 1983, amended in 2006) art. 10 [hereinafter The Law of Org. of the People's Cts. of China]. In general, the discussion of case at the judicial committee is a closed door meeting and is not accessible. But in a recent divorce case decided by a trial court in Nanjing, Jiang Su Province, the judge incorporated the trial committee split opinions in details into the judgment concerning the issue about division of marital property. It was the very first case in which the judicial committee's opinions were disclosed. See The Civil Judgment of Xuan Wu District People's Court of Nanjing Municipality, (2015) XUAN SHAO MIN CHU ZI No. 123.

³⁷ See *id.*

³⁸ *Id.* at art. 10.

³⁹ See *id.*

⁴⁰ See *id.* at art. 127.

⁴¹ See *People's Courts Nationwide*, THE SUP. PEOPLE'S CT., <http://www.court.gov.cn/jigou.html>.

⁴² See XIANFA, art. 127 (1982).

an attempt to establish regional judicial bodies to handle multi-provincial cases. In early 2015, two circuit courts were created in China. The First Circuit is located in Shenzhen, in the south, while the Second Circuit is in Shenyang, in the north. In December 2016, four more circuit courts were established in Nanjin, Zhengzhou, Congqin and Xian respectively. The 6 circuits now cover 26 provinces and municipalities in the mainland.⁴³

According to the Supreme People's Court, the circuit courts are intended to serve a twofold purpose: to solve "cross regional" and "serious" administrative, civil, and commercial disputes, and to avoid the influence of local interests.⁴⁴ It is important to note, however, that the circuit courts do not add any additional level to the current court system of China; rather, they are merely the dispatched branches of the Supreme People's Court. The judgments made by the circuits are deemed as the same made by the Supreme People's Court.⁴⁵

An interesting phenomenon concerning the judicial function is the interpretation of law. Under the Constitution the power of interpretation of law rests with the Standing Committee of the NPC. In addition, the Legislation Law of China explicitly provides that the authority to interpret the law belongs to the Standing Committee of the NPC.⁴⁶ Pursuant to Article 45 of the Legislation Law, the Standing Committee of the NPC shall interpret a law if the specific meaning of a provision of such law requires further clarification or a new situation arises after enactment of such law, requiring clarification on its application.⁴⁷ Article 46 further provides that if a need for interpretation of law arises, the Supreme People's Court may

⁴³ The remaining five provinces and municipalities including Beijing, Tianjin, Hebei, Inner Mongolia and Shandong are under the Supreme People's Court. *See* Supreme People's Court, Resolution to Amend the 2015 Rules of the Supreme People's Court on Several Issues Concerning Adjudication of Cases by Circuit Courts, adopted by the Supreme People's Court on December 8, 2016, http://www.law-lib.com/law/law_view.asp?id=551711.

⁴⁴ *See* Supreme People's Court, Rules of the Supreme People's Court on Several Issues Concerning Adjudication of Cases by Circuit Courts, issued by the Supreme People's Court on January 5, 2015, available at <http://www.court.gov.cn/zixun-xiangqing-13148.html>. According to the Supreme People's Court, the Circuit Courts hears eleven types of cases, including administrative, civil and commercial cases of first instance which are of significance or have major impacts on the country; appeals from the High People's Courts, procedural matters involving judicial supervision or the decisions of the High People's Court, and civil and commercial cases involving judicial assistance or the parties from Hong Kong, Macau or Taiwan,

⁴⁵ *See* Circuit Courts, the Sup. People's Ct., <http://www.court.gov.cn/xunhui1.html>.

⁴⁶ *See* Zhongguo Susong Fa (中国诉讼法) [Legislation Law of China] (promulgated 2000, amended 2015), art. 45, <https://www.cecc.gov/resources/legal-provisions/legislation-law-chinese-and-english-text>.

⁴⁷ *See id.*

make a request to the Standing Committee of the NPC for this purpose.⁴⁸ The underlying notion of these provisions is that interpretation of law is an exercise of lawmaking power and such power is reserved exclusively to the legislature.

Thus, under the Constitution and the Legislation Law, the Chinese judiciary does not have the power to interpret law. But in 1981, a year before the adoption of the current Constitution, the Standing Committee of the NPC passed the Resolution on Strengthening the Work of Interpretation of Law (1981 Resolution).⁴⁹ In the 1981 Resolution, the Standing Committee of the NPC laid out a framework for the interpretation of law, which allows the Supreme People's Court to exercise a limited power pertaining to interpretation. According to the 1981 Resolution, if the law itself would need to be clarified, the interpretation shall be made by the Standing Committee. If, however, the issue involved specific application of law in the adjudication at the courts, the Supreme People's Court may do the interpretation.⁵⁰

The 1981 Resolution has several implications. First, legal interpretation in China is divided into two categories: legislative interpretation and judicial interpretation. The former deals with the interpretation of law while the latter is concerned with the interpretation of the application of law. Second, the legislative interpretation is within the domain of the NPC and its Standing Committee, and the judicial interpretation is a function of the judiciary. Therefore, people's courts may not interpret the law. Third, the Supreme People's Court is the only body in the nation that has the authority to make judicial interpretation and none of the lower courts may do so.

In addition to the 1981 Resolution, the other provision of law that grants the Supreme People's Court the power of judicial interpretation is Article 32 of the 1983 Law of Organization of the People's Courts (as amended in 1986). Echoing the 1981 Resolution, Article 32 provides that the Supreme People's Court interprets issues concerning specific application of laws and decrees in judicial proceedings.⁵¹ Article 32 of the Law of Organization of People's Court together with the 1981 Resolution

⁴⁸ See *id.* at art. 46.

⁴⁹ See Resolutions on Strengthening the Work of Interpretation of Law, the Standing Comm. Nat'l People's Cong., 1981, http://www.npc.gov.cn/wxzl/gongbao/2000-12/06/content_5004401.htm.

⁵⁰ See *id.*

⁵¹ See The Law of Org. of the People's Cts. of China, art. 32.

constitutes the legal origin from which the power of the Supreme People's Court to conduct judicial interpretation derives.

However, what has become troublesome is the difference between legislative interpretation and the judicial interpretation. Confusion arises in several aspects. First of all, it is unclear where the line is between interpretation of law and interpretation of the application of law, because in judicial practice, the issue of application of law often involves what a provision of law actually means and how such a provision should be applied.⁵² Secondly, a question commonly encountered is whether the judicial interpretation has the same effect as the legislative interpretation. Put differently, the question is whether the judicial interpretation can be deemed as law.⁵³ Thirdly, from a practical viewpoint, judges in making their judgments often struggle on the issue of whether their judgment could rely solely on the judicial interpretation.⁵⁴ In other words, it is questionable whether a court may explain (interpret) the meaning of the law that is to be applied in the way intended by the judicial interpretation without referring to the law.

The lack of clarity as to the distinctions of the legislative interpretation *vis-a-vis* the judicial interpretation often results in a clash between the legislature and judiciary. On the one hand, the ambiguity makes it possible for the judiciary to step over into the realm of interpretation of law. On the other hand, the legislatures seem very sensitive about being offended by the judiciary, and in many cases appear to be antagonistic to possible intrusion by the judiciary into legislative areas during judicial proceedings that involve the application of law.⁵⁵ The “Corn Seeds” case might best illustrate the kind of conflict between the two government bodies and the dilemma facing the people's courts.

The “Corn Seeds” case was decided at first instance on May 17, 2003.⁵⁶ The case involved a dispute over the performance of a contract between Ru Yang County Seeds Company (Ru Yang Co.) and Yi Cun Seeds

⁵² See Cao Shibing, *The Legal Status of the Judgment and Judicial Interpretation of the Supreme People's Court*, 3 CHINESE SCI. L., 175–81 (2006), <http://www.iolaw.org.cn/showNews.asp?id=16296>.

⁵³ See generally Ji CHENG, JUDICIAL INTERPRETATION OF THE SUPREME PEOPLE'S COURT: A PRELIMINARY STUDY (2007).

⁵⁴ See *id.*

⁵⁵ See Wang Chenguang, *Law-making Functions of the Chinese Courts: Judicial Activism in a Country of Rapid Changes*, 4 FRONTIERS OF L. CHINA 524, 531–33 (2006)

⁵⁶ The judicial proceedings in China take two instances: trial and appeal. On appeal, the appellate court decision is final and the adjudication ends. See Mo Zhang, *International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System*, 25 B.C. INT'L & COMP. L. REV. 59 (2002).

Company (Yi Cun Co.). Both the Plaintiff and Defendant were in Henan Province. Under the contract, Plaintiff Ru Yang Co. provided Defendant Yi Cun Co. with a stated quantity of corn seeds for the Defendant to reproduce for the Plaintiff as hybrid corn seeds, as specified in the contract. The Defendant, however, failed to fulfill its obligation and did not deliver to the Plaintiff any hybrid corn seeds that were reproduced. The Plaintiff then sued the Defendant in the Intermediate People's Court in Luo Yang, Henan Province, for breach of contract, claiming damages resulting from the Defendant's failure to perform.

During the trial, one disputed issue was the determination of the amount of damages. There were two conflicting legislative acts that were relevant because both of them involved the price of the corn in question. One of the legislative acts was the national Seeds Law and the other one was the "Regulations for Administration of Crop Seeds of Henan Province" (Provincial Regulations).⁵⁷ Under the Provincial Regulations, the purchase and sale of seeds must comply with the provincial policy of unified price. The unified price was referred to as the fixed price set by the provincial government. The Seeds Law, however, did not require a fixed price, which meant that the price could be determined on the basis of the market. The Plaintiff argued that the market price should be used to calculate the damages because of the applicability of the Seeds Law. The Defendant insisted that the Provincial Regulations should prevail in the present case. The Defendant also relied on a "Notice" jointly issued by the Provincial Bureau of Commodity Pricing and the Provincial Bureau of Agriculture to implement the Provincial Regulations to support its argument.

When deciding the case, the court applied the Seeds Law and ruled in favor of the Plaintiff. In the court judgment, the presiding judge wrote in the reasoning that the Provincial Regulations were a local law and thus was subordinate to the national law in terms of legal effect. The judge concluded in the judgment that any of the provisions in the Provincial Regulations that were in conflict with the Seeds Law should necessarily become void. The judge further opined that any provision in the "Notice" that was inconsistent

⁵⁷ National Seeds Law was adopted in 2000 by the NPC, and it was amended in 2003, 2013, and then revised in 2015. The Seeds Law promotes a market-oriented seeds management system. The 2015 revised Seeds Law is available at <http://www.forestry.gov.cn/portal/hhxx/s/1501/content-819688.html>. The "Provincial Seeds Regulations of Henan", now abolished already, was adopted in 1984, and amended in 1989, 1993 and 1997 respectively. Article 36 of the Regulations requires purchase and sale of seeds to follow the price fixed by the local government, which is available at http://www.law-lib.com/law/law_view.asp?id=81606.

with the Seeds Law must also be considered void.⁵⁸

When the judgment was handed down, the local legislature was furious because the judgment was viewed as an intolerable offense to the legislative power. The judge's opinion voiding the local regulations was, in particular, deemed a violation of the people's congress system. The Standing Committee of the People's Congress of Henan Province took a tough stance and issued a notice condemning the judgment, and urged the provincial High People's Court to look into and deal with this "serious matter."⁵⁹ Under this tremendous pressure, the provincial High People's Court circulated a notice of criticism internally among all lower courts in the jurisdiction, characterizing the judgment as law-breaking conduct that threatened the authority of the local law and regulation as well as the unified legal system.⁶⁰ What really shocked the legal community was that as a penalty, the presiding judge was suspended from the bench.⁶¹

Interestingly, however, on appeal the High People's Court of Henan affirmed the judgment. The High People's Court held that since the contract at issue was concluded after the adoption of the 1999 Contract Law, its validity must be judged under the Contract Law and relevant Supreme People's Court interpretation.⁶² Under Article 52(5) of the Contract Law, a contract is null and void if it violates the mandatory provisions of the law.⁶³ According to Article 4 of the Supreme People's Court "Explanations to the Questions Concerning Application of Contract Law of China (I)," when determining validity of a contract, the people's court shall apply national law, but not local rules.⁶⁴

The "Corn Seeds" case generated debate concerning the relationship between the legislature and the judiciary. Although the judgeship of the presiding judge was reinstated after the several-month suspension due to, at

⁵⁸ See *Ru Yang County Seeds Co. v. Yi Cun Seeds Co.*, Luo Min Chu Zhi No. 6 (Luo Yang Intern. People's Ct. He Nan Province 2003) (China). For a full English translation of this judgment, see MO ZHANG, CHINESE CONTRACT LAW, THEORY AND PRACTICE 17–20 (2006).

⁵⁹ See *id.* at 21.

⁶⁰ See *id.*

⁶¹ See *id.* at 22.

⁶² See *Yu Fa Min 2 Zhong Zi No. 153* (High People's Ct. Henan Province 2003).

⁶³ See *Zhongguo Hetong Fa* (中国合同法) [Chinese Contract Law] (promulgated by President, Mar. 15, 1999, effective Mar. 15, 1999), art. 52 P.R.C. LAWS, http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383564.htm.

⁶⁴ See Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Contract Law of the People's Republic of China (1), art. 4 (1999), <http://www.chinaacc.com/new/63/73/132/2006/4/ma001614460020-0.htm>.

least in part, the vast support from the legal community nationwide,⁶⁵ serious issues were raised. One of the issues was how the judicial power should be defined under the Constitution.⁶⁶ The real question behind this issue was whether the court should have any kind of judicial review power, or the power to determine what the law is.⁶⁷ A related issue was whether the legislature could interfere with judicial matters even though under the people's congress system the judiciary reports to the congress.⁶⁸

All these issues do not seem to have an easy answer given the people's congress-based government structure. At the national level, the Supreme People's Court often has to deal with the same issues and to try to maintain as well as expand its power without offending the NPC and its Standing Committee. As a practical matter, however, although the judicial interpretation is limited to the application of law, but the Supreme People's Court often interprets more than just how the law is to be applied. The compilation of guiding cases and the building of a guiding case system further demonstrates how the Supreme People's Court plays its role in the development of law in China.

III. SOURCES OF LAW AND THE ROLE OF THE SUPREME PEOPLE'S COURT

Law in China is considered to have both primary and secondary sources.⁶⁹ The foremost primary source is the Constitution, followed by the laws promulgated by the NPC and its Standing Committee. Parallel with the laws are the treaties to which China is a party or member. Also included in the primary sources of law are the administrative and local regulations. The administrative regulations are the legislative acts made by the State Council and are applicable nationwide. The local regulations involve local concerns and are adopted by provincial or larger city people's congresses.⁷⁰ At the

⁶⁵ In response to the "Corn Seeds" case, Tsinghua University Law School held a special roundtable conference in November 2003 on both constitutional and judicial questions arising from the case (Tsinghua Law School Roundtable). *See* MO ZHANG, *supra* note 58, at 23.

⁶⁶ *See id.* at 22-23.

⁶⁷ *See id.*

⁶⁸ *See id.*

⁶⁹ *See generally* SHU GUOYING & LI HONGBO, LADDER OF JURISPRUDENCE 39-50 (2006).

⁷⁰ It is required that the local regulations be filed with the Standing Committee of the NPC on record, and the regulations passed by the people's congress in a larger city be submitted to its corresponding provincial people's congress for approval before they take effect. *See id.* at 44. In addition, under the Constitution, people's congresses of national autonomous areas have the power to enact autonomy regulations and specific regulations in the light of the political, economic and cultural characteristics of the nationality or nationalities in the areas concerned. The autonomy regulations and specific regulations of autonomous regions shall be submitted to the Standing Committee of the National People's Congress for approval before they go into effect. Those of autonomous prefectures and counties shall be submitted to

bottom of the hierarchy are the rules, decrees or ordinances issued by various ministries as well as the executive branch of provincial governments.

The secondary source of law is commonly viewed in China to include customs and moral standards, as well as the policies of the Communist Party. In general, it is held that the customs and moral standards, though not necessarily binding, have considerable impacts on the decisions of courts. In other words, they are the factors that the courts would have to consider in adjudicating cases.⁷¹ The policies of the Communist Party used to be the primary source of law during the Mao era from 1949-1976.⁷² The development of the rule of law in the nation after its vast economic reform launched in 1978 led to the abandonment of the concept of “the party policy as the law,” and shifted the focus onto the statutes. As a result, no judgment shall be made on the basis of policy. But because the law and policy remain closely intertwined in China, the Communist Party policies remain important, and even decisive, in Chinese law making.⁷³

Whether the judicial interpretations and the cases published by the Supreme People’s Court are a source of law is both problematic and controversial in China. This issue directly involves the role that the Supreme People’s Court would play in the judicial process pertaining to the application of law. Narrowly speaking, the issue concerns the extent to which the judicial interpretation and published cases can be legally binding. As noted, the legislative interpretation by the Standing Committee of the NPC is part of the legislative process and thus is treated the same as the law. But, due to the lack of the lawmaking power in the judiciary, it becomes questionable whether the judicial interpretation may also have the effect of law.⁷⁴

the standing committees of the people's congresses of provinces or autonomous regions for approval before they go into effect, and they shall be reported to the Standing Committee of the National People's Congress for the record. See XIANFA art. 116 (1982), http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm.

⁷¹ See SHU GUOYING & LI HONGBO, *supra* note 69, at 49. See also SHEN ZHONGLING & ZHANG WENXIAN, JURISPRUDENCE 320-21 (2004); SUN GUOHUA & FENG YUJUN, STUDY ON THE SOCIALIST LEGAL SYSTEM WITH CHINESE CHARACTERISTICS: CONCEPTS, THEORIES AND STRUCTURE 440 (2009).

⁷² At that time, the law in China was defined as the rules representing the will of the Communist Party and implementing the policies of the Communist Party. See SHU GUOYING & LI HONGBO, *supra* note 69, at 48. See also Mo Zhang, *The Socialist Legal System with Chinese Characteristics: China's Discourse for the Rule of Law and a Bitter Experience*, 24 TEMP. INT'L & COMP. L.J. 1, 38-40 (2010).

⁷³ See SUN GUOHUA & FENG YUJUN, *supra* note 71, at 445-556; see also SHEN ZONGLING & ZHANG WENXIAN, *supra* note 71, at 322.

⁷⁴ See SUN GUOHUA & FENG YUJUN, *supra* note 71, at 447.

In reality however, it is hard, if not impossible, to tell how the question about “what the law is” (interpretation of law) differs from the one concerning “how the law is to be applied” (interpretation of the application of law). The Supreme People’s Court, when making judicial interpretations, often seems to actually deal with the issue about what the law is, although the language in its interpretation is not explicit in this regard. For example, after the Civil Procedure Law (CPL) was amended in August 2012, the Supreme People’s Court issued a lengthy Interpretation on the Application of Civil Procedure Law of China in January 2015 (2015 Interpretation).⁷⁵ Under Article 18(1) of the CPL, the intermediate people’s court shall have jurisdiction as the court of first instance over major cases involving foreign elements.⁷⁶ Article 18(1) of the CPL does not define “the major cases.” Article 1 of the 2015 Interpretation provides that the major cases involving foreign elements as provided in Article 18(1) of the CPL shall include cases in which the subject matter in dispute involves a large amount of money and complicated circumstances, or cases having significant impacts, such as a case where one side has a large number of parties concerned.⁷⁷ It is difficult here to say whether the Supreme People’s Court is interpreting what Article 18(1) of the CPL is about or interpreting how it should be applied.

In addition, the Supreme People’s Court has tried to give full effect to the judicial interpretations and to make them binding to all courts. Under its Provisions on the Work of Judicial Interpretation issued on March 23, 2007 (2007 Provisions), the Supreme People’s Court clearly instructed all people’s courts that the judicial interpretations should have legal effect.⁷⁸ Obviously, the “legal effect” as used by the Supreme People’s Court is intended to mean “binding”. The 2007 Provisions also reiterated the principle that all issues involving the application of law in the judicial proceedings of the people’s courts shall be dealt with by the Supreme

⁷⁵ The CPL has a total of 284 articles while the Supreme People’s Court 2015 Interpretation contains 552 articles. See Interpretation of the Supreme People’s Court on the Application of the Civil Procedure Law of the People’s Republic of China, LAW LIBRARY (2015), *translated in Civil Procedure Law of the People’s Republic of China*, INT’L TRADE L. NETWORK (Mar. 30, 2012), <http://www.tradelawchina.com/rongzi/HTML/109.html>.

⁷⁶ See *id.* at art. 18.

⁷⁷ See *id.* at art. 1.

⁷⁸ See Provisions of the Supreme People’s Court on the Judicial Interpretation Work, art. 5 (2007), PEKING U. CTR. LEGAL INFO, <http://en.pkulaw.cn/display.aspx?cgid=89508&lib=law> (last visited Jan. 15, 2017) (The Provisions were issued on March 23, 2007 and effective April 1, 2007 to replace the Several Provisions on the Work of Judicial Interpretation adopted on July 1, 1997). [hereinafter The Supreme People’s Court, the 2007 Provisions].

People's Court.⁷⁹ The principle, once again, underscores the rule that only the Supreme People's Court may make judicial interpretations.

According to the Supreme People's Court, the judicial interpretation may take four different forms, namely "interpretation," "provisions," "reply," and "decision".⁸⁰ The "interpretation" is to handle the issue concerning how to specifically apply a certain piece of law or how to apply the law to a specific type of case or matter in judicial practices. The "provisions" refer to the judicial interpretation made in lieu of regulations or opinions adopted on the basis of need for judicial work pursuant to the legislative spirit. The "reply" is an interpretation in response to the request from the higher people's courts or the military courts for direction on the specific application of laws in a trial. The "decision" is the form employed by the Supreme People's Court to amend or repeal a judicial interpretation.⁸¹

Under the 2007 Provisions, there are three major sources from which the judicial interpretation could be initiated. The first source is the request of the judicial committee of the Supreme People's Court or the suggestion from various divisions adjudicating cases or related matters.⁸² The judicial interpretation may also take place upon the request from various higher people's courts or the military courts for instruction on formulating the specific issue concerning the application of laws. The third source is the outside the judiciary and refers to the judicial interpretation suggestions or proposals from individuals, government entities, or social organizations. The individuals include delegates of the NPC, members of the Chinese People's Political Consultative Conference (known as the CPPCC), and other citizens.⁸³ In addition, the Supreme People's Court may make judicial interpretations under any circumstance deemed necessary.⁸⁴

The 2007 Provisions also provide a list of factors that would need to be taken into account when the Supreme People's Court reviews the request,

⁷⁹ See *id.* at art. 2.

⁸⁰ See Rules of Judicial Interpretation (issued by the Supreme People's Court, March 9, 2007), http://www.law-lib.com/law/law_view.asp?id=194506 [hereinafter Supreme People's Court, 2007 Provisions].

⁸¹ See *id.* at art. 6.

⁸² Currently, there are 16 divisions that involve adjudication of cases and related matters in the Court, including a case filing division, 5 criminal divisions, 4 civil divisions, environmental division, administrative division, judicial supervision division, enforcement division, and two circuit courts. See THE SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA, <http://www.court.gov.cn/jigou-fayuanjigou.html> (last visited Jan. 15, 2017).

⁸³ See Supreme People's Court, 2007 Provisions, *supra* note 80, at art. 9.

⁸⁴ See *id.*

suggestion, or proposal for a judicial interpretation and decides whether such an interpretation would be needed. These factors are intended to ensure the propriety of the contents of the judicial interpretation. According to Article 20 of the 2007 Provisions, the factors pertaining to interpretation include (a) whether it complies with the Constitution and the provisions of laws; (b) whether it exceeds the limits of the judicial interpretation's authority; (c) whether it overlaps or conflicts with relevant judicial interpretations; (d) whether it meets the prescribed procedure; (e) whether the materials submitted comply with the requirements; (f) whether it fully and objectively reflects the major concerns of relevant aspects; (g) whether it is clear as to the major issues in dispute and their solutions; and (h) other substances that ought to be examined.⁸⁵

With regard to the legal effect of the judicial interpretation, Article 27 of the 2007 Provisions specifically requires that the people's courts cite the judicial interpretation in their judicial documents if the adjudication is made on the basis of the interpretation.⁸⁶ As to the relationship between the law and the judicial interpretation, Article 27 further provides that if a people's court simultaneously cites the law and the judicial interpretation as the basis of the judgment, the court shall cite the law first and then the judicial interpretation.⁸⁷ Moreover, the 2007 Provisions set forth a supervision process in order to guard the application of judicial interpretation.⁸⁸ It is mandated in Article 28 that the Supreme People's Court supervise all lower local people's courts, and that a superior people's court supervise its inferior people's courts in their application of judicial interpretations during trials.⁸⁹

The main scheme of the 2007 Provisions serves a two-fold purpose. In one aspect, the Supreme People's Court wants to stress the importance of judicial interpretations and require the mandatory application of them in the judicial proceedings. It is discernable that the Supreme People's Court has a strong desire to both materialize and optimize its power of judicial interpretation. In another aspect, the Supreme People's Court has to watch its steps and try not to move too far so that the power of legislature would be undermined.⁹⁰ Thus although the keynote of the 2007 Provisions is that the

⁸⁵ *See id.* at art. 20.

⁸⁶ *See id.* at art. 27.

⁸⁷ *See id.*

⁸⁸ *See id.*

⁸⁹ *See id.* at art. 28.

⁹⁰ *See generally* Wang Chenguang, *supra* note 55.

judicial interpretation is legally binding, the Supreme People's Court has made it imperative that the draft judicial interpretation be submitted for opinion to the relevant special committee of the NPC or the relevant department under the Standing Committee of the NPC,⁹¹ and that the judicial interpretation, once promulgated, be filed with the Standing Committee of the NPC for record within 30 days of the promulgation.⁹²

Despite the concern of judicial interpretations becoming a source of law, the Supreme People's Court clearly intends to make them legally authoritative. The requirement for the citation of judicial interpretations in judicial decisions suggests that the judicial interpretation is deemed a source of law by the judiciary. From this perspective, it seems inaccurate to hold that the Supreme People's Court does not have the power to make law. In fact, it is believed in China that given the importance and actual effect of judicial interpretation in judicial proceedings, the Supreme People's Court is actually making law,⁹³ or at least has a quasi-law making power.⁹⁴ And it is such power that further blurs the line between legislative and judicial interpretations.⁹⁵

Compared with judicial interpretation, the legal status of the cases published by the Supreme People's Court is a more difficult issue. The focal point is whether there is or should be a doctrine of *stare decisis* in the country. More explicitly, it is the issue of whether the people's courts may follow precedent in adjudication of cases. A general holding in China is that there is no case law in the country because of its civil law tradition and the people's congress system.⁹⁶ But, as noted, since the Supreme People's Court first published cases in 1985, there has been a debate on the role that the published cases would play. Also, due to the lack of clear provisions in the law that prohibit the use of precedent, the Supreme People's Court has certain flexibility to be able to infuse the published cases with legal significance that would affect the trials in the people's courts.

The initiative to build a guiding case system in the Chinese judiciary is a big step taken by the Supreme People's Court in favor of the role of the guiding cases as "*stare decisis*." Many believe that it is not a simple shift

⁹¹ See *id.* at art. 18.

⁹² See *id.* at art. 26.

⁹³ See JI CHENG, JUDICIAL INTERPRETATION OF THE SUPREME PEOPLE'S COURT 154–55 (2007).

⁹⁴ See SUN GUOHUA & FENG YUJUN, *supra* note 73, at 448–49.

⁹⁵ See Wang Chenguang, *supra* note 55, at 524–49.

⁹⁶ See SHEN ZONGLING & ZHANG WENXIAN, *supra* note 65, at 320–22.

from publication of cases in general to the compilation of guiding cases but rather a significant change in the appreciation of the importance of the cases purposefully selected for the judicial proceedings.⁹⁷ But the initiative has generated many heated debates on the application of guiding cases in the trials. The question that troubles everyone is whether guiding cases would constitute precedent. Behind this question is whether case law will develop in China. Then, the answer to this question once again goes to the issue whether the Supreme People's Court has or should have the power to make law.

IV. GUIDING CASES AND SELECTION MECHANISM

As noted, guiding cases are selected cases. According to the 2010 Guiding Case Provisions, to qualify as a guiding case two requirements must be met: (1) the judgment of the case has taken into effect, and (2) the case shall have one of the following values: (a) it is of great social concern; (b) it involves the issue for which the legal provision is relatively general; (c) it is typical; (d) it is difficult, complicated or of new type; or (e) it contains other quality of guidance.⁹⁸

The 2015 Detailed Rules further define the guiding case as the case having such essential factors as follows: (1) the judgment has become effective; (2) the determination of facts is clear; (3) the application of law is correct; (4) the reasoning of judgment is sufficient; (5) its legal and social consequences are positive; and (6) it can be of a meaningful and general guidance to the trial of the similar cases.⁹⁹ For the purpose of guiding case selection, the Detailed Rules focus more on the substance of the case, including the fact determination, application of law, legal reasoning, and social impacts.

With regard to the source of guiding cases, the Guiding Case Provisions and the Detailed Rules provide a three-step selection process. The first step is the case recommendation. There is a broad base for making such a recommendation. Under the Guiding Case Provisions and the Detailed Rules, the recommendation could be made internally and externally. The internal recommendation may come from the adjudication divisions of the Supreme People's Court, the High People's Courts, and military courts as well. The people's courts at all intermediate and trial

⁹⁷ See generally Shen Deyong, et al., *supra* note 20.

⁹⁸ See *Supreme People's Court, the Guiding Case Provisions*, *supra* note 9, at art. 2.

⁹⁹ See *Detailed Rules*, *supra* note 16, at art. 2.

levels may also make recommendations through their corresponding High People's Court.¹⁰⁰ Externally, the recommenders could be the delegates of the NPC, members of the CPPCC, experts, scholars, lawyers, and any others who are interested in the adjudication and enforcement work of people's courts.¹⁰¹

The second step consists of case selection and review. In order to implement the Guiding Case Provisions and facilitate the guiding case selection, the Supreme People's Court has created an office for work on guiding cases (the Guiding Case Office). Members of the Guiding Case Office are the judges designated by the Supreme People's Court. Under the Detailed Rules, the Guiding Case Office is in charge of the solicitation of case recommendation and is responsible for collecting, selecting, and reviewing the cases recommended.¹⁰² In addition, the Guiding Case Office has the authority to coordinate the guiding case selection process and provide instruction to the work on guiding cases nationwide.¹⁰³ Furthermore, the Guiding Case Office is equipped with the power to publish and compile guiding cases and undertake research in related matters.¹⁰⁴

The third step is approval of guiding cases. Upon its review of the recommended cases, the Guiding Case Office makes a selection and then submits the selected cases to the Judicial Committee of the Supreme People's Court for approval.¹⁰⁵ Upon approval, the guiding cases will be sent as a form notice by the Supreme People's Court to all of the High People's Courts and will be published in the *Supreme People's Court Gazette*, *People's Court Daily*, and on the Supreme People's Court website.¹⁰⁶ If in its view further discussion or research is needed for certain selected cases, the Guiding Case Office may send these cases to relevant government entities, social organizations, members of guiding case advisory committee, and other experts and scholars for opinions and comments.¹⁰⁷

It should be noted that in contrast with the cases previously published by the Supreme People's Court, the guiding cases are distinctive in at least two aspects. First, before the guiding case system was initiated, the

¹⁰⁰ See *id.* at art. 4.

¹⁰¹ See *id.* at art. 5.

¹⁰² See *Supreme People's Court, the Guiding Case Provisions*, *supra* note 9, at art. 3.

¹⁰³ See Detailed Rules, *supra* note 16, at art. 4.

¹⁰⁴ See *id.*

¹⁰⁵ See *id.* at art. 8.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.* at art. 7.

Supreme People's Court from time to time would publish certain cases either decided by itself or by lower courts. The case publication at that time was aimed to serve two functions: the general public function and the judiciary function. The general public function was that the publication of cases would help maintain judicial transparency and justice. With regard to the judiciary function, the cases published were intended to provide lower courts with certain examples.¹⁰⁸ In contrast, the guiding cases have a clear focus on guiding effect with a notion to bind all lower courts.

Second, the cases previously published did not have a formal selection process and although the cases were edited to meet the need for publication, there was no unified procedure. The guiding cases are obviously different: not only must the selection follow the required procedure but also the cases selected should all uniformly comply with particular formality. Under Article 3 of the Detailed Rules, a guiding case must contain the following elements: (a) a title; (b) key words; (c) main points of adjudication; (d) relevant legal provisions; (e) basic facts of the case; (f) the result of adjudication; (g) the judgment's reasoning; and (h) the name of judges appearing on the judgment that has taken effect.¹⁰⁹

The important part of a guiding case is the reasoning on which its judgment stands. Judgments in Chinese courts used to be very simple and contained no legal reasoning.¹¹⁰ In 1999, when the Supreme People's Court issued its first Five-Year Judicial Reform Outline, improving judgment writing became part of judicial reform. It was required in the Outline to add legal analysis and reasoning into the judgment in order to make the judgment more rational and persuasive.¹¹¹ The reform on judgment writing

¹⁰⁸ See Hu Yunteng & Yu Tongzhi, *supra* note 4, at 2–3.

¹⁰⁹ See The Supreme People's Court Detailed Rules for the Implementation of the Provisions of Guiding Cases art. 3 (2015), *Zuigao Renmin Fayuan Gongbao*; Stanford Law School has an on-going "China Guiding Cases Project". In one of its online publications, it explains the required elements as follows: 1. "Keywords" (to list keywords that indicate the nature of the dispute etc.); 2, "Main Points of the Adjudication" (to include general principles prepared by the SPC that it expects other courts to refer to); 3, "Related Legal Rule(s)" (to list the legal rule(s) considered in the GC); 4, "Basic Facts of the Case" (to summarize the most important facts of the GC); 5, "Results of the Adjudication" (to report the outcomes of legal proceedings); and 6, "Reasons for the Adjudication" (to summarize the reasons for the final ruling/judgment). See STANFORD LAW SCHOOL: CHINA GUIDING CASES PROJECT, <https://cgc.law.stanford.edu/guiding-cases-analytics/issue-4/>.

¹¹⁰ A civil judgment in Chinese courts typically followed a six-part pattern in the past. It began with an introduction paragraph stating the name of the parties and cause of action, followed by "plaintiff claims that..." and then "defendant argues that..." The fourth part is "it is found by the court that", and the next one is "it is the opinion of the court that". The last part is "it is decided by the court that".

¹¹¹ See Five-Year Reform Outline of People's Courts (issued by the Supreme People's Court, October 21, 1999), art.13, <http://www.chinacourt.org/article/detail/2013/04/id/941425.shtml>.

was further endorsed in the 2012 amended CPL. Article 152 of the CPL provides that a judgment shall state the outcome of the judgment and reasoning, and shall include: (1) the cause of action, claims, and the facts and reasons of disputes; (2) the facts and causes affirmed by the judgment, applicable laws and causes; (3) the consequences of a judgment and the obligation of litigation costs; and (4) the time limit for filing an appeal and the appellate court with which the appeal shall be filed.¹¹² The guiding cases certainly are intended to serve as a model to guide the judges for their writing of the legal reasoning in judgments.

To illustrate, the case below is guiding case number 56, which was released by the Supreme People's Court on November 26, 2015 in its 11th set of the guiding cases. The case involved a dispute over jurisdiction and began in the first instance at the intermediate people's court in Dalian. On appeal, the High People's Court of Liaoning Province affirmed. The request for retrial was made to the Supreme People's Court through the judicial supervision process. The case is relatively short and has simple facts. Note, however, before the publication, all cases selected are edited by the Supreme People's Court's Guiding Case Office for the purpose of compilation. Therefore, the judgment published as the guiding case is not necessarily the same verbally as the judgment originally entered.

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Supreme People's Court of China

Guiding Case No. 56¹¹³

Han Fengbin v. Jiu Jun Pharmaceutical Company, Ltd. of Inner Mongolia, et al.: A Case Concerning the Jurisdiction over the Product Liability Disputes (Issued upon the Approval by the Judicial Committee of the Supreme People's Court on November 19, 2015)

Keywords:

¹¹² See the CPL, *supra* note 75, at art. 152

¹¹³ See Hanfengbin Su Neimenggujiuqunyaoyeyouxianzerenggongsi Deng Chanpin Zereng Jiufen Guanxia Quanyi Yian (韩凤彬诉内蒙古九郡药业有限责任公司等产品责任纠纷管辖权异议案) [Guiding Case No. 56: Han Fengbin v. Inner Mongolia], (SUP. PEOPLE'S CT. Nov. 26, 2015).

Civil Litigation/Jurisdiction Objection/Retrial Process

Main Points of Adjudication:

If a party did not object to the jurisdiction when submitting its answer during the trial of the first instance, and then raised the objection to the jurisdiction during appeal or retrial upon a remand, the people's court shall reject it.

Relevant Provisions:

Article 27, Civil Procedure Law of China

Basic Facts of the Case:

Plaintiff Han Fengbin brought a product liability suit against Jiu Jun Pharmaceutical Company, Ltd. of Inner Mongolia (Jiu Jun Pharmaceutical), Shanghai Yunzhou Department Store, Ltd. (Yuzhou Department Store), Shanghai Broadcasting and Television Station (Shanghai BTV), and Dalian Hongyan Pharmacy, Ltd. (Hongyan Pharmacy). Dalian Intermediate People's Court entered a civil judgment, (2007) Da Minquan Chuzhi No. 4, on September 3, 2008. Jiu Jun Pharmaceutical, Yunzhou Department Store and Shanghai BTV disagreed and appealed to Liaoning High People's Court. Liaoning High People's Court made a final judgment, Liao Minyi Zhongzhi No. 400 (2008), on May 24, 2010. After the final judgment took effect, Jiujun Pharmaceutical and Yunzhou Department Store made a request to the Supreme People's Court for a review on retrial.

The Supreme People's Court granted a review of the case on December 22 of the same year, (2010) Min Shen Zhi No. 1019 Civil Ruling, and ruled on August 3, 2011 to vacate the judgments made at both first and second instances. The case was then remanded to the Intermediate People's Court of Dalian, Liaoning Province for retrial, (2011) Min Ti Zhi No. 117 Civil Ruling. During the retrial, Jiujun Pharmaceutical and Yunzhou Department Store raised an objection to the court jurisdiction.

Result of Adjudication

Dalian Intermediate People's Court conducted a retrial and made a ruling on February 29, 2011, Da Shen Min Zhai Chu Zhi No. 7 Civil Ruling. The Intermediate Court ruled that the retrial was conducted under the order of the Supreme People's Court. Since one of the defendants in this case,

Hongyan Pharmacy had its place of business in Zhongshan District, Dalian City, Liaoning Province, the Intermediate People's Court rejected JiuJun Pharmaceutical and Yunzhou Department Store's objection to the jurisdiction. On appeal, the High People's Court of Liaoning entered a ruling on May 7, 2012, affirmed the lower court decision, (2012) Ling Li Yi Min Zhai Zhong Zhi No. 1 Civil Ruling. It was held that when Plaintiff Han Fengbin filed the suit with the Intermediate People's Court of Dalian, Hongyan Pharmacy was listed as one of the defendants. During the trial, the plaintiff submitted to the court evidence proving the drug purchases by Hongyan Pharmacy, and such evidence was cross-examined. It was further held that since Hongyan Pharmacy was a proper defendant, the Intermediate People's Court of Dalian had jurisdiction. Thereafter, JiuJun Pharmaceutical and Yunzhou Department Store again filed a petition to the Supreme People's Court for a retrial, the Supreme People's Court ruled on March 27, 2013, (2013) Ming Zhai Shen Zhi No. 27 Civil Ruling, and denied the petition.

Judgment Reasoning

The effective judgment of the court holds that in respect to the time during which a party may raise an objection to jurisdiction, Article 127 of the CPL clearly provides that if a party objects to the jurisdiction after the case was docketed in a people's court, the party shall raise the objection when submitting the answer. If the party filed an answer to respond to an action without challenging jurisdiction, the people's court taking the case shall be deemed to have jurisdiction. Therefore, if a party failed to object to the jurisdiction of the court when filing the answer in the trial of first instance, he may not raise an objection during the appeal or retrial, because under the principle of constancy of jurisdiction, once jurisdiction is determined, the people's courts shall not view it again.¹¹⁴

In this case, JiuJun Pharmaceutical and Yunzhou Department Store raised an objection to jurisdiction during the retrial after the Supreme People's Court remanded the case through the judicial supervision process. When JiuJun Pharmaceutical and Yunzhou Department Store were served the first time with Plaintiff Han Fengbin's complaints during the first instance trial, none of them ever raised any objection to the jurisdiction during the period of filing their answers. This would mean that they had

¹¹⁴ Constancy of jurisdiction means that whether a court has jurisdiction over a case is determined at the time the case was filed. If a court has jurisdiction at the time of filing, its jurisdiction shall not be affected by the change of elements essential to the determination of the jurisdiction during the trial.

actually accepted the court jurisdiction, and jurisdiction had been determined. After the first instance trial, second instance appeal and retrial, the jurisdiction has gone through all of the processes and its procedural effect remains intact and is irreversible.

This case was remanded through the judicial supervision process to the trial court of first instance for retrial. Although the retrial was conducted under the process of first instance trial, the case was not new and its jurisdiction was already determined long ago. In light of jurisdiction, it should be determined at the time when the case was filed because the civil litigation commences with the filing of the case. Thus, if a court has jurisdiction at the time of filing, its jurisdiction shall not be affected by the change of facts determinative to the jurisdiction that occurs during the process of litigation. When a suit was brought to a people's court, and after the court reviewed and determined to take it, the service of process would be made to defendant. If the defendant did not raise any objection to the jurisdiction, it would suggest that the jurisdiction of the case has been ascertained. The court that has jurisdiction over the case may not be switched when the domicile or habitual residence of a party or administrative divisions changed thereafter.

Once the jurisdiction has been determined, no party has the right to raise an objection to it. If a party were allowed to challenge the jurisdiction during the retrial, it would undoubtedly make uncertain the routine litigation process, destruct the stability and order of the procedure, and drag on the litigation. In that situation, it would not only diminish the judicial efficiency but also waste judicial resources, whereby the course of dispute resolution would be obstructed. Therefore, under the principle of constancy of jurisdiction, and the need for stability of judicial process, justice and efficiency, the party in a retrial shall not be allowed to raise an objection to jurisdiction. On those grounds, JiuJun Pharmaceutical and Yunzhou Department Store's objection to jurisdiction did not have legal basis and therefore, the denial of their objection by the trial court was not improper.

To sum up, the retrial petition by JiuJun Pharmaceutical and Yunzhou Department Store does not fall within any of the circumstances under which a retrial should be granted under Article 200 (6) of the CPL. The petition for retrial is therefore denied in accordance with Article 204 (1) of the CPL.

(Judges participating in the effective judgment: Zhang Zhihong, Ning Sheng, Jia Yaqi)

* * * * *

Guiding case No. 56 is an interesting case. Procedurally, it went to the Supreme People's Court twice through the judicial supervision process. As a principle, Chinese courts must stay with a two-instance trial rule, namely, a trial and an appeal in the judicial proceeding. In other words, after a trial, only one appeal to the next level of the people's court is available.¹¹⁵ But judicial supervision may break this rule and get the case tried anew.¹¹⁶ This process has been strongly criticized in China because it creates doubts regarding the finality of a case.¹¹⁷ Since the criteria for initiating the judicial supervision is very broad, literally almost in every case, the party dissatisfied with the judgment made by the court on appeal may make a request for judicial supervision and thus render the final judgment (judgment made in the second instance) virtually non-final.¹¹⁸

¹¹⁵ In China, most cases will begin at county level trial court as the first instance. But for certain cases that are considered to have significant impacts locally or nationally, the first instance could start at an intermediate people's court, the high people's court, or even the Supreme People's Court.

¹¹⁶ The judicial processing in Chinese courts consisted of two instances: trial and appeal. The trial may take place at any of the four levels: the basic people's court, the intermediate people's court, the High People's Court and the Supreme People's Court, depending on the nature of the case, but a vast majority of the cases started at trial level. If a party disagrees with the trial court judgment, the party may make an appeal to the next level of higher court. There is only one appeal available. However, when the final judgment took effect, a party may still make file a petition for a retrial at a higher level of people's court through a judicial supervision process. Under Article 199 of Chinese Civil Procedure Law (as amended 2012), if the parties concerned believe that there is an error in a legally effective judgment or ruling, they may apply to the people's court at the next higher level for a retrial. If one party to the case comprises a large number of persons, or both parties to the case are citizens, they may also apply to the people's court of original instance for retrial. However, the execution of the judgment or ruling shall not be suspended during the application. Article 200 provides a laundry list of the circumstances in which a retrial should be conducted, including (1) There is new evidence which is conclusive enough to overrule the original judgment or ruling; (2) The main evidence used in the original judgment or ruling to find the facts was insufficient; (3) The main evidence used in the original judgment or ruling to find the facts was forged; (4) The main evidence used in the original judgment or ruling to find the facts was not cross-examined; (5) The parties concerned are unable to collect the main evidence of the case by themselves for objective reasons and apply for help to the people's court, but the people's court fails to collect such evidence; (6) There was an error in the application of the law in the original judgment or ruling; (7) The trial organization was unlawfully formed or the adjudicators that should withdraw have not done so; (8) The person incapable of action is not represented by a legal agent, or the party that should participate in the litigation failed to do so because of the reasons not attributable to himself or his legal agent; (9) The party's right to debate was deprived of in violation of the law; (10) The default judgment in the absence of the party was made whereas that party was not served with summons; (11) Some claims were omitted or exceeded in the original judgment or ruling; (12) The legal document on which the original judgment or ruling was made is cancelled or revised; or (13) The judicial officers have committed embezzlement, accepted bribes, engaged in malpractices for personal benefits or perverted the course of law when trying the case. Civil Procedure Law of the People's Republic of China, art. 199 (2012).

¹¹⁷ See generally Jianming, *supra* note 35, at 794–801.

¹¹⁸ See *id.* at 799–800.

Like all other guiding cases, guiding case No. 56 has a number of unique features. As discussed in Part V of the article, some of the features have serious shortfalls. First, it is an edited version of the original case. Therefore, it looks more like a brief of the case than the case itself. Second, those who edited the case were not the judges in the case and therefore took no part in the trial of the case. Under both the Guiding Case Provisions and the Detailed Rules, the final review of a guiding case before it is submitted for approval of publication is the responsibility of the Guiding Case Office of the Supreme People's Court. Third, since the case is selected and published by the Supreme People's Court, it represents the position that the Supreme People's Court takes pertaining to the legal issue involved and application of law to that issue. As a result, its holding is considered authoritative.

Another notable feature of the guiding cases is that not all of the guiding cases are cases tried or reviewed by the Supreme People's Court. In fact, many cases that are selected as guiding cases are those decided by the lower courts, including high people's courts, intermediate people's courts, and even the basic trial level people's court. Among seventy-seven (77) guiding cases issued by the Supreme People's Court, there are only sixteen (16) cases that were actually decided by the Supreme People's Court. The rest of the guiding cases were the judgments rendered by the lower courts, including twenty-two (22) from the High People's Courts, twenty (20) from the intermediate people's courts and seventeen (17) from the basic (district) people's court.¹¹⁹ More specifically, nearly eighty percent (80%) of the guiding cases were picked from lower court decisions.¹²⁰

It is worth noting that the publication of guiding cases is also intended to serve a function of guiding the general public or society as a whole in addition to its primary purpose to guide the people's courts in their future trial. Thus, when reporting the guiding cases, the major media of the Supreme People's Court, the People's Court Daily, always comes up with an editorial note addressing the social effect of each of the guiding cases published. For instance, in its report on the No. 64 guiding case, the People's Court Daily pointed out that the judgment and the supporting

¹¹⁹ The details are as follows: the Supreme People's Court Cases: No. 2, 20, 33, 34, 35, 36, 42, 43, 44, 47, 52, 56, 61, 67, 68 and 75; the High People's Court cases: No. 3, 4, 8, 11, 12, 15, 16, 22, 27, 29, 30, 37, 40, 45, 46, 48, 49, 53, 54, 55, 58 and 72; the intermediate people's court cases: 1, 2, 9, 10, 17, 19, 21, 31, 38, 39, 51, 57, 59, 60, 62, 65, 66, 69, 74, and 76; the basic (district) people's court cases: 5, 6, 13, 14, 18, 23, 24, 25, 26, 28, 32, 41, 50, 61, 64, 71 and 77.

¹²⁰ See *id.*

reasoning of the case possess a great significance of guidance in maintaining the good order of operation in the telecommunication service industry and protecting consumer interests.¹²¹

The No. 64 guiding case was a contract case decided by Quanshan district people's court in Xuzhou, Jiangsu Province in 2011. The case involved a prepaid cellphone card service agreement between Liu Chaojie, the plaintiff and China Mobile, Xuzhou Branch, the Defendant. On November 24, 2009, the Plaintiff purchased a prepaid cellphone card from the Defendant. After the purchase, the Plaintiff may use the card for cellphone use up to the monetary amount on the card. The Plaintiff may continue to use the card by adding money to it. Under the agreement, the Defendant may suspend or restrict the Plaintiff's use of phone service if (a) the Defendant was unable to receive the Plaintiff's payment for the service due to the plaintiff's bank account being frozen, or insufficient funds in said account and the like; or (b) the fee prepaid being used up without money being added in a timely manner.

On July 5, 2010, the Plaintiff added RMB50 to the prepaid phone card. The service however was suspended on November 11, 2010, even though there was still a certain amount of unused money on the card. When consulting with the Defendant, the Plaintiff was told that the phone card could not be used because the valid period of the card expired. According to the Defendant, the prepaid phone card has a fixed period of use, and the period began from one prepay to the next prepay. If no additional payment was made before the expiration day, the card will be suspended regardless of the residual amount of money paid to the card.

The Plaintiff brought the case against the Defendant on the grounds of breach of contract. The district people's court ruled in favor of the Plaintiff. The Defendant appealed but later withdrew. In its decision, the district people's court stated that under the provision of Article 39 of the Contract Law of China, when a contract is made on the basis of the standard form, the form provider shall define the rights and obligations of the parties in accordance with the principle of fairness, and shall in reasonable means inform the other party of any liability exclusion or restriction.

¹²¹ See *The Supreme People's Court Announces the Thirteenth Set of Guiding Cases*, PEOPLE'S CT. DAILY (July 4, 2016), <http://www.chinacourt.org/article/detail/2016/07/id/2011306.shtml>.

Applying the above provision to this case, the district people's court held that since at the time the service agreement was made the Defendant did not tell the Plaintiff about the fixed period for the use of the prepaid phone card, but suspended its service to the Plaintiff during the performance because of the expiration of the fixed period, the defendant's conduct constituted a breach of contract, for which the Defendant was liable. In the judgment reasoning, the district people's court was of the opinion that if a business operation in its standard contract did not explicitly provide limitations or conditions on certain products or services, and could not prove that at the time of contract it had made the consumer informed of the limitations or conditions and had obtained the consumer's consent to them, such limitations or conditions shall have no effect on the consumer.¹²²

V. GUIDING CASES IN APPLICATION

The application of guiding cases in Chinese courts does not seem to have an easy path. At first, the legal status of guiding cases remains to be further clarified. As stated in the Detailed Rules, the Supreme People's Court wants to maximize the directive role of the guiding cases in trials at the people's courts.¹²³ However, due to the vagueness of the "directive role" of the guiding cases, judges in people's courts are struggling with the extent to which the guiding cases may be used in their judgment-making.¹²⁴ In addition, although the Supreme People's Court has emphasized that the guiding cases are binding, it is still unclear as to the scope of their binding force. As discussed, the question is whether the guiding cases may become law.¹²⁵ Moreover, there is a concern from the viewpoint of the legislature that the Supreme People's Court may overstep and virtually exercise a law-making power.¹²⁶

A. *Current Application*

Under both the Guiding Case Provisions and the Detailed Rules, the application of guiding cases in the people's courts shall be made (a) by reference and (b) in similar cases.¹²⁷ But neither the "reference" nor the "similarity" is defined or explained. In the Detailed Rules, the Supreme

¹²² See Thirteenth Set of Guiding Cases, *supra* note 11.

¹²³ See Detailed Rules, *supra* note 16, at art. 1.

¹²⁴ See Hu Yunteng & Yu Tongzhi, *supra* note at 11.

¹²⁵ See JIANG YONG, *supra* note 49, at 155.

¹²⁶ See Lang Guimei, *Study on Certain Fundamental Issues Concerning the Guiding Case System of China*, 17 SHANGHAI JIAOTONG U. J. – PHIL. & SOC. SCI., 24, 29 (2009).

¹²⁷ See Detailed Rules, *supra* note 15, at art. 10.

People's Court seems to infer that "to refer to guiding cases" is to cite the guiding case in the judgment reasoning.¹²⁸ Some scholars, however, suggest that "to refer to" shall be understood as "to follow," which would mean to be bound by the guiding case not to simply take the guiding case as a reference.¹²⁹ With respect to the similarity, the Supreme People's Court is silent about how it should be determined. According to a scholarly opinion, similarity shall include (a) similar facts; (b) similar legal relations; (c) similar disputes; or (d) similar legal issues involved.¹³⁰ The question, however, remains because it is still disputable whether all of the four aspects must be present in order to find the similarity or any of the four would suffice.

The more difficult issue is, again, the legal status of the guiding cases. For decades, there have been debates about the role of the published cases. The establishment of the guiding case system raises a further question as to whether guiding cases should be deemed precedent. Under the Detailed Rules, the application of guiding cases as reference in similar cases is compulsory.¹³¹ But what the compulsory reference would mean to the people's court inevitably becomes an issue that faces not only the Supreme People's Court but also the country in general. The bottom line is whether there is or should be case law in China, which once again relates to the likelihood of the guiding cases to constitute a source of law.

Views of the legal effect and role of guiding cases differ sharply in China. Some believe that guiding cases possess no legal force of law and thus should not be considered as a source of law.¹³² In their view, because of their role of guiding and reference, the guiding cases have only persuasive effect,¹³³ and they are no more than a useful tool to help judges conduct legal research and exchange experiences of case adjudication.¹³⁴ Others, however, disagree. They argue that the guiding cases, once issued by the Supreme People's Court, should have the effect of binding all lower courts.¹³⁵ It is

¹²⁸ See *id.*

¹²⁹ See Wang Limin, *supra* note 21, at 75.

¹³⁰ See *id.*

¹³¹ See Detailed Rules, *supra* note 16, at art. 9–10.

¹³² See Zhou Wei, *Interpretation of Law Through Cases: Development of the Supreme People's Court Guiding Case System*, 23 CONTEMP. L. REV. 134, 139 (2009).

¹³³ See Yue Zhiyong, *Construction of Guiding Case System of the Country*, LEG. SYS. & SOC. (2009).

¹³⁴ See Cui Kai, *Establishment of Guiding Case System in China: A Comparison with the Case Law in the West*, 4 J. OF THE POSTGRADUATE OF ZHONGNAN U. OF ECON. & L., 146–49 (2006); see also Zhang Yadong, *Rethinking the Guiding Case System*, 34 J. APP. L. 269 (2008).

¹³⁵ See Dong Hao & He Xiaoyu, *Technic Probe into the Guiding Cases in Uniform Application of Law*, 11 JURIS. 144 (2008).

further asserted that the guiding cases should have the same legal status as the judicial interpretation by the Supreme People's Court, and therefore their application in the judicial proceedings shall be imperative.¹³⁶

In the middle of the spectrum is the argument that the guiding cases are an important supplement to the source of law and they have the *de facto*, if not necessarily *de jure*, binding effect.¹³⁷ The idea is that the function of the guiding cases is to guide how the law is to be applied and taking guiding cases as reference as required by the Supreme People's Court is purposed to (a) impose duties on the judges to follow the guiding cases and be critical to the legal reasoning in their judgment making; (b) to help justify the ground on which the judicial supervision is sought for certain cases; and (c) and to provide lawyers and other litigation participants with an official channel for better understanding of the application of law in their arguments or defenses.¹³⁸

With regard to the binding force of the guiding cases, at least three issues are involved. The first issue is whether the result of adjudication of the guiding cases is binding. The second issue concerns whether the rules derived from the main points of adjudication have any authoritative effect. The third issue relates to whether the judgment's reasoning of guiding cases has any force of control.¹³⁹ For the first issue, it is generally agreed, as noted, that the judgment of a guiding case is binding only to that case and the parties involved in the case.¹⁴⁰ Thus, many of the debates on the legal effect of the guiding cases have to do with the second and third issues, namely the main points of adjudication and judgment reasoning. The reason is that in terms of significance, both the main points of adjudication and the judgment reasoning of a guiding case are not necessarily limited to the guiding case itself but are applicable to future similar cases.

A survey conducted by two scholars with regard to the legal effect of the guiding cases revealed very diverse opinions among judges and lawyers in the country.¹⁴¹ The survey was conducted in the form of mailed questionnaires. Of 4,521 returned questionnaires, 3,994 were valid and

¹³⁶ See Zhu Jianmin, *Several Issues on the Building of Guiding Case System: a Respective of Effect Determination*, 7 R. OF L. RES. 35 (2008).

¹³⁷ See ZUO WEIMIN & CHEN MING-GUO, *THE RESEARCH ON THE GUIDING CASE SYSTEM IN CHINA* 137-41 (2014).

¹³⁸ *Id.* at 143-44.

¹³⁹ *Id.* at 162-63.

¹⁴⁰ *See id.*

¹⁴¹ *Id.* at 82.

effective, including 1,367 from judges and 488 from lawyers. Among the judges participating in the survey, slightly more than twenty six percent (26.26%) considered the guiding cases as having de jure binding effect, and about forty seven percent (47.12%) deemed the guiding cases to have de facto binding effect. Some sixteen percent (16.24%) thought that the guiding cases had only evidentiary effect and about fifteen percent (15%) believed that the guiding cases have no binding effect. Among the lawyers, the ratio was 26.84%, 43.65%, 13.73%, and 11.48 respectively.¹⁴² What the survey has revealed is that the majority regards the guiding cases as having de facto binding effect.

In fact, as demonstrated in the Detailed Rules, the Supreme People's Court does intend to make the guiding cases binding although it does not explicitly use the term "binding force." The compulsory reference is widely understood to infuse the guiding cases with legal authority.¹⁴³ The requirement of citing guiding case in the judgment reasoning of a similar case is obviously an indicator of the authoritative force of the guiding cases.¹⁴⁴ Despite the fact that under the Detailed Rules, the people's courts may not rely on a guiding case to enter a judgment, the judgment reasoning that embodies the guiding case suggests the actual force of the guiding case. In addition, it is required under the Detailed Rules that the judges adjudicating a case shall look up relevant guiding cases during the process of adjudication and shall also explain whether a reference has been made to a relevant guiding case if the parties or their lawyers in the case have cited the guiding case in their arguments or defense.¹⁴⁵

But, given the debatable nature of the legal status of the guiding cases, the effective application of them in judicial proceedings remains yet to be tested. According to a scholarly annual report on judicial application of guiding cases published in December 2015, as of November 25, 2015, the total number of cases in which the guiding cases were cited was only about 241,¹⁴⁶ and out of the 56 guiding cases then published, only 25 were cited.¹⁴⁷

¹⁴² *Id.* Note that about 2.05% of judges and 4.30% of lawyers did not answer. *See also* Detailed Rules, *supra* note 16, at art. 9-10.

¹⁴³ *See* Detailed Rules, *supra* note 16, at art. 9.

¹⁴⁴ *See id.* at art. 10.

¹⁴⁵ *See id.* at art. 11.

¹⁴⁶ In 2015, the cases filed with Chinese courts at all levels were nearly 18 million, among which over 11 million were civil and commercial cases. Of the 18 million cases, more than 11 million were the first instance cases. *See* SUPREME PEOPLE'S COURT, THE STATISTICS ON CASES IN THE PEOPLE'S COURTS IN 2015 (Mar. 18, 2016), <http://www.court.gov.cn/fabu-xiangqing-18362.html>.

¹⁴⁷ *See* PEKING UNIVERSITY: 2015 ANNUAL REPORT ON THE JUDICIAL APPLICATION OF GUIDING CASES OF THE SUPREME PEOPLE'S COURT, <http://www.chinalawinfo.com/AdHtml/20151224/index.html>

The report also indicates that most of the 241 citations were made by trial and intermediate people's courts, representing 34.8% and 58.5% respectively. The ratio of citations in the High People's Courts was down to 4.97% and the Supreme People's Court only cited two guiding cases.¹⁴⁸ In addition, in the cases where a guiding case was cited, only 27% were an active citation, meaning that the citation was made by the judge, while 73% were made by the parties and other litigation participants, or a passive citation.¹⁴⁹

The reasons attributable to the lack of enthusiasm in the application of the guiding cases might be many. The primary reason, however, is the uncertainty of the legal status of the guiding cases. The ambiguity of "shall refer to" causes a great deal of confusion among the people's courts. On the one hand, because the statutory rules are the main source of law on which the judgments are made, the people's courts appear hesitant to apply the guiding cases without statutory provisions.¹⁵⁰ Thus, there has been a suggestion that in order to get the guiding cases effectively applied, some legislative actions would be required.¹⁵¹ On the other hand, although the Supreme People's Court requires judges to refer to the guiding case in similar cases, the Detailed Rules provide no explanation as to the circumstances under which the guiding cases must be applied and the effect that must be given to the guiding cases.¹⁵² Also uncertain is whether an appeal is allowed on the ground that the case decided was in conflict with, or the court failed to cite, the applicable guiding case.

B. Future Implication

No matter how the guiding cases are currently applied in Chinese courts, the establishment of a guiding case system in the Chinese judiciary will certainly have a long-term impact on the Chinese legal system. It is

[hereinafter 2015 ANNUAL REPORT]. The most cited case is the guiding case No. 24 (103 times according to the report). The case involved an injury in a traffic accident and was concerned with the application of rule of comparative negligence. The issue was whether the pre-existing health condition of the victim should be taken into account to calculate the portion of tortfeasor's negligence. At the trial, the intermediate court assigned 25% to plaintiff as her negligence given her health condition prior to the injury. On appeal, the high court reversed, holding that the pre-existing health condition does not fall within the negligence as provided in the torts law for the purpose of determination of damages. For the full text of the guiding case No. 24, see STANFORD LAW SCHOOL: CHINA GUIDING CASES PROJECT, *supra* note 109.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *See id.*

¹⁵¹ *See id.*

¹⁵² *See id.*

highly predictable that the application of guiding cases would bring changes to Chinese legal landscape in a number of ways. First, the guiding cases will play an increasingly important role in Chinese judicial proceedings with more actions expected from the Supreme People's Court, requiring both judges and litigation participants to pay greater attention to them. More specifically, the main points and judgment reasoning of the guiding cases would, to say the least, become the dicta that greatly influences future trials and judgments in the cases bearing similarities and even the cases in general.¹⁵³

Second, the introduction of guiding cases into Chinese judicial proceedings will inevitably bring to an end the sole statutory-based trial and incorporate cases in Chinese judicial proceedings and the legal system as well. It is true that the case law does not officially exist in China. But it is hard to deny the legal function of the guiding cases because under the requirement of compulsory reference imposed by the Supreme People's Court, guiding cases would constitute the legal basis on which the court opinion would rely. Additionally, the compilation of guiding cases will necessarily become a unique source pertaining to the application of law. Moreover, given their stated purpose to maintain unification of the application of law, the guiding cases would ultimately affect how the laws are to be applied.¹⁵⁴

Third, by adopting the guiding case system, the Supreme People's Court has actually moved beyond the normal scope of judicial interpretation and expanded its power from interpreting the application of law to establishing the case-based framework under which the adjudication of people's courts is directed. Fortunately, the move does not seem to have met any objection from the NPC. The recognition of such practice in the judiciary by the legislature would help reinforce the Supreme People's Court effort to promote the use of guiding cases. As a matter of fact, both the Supreme People's Court and the NPC are expected to adopt certain rules to materialize the guiding cases and elaborate their application to cement the status of the guiding cases and ensure their authoritative force.¹⁵⁵

¹⁵³ See Wang Chenguang, *System Construction and Technique Innovation: Challenges Our Guiding Cases System Is Facing*, STANFORD LAW SCHOOL: CHINA GUIDING CASES PROJECT (Feb. 2, 2015), <https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2015/09/commentary-2-English.pdf>.

¹⁵⁴ See ZUO WEIMIN & CHEN MING-GUO, *supra* note 137, at 43–44.

¹⁵⁵ See 2015 ANNUAL REPORT, *supra* note 147.

Fourth, the development of the guiding cases system will result in the change in the contents and substances of legal education as well as legal training. From an educational perspective, guiding cases are valuable resources for the legal textbook and class teaching. The reasons are obvious. Guiding cases are real cases and the use of them in the classroom will help bridge the gaps between law in paper and law in motion. In addition, since the guiding cases reflect the legal opinions and holdings endorsed by the Supreme People's Court, their authoritative force in respect to the application of law goes far beyond the academic field. Moreover, the judgment reasoning contained in the guiding cases will help enhance legal analysis and critical thinking that are essential to legal professionals.¹⁵⁶

Fifth, the guiding cases would become an influential force that affects the development of law and to a certain extent shapes the trend of legal development. Like in all other civil law countries, statutes in China are the primary source of law. A notable feature of the statutes is that the provisions in the statutes are not in details, and they are quite inflexible and very abstract in general, which often creates gaps between the provisions of law and their application to particular cases or the cases with unique facts. The guiding cases provide much needed guidance to help fill in those gaps and thus achieve the outcome as intended by the provisions of law. In doing so, the guiding cases would also help the legislature figure out whether a particular provision of law would need to improve and how the improvement should be made.¹⁵⁷

Thus, it is fair to say the adoption of the guiding case system in China is a significant step taken by the Supreme People's Court to promote case law in the country. But nothing here is to suggest that the guiding cases are the same as the case law in the sense of common law. On the contrary, there are a number of distinctions between the guiding cases and the common law cases. First of all, the guiding cases are only the cases selected by the Supreme People's Court and therefore are not all of the cases decided by people's courts. Secondly, the guiding cases selected are not necessarily the higher court decisions, and in fact many of the guiding cases are the decisions made by lower courts. Thirdly, as noted, the guiding cases are not original but edited judgments and the editors are not the judges who actually

¹⁵⁶ See Hu Yunteng & Yu Tongzhi, *supra* note 4, at 10–11; see also Fang Wencui & Ding Haihu, *The New Trend of Legal Education Reform: the Guiding Case System*, 6 APP. L. J. 81 (2008).

¹⁵⁷ See Wang Limin, *supra* note 21, at 75–76.

tried the cases. Lastly, the guiding cases are standardized under the format prescribed by the Supreme People's Court.

Certainly, there is no consensus in China as to whether the guiding cases may constitute precedent. In the common law system, precedent is generally defined as, “an adjudicated 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.”¹⁵⁸ During their trials, the common law courts “attempt to decide cases on the basis of principles established in prior cases.”¹⁵⁹ Literally speaking, in light of “furnishing an example or authority,” the guiding cases are actually functioning as the precedent. But compulsory reference requires Chinese courts to decide cases on the basis of rules and principles pertaining to the application of law established not “in prior cases” but in guiding cases. Perhaps for the purpose of distinguishing the guiding cases from common law precedent, many in China prefer to call the guiding case system as “the case law with Chinese Characteristics,”¹⁶⁰ even though the term “Chinese Characteristics” itself is considerably ambiguous.¹⁶¹

VI. CONCLUSION

The guiding case system is a special product of the Chinese judiciary under the people's congress centered government infrastructure. It reflects the ambition of the Supreme People's Court to push toward the law-making power, especially in the grey area between the interpretation of law and interpretation of the application of law. In the meantime, it also represents a new trend of legal development in China—a merger of civil law tradition with common law practice. But what would be highly notable is that the merger will take place in a Chinese way or in the process of development of a system of case law with Chinese characteristics.

¹⁵⁸ *Precedent*, BLACK'S LAW DICTIONARY (6th ed. 1990).

¹⁵⁹ *Id.*

¹⁶⁰ See SHEN DEYONG, *supra* note 20, at 3–4.

¹⁶¹ In recent years, “Chinese characteristics” has become a popular term to describe and justify whatever is different in China as compared with the rest of the world. For example, the socialist system in China is labeled as socialist system with Chinese characteristics, and Chinese legal system is called the socialist legal system with Chinese characteristics, even though vast majority of people in China may not actually know what the Chinese characteristics really are. With regard to the Chinese characteristics related to the case law, one interpretation is that the case law in China (a) is based on statutory tradition, (b) focuses on main points of adjudication edited and summarized from original case, and (c) is selected and compiled by the Supreme People's Court only. See ZUO WEIMIN & CHEN MING-GUO, *supra* note 137, at 144–45.

With the compiling of the guiding cases that are required to be applied in the judicial proceedings, the Supreme People's Court are virtually creating precedent-like model cases by which all people's courts are bound. In contrast with judicial interpretation, the guiding cases are generally appraised in the Chinese legal community to be more specific, more efficient, much prompter, and more accurate.¹⁶² More importantly, the guiding cases help establish the standards for the application of law,¹⁶³ and the standardization, which is considered highly necessary given the reality of uneven quality of judges, would limit the discretionary power of the people's courts in their determination of the application of law.¹⁶⁴

But, it should be noted that the establishment of the guiding case system remains at an early stage of the development of the case law in China. The application of guiding cases indeed implicates a move toward the adoption of case law in the country, but the question still is how far it may go. There are many issues yet to be answered. Among the important issues include (a) whether the guiding cases may become the source of law; (b) how the guiding cases could be effectively applied; and more generally (c) whether there may develop a power for the Supreme People's Court to make law de jure through the guiding cases compilation. The response to those issues either from the Supreme People's Court or the People's Congress will certainly affect the direction of the use of guiding cases in Chinese legal system.

¹⁶² See Wang Limin, *supra* note 21, at 74–75.

¹⁶³ See *id.*

¹⁶⁴ See *id.*

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