Five-Year Review of China's Case Guidance System

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Abstract

In ancient China, case law played an important role, but over more or less the last one hundred years the former case law tradition has been almost wholly cast aside. After several decades of peaceful and rapid development, China is now facing a transition period of sorts. Both academics and the judiciary have noticed the attractions of case law, which are significant in China's quest to proceed through the transition period smoothly. However, because of China's centralized power structure, the unique mode of judicial organization and the strong authority of the SPC, the case law mechanism in China is different than other currently existing case law models. The SPC has designed the case guidance system as an extra-adjudicatory mechanism in its reform of case law and is implementing the system with a top down approach. In reviewing the past five years of the case guidance system – from 2010 to 2015 – it is quickly ascertainable that achievements and inefficiencies coexist across the whole system. Nonetheless, the case guidance system is ultimately only in its infancy and many problems remain unsettled. At the current stage, every step forward made by the case guidance system relies heavily on the institutional authority of the SPC. However, from a long-term perspective, a more profound case law environment needs to be fostered, and the cases guidance system needs to reach a stage where it advances as a process of natural evolution.

I. Introduction

On November 26, 2010, as the first step in establishing China's case guidance system, the Supreme People's Court of China (hereinafter the SPC) issued the *Provisions on Case Guidance* (hereinafter *Provisions*).[2] Almost one year later, on December 20, 2011, the SPC released four cases as the first batch of guiding cases.[3] On May 13, 2015, the SPC issued the second important regulation, the *Detailed Rules for the Implementation of the Provisions on Case Guidance* (hereinafter *Rules for Implementation*).[4] Compared to the *Provisions*, the *Rules for Implementation* have adjusted several items, such as the definition, formation, selection, citation and binding force of guiding cases. Before the issuance of the *Rules for Implementation*, the SPC had issued 10 batches of guiding cases, totaling 52 cases; after that, on November 19, 2015, the SPC released four new cases as the 11th batch of guiding cases.[5] The case guidance system can be considered as the first purposeful official reform on case law in China, indicating the primary stage of the Chinese case law mechanism. From 2010 to 2015, the case guidance system has gone through its first five years; thus, it is time to summarize and evaluate the characteristics, functions and the practical operation of the whole system, based on which the long-term orientation and tendencies of the entire case law environment can also be predicted.

Part II of this article takes a retrospective look at the prosperity and decline of case law in China's history. Part III points out functions and advantages of case law and, further, shows why case law is meaningful and attractive for China's current society. Part IV tries to explain why China cannot simply transplant current case law modes, whether from the common law or civil law systems, to establish its own case law mechanism and illustrates the necessity and reasonableness of designing a case guidance system unique to China. Part V employs statistical analysis to examine the actual operation of the case guidance system in the past five years and to identify in depth explicitly or implicitly evolving tendencies; furthermore, it provides recommenda-

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[2] Provisions on Case Guidance (关于案例指导工作的规定) (promulgated by the Sup. People's Ct., Fa [2010] No. 51, effective November 26th, 2010), CLI. 3. 143870 (EN) (available at <www.chinalawinfo.com> visited March 22th, 2016).

[3] Notice on the Issuance of the 1st Batch of Guiding Cases (关于发布第一批指导性案例的通知) (promulgated by the Sup. People's Ct., Fa [2011] No. 354, effective December 20th, 2011), CLI. 3. 163998(EN) (available at <www.chinalawinfo.com> visited March 22th, 2016).

[4] Detailed Rules for the Implementation of the Provisions, (《关于案例指导工作的规定》实施细则) (promulgated by the Sup. People's Ct., Fa [2015] No. 130, effective May 13th, 2011), CLI. 3. 249447(EN) (available at <www.chinalawinfo.com> visited March 22, 2016).

[5] Notice on the Issuance of the 11th Batch of Guiding Cases, (关于发布第十一批指导性案例的通知) (promulgated by the Sup. People's Ct., Fa [2015] No. 320, effective November 19th, 2015), CLI. 3. 260564(EN) (available at <www.chinalawinfo.com> visited March 22, 2016).

tions regarding possible improvements for the Chinese case law mechanism in the future. Finally, Part VI will offer a conclusion to the whole article.

II. The Historical Trail of Case Law in Ancient China

It is not true to say that China has no case law tradition. Nowadays it has been proved that case law played significant role in ancient China. From the Zhou Dynasty to the Spring and Autumn Period, case law occupied a dominant position; and in the time span from the Han Dynasty to the Qing Dynasty, there was a mixed law period in which case law and enacted law coexisted together.[6] However, in the last century, case law ceased to be applicable.

As interpreted by modern researchers, case law in ancient China actually took root in the philosophical thought of the time. Generally speaking, the highly developed case law was closely linked to the empirical philosophy (or experience rationalism) that was the leading philosophical belief for a long period.[7] Thoughts regarding empirical philosophy originally emerged in the Spring and Autumn Period, which ran from about 770–476 BC; and empirical philosophy eventually formed in the late Warring States Period.[8] It is well-known that the Pre-Qin Period in ancient China was famous for embracing the prevailing thoughts from various academic schools. Among those, Confucianism was a kind of agnosticism while the Legalists were characterized by knowability. Such a difference at the epistemological level led to opposite attitudes towards the forms of law: the Confucians opposed enactments and advocated following the rules and principles of past generations; thereby, Confucians were friendly to case law. By contrast, the Legalists showed great reverence for statutory law and believed it was possible to establish a perfect and completed legal system via statutes, while at the same time strictly limiting the interpretation of statutes; thus, there was almost no room for case law. In the late Warring State Period, Xunzi, who was a Confucian in essence, absorbed the views of both epistemologies and found a middle position. On one hand, he admitted the importance of statutory law; on the other hand, he confirmed the position of case law by emphasizing "Yi"(议), which means "interpreting statutes". This kind of eclectic epistemology had become the predominant philosophy concerning the rule of law in ancient China beginning with the Han Dynasty, when Dong Zhongshu reformed Confucianism and made it a monopoly positon in the whole country.[9]

From the Han Dynasty to the Qing Dynasty, a period of more than two thousand years, case law coexisted with enacted law. In most dynasties, codes or enacted law are the basis of the whole legal system, but at the same time it had been admitted that statutory law could not cover all problems in practice; therefore, case law was necessary for supplementing the gaps in statutory law and resolving practical legal problems.[10] Normally, case law could be the basis of a ruling, provide support for reasoning and be the grounds for new legislation.[11] Particularly in the Yuan Dynasty – with the big empire being ruled by Mongolia, a northern nomad nation – the function of statutory law was specially denied or ignored;[12] therefore, case law gained a more prominent position and had the same function as legislation, even being capable of creating new types of crimes.[13]

However, in the past one and a half centuries, this old empire underwent painful and drastic changes. As early as the last half of the 19th century, due to the collapse of the empire, Chinese patriots began to import western legal thought; at the dawn of the 20th century, the government of the Qing Dynasty began to amend old Chinese statutes by borrowing from western modes.[14] During this process, German philosophy was deemed a single "basic" solution serving as an alternate to the obsolete empirical philosophy, since it was the root of Japan's success. One immediate consequence was the fading of case law.[15] Unlike some traditional civil law countries, such as Germany, France and Italy, case law in China was not lucky enough to survive through this tough time. In the past 150 years, there was nearly no role for case law, no matter how formal or informal.

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[6] *XIE Hui* (谢晖), The Decline and Rise of Empirical Philosophy and the Fate of Case Law in Ancient China (经验哲学之兴衰与中国判例法的命运), Law Science (法律科学) 2000, No. 4, p. 33.

[7] Id, p. 29.

[8] *HU Xingdong* (胡兴东), Research on the Mode of Case Law in Ancient China: Focusing on the Yuan and Qing Dynasties (中国古代判例法模式研究——以元清两朝为中心), Northern Legal Science (北方法学) 2010, No. 1, p. 115. Also see *HU Xingdong* (胡兴东), Epistemology: Another Perspective on Case Law Issues in Ancient China (认识论：中国古代判例法问题的另一视角), Study of Legal Culture (法律文化研究) 2009, pp. 109–113.

[9] Id, pp. 109–113.

[10] Id, pp. 113–118.

[11] *HU Xingdong*, Research on the Mode of Case Law in Ancient China (supra note 8), pp. 120–121.

[12] *HU Xingdong*, Epistemology (supra note 8), pp. 116–117.

[13] *HU Xingdong*, Research on the Mode of Case Law in Ancient China (supra note 8), pp. 115–118, 120–121.

[14] See *LI Guilian* (李贵连), A Brief Summary of the Modernization of Chinese Law (中国法律近代化简论), Journal of Comparative Law (比较法研究) 1991, No. 2, pp. 5–23.

[15] *XIE Hui* (supra note 6), p. 34.

III. Implications of Rebuilding the Case Law Mechanism in China

In modern society, it is something of a consensus that case law is not exclusive to common law systems as traditional civil law or mixed jurisdictions also adopt different variations of case law. The history of Chinese academics advocating for the reconstruction of a case law mechanism can be traced back to the end of the 20th century.[16] Why has case law become attractive to China again? The answer is not limited to the well-known charms and advantages of case law in a general sense, but is also explained by the fact that case law is of special value to current Chinese society given the country's particular legal and social background.

1. Promoting Internal Functions of the Judiciary

The case law mechanism is able to enhance the internal function of the judiciary as regards three aspects: the consistency of judgments, judicial efficiency and adjudicatory quality.

The simplest and most common expression of case law is to "treat like cases alike", which is a requirement for justice, fairness and equality.[17] Thus, the consistency of judgments can be achieved through this process, and the arbitrary discretion of judges can be avoided. In the case of China, both the *Provisions* (Art. 7) and the *Rules for Implementation* (Art. 9) require that all courts refer to the guiding cases when they decide similar cases. Since all guiding cases are selected and confirmed by the SPC, the case guidance system actually has the function of judicial administrative management, its being capable of enhancing the SPC's control over subordinate courts, limiting the discretion of judges and achieving adjudicatory uniformity.[18]

Additionally, judicial efficiency can be increased in two aspects: (1) a case law system allows "less reconsideration of questions already considered"[19] in precedents, so subsequent judges can save time and work; and, (2) considering the evolution of the whole system, case law "generates a sequential interaction between a series of judges with different preferences, whose idiosyncrasies then balance one another", which in turn proves "a never-ending process that evolves toward greater efficiency".[20]

Furthermore, a case guidance system can also stimulate lower courts to improve the quality of judgments. The judgments of lower courts have been criticized for a long time by academics due to their lacking detailed reasoning.[21] But both the selection and the citation of guiding cases can push judges to change. On one hand, if a judge wants his/her judgment to be selected as a guiding case, which would also be helpful for future promotion or reward,[22] he/she must try to write it as thoughtfully as possible, since that has become a prerequisite for guiding cases.[23] On the other hand, the citation requirements in the *Rules for Implementation* (Arts. 10, 11) demand that a judge quote the relevant guiding case's number and key points of judgment when he/she decides a similar case; if the parties or other litigants quote any guiding case as the basis of their arguments, the judge must respond and state whether he/she has referred to the guiding case and explain his or her reasoning.

2. Harmonizing the Relationship between the Judiciary and Other Governmental Branches

Case law mechanisms are also helpful for developing a harmonious relationship between the judiciary and the legislative body as well as with executive authorities.

Firstly, as to the relation between the judiciary and the legislature, from a more general standpoint case law may complement enacted law; at the same time, case law is also flexible enough to keep enacted law from needing frequent revision. Considering the special legal background of China, influenced by a socialist law tradition, the SPC can issue judicial interpretations of statutes, "outside the context of a particular case" and having binding force on all courts.[24] Such judicial interpretations are notoriously condemned as representing quasi-legislation[25] and criticized as both invading the power of the legislative body and defying the

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[16] See *ZHANG Qi* (张骐), A Comparative Study on Case Law: The Meaning and Basis for Building Case Law in China and its Operation (判例法的比较研究——兼论中国建立判例法的意义、制度基础与操作), Journal of Comparative Law (比较法研究) 2002, No. 4, p. 79, footnote 1.

[17] See *Frederick Schauer*, Precedent, in: Stanford Law Review, Vol. 39 (1987), No. 3, pp. 595–96.

[18] See *QIN Zongwen* (秦宗文), The Characteristics, Problems and Future of the Case Guiding System (案例指导制度的特色、难题与前景), Law and Social Development (法制与社会发展) 2012, No. 1, pp. 100–103.

[19] *Schauer* (supra note 17), pp. 599.

[20] *Giacomo A. M. Ponzetto/Patricio A. Fernandez*, Case Law versus Statute Law: An Evolutionary Comparison, in: The Journal of Legal Studies, Vol. 37 (2008), No. 2, p. 411.

[21] See *WAN Yi* (万毅)/*LIN Xifen* (林喜芬), From the "No Reason" Decision to Judgment "Argumentation" (从"无理"的判决到判决书"说理"), Legal Forum (法学论坛) 2004, No. 5, p. 29.

[22] See the Rules for Implementation (supra note 4), (Art. 14 The people's courts at all levels shall reward entities and individuals that have made outstanding achievements in case guidance work in accordance with the Judges Law of the People's Republic of China and other relevant provisions).

[23] See id, Art. 2.

[24] See *John Quigley*, Socialist Law and the Civil Law Tradition, in: The American Journal of Comparative Law, Vol. 37 (1989), p. 792 (discussing the many Socialist supreme court issuances of so-called "guiding explanations" of code provisions).

[25] See *JIN Zhenbao* (金振豹), An Analysis on the Abstract Interpretative Power of the SPC (论最高人民法院的抽象司法解释权), Journal of Comparative Law (比较法研究) 2010, No. 2, pp. 58, 64–66. Also see *HU Yan* (胡岩), Judicial Interpretation in China: Its Origins, Current State and Future Development (司法解释的前生后世), Tribune of Political Science and Law (政法论坛) 2015, No. 3, pp. 41–42.

judicial nature of the SPC. But it has been admitted as one necessary competent of the whole legislative process of China.[26] The case guidance system indicates that the SPC is attempting to unify the adjudicatory activities of the whole judiciary through a more judicative approach, rather than relying to a greater extent on judicial interpretations; although the current situation cannot be completely changed in the short term, from a long-term perspective, using the case law mechanism to eventually replace abstract judicial interpretations has been advocated by academics.[27] Then, the separation of powers between the SPC and the legislative body will become clearer, and the judicial function of the SPC will be strengthened.

Secondly, the case guidance system is helpful for shifting the actual control over lower courts from the local authorities to the SPC and for consolidating the independence of the judiciary as a whole. In this new round of judicial reform, it has been clearly announced that judicial authority shall be the power of the central government, and removing the influence of localism and local-authority protectionism over the lower courts is one of the main targets of the reform.[28] The case guidance system requires lower courts to treat similar cases alike consistent with the guiding cases, and this will promote (i) uniformity of adjudication by shielding lower courts from the interference of local authorities and (ii) other ancillary reform measures, such as centralizing each province's judicial administrative management (financial, personnel, and property management).[29]

3. Stimulating the Establishment of a Legal Community

Academia and the consensus of the legal community are of extraordinary significance for the evolution of case law (*jurisprudence constante*) in civil law countries.[30] Chinese legal scholars have also realized that, as with their colleagues in most civil law countries, academics are to play a similarly pivotal role in the case law process,[31] although the operative process of the case guidance system is different from *jurisprudence constante* to a certain extent. It has been acknowledged that case study has become the orientation for future legal research and legal education.[32]

Since the launching of the case guidance system, academics have dedicated much energy and passion to the research of guiding cases. And both the *Provisions* (Art. 5) and the *Rules for Implementation* (Art. 5) allow academics to nominate to the judiciary candidates which might serve as guiding cases. Under the latter instrument, academics enjoy a more independent and favorable position in the selection process for guiding cases. For example, a Case Guidance Experts Committee (hereinafter the Experts Committee) has been established; both legal scholars and the Experts Committee can propose candidate cases to the Case Guidance Office of the SPC directly, whereas this is not set down in the *Provisions*. What's more, the Case Guidance Office can also consult the Experts Committee or other scholars when it finds it is necessary to do further research on candidate cases (Art. 7).

Thus, enhancing cooperation between the judiciary and academia is an indispensable element for the development of case law mechanism; at the same time, the case guidance system is *per se* a reform having the purpose of promoting cooperation between these two groups. Eventually, a legal community will be established through this process of interaction.

4. Stabilizing Social Acceptance in the Transition Period

As mentioned above, in the past 100 plus years, both the legal philosophy and legal system of China have undergone dramatic changes. Since 1978, marking the end of the Cultural Revolution and the start of economic reform, a new legal system has begun to be reconstructed step by step, a process which is still continuing today. However, China is currently still in the course of a transition period, this encompassing legal, political and economic mechanisms. At the same time, the legal order as well as the legal culture and legal tradition are also undergoing a gradual transformation. In the last several decades, China has been influenced by multiple jurisdictions, such as the U.S., Germany, France, Japan and Tai-

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[26] See *LEI Lei* (雷磊), Rethink the Legal Source Status of Guiding Cases (指导性案例法源地位再反思), China Legal Science (中国法学) 2015, No. 1, p. 285.

[27] See *HU Yan* (supra note 25), pp. 49–50.

[28] See *SU Zelin* (苏泽林), The Meaning of the Rule of Law as Resulting from the Reform of Trans-Administrative Division Courts (跨行政区划设立人民法院的法治意义), People's Court Daily (人民法院报), October 27th, 2014, p. 2.

[29] Decision concerning Comprehensive and Deepened Reforms from the 3rd Plenary Session of the 18th CPC Central Committee (中共中央关于全面深化改革若干重大问题的决定), November 15th, 2013, Art. 32, (available at <http://news.xinhuanet.com/politics/2013-11/15/c_118164235.htm.> visited March 22th, 2016).

[30] See *Robert Alexy/Ralf Dreier*, Precedent in the Federal Republic of Germany; and *Michel Troper/Christophe Grzegorczyk*, Precedent in France, in *D. Neil MacCormick/Robert S. Summers* (eds.), Interpreting Precedents: A Comparative Study, Hants/ Vermont 1997, pp. 40–47, 112, 12. Also see *Michele Taruffo*, Precedents in Italy; *E. Matsumoto*, Adjusting an "Imported" (or "Received") Law: An Approach from the "Precedent" in Japanese Law; and *Sang Yong Kim*, Precedent and Law in Korea, in *Ewoud Hondius* (ed.), Precedent and the Law, Brussels 2007, pp. 178, 331–32, 338, 345–46.

[31] See *XIE Gen* (解亘), Roles for Scholars to Play in the Case Guidance System (论学者在案例指导制度中的作用), Journal of Nanjing University (南京大学学报) 2012, No. 4, pp. 83–84.

[32] See *HE Jian* (贺剑), Taking Case Notes Seriously: From the Standpoint of Legal Doctrinism (认真对待案例评析：一个法教义学的立场), Journal of Comparative Law (比较法研究) 2015, No. 2, pp. 172–85.

wan.[33] Since the remains of old legal thought and the transplantation of western legal thought coexist in such a process, the legal tradition found in today's China is actually a mixed one, containing elements from civil law as well as from both the socialist and traditional Chinese legal families.

During the process of a legal transplant, a fundamental question is how the transplanted law can be adapted to the local social, economic, cultural and political environment, these questions being closely related to the failure of a legal transplant.[34] Concerning the case of China, the old Chinese legal philosophy has lost almost all of its influence in positivist law, but it still exerts an impact on people's thoughts about justice; the result is that conflicts are generated. That is why the public does not trust the judgments from the judiciary, and sometimes the losing parties have even attacked the judges.[35] The lack of judicial credibility has become one important political concern in China; President Xi even said "the public have long complained about miscarriage of justice".[36]

To fundamentally solve the problems associated with social stability, one solution may be rebuilding the belief in legal culture and tradition, and progressively harmonizing traditional legal philosophy with newly imported legal regimes. An appropriate case law mechanism may be helpful in this process by smoothing the transition and stabilizing social acceptance.

Firstly, case law can strengthen the public trust in the judiciary. Because case law can maintain a consistency of judgments, based on which litigants can reasonably anticipate the consequences of their behaviors, the value of predictability could hence be attained.[37] As a result of both internal consistency and the protection of predictability, the judiciary can better gain external trust and enhance its legitimacy. This new round of judicial reform makes greater efforts at improving the consistency and uniformity of judgments by means of the case guidance system; furthermore, judicial transparency is enhanced also by the online publication of all judgments,[38] thus allowing people to predict the consequences of their behaviors and supervise the operation of judiciary.

Additionally, case law mechanisms may contribute to domesticating transplanted rules and doctrines and bridge the import stage and the independent development stage. In the short term, the localization functions of case law can be realized in two regards: On one hand, case law mechanisms can interpret those (existing) enacted rules that are derived from foreign sources in combination with domestic elements and usher in their acceptance in domestic society. On the other hand, case law also can be used as an experiment in respect of the transplant target; specifically, if a legal institute can be incorporated in the established case law and thereby prove that it can fit in domestic society, then there will be no obstacle to absorbing it as enacted law. With the above process, the stability of enacted law can also be maintained.

Furthermore, assisted by the case law, the whole legal system may in the long run progress beyond the import period and move into the independent development period. Because of its rapid economic development, China has become considerably and comprehensively influential over all manners of world affairs. Chinese official announcements identify the Chinese legal system as "the socialist rule of law with Chinese characteristics",[39] from which we can infer the central authority's ambition as to independent legal development. Chinese academics have also been aware of the importance of independent legal development from the perspective of legal philosophy, and in recent years some legal scholars have also engaged in exploring how to establish China's own legal theory (or jurisprudence).[40]

IV. The Special Design of the Chinese Case Law Mechanism

In the contemporary world, case law can be classified into two main categories: *stare decisis* as found in common law countries, and *jurisprudence constant* as encountered in civil law countries. However, neither of them is suitable for transplant in China, so this part will explain the concrete reasons and the special design of the Chinese case law mechanism.

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[33] See *Mathias Siems*, Comparative Law, Cambridge 2014, pp. 88, 212.

[34] Id, p. 197.

[35] For example, on September 9th, 2015, one man, because he could not accept the result of the judgment, assaulted the four judges of the Intermediate People's Court of Shiyan (Hubei Province) who were in charge of his case. (available at <http://finance.ifeng.com/a/20150909/13963452_0.shtml> visited September 10th, 2015).

[36] Xi expounds new judicial reform measures, November 16th, 2013, (available at <http://english.cntv.cn/20131116/100753.shtml> visited March 22th, 2016).

[37] See *Jeremy Waldron*, Stare Decisis and the Rule of Law: A Layered Approach, in: Michigan Law Review, Vol. 111 2012, No. 1, pp. 9–10.

[38] See Comprehensively Deepening Reform of the People's Courts: the 4th Five-Year Reform Outline (关于全面深化人民法院改革的意见——人民法院第四个五年改革纲要（2014–2018）) (promulgated by the Sup. People's Ct., Fa Fa [2015] No. 3, effective February 4th, 2015), CLI. 3. 243720 (available at <www.chinalawinfo.com> visited on March 22th, 2016), Art. 39.

[39] *LAN Hongguang*, Highlights of Communique of 4th Plenary Session of CPC Central Committee, October 23th, 2014, (available at <http://news.xinhuanet.com/english/china/2014-10/23/c_133737957.htm> visited March 22th, 2016).

[40] *ZHANG Zhongqiu* (张中秋), Expect New Chinese Jurisprudence: A Review of "the Principles of Chinese Jurisprudence" by Prof. Xu Zhangrun (期待中国新法学——读许章润教授新著《汉语法学论纲》有感), China Law Review (中国法律评论) 2015, No. 5, pp. 190–91.

1. Centralized Power Structure and Top-to-Bottom Reform

The *stare decisis* approach of common law systems cannot be transplanted by China because its evolution is characterized by decentralization and localization. Additionally, it is a bottom-to-top process.[41] China, by contrast, is a unitary country with a very powerful and active central government, and thus the power structure needs to be centralized.

Generally speaking, in China the fundamental principle of governmental organization is "democratic centralism". Concerning the relations between the central government and local authorities, Art. 3(4) of the *Constitution* stipulates the basic principles, "the division of functions and powers between the central and local state organs is guided by the principle of giving full scope to the initiative and enthusiasm of the local authorities under the unified leadership of the central authorities";[42] thus, although local governments have the power to handle local affairs, they must be under the supervision of and in obedience to the central authority. For example, all legislative power in China is vested in the National People's Congress and its Standing Committee.[43] Different levels of local governments actually have authority to enact local regulations that are applicable exclusively to local affairs, but none of these local regulations are allowed to contravene the law or regulations promulgated by the central authority, and the local authorities must report their local regulations to the central authority.[44] Recently, the central authority has initiated a new round of reform that focuses on reinforcing central legislative authority and controlling as well as limiting the expansion of local legislative powers. The fourth plenary session of the 18th Communist Party of China (CPC) Central Committee issued a communique having the subject of "comprehensively advancing the rule of law" in China; its text emphasized that the reporting and reviewing mechanism of normative documents is to be enhanced. This mechanism covers all normative documents and has the function of repealing and adjusting normative documents that conflict with the *Constitution* or statutes, and prohibiting local governments from issuing normative documents of a legislative nature.[45]

The judicial authorities are also organized and function in a centralized way. As mentioned above, during this new round of judicial reform, several measures have been taken to remove the improper influence exerted by the local authorities on lower courts because judicial authority has been emphasized as a power of the central authority.[46] These measures include centralizing the judicial administrative management of each province (financial, personnel, and property management),[47] the experimental reforms of the trans-administrative-division judicial districts and the circuit tribunals of the SPC; and the recording, reporting and responsibility mechanism for instances when local officials interfere with the adjudication process.[48] Moreover, focusing on the purpose of the case guidance system *per se*, the primary intention of the SPC is to unify the application of law as indicated by the *Provisions* and the *Rules for Implementation*.[49] Therefore, the SPC can enhance its control over lower courts.[50] Additionally, from the implementation of the case guidance system, the SPC dominates each step of the reform and pushes the reform from the top to the bottom. We can hardly find any indication showing that lower courts have made any notable contribution to the design and the construction of the whole system through a bottom-to-up process.

2. The Powerful SPC and the Normative Binding Force of Guiding Cases

In civil law countries, with the exception of precedents from the constitutional courts of some countries, such as Germany, precedents are normally binding only *de facto*, but not *de jure*, something which has been admitted by both judges and academics.[51] Some authors have pointed out that such an approach to case law, *jurisprudence constante*, is often characterized by instability and uncertainty, although civil law systems are constantly emphasizing legal certainty and stability.[52] It is well-known that the whole legal regime as well as the judicial organization of China is greatly influenced by the

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[41] See *Nuno Garoupa/Carlos Gómez Ligüerre*, The Evolution of the Common Law and Efficiency, in: Georgia Journal of International and Comparative Law, Vol. 40 (2012), No. 2, pp. 312–13, 322.

[42] Constitution (宪法) (promulgated by Nat'l People's Cong., amended on March 14th, 2004), CLI.1.51974(EN) (available at <www.chinalawinfo.com> visited March 22th, 2016).

[43] Id, Art. 58.

[44] Id, Art. 100. Also see Law on Legislation (立法法) (promulgated by the Nat'l People's Cong., amended on March 15th, 2015, effective July 1th, 2000), CLI. 1. 245693(EN) (available at <www.chinalawinfo.com> visited March 22th, 2016), Arts. 72–75, 98.

[45] The Important Decision on "Comprehensively Advancing the Rule of Law" from the CPC Central Committee (中共中央关于全面推进依法治国若干重大问题的决定), October 28th, 2014, (available at <http://news.xinhuanet.com/politics/2014-10/28/c_1113015330_2.htm> visited March 22th, 2016).

[46] See *SU Zelin* (supra note 28), p. 2.

[47] Decision concerning Comprehensive and Deepened Reforms from the 3rd Plenary Session of the 18th CPC Central Committee (supra note 29).

[48] The Important Decision on "Comprehensively Advancing the Rule of Law" from the CPC Central Committee (supra note 45).

[49] The Provisions (supra note 2), para. 1; The Rules for Implementation (supra note 4), Art. 1.

[50] See *QIN Zongwen* (supra note 18), pp. 101–103.

[51] See *Aleksander Peczenik*, The Binding Force of Precedent, in *D. Neil MacCormick/Robert S. Summers* (eds.), Interpreting Precedents: A Comparative Study, Hants/Vermont 1997, pp. 461–62.

[52] See *Vincy Fon/Francesco Parisi*, Judicial Precedents in Civil Law Systems: A Dynamic Analysis, in: International Review of Law and Economics, Vol. 26 (2006), p. 520.

civil law system; however, due to the powerful SPC, especially its quasi-legislative authority, the force of guiding cases is more normative and is kept from the swamp of uncertainty and instability.

Like most civil law countries, in China neither the *Constitution*, nor the *Law on Legislation* has any provision stipulating case law. The entire reform of the case guidance system has been initiated and pushed by the SPC. Thus, the constitutional problems regarding the force of guiding cases arise: (1) What kind of force is to be given to guiding cases, formally binding force, *de facto* force or normative binding force? (2) Are guiding cases to be qualified as a kind of legal source? (3) If the SPC empowers guiding cases with normative binding force, has it gone beyond the function and role of a judicial organ of the state under the *Constitution*?[53]

Distinct from other civil law countries' supreme courts – most of which do admit the *de facto* force of precedents and regard some of their judgments as precedents in fact but only seldom explicitly stipulate the scope, status and binding force of precedents – the SPC has designed the Chinese case law mechanism with a very different approach, although the underlying rational is quite paradoxical and tricky. The SPC actually possesses quasi-legislative authority to enact abstract judicial interpretations. Both regulations concerning the case guidance system, the *Provisions* and the *Rules for Implementation*, envision this kind of judicial interpretation in nature, and do empower guiding cases with normative force gradually. Article 7 of the *Provisions* only obscurely stipulates that "when trying similar cases, people's courts at all levels shall refer to the guiding cases issued by the SPC as a reference". However, there is no detailed standard or requirement for the citation of guiding cases. This situation has been adjusted by Arts. 9–11[54] of the *Rules for Implementation*, which list citing requirements clearly, including (i)"when" guiding cases are to be cited: the case being tried is similar to a guiding case in terms of fact and the application of law, or litigants quote a guiding case as the basis of their argument; and (ii) "how" guiding cases are to be cited: only the number and the key points of the guiding case are to be cited, and only within the reasoning part of the judgment, not as the basis of ruling. Therefore, it is certain that guiding cases do have normative binding force. However, the SPC also hesitates to elaborate on the issue of whether guiding cases shall have the status of sources of law. The SPC obviously does not want to go too far: guiding cases have normative force but cannot be the basis of a ruling; thus, the issue on source of law is avoided. In sum, in the short term, the normative force of guiding cases stems from the quasi-legislative authority of the SPC, whereas in the long term, once this kind of case law mechanism grows mature enough, which is judicial authority in nature, it might limit, replace or even eliminate the quasi-legislative authority that originally fostered it. This phenomenon may be a kind of transition in judicial authority under the bigger picture of the whole society's transition.

3. The Special Judicial Organization and Extra-Adjudicatory Selection

No matter whether in a common law system or in a civil law system, precedents are produced in the process of adjudication. Nevertheless, in China, because of the special structure of the judiciary and the distribution of jurisdiction, the guiding cases can only be selected outside the decision-making process of the judiciary.

For general jurisdiction courts, there are normally four layers of courts in China. Running from the bottom to the top: the local people's courts at county level (hereinafter the local courts),[55] the intermediate people's courts at municipality level (hereinafter the intermediate courts),[56] the higher people's courts at province level (hereinafter higher courts),[57] and the SPC. The distribution of jurisdiction among the four layers of courts and the two-instance system lead to the uniqueness of China's judicial hierarchy. As normal procedure, China adopts a system whereby the second instance court is the last resort for relief;[58] in order to make sure that courts at higher levels of

[53] Constitution (supra note 42), Art. 123.

[54] The Rules for Implementation (supra note 4), (Art. 9 Where a case being tried by a people's court at any level is similar to a guiding case issued by the Supreme People's Court in terms of basic facts and application of law, a judgment shall be rendered by reference to the key points of judgment in the relevant guiding case. Art. 10 Where a people's court at any level refers to a guiding case in the trial of a similar case, it shall quote the guiding case as the judgment's reasoning, instead of citing it as the basis for the judgment. Art. 11 In the process of handling a case, the case handling personnel shall consult relevant guiding cases. Where any relevant guiding case is quoted in the written judgment, the number of the guiding case and its key points of judgment shall be quoted in the judgment's reasoning. Where a public prosecution authority, a party to a case, or a defender or litigation representative thereof quotes a guiding case as the ground for prosecution (or defense), the case handling personnel shall respond in the judgment's reasoning as to whether the guiding case has been referred to, and explain the reasons.).

[55] The Law on Organization of Courts (人民法院组织法) (promulgated by the Standing Comm. People's Cong., amended on October 31th, 2006), CLI. 1. 81825(EN) (available at <www.chinalawinfo.com> visited March 22th, 2016), (Art. 17 Local people's courts are: (1) county people's courts and municipal people's courts; (2) people's courts of autonomous counties; and (3) people's courts of municipal districts.).

[56] Id, (Art. 22 Intermediate people's courts are: (1) intermediate people's courts established in prefectures of a province or autonomous region; (2) intermediate people's courts established in municipalities directly under the Central Government; (3) intermediate people's courts of municipalities directly under the jurisdiction of a province or autonomous region; and (4) intermediate people's courts of autonomous prefectures.).

[57] Id, (Art. 25 Higher people's courts are: (1) higher people's courts of provinces; (2) higher people's courts of autonomous regions; and (3) higher people's courts of municipalities directly under the Central Government.).

[58] Id, Art. 11.

the four-layered pyramid have cases to hear, original jurisdiction is consequently allocated among all four levels of courts. In other words, with the exception of the local courts that have only original jurisdiction, the other three layers of courts, i.e. the intermediate courts, the higher courts and the SPC, have both original and appellate jurisdiction simultaneously.[59]

Due to this kind of structure, it has been pointed out that the Chinese judiciary is actually divided into three two-layered pyramids: the local courts and the intermediate courts; the intermediate courts and the higher courts; and the higher courts and the SPC.[60] Obviously, the courts at higher levels have almost no power to control the lower courts absent an immediate appeal relationship in the judicial decision-making process, a limitation which describes the relationships between the higher courts and the local courts as well as the SPC and the intermediate courts (or the local courts). What's more, departure from decisions of higher courts cannot be a ground for appeal or retrial in China.[61] Thereby, the higher courts probably cannot reverse the decisions of lower courts that are in conflict with their own decisions, which would ultimately mean that the SPC is powerless to unify the application of law through the review of cases from courts below.

Additionally, it would be unreasonable if the lower courts were rigidly required to adhere to all decisions of higher courts. For one thing, the number of decisions from higher courts is too substantial. Taking the caseload of the SPC as an example, as of the year 2013 the SPC had a total of 1,169 staff members, including the more or less 700 judges who are in charge of deciding cases.[62] The annual caseload of the SPC has exceeded 10,000 since 2009.[63] For another thing, besides the basic assumption that the ability to decide a case correctly increases as one advances to higher court levels, there is another presumption that the likelihood of achieving truth and correctness increases with the number of instances before which the case is tried. Thus, it is odd to require an intermediate court to follow a first-instance case decision from the higher court above it when it decides a second-instance case.

Although there are debates whether China should reform the current two-instance system and the distribution of jurisdiction, up to now this basic structure has not been changed fundamentally. As one author has pointed out, the issues of judicial levels and the hierarchy of courts "are subjected to the design of the state's political pattern and are not an outcome of simple judicial technology". The two-instance system can, furthermore, be traced back to the 1950s.[64] Thus, it is unlikely that they would be changed only for case law transplantation purposes. In recent years, the trial supervision procedure has been deemed as a reform trying to supplement the current two-instance system with the partial func-

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[59] Id, (Art. 20 Except for cases otherwise provided for by laws or decrees, a primary people's court adjudicates criminal and civil cases of first instance. When a primary people's court considers that a criminal or civil case it is handling is of major importance and requires trial by the people's court at a higher level, it may request that the case be transferred to that court for trial. Art. 24 An intermediate people's court handles the following cases: (1) cases of first instance assigned by laws and decrees to their jurisdiction; (2) cases of first instance transferred from the primary people's courts; (3) cases of appeals and of protests lodged against judgments and orders of the primary people's courts; and (4) cases of protests lodged by the people's procuratorates in accordance with the procedures of judicial supervision. When an intermediate people's court considers that a criminal or civil case it is handling is of major importance and requires trial by the people's court at a higher level, it may request that the case be transferred to that court for trial. Art. 27 A higher people's court handles the following cases: (1) cases of first instance assigned by laws and decrees to their jurisdiction; (2) cases of first instance transferred from people's courts at lower levels; (3) cases of appeals and of protests lodged against judgments and orders of people's courts at lower levels; and (4) cases of protests lodged by people's procuratorates in accordance with the procedures of judicial supervision. Art. 31 The Supreme People's Court handles the following cases: (1) cases of first instance assigned by laws and decrees to its jurisdiction and which it considers should be tried by itself; (2) cases of appeals and of protests lodged against judgments and orders of higher people's courts and special people's courts; and (3) cases of protests lodged by the Supreme People's Procuratorate in accordance with the procedures of judicial supervision.).

[60] *SONG Xiao* (宋晓), The Creation of Precedent and the Case Guidance System in China (判例生成与中国案例指导制度), Chinese Journal of Law (法学研究) 2011, No. 4, p. 63.

[61] The Civil Procedure Law (民事诉讼法) (promulgated by the Standing Comm. People's Cong., amended on August 31th, 2012) CLI.1.183386(EN) (available at < www.chinalawinfo.com> visited March 22th, 2016), (Art. 170 After trial, the people's court of second instance shall handle appeal cases according to the following different circumstances: … (2) Reversing, revoking or modifying the original judgment or ruling in accordance with law in the form of a judgment or ruling, if the original judgment or ruling is erroneous in fact finding or application of law. (3) Issuing a ruling to revoke the original judgment and remand the case to the original trial people's court for retrial or reversing the original judgment after ascertaining facts, if the original judgment is unclear in finding the basic facts. Art. 200 Where a petition for retrial filed by a party falls under any of the following circumstances, the people's court shall conduct a retrial: (1) There is any new evidence which suffices to overturn the original judgment or ruling. (2) The basic facts found in the original judgment or ruling are not evidenced. (3) The primary evidence admitted in the original judgment or ruling for finding facts is forged. (4) The primary evidence admitted in the original judgment or ruling for finding facts has not been cross-examined. (5) For objective reasons, a party is unable to gather any primary evidence necessary for the trial of a case and applies in writing for the people's court to investigate and gather the evidence, but the people's court has not investigated and gathered the evidence. (6) There is any erroneous application of law in the original judgment or ruling. (7) The composition of the trial organization is illegal or any judge who shall be disqualified in accordance with law fails to be disqualified. (8) The legal representative of a person without competency to participate in the action fails to participate in the action on behalf of the person or a party which shall participate in the action fails to participate in the action, which is not attributable to the fault of the party or the litigation representative thereof. (9) A party's right to debate is illegally denied. (10) A default judgment is entered against a party which has not been summonsed. (11) The original judgment or ruling has omitted any claims or exceeded the claims of the parties. (12) The legal instrument on which the original judgment or ruling is based has been revoked or modified. (13) When trying the case, a judge commits embezzlement, accepts bribes, practices favoritism for personal gains, or adjudicates by bending the law.).

[62] *ZONG Bo* (纵博), The Background, Function and Design of the Building Circuit Tribunals of the Supreme Court (最高人民法院巡回法庭的设立背景、功能及设计构想), Science of Law (法律科学) 2015, No. 2, p. 72.

[63] This data is from the annual reports of the Supreme Court from 2010 to 2014.

[64] *LIU Zhong* (刘忠), The Roots and Evolution of the System of Two Instances at Four Levels of Courts (四级两审制的发生和演化), Chinese Journal of Law (法学研究) 2015, No. 4, pp. 49–50, 58.

Chart 1.1.1: Issuance Frequency from 2011 to 2015 (Batches)

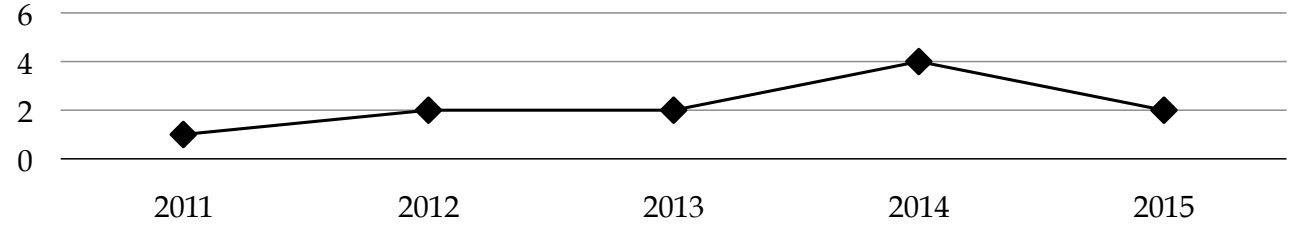


Chart 1.1.2: Annual Output from 2011 to 2015 (Cases)

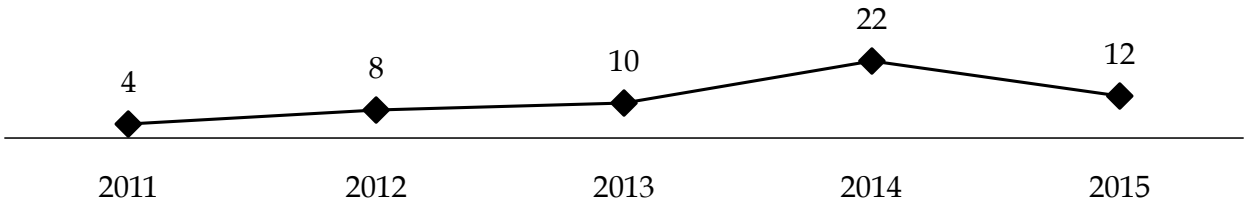
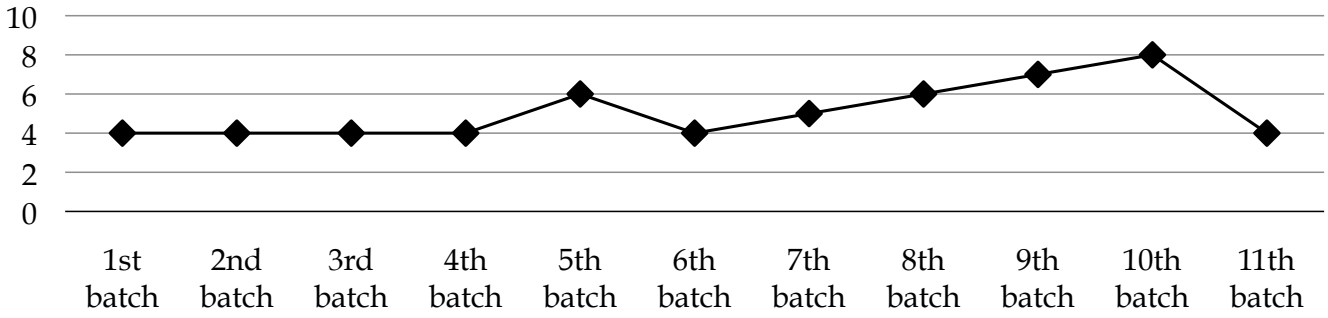


Chart 1.1.3: Quantity of Each Batch (2011–2015)



tion of a third instance, but scholars have pointed out that this supervision mechanism cannot really play the role of a third instance.[65] Furthermore, concerning the distribution of jurisdiction, referring to the most recently issued judicial interpretation, the SPC has only adjusted the amount in controversy criteria among different geographic areas according to economic development levels; the intermediate courts and the higher courts still enjoy original jurisdiction.[66]

Therefore, in order to unify the application of law in the whole country through a case law approach, the SPC employs a selection procedure that is external to the judicial decision-making process: it selects excellent and typical judgments from decisions at all levels of courts – many of which are cases that have been decided by lower courts, and then those judgments are reviewed by higher courts level by level, thus establishing their worthiness as guiding cases to be empowered with precedential force by the SPC eventually.

V. Five-Year Review of the Case Guidance System

The past five years have witnessed the SPC release 11 batches of guiding cases, 56 cases in total. Statistical analysis of the past 11 batches of guiding cases can reveal the main features and tendencies of this mechanism over the past five years, which will help in evaluating its practical operation and exploring how to improve it in future. This part will examine the operation of the case guidance system in regard to four aspects: their general output, selection process, editing and citation.

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[65] *FU Yulin* (傅郁林), Constructive Principles of Judicial Hierarchy: A Comparative Survey from the Viewpoint of Civil Procedure (审级制度的建构原理——从民事程序视角的比较分析), Social Sciences in China (中国社会科学) 2002, No. 4, pp. 93–99.

[66] Notice on Adjusting the Standards for the Jurisdiction of the Higher People's Courts and Intermediate People's Courts over Civil and Commercial Cases of the First Instance (关于调整高级人民法院和中级人民法院管辖第一审民商事案件标准的通知) (promulgated by the Sup. People's Ct., Fafa [2015] No. 7, effective April 30th, 2015), CLI.3.247643(EN) (available at <www.chinalawinfo.com> visited March 23th, 2016).

1. The General Output of Guiding Cases

1.1. Quantity and Frequency

From Chart 1.1.1, Chart 1.1.2 and Chart 1.1.3, it can be seen that the quantity of issued guiding cases (56) is very limited with an unstable frequency.

Some authors have criticized that the current quantity of guiding cases is too small to satisfy the needs of judicial practice, such that more guiding cases should be selected.[67] The average annual output of guiding cases is almost the lowest when viewed in comparison to the annual output of precedents produced by the highest courts of all legal systems employing precedent, whether in civil or common law countries.[68] If the quantity of guiding cases is too small, the case law function of the case guidance system will be impaired; therefore, as a long term concern, the annual output of guiding cases should be increased.

At the same time, from the fluctuations of these three curves, another main characteristic in the issuance of guiding cases can be identified: its instability. Before 2014, both the frequency of issuance (within a given year) and the overall quantity was increasing slowly, with the quantity of each batch remaining very stable – with the exception of the 5th batch, its containing 6 cases as opposed to the 4 in each previous batch. In 2014 all curves rose dramatically. In that year 4 batches of guiding cases (totally 22 cases) were issued, amounting to the aggregate number of guiding cases released in the previous three years; additionally, the quantity of each batch steadily increased, from 4 cases to 7 cases. Nevertheless, more than half of the whole annual output (the 8th and the 9th batches, 13 cases in total) were issued at the end (December) of the year.[69] In 2015, all three curves moved downward again; in the whole year, the SPC issued only 2 batches of guiding cases, 12 cases in total. Particularly in the 11th batch, the quantity of cases was again reduced to its lowest level (4 cases).

It can be inferred from the currently low and unstable output of guiding cases that a comprehensive case law environment has not yet been established. The lower courts still need do more to improve the reasoning and general quality of their judgments, and the communication between academics and the judiciary is insufficient, which will affect the output and quality of guiding cases. Therefore, even if the SPC issues more guiding cases at the current stage, the authority and stability of precedents will be under threat if their quality cannot be guaranteed. Instead of issuing a large number of guiding cases, the SPC is releasing an increasing number of typical cases in different fields much more frequently. According to the data from the "pkulaw" (http://www.pkulaw.cn), over the entire year of 2015 the SPC issued a total of 373 typical cases in different areas.[70] Unlike the guiding cases, while typical cases have a guiding function in judicial practice, they do not have normative binding force. As a result, the lower courts have the discretion to decide whether or not to adhere to those cases. Through the accumulation of judicial practice, the SPC can examine the quality and acceptability of typical cases before confirming them as guiding cases and empowering them with normative binding force.

1.2. Average Interval between the Final Decision and Issuance

The interval between the final decision and issuance indicates the length of time during which the candidate guiding case can subsequently be examined by courts, practitioners and academia. Although not absolutely true, the formation of precedent is normally a relatively long process, whether in respect of a single leading case or for an established line of precedents, since case law itself is a gradual, evolutionary process. Thus, ideally there should be enough time – for both academic research and judicial practice – to explore, discuss and shape case law rules before the issuance of guiding cases, which is one of the most important safeguards for the quality and stability of guiding cases.

Chart 1.2.1 shows that the average interval between the final decision and issuance for the first several batches was relatively short. The shortest interval was that of Case No. 4 in the 1st batch, which was only 6 months. Thus, those guiding cases were comparably young at the time of issuance. One pos-

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[67] *HE Jiahong* (何家弘), Constructing a State under Rule of Law Requires Perfecting the Case Law Mechanism (完善司法判例制度是法治国家建设的需要), Law and Social Development (法制与社会发展) 2015, No. 1, p. 26.

[68] For the highest courts in common law countries, the annual output of precedents equals the annual caseload .Thereby, for the U.S. Supreme Court the annual caseload is slightly under 100; for the Supreme Court of the U.K. the average annual caseload has also been just under 100 since 2010. See *Daniel John Meador/Gregory Mitchell,* American Courts, Third edition, Minnesota 2009, p. 25. And see <https://www.supremecourt.uk/decided-cases/index.html> visited September 17th, 2015. However, for the highest courts of civil law countries, it is hard to calculate the exact annual output of precedents since the annual caseloads are huge and a very large percentage of these cases cannot be treated as precedents. Regardless, the quantity is necessarily much bigger than the annual output of guiding cases in China.

[69] Notice on the Issuance of the 8th Batch of Guiding Cases (关于发布第八批指导性案例的通知) (promulgated by the Sup. People's Ct., Fa [2014] No. 327, effective December 18th, 2014), CLI.3.239989 (available at < www.chinalawinfo.com> visited March 23th, 2016). Notice on the Issuance of the 9th Batch of Guiding Cases (关于发布第九批指导性案例的通知) (promulgated by the Sup. People's Ct., Fa [2014] No. 337, effective December 24th, 2014), CLI.3.240499 (available at <www.chinalawinfo.com> visited March 23th, 2016).

[70] The data is available at <http://eproxy2.lib.tsinghua.edu.cn/rwt/160/http/P75YPLURNN4XZZLYF3SXP/cluster_form.aspx?Db=chl&menu_item=law&EncodingName=&clust_param=0/XG04&keyword=&range=name&> visited January 2th, 2016.

Chart 1.2.1: Average Interval from Final Decision to Issuance of Each Batch (Months)

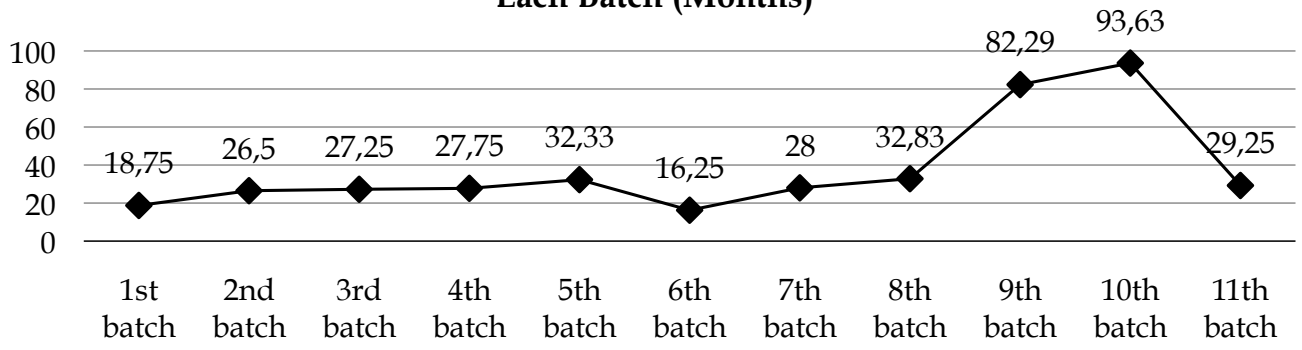
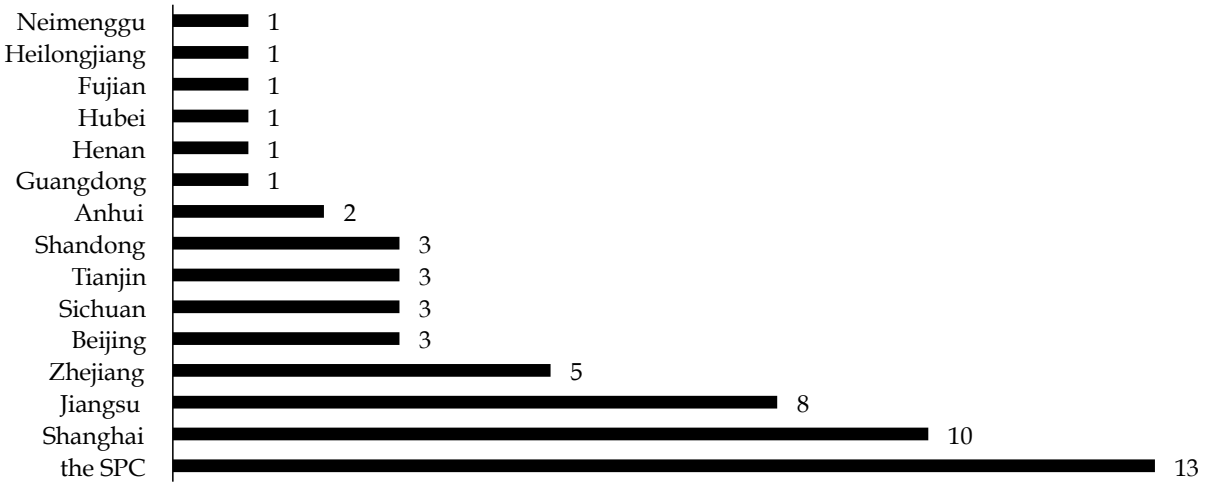


Chart 1.3.1: Geographic Distribution of Final Courts for Guiding Cases (2011–2015)



sible explanation for such phenomenon might be that at the beginning stage of the case guidance system, the SPC emphasized innovation when selecting guiding cases:

> *The key points of the judgment should be innovative and summarize the novel contributions of the judgment to the application of law or other issues. Namely, the key points of the judgment should be neither the duplication or the restatement of explicit provisions of existing law, nor something on which consensus has been achieved or that has become commonly accepted in jurisprudence or judicial practice.*[71]

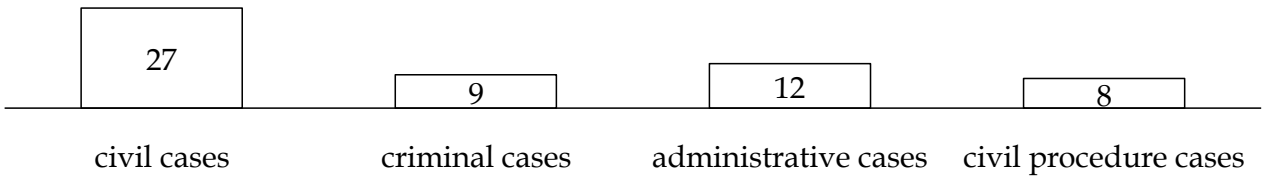
Such a situation seems to have changed, as since the 8th batch the average interval has been increasing. Especially in the 9th and 10th batches of guiding cases, the average intervals increased dramatically compared with previous batches. The longest interval was that of Case No. 38 in the 9th batch, which was as long as 188 months (15 years and 8 months). There might be two possible reasons for such change: the first one is that all the guiding cases in the 9th and 10th batches were selected from cases reported by the *Gazette of the Supreme Court* (hereinafter "Gazette cases").[72] Before the case guidance system, the Gazette cases actually had a significant position in judicial practice, although they did not have precedential force. Thus, those Gazette cases that were able to be selected as guiding cases must have been very successful and influential in judicial practice, which was presumably demonstrated and proved in long-term practice. Meanwhile, the formulation of Art. 2 and Art. 3 of the *Rules for Implementation* pays more attention to the quality of candidate case judgments, such as their demonstrating the correct application of law or a sufficiency of reasoning;[73] thereby, it seems that the

[71] *HU Tengyun* (胡云腾)/*WU Guangxia* (吴光侠), The Meaning and Application of the Opinions on Style for Compiling and Submitting Guiding Cases (《关于编写报送指导性案例体例的意见》的理解与适用), The People's Judicature (人民司法) 2013, No. 9, p. 32.

[72] See Notice on the Issuance of the 9th Batch of Guiding Cases (supra note 69). Notice on the Issuance of the 10th Batch of Guiding Cases (关于发布第十批指导性案例的通知) (promulgated by the Sup. People's Ct., Fa [2015] No. 85, effective April 4th, 2015), CLI.3.247358 (available at <www.chinalawinfo.com> visited March 23th, 2016).

[73] The Rules for Implementation (supra note 4), Arts. 2–3, (A guiding case shall be a case in which the judgment has become effective, the determination of facts is clear, the application of law is correct, and judg-

Chart 1.4.1: Categories of Guiding Cases (2011–2015)



attitude of the SPC to the requirements of guiding cases has shifted to an emphasis on the maturity and stability of guiding cases. Unfortunately, such tendency ceased at the 11th batch, the average interval of which declined to a level seen prior to the 8th batch (29.25 months). However, the interval for each case in the 11th batch was relatively equal (Case No. 53: 26 months; Case No. 54: 24 months; Case No. 55: 35 months; Case No. 56: 32 months); thus, those four cases were not very new at the time of issuance compared with Case No. 4 or other similar cases in the first several batches.

1.3. Geographic Distribution

The mainland of China has 31 provincial administrative divisions,[74] all of which greatly differ in their economic development. Chart 1.3.1 shows the the geographic distribution of the final courts corresponding to the first 11 batches of guiding cases from 2011 to 2015. Except for the 13 cases decided by the SPC, the other 43 cases were selected from 14 provincial administrative divisions; this means that most provinces have not produced any guiding cases yet. Among the above 14 provincial administrative divisions, Shanghai, Jiangsu and Zhejiang are the top three provinces with respect to the output of guiding cases. It should be noted that those three provinces belong to the Yangtze River Delta, which is the most developed area in China nowadays. Therefore, although it is not absolutely established, we can infer that the geographic distribution of the guiding cases' final courts is positively correlated with the economic development level.

1.4. Categories, Subjects and Groups of Cases

Chart 1.4.1 shows the categories of guiding cases in the past five years: the quantity of civil cases was the highest (48%), whereas the numbers for the other three categories, criminal cases (16%), administrative cases (21%) and civil procedure cases (14%), are a bit lower. From Charts 1.4.2, 1.4.3, 1.4.4 and 1.4.5, it can be concluded that, up to now, guiding cases have not yet been capable of covering all fields. Generally, guiding cases are dispersed in different subjects in unbalanced quantities; for instance, some areas, such as contracts and unfair competition disputes in civil cases, have accumulated more cases than other areas.

There might be two possible explanations for the unbalanced distribution of the subjects of guiding cases. Above all else, the history of the case guidance system is quite brief and the whole system has not yet matured; thus, the total output is relatively low. Moreover, the unbalanced distribution is closely linked to the nature of case law. Unlike the adoption of enacted statutes that are drafted and revised so as to cover all subjects, the development of case law depends wholly on whether there are typical cases and high quality decisions in judicial practice; therefore, this will necessarily be a gradual case-by-case process exhibiting great randomness.

According to Chart 1.4.6 and Chart 1.4.7, since the 7th batch the SPC has deliberately issued the same type of cases in groups (with the exception of the 11th batch), and the numbers of both the groups and the cases in those groups have increased. The 7th batch has a group of cases on anti-unfair competition (Nos. 29–30); the 8th batch has a group of cases on enforcement reconsideration (Nos. 34–37); the 9th batch has a group of cases on the refusal by universities to issue graduation and degree certificates (Nos. 38–39) and a group of cases on national compensation (Nos. 42–44); the 10th batch has a group of cases on unfair competition (Nos. 45–46) and a group of cases concerning violation of software copyrights (Nos. 48–49); and the 11th batch has a group of cases on the property rights attaching to a pledge (Nos. 53–54). Additionally, we also can find cases with the same or similar subjects among different batches, such as Case No. 4 in the 1st batch and Case No. 12 in the 3rd batch; these are both about how to apply for a reprieve from a death penalty sentence in intentional murder cases stemming from disputes in romantic relationships. Case No. 8 in the 2nd batch and Case No. 9 in the 3rd batch are both related to the dissolution and liqui-

ment's reasoning is sufficient, with positive legal and social effects and universally directive significance in the trial of similar cases. A guiding case shall consist of a title, key words, key points of judgment, relevant legal provisions, basic facts, the results of the judgment, the judgment's reasoning, and notes including the names of the judges in the effective judgment, among others.).

[74] Since Hong Kong, Macao and Taiwan each have distinct legal systems, the case guidance system does not cover these three areas.

Chart 1.4.2: Subjects of Civil Cases

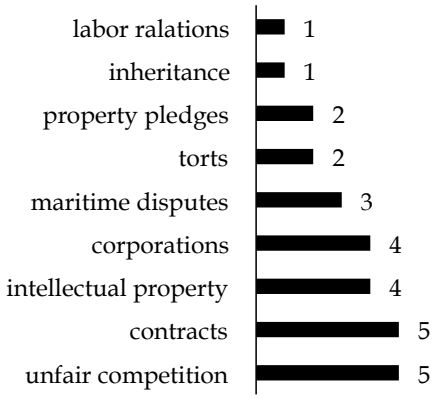


Chart 1.4.3: Subjects of Criminal Cases

Chart 1.4.4: Subjects of Administrative Cases

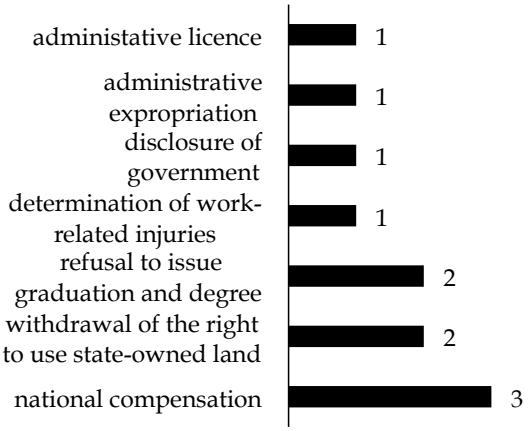
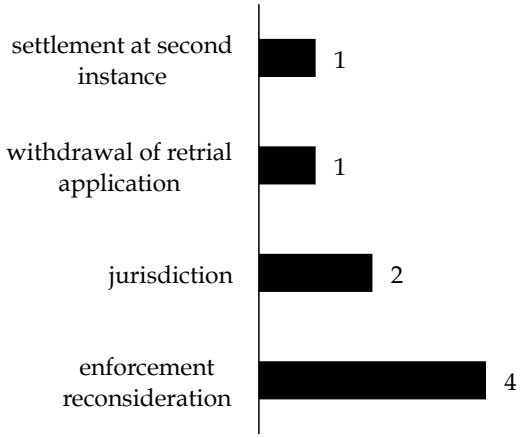


Chart 1.4.5: Subjects of Civil Procedure Cases



dation of companies. Case No. 22 of the 5th batch and Case No. 41 of the 9th batch are both about the legality and reasonableness of an administrative institution's withdrawing land-use rights.

In a civil law system, the established line (or chain) of precedents is of considerable significance for case law and actually has been considered as a secondary legal source.[75] Up to now, however, it is hard to conclude that the groups of guiding cases described above are the same as established lines of precedents because, on the one hand, there is insufficient evidence as to whether those guiding cases are the leading cases in judicial practice. And on the other hand, for most groups the key points of judgment refined by the SPC in the cases involved are not identical, which means that although the SPC issued cases having the same subject in a group, the adjudicatory rules in them do not focus on the same issues. Nevertheless, a potential trend might be found in Case No. 4 and Case No. 12.

Both Case No. 4 and Case No. 12 show the intention of the SPC to control the implementation of the death penalty. Interestingly, although Case No. 4 was issued on December 20, 2011, and Case No. 12 was issued almost one year later, on September 18, 2012, their final judgments were actually delivered on the same day (May 3, 2010), and both the substantive issues and procedures of those two cases are extremely similar. From a procedural perspective, both cases were heard at first instance by the intermediate courts and then at second instance by the higher courts, and both instances held in favor of the death penalty with immediate execution. However, the SPC overruled the holdings of both cases and sent them back to the

[75] *Fon/Parisi* (supra note 52), pp. 522–23.

Chart 1.4.6: Numbers of Groups in Each Batch (2011–2015)

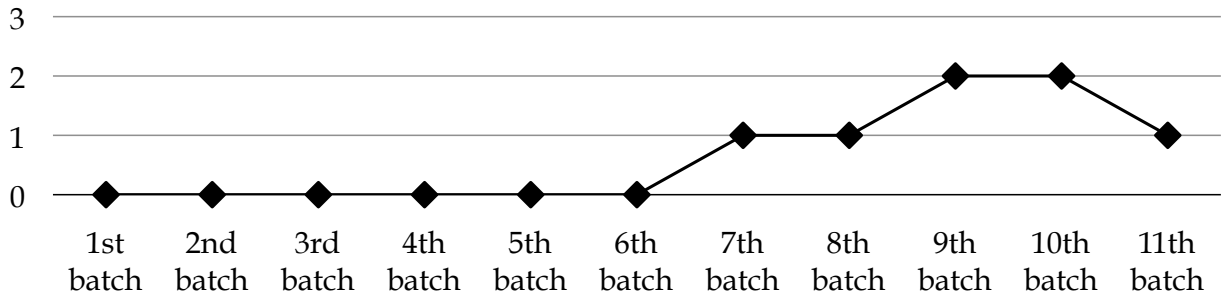
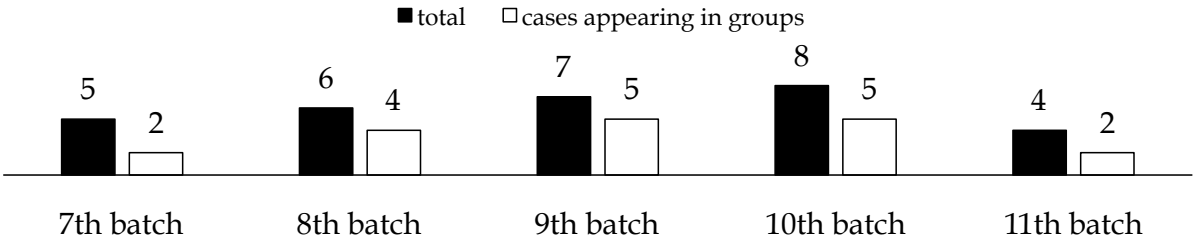


Chart 1.4.7: Cases Appearing in Groups (7th–11th Batch)



second instance courts for retrial. After retrial, both higher courts held for a partial reprieve, staying imposition of the death sentence for two years but simultaneously limiting the right of further commutation. Concerning substantive issues, despite minor differences, the facts of both cases share many similarities: (1) both cases are intentional murders; (2) both cases stemmed from disputes in romantic relationships; (3) both defendants confessed and showed remorse for their crimes; (4) both defendants or their relatives actively compensated the economic losses of the victims' relatives; and (5) both the victims' relatives did not forgive the defendants.[76] Although it is a little odd that the SPC issued two similar cases decided on the same day in different batches, the most possible explanation might be that the SPC intended to use Case No. 12 to reaffirm and emphasize its viewpoints in Case No. 4, thus controlling the imposition of the death penalty. Thereby, we could say those two cases also comprise a line of precedent to a certain degree.

2. The Selection Process for Guiding Cases

2.1. The Hierarchical Position of the Final Court

Reviewing Chart 2.1.1 and Chart 2.1.2, we need to observe the hierarchical distribution of final courts for all guiding cases with both an overall perspective and one looking at each batch. Generally speaking, all four layers of the courts make up a substantial proportion among the 11 batches of guiding cases. The percentage of cases from the higher courts is the greatest among all layers of courts (30%); the second highest is held by the cases from the SPC (27%); following that are the cases from the intermediate courts (23%); and the percentage of the cases from the local courts is the lowest (20%). Concretely, the ratio of guiding cases judged by final courts of various hierarchical levels changes among different batches. With the exception of the 5th batch and the 6th batch, which are mainly comprised of cases from the local courts and the intermediate courts, the percentages of cases from these two layers of courts are lower than 50% in all other batches. In the last five batches, the proportion of cases from these two layers of courts, especially from the local courts, is obviously declining; conversely, the proportion of cases from the higher courts and the SPC is increasing. This holds true especially in the 11th batch; although only four cases were released, all of them come from higher courts and the SPC.

Chart 2.1.3 shows that most guiding cases were heard by two instances (63%); only 21% of the guiding cases were heard at only one instance, which is a little higher than the percentage of local court cases (20%). The percentage of guiding cases heard by more than two instances, such as the retrial or

[76] Notice on the Issuance of the 1st Batch of Guiding Cases (supra note 3), Guiding Case No. 4. Notice on the Issuance of the 3rd Batch of Guiding Cases (关于发布第三批指导性案例的通知) (promulgated by the Sup. People's Ct., Fa [2012] No. 227, effective September 18th, 2012), CLI.3.185507 (available at <www.chinalawinfo.com> visited March 23th, 2016), Guiding Case No. 12.

Chart 2.1.1: Hierarchical Positions of Final Courts in Each Batch (2011–2015)

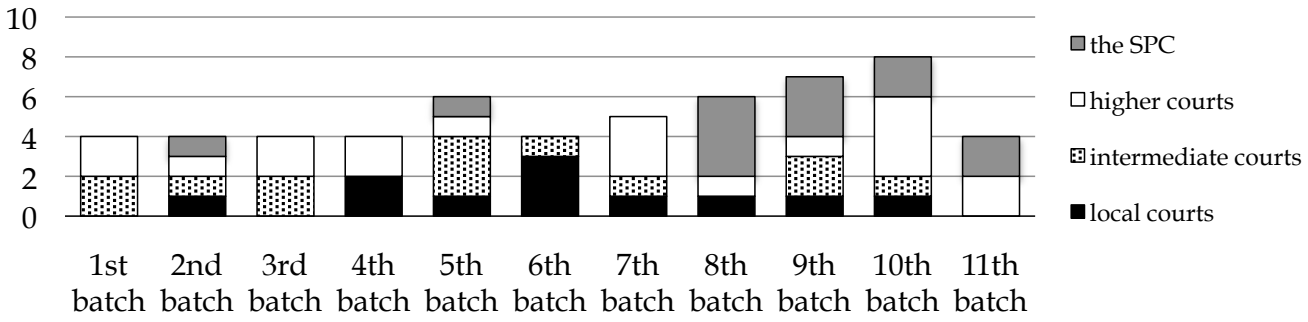


Chart 2.1.2: Final Court Position in Percentages

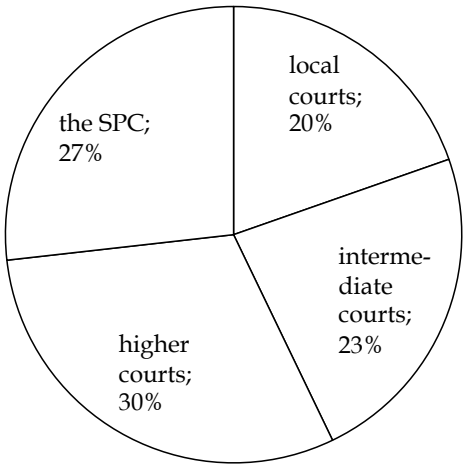
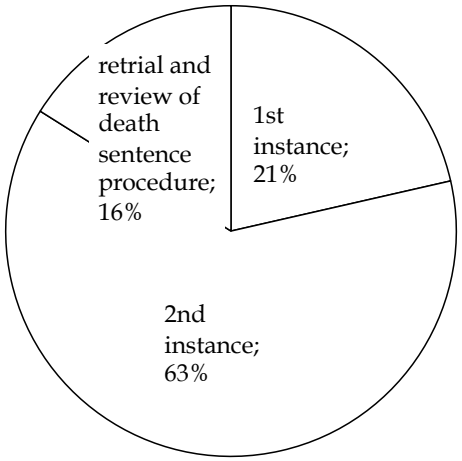


Chart 2.1.3: The Instances of Final Decisions



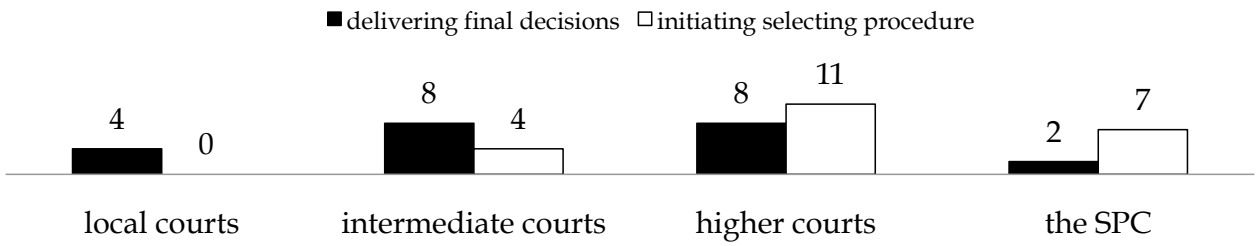
review of a death sentence procedure, is very low at only 16%.

It can be discerned from the above statistics that, on account of the two-instance system and the distribution of jurisdiction mechanism, most guiding cases originated as second instance decisions; meanwhile, a considerable proportion of guiding cases come from the lowest trial courts or other first instance cases, which is perhaps the most unique Chinese case law characteristic. As has been mentioned, it is currently impractical to fundamentally reform the two-instance system and the distribution of jurisdiction given the need to maintain the uniformity of the adjudicatory process of lower courts, namely the local courts and the intermediate courts, both of which handle a very large percent of the whole country's caseload. Therefore, the SPC must select guiding cases from their decisions since it rarely has the opportunity to review cases decided by those courts through normal appeal or retrial procedures.

However, selecting guiding cases from local court decisions or from other first instance judgments is questionable. First of all, the main task of the first instance is fact-finding, whereas the emphasis of precedents should be put on the application of law. Normally, it is quite likely that the quality of judgments from first instance cases may not meet the requirements of guiding cases; thus, many of them need to be modified or supplemented before being issued as guiding cases, as analyzed under Section 3 of this Part (The Editing of Guiding Cases). Furthermore, the judicial decision-making process and the external selection process must be balanced. The selection of guiding cases is a kind of administrative process, whereas case law is a judicial mechanism in nature. One author has argued that the selection of guiding cases deviates from a judicial nature.[77] Thus, in order to maintain the judicial nature of the case guidance system and harmonize the relationship between the decision-making process and the selection process, the latter must be restricted to a necessary and proportional extent. That is to say, the selection process only can be used to overcome the insufficiency of the decision-making process, but it

[77] See *QIN Zongwen* (supra note 18), pp. 99–106. Also see *SONG Xiao* (supra note 60), p. 65.

Chart 2.2.1: Courts Delivering Final Decisions and Courts Initiating Selection Procedure in the First Five Batches of Guiding Cases



cannot replace it. Thereby, guiding cases are to be selected from judgments that have gone through all possible steps within the judicial decision-making process. We can observe that the percentage of first instance cases has obviously declined in the last several batches.

2.2. Internal Judicial Selection Procedure

Compared with the texts of the *Provisions* and the *Rules for Implementation*, the SPC has made some adjustments regarding the selection procedure for guiding cases.

Generally, under the *Provisions*, there are two approaches for selection: (1) the candidate cases are recommended by lower courts, layer by layer, and (2) the candidate cases are recommended by relevant divisions of the SPC.[78] Under the second approach, the relevant divisions of the SPC can only recommend candidate cases to the Case Guidance Office of the SPC, but they do not have authority to review and decide guiding cases. For both approaches, the Case Guidance Office and the Judicial Committee of the SPC occupy the dominant positions: the Case Guidance Office has the power to review recommended cases and issue opinions; after that, the Case Guidance Office is to submit candidate cases and their opinions to the relevant president or vice-president who is in charge of case guidance issues; finally, the president or vice-president transfers those cases to the Judicial Committee, which only has the power to make a final determination.[79]

By contrast, the *Rules for Implementation* make two main adjustments on the basis of the above structure. Firstly, the function of the SPC divisions has been enhanced. In addition to recommending candidate cases, the SPC divisions also have the authority to review candidate cases.[80] Secondly, concerning the approach of recommending candidate cases by the lower courts, the role of higher courts has been highlighted. Their responsibilities are not simply limited to recommending candidate cases to the SPC; rather they also operate and supervise the case guidance system and ensure the quality of candidate cases in their jurisdictions.[81]

The SPC seldom discloses the detailed selection process of each guiding case when guiding cases are issued. Thus, we do not have much first-hand material allowing us to evaluate the practical operation of the selection procedure. But fortunately, the 2014 sixth volume of the *People's Judicature (Cases)* compiled the first five batches of guiding cases, including the selection process of each case,[82] and through this we can both learn more about the practical operation of the selection process and explain why the *Rules for Implementation* have made adjustments.

Firstly, under the approach of recommendation by lower courts, the higher courts absolutely show the most active role according to Chart 2.2.1. Not only did they initiate the guiding case selection process in a majority of instances for cases decided by themselves (Nos. 3, 8, 11, 15 and 22), they also started such a procedure for some cases decided by the intermediate courts (Nos. 1, 10, 17 and 19) as well as the local courts within their territorial jurisdiction (Nos. 14 and 18). Only a very few intermediate courts initiated the selection process for

[78] The Provisions (supra note 2), (Art. 4 Where any trial division of the SPC deems that a valid judgment rendered by this Court or the local court at any level complies with Article 2 of these Provisions, the trial division may recommend such a judgment to the Case Guidance Office. Where a higher court or the Military Court of the People's Liberation Army deems that a valid judgment of this Court or a court within its jurisdiction complies with Article 2 of these Provisions, upon deliberation and decision of the Judicial Committee of this Court, it may recommend such a judgment to the Case Guidance Office of the SPC. Where an intermediate court or a local court deems that any of its valid judgments comply with Article 2 of these Provisions, upon deliberation and decision of the Judicial Committee of this Court, it shall report to the higher courts level by level, and suggest that the higher court recommend such a judgment to the Case Guidance Office of the SPC.).

[79] Id, Art. 3, Art. 6.

[80] The Rules for Implementation (supra note 4), (Art 4. 2 The trial divisions of the SPC shall be in charge of the recommendation and examination of guiding cases, among others, and designate special persons to be responsible for liaison work).

[81] Id, (Art. 4 … The higher courts shall be in charge of the recommendation and survey of, and supervision over guiding cases within their jurisdictions, among others. A potential guiding case recommended to the SPC by a higher court shall be determined by the judicial committee upon deliberation, or approved by the judicial committee by a simple majority…).

[82] The People's Judicature (Cases) 2014, No. 6, pp. 4–110.

their own cases (Nos. 2, 6, 9, 16[83]); moreover, local courts did not participate in the selection process at all. Therefore, it is understandable that the SPC has highlighted the role of higher courts in the selection procedure in the *Rules for Implementation*.

Secondly, under the approach of recommendation by SPC divisions, there are two types of cases: the cases decided by SPC divisions (Nos. 7 and 20) and the cases decided by lower courts. For the second type of cases, SPC divisions may recommend decisions made by lower courts under three possible circumstances: (i) where a lower court trying the case requested an advisory opinion from an SPC division (Nos. 5 and 13);[84] (ii) where a lower court sentenced a defendant to the death penalty with immediate execution and the case was subject to mandatory review by the criminal division of the SPC (Nos. 4 and 12); and (iii) where a lower court submitted its judgment to a relevant SPC division in order to participate in the selection of typical cases in certain fields (No. 21). Under the first two circumstances, although divisions of the SPC did not deliver the final decisions of those cases, they actually contributed to or controlled those decisions.

For the internal review process of the SPC, different approaches entail distinct procedures. Under the approach of recommendation by the lower courts, usually, the higher courts submitted candidate cases to the Case Guidance Office of the SPC, which first researched and discussed those candidate cases and then sent them to relevant SPC divisions. After being reviewed with substantive opinions, those cases would then be sent back to the Case Guidance Office. After re-receiving those cases, the Case Guidance Office discussed them again in their routine meetings and then submitted them to relevant SPC leaders who transmitted those cases to the Judicial Committee for final conformation. Under the approach of recommendation by SPC divisions, it was normally the case that relevant divisions recommended candidate cases to the Case Guidance Office with substantive opinions; after discussing and modifying those candidate cases, the Research Office[85] would then submit them to relevant leaders, and the Judicial Committee would make the final decision. In all 22 cases, 18 cases had substantive review opinions authored by relevant divisions of the SPC; only 5 cases had concrete review opinions from the Judicial Committee, whose opinions on other cases are very general, such as "conforming to Art. 2 of the *Provisions*" [86], "having guiding effect" or "approving of being selected as guiding case"; and the Case Guidance Office did not issue substantive opinions on any case. The practical realities dictating the significant role played by SPC divisions in the review procedure may offer an explanation as to why the SPC has confirmed such a function in the *Rules for Implementation*.

However, the selection process of Guiding Case No. 7 deserves more attention. The Judicial Committee of the SPC identified this case as a guiding case on June 13, 2011; however, the final judgment of the case was delivered on July 6, 2011 by the SPC. This kind of situation should be avoided in the future since one of the most important prerequisites for a guiding case is that the judgment is final and effective.[87]Additionally, the guiding function of the Judicial Committee should be limited to the macro-level.[88]Accordingly, it should principally respect the judicial decision-making process and the review opinions issued by the SPC divisions; exceptionally, in the event that there are conflicts between different divisions, the Judicial Committee may make the final decision.

2.3. Comparison between Internal and External Contributions

Both the *Provisions* and the *Rules of Implementation* have opened the selection process of guiding cases to all kinds of social actors, especially academics. The *Rules of Implementation* empower academics with the right to directly recommend candidate cases to the Case Guidance Office of the SPC.[89] However, according to the empirical data, up to now

[83] Guiding Case No. 16 is very special. Its final decision was delivered by the Shanghai Higher People's Court, but its selection procedure was initiated by the trial court, the Shanghai Maritime Court.

[84] In order to foster guiding cases, the SPC has institute a follow-up mechanism for this kind of case. See *HU Yunteng* (胡云腾), How to Improve the Selection and Application of Guiding Cases (如何做好案例指导的选编与适用工作), China Trial (中国审判新闻月刊) 2011, No. 9, p. 83.

[85] We could only find the Research Office in the organizational framework of the SPC on its official website, which has the function of compiling guiding cases. Thereby, we could deduce from above information that the Case Guidance Office is inside the department of the Research Office. (available at <http://www.court.gov.cn/jigou-fayuanjigou-zhineng-22.html> visited October 28th, 2015).

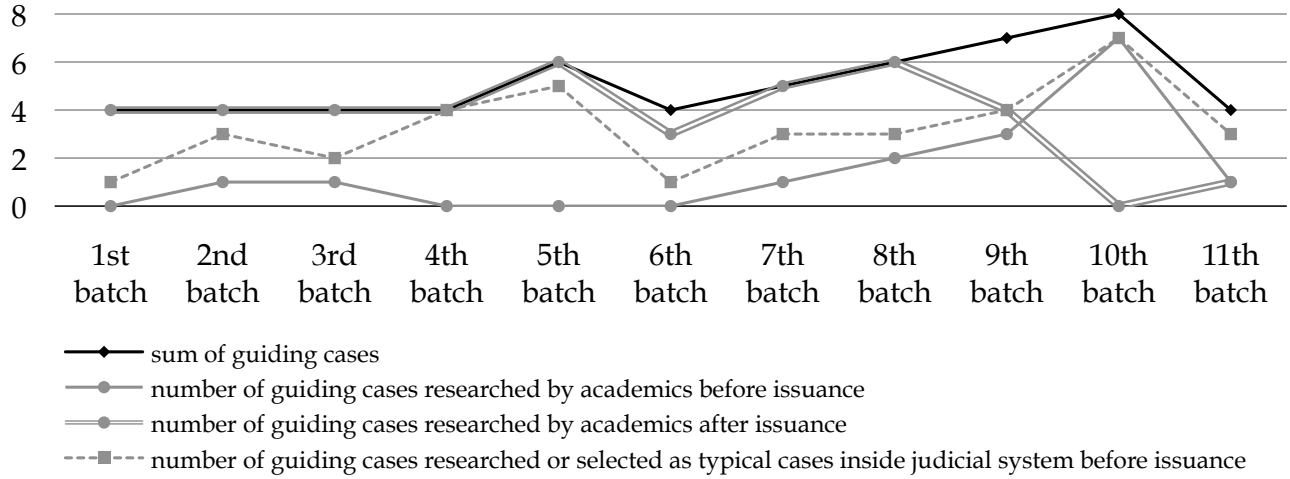
[86] The Provisions (supra note 2), (Art. 2 The term "guiding cases" as mentioned in these Provisions means cases whose judgments have come into force and which satisfy the following conditions: 1. attract wide attention from society; 2. the legal provisions are, to a greater degree, on the principles of law; 3. are representative in nature; 4. difficult, complicated or novel; or 5. other cases that have a guiding function).

[87] See Id, Art. 2; Also see The Rules for Implementation (supra note 4), Art. 2.

[88] See Comprehensively Deepening Reform of the People's Courts (supra note 38), Art. 32.

[89] The Provisions (supra note 2), (Art. 5 Where a people's congress deputy, CPPCC member, expert, scholar, lawyer, or any other person from the general public concerned about trial or enforcement by the people's court, deems that a valid judgment of a people's court complies with Article 2 of these Provisions, the said person may recommend the judgment to the original people's court that rendered the valid judgment.). The Rules of Implementation (supra note 4), (Art. 5 A deputy to the people's congress, a member of the political consultative conference, a people's assessor, an expert, a scholar, an attorney or any other member of the society concerned with the trial and enforcement of the people's courts may recommend a case satisfying the conditions of a guiding case to the people's court which originally tried the case and has rendered an effective judgment, or recommend the case to the Case Guidance Office. Members of the Case Guidance Expert Committee may recommend a case satisfying the conditions of a guiding case to the Case Guidance Office.).

Chart 2.3.1: Comparison of Case Study between Judicary and Academics



the entire selection process has been monopolized mainly by the judiciary; the contributions of external actors are comparably limited.

On the one hand, based on the data regarding the selection process for the first five batches of guiding cases, in all 22 cases, only two cases (Nos. 13 and 21) reflect consultation from other governmental departments during the internal review process of the SPC.

On the other hand, the contribution of academics has also been very limited. The data from Chart 2.3.1 is from the two biggest databases in China, "pkulaw" and "CNKI" (http://www.cnki.net). It indicates the research situation of academics both before and after the issuance of guiding cases, and shows a comparison with the research conducted by the judiciary. According to those curves, we can determine following:

Firstly, before the issuance of guiding cases, it is obvious that academics paid less attention to the original judgments of those candidate cases than the judiciary. 64% of the guiding cases' original judgments (36) have case notes written by judges or were selected as typical cases in certain areas. Normally, the case notes consisted of the main content of judgments and simple commentaries, and most authors of the case notes were the judges who decided the cases. Additionally, the main platforms for their publication were *The People's Judicature (Cases)* and *The Newspaper of the People's Court*. Those cases selected as typical cases can be divided into three categories: (1) original judgments selected as Gazette cases by the SPC; (2) original judgments selected as typical cases in certain areas and issued by the SPC; and (3) original judgments selected as typical cases by lower courts. Some cases may be covered by two or more categories simultaneously, such as the original judgments of Case No. 45 and Case No. 46 that were simultaneously selected as typical cases and Gazette cases and on which judges have written case notes. They are truly the "super star" cases within the judicial system. Nevertheless, only 28% of the guiding cases' original judgments (16) were referred to in academic literature before issuance, and most of the time in articles that do not focus on the individual case. Furthermore, the core legal journals, such as those within the list of CSSCI, demonstrate little interest in such a manner of case study.[90]

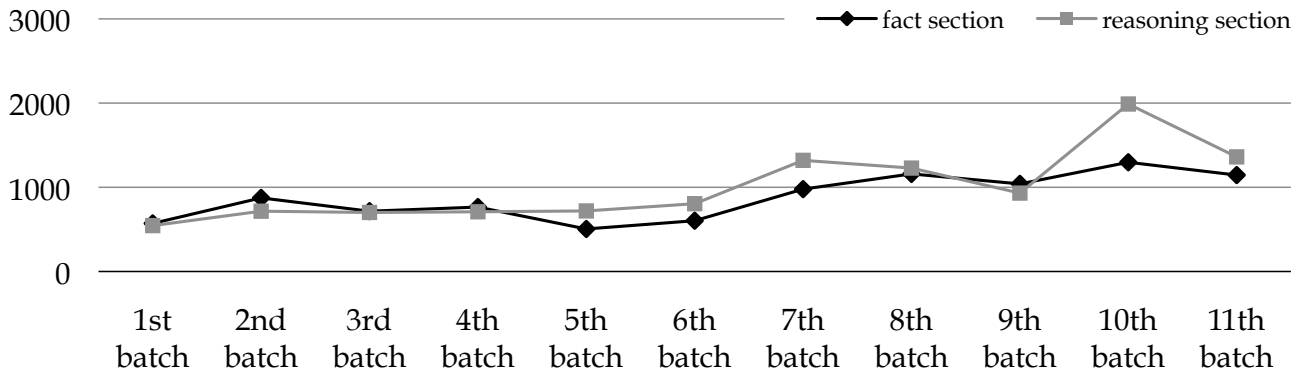
Secondly, the academic passion for guiding cases after their issuance reflects a sharp contrast with the above-described research situation before issuance. 73% of the guiding cases (41) have been referred to in academic articles, a considerable percentage of which focus on an individual case and are published in core legal journals.

Therefore, the current case study conducted by academics cannot undertake the task of shaping case law because: (1) research focusing on guiding cases that already have precedential force cannot contribute to the process of producing precedents. (2) More seriously, the current case study does not yet show a distinct awareness for finding leading cases and refining their *ratio decidendi*.[91] (3) Strictly speaking, most case studies authored by academics are not real case notes or comments on individual cases but research related to cases; the purpose of citing cases just serves in the argumentation of the

[90] We only could find four original judgments of guiding cases (Nos. 38, 45, 48 and 49) that are referred to in articles in core legal journals.

[91] *XIE Gen* (解亘), Rethinking Case Study (案例研究反思), Tribune of Political Science and Law (政法论坛) 2008, No. 4 p. 7.

Chart 3.1.1: Average Length of Fact and Reasoning Sections of Guiding Cases (2011–2015)



theses.[92] (4) There is not yet a well-established platform, such as a journal or review, for the publication of case notes.[93]

However, as a point of long-term consideration, the function of academics should be enhanced. As one scholar has pointed out, the case notes written by judges are mainly illustrations or explanations of judgments, lacking academic critique and theoretical analysis; thus, they cannot replace the role of academic case research.[94] The case study conducted by academics is pivotal for rebuilding the case law environment and tradition. To achieve future improvement, academics should enhance their cooperation with the judiciary and pay more attention to the typical cases published by the SPC. Meanwhile, academics should also develop a well-accepted pattern for case study, such as one addressing the structure, methodology and publishing platform for case notes.

3. The Editing of Guiding Cases

3.1. Average Length of Guiding Cases

Chart 3.1.1 indicates the average length of the fact and reasoning sections of the guiding cases found in each batch. As reflected by the interaction of the two curves, the SPC has changed its attitude towards the editing of guiding cases. Firstly, the average length is quite short in the first several batches, but it tends to become longer, especially in the last several batches. Secondly, in the first four batches, the average length of the factual section of the judgment is a bit longer than that of the reasoning section; since the 5th batch, the average length of the reasoning section has exceeded the average length of the factual section, except for the 9th batch. Furthermore, considering all 56 guiding cases, the average length of the factual section is 915 words, while that of the reasoning section is 1,073 words. Thereby, it can be inferred that the soundness of reasoning has gradually gained an increasing importance during the editing process of guiding cases.

However, the data above regarding the final version of guiding cases is inadequate to establish their concrete editing process. Thus, the next part will undertake a case-by-case comparison of texts in their final form as guiding cases with their form as original judgments in order to explore and evaluate the editing of guiding cases.

3.2. Search Results of Original Judgments

This part of the research searched out the original judgments of all 56 guiding cases in both of the two biggest databases for judicial decisions, "pkulaw" and "Judicial Opinions of China" (http://www.court.gov.cn/zgcpwsw/). Ultimately, 33 original judgments were found,[95] accounting for about 59%. Chart 3.2.1 shows that the search results for original judgments have no obvious connection with the time of issuance; for example, all original judgments of the 3rd batch have been found, while only half of the 10th and 11th batches could be found. In accordance with Chart 3.2.2, the search results for original judgments is directly related to the hierarchical position of the court delivering the final judgment: the higher the level of the court, the greater the likelihood that the original judgment could be found. According to Chart 3.2.3, except for the cases decided by the SPC, the geographic distribu-

[92] See *HE Jian* (supra note 32), pp. 172, 176, 183; Also see *XIE Gen* (supra note 91), p. 5.
[93] See *HE Jian* (supra note 32), pp. 178–184.
[94] See *XIE Gen* (supra note 91), p. 6.
[95] For some guiding cases, we could find relevant case notes written by judges, which include the content of judgments. But we have precluded this kind of form since they may modify or supplement the original judgments. The guiding cases for which we could find original judgments are: Nos. 1, 3, 4, 6, 8, 9, 10, 11, 12, 15, 16, 19, 20, 27, 29, 30, 32, 33, 34, 35, 36, 37, 38, 40, 42, 43, 44, 46, 47, 48, 52, 55 and 56.

Chart 3.2.1: Search Results for Original Judgments in Each Batch

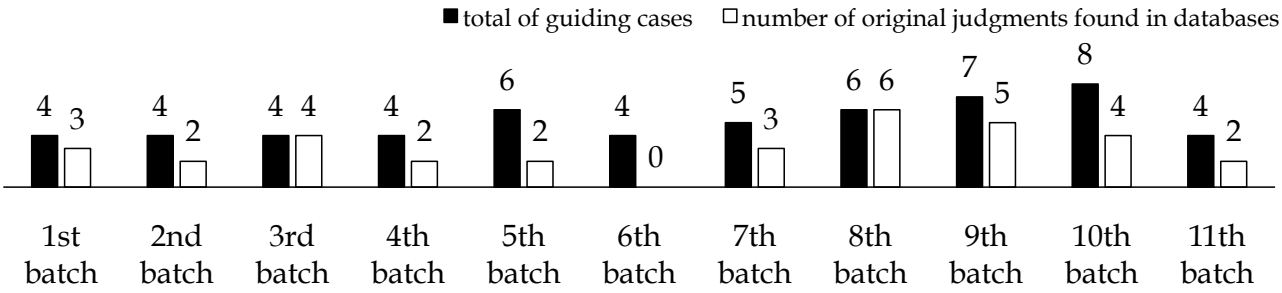


Chart 3.2.2: Search Results for Original Judgments at Each Court Level

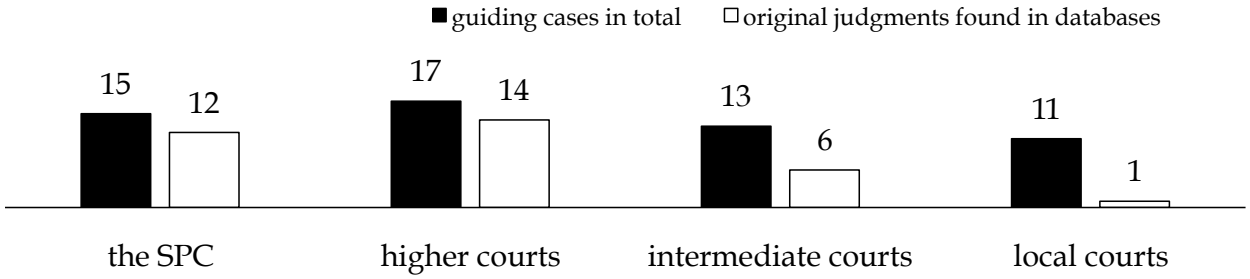
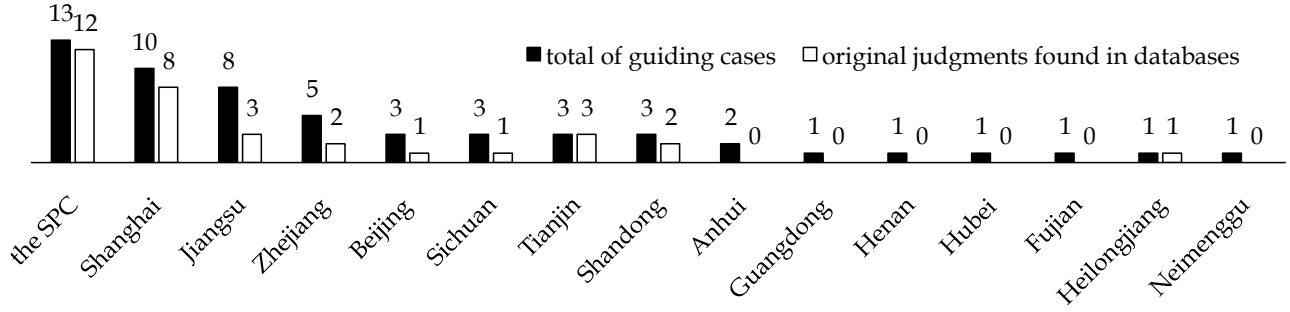


Chart 3.2.3: Search Results for Original Judgments of Different Provinces



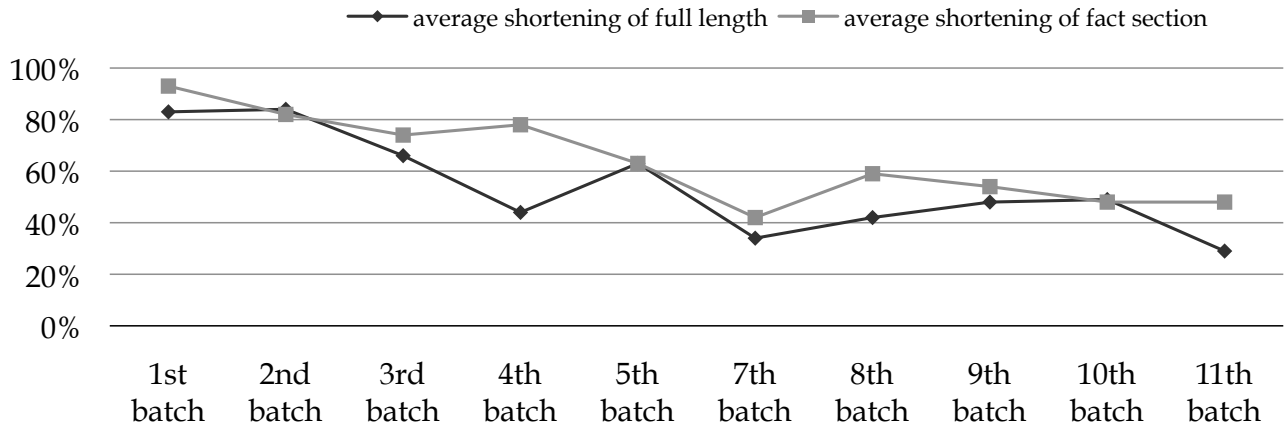
tion of the original judgments that could be found related to the geographic distribution of the guiding case's final court. In the more developed areas, such as Shanghai, Jiangsu, Zhejiang and Tianjin – which have produced far more guiding cases than other areas – more original judgments could be found, especially for Shanghai.

The above data actually reveals the situation of judgments published before the national reform resulting in the publication of all judgments online. Before such reform, the courts had no mandatory obligation to publish all of their judgments, and there was also no national platform for publishing judgments. The courts found at higher hierarchical positions and in developed areas are of a higher awareness and demonstrate a greater willingness to publish their judgments. The poor disclosure of judgments used to be one of the biggest complaints from academics, and it was claimed to be a reason for underdeveloped case study.[96] After the launching of "Judicial Opinions of China", which has been alleged to be the biggest judicial opinion website in the world,[97] the above situation might improve since all courts have the obligation to publish their judgments on such a website.

[96] *XIE Gen* (supra note 91), p. 9.

[97] China Has Built the Biggest Judicial Opinions Website on the World (中国目前已建成全球最大裁判文书网), (available at <http://www.chinacourt.org/article/detail/2015/12/id/1761060.shtml> visited January 5th, 2016.).

Chart 3.3.1: Average Shortening of the Length of the Guiding Cases Versions Compared to Original Judgments



3.3. The Editing of the Fact Section

For all the found original judgments, the average full length is 7,154 words; the average length of the fact section is 3,224 words and the average length of the reasoning section is 1,655 words. By contrast, in their guiding case versions, the average full length is 2,571 words, the average length of the fact section is 1,001 words and the average length of the reasoning section is 1101 words. From this data, we can deduce the following: (1) one general style of Chinese judgments in judicial practice is that the length of the fact section is much longer than that of the reasoning section; (2) for the guiding case versions, the average length of the fact and reasoning sections are very close, but the latter is a bit longer; (3) generally, the guiding cases' texts cut down the length of original judgments, the average shortening rate of the full length is 52%, that of the fact section is 53%, and that of the reasoning section is 33%. Nevertheless, unlike the overall length and the fact section – where both of them are abridged in every case – the length of the reasoning section is supplemented in some cases and abridged others.

According to Chart 3.3.1, the tendency of shortening both the whole length and the fact section is gradually declining. Such tendency coincides with the increasing tendency of the curves showing the average length of guiding case versions in Chart 3.1.1. Thereby, the conformity between final guiding case versions and their original judgments is increasing.

By a case-by-case comparison of original judgments with their guiding case versions, we can identify the following measures as always being used to compress the length and content of the original judgments, especially the fact section: (1) omitting procedural issues; (2) omitting evidence related issues; (3) omitting or simplifying the complaints, answers and other arguments submitted by the parties; (4) omitting or simplifying the facts unrelated to key points of judgment; (5) omitting the holdings of non-final courts;[98] and (6) refining the expression of facts. All of these measures reflect two requirements of the SPC in compiling the basic facts of guiding cases: distilling key points in the judgments and concise expression.[99]

3.4. The Editing of the Reasoning Section

Chart 3.4.1 shows that unlike the full length and the fact section, the curve indicating the change in the length of reasoning section of guiding cases is fluctuating as compared to the original judgments. The reasoning section is abridged in 21 guiding cases, with an average decrease rate of 45%, while the reasoning section in 10 guiding cases was supplemented or lengthened, with the average increase in length being by 82%. The chart illustrates the length of guiding cases after their length is adjusted, because among all the guiding cases it is common that the reasoning section of a single case may be simultaneously compressed and supplemented. Thus, even if a guiding case is shortened, certain content may also be added to its reasoning section and vice versa.

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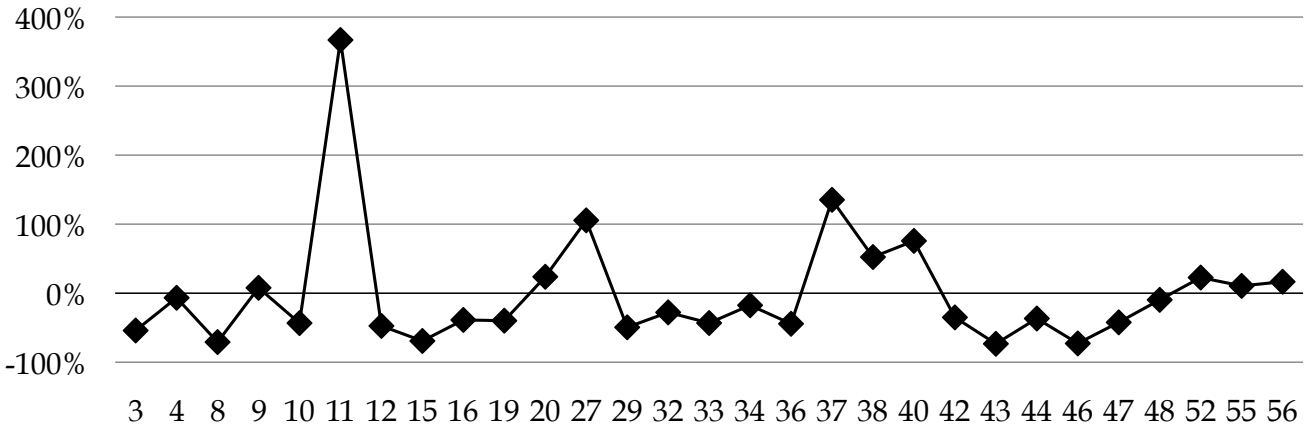
[98] This is not absolutely true for all cases. For instance, Guiding Case No. 34 incorporates the holding of the non-final courts in the basic facts, and several guiding cases include non-final holdings in the reasoning section.

[99] *HU Tengyun/WU Guangxia* (supra note 71), p. 33 ("Whether it is necessary to list the complaints, answers and evidence depends on whether they are related to the key points of a judgment. The facts, circumstances and application of law that relate to the key points of a judgment are to be illustrated concretely; those unrelated to the key points of a judgment, but related to the results of the judgments, are to be described concisely; whereas those without any influence on the key points or results of a judgment can be omitted"). Also see *HU Yunteng* (supra note 84), p. 84 (firstly, the facts shall be concise, clear … secondly, the facts are to relate to the key points of a judgment; an unrelated fact can be simplified or omitted … thirdly, the facts listed in the judgments are to be reorganized or generalized in narrative form).

Chart 3.4.1: Fluctuating Rate of the Length of Reasoning Section of Guiding Cases as Compared to Original Judgments



The reasoning is edited with an eye to the primary consideration of supporting the key points in a judgment. The key points of a judgment in guiding cases, which have the equivalent function as the holding or the *ratio decidendi* in other case law systems, are refined by the SPC; their reasonableness is related to the normative force of guiding cases established by the SPC. Since all courts have the mandatory obligation to apply or refer to guiding cases when deciding similar cases, it must first be confirmed which parts of the guiding cases have normative binding force. The key points of judgments are not simply a summary of all the reasons listed in the original judgments, instead being only those issues which have typical meaning or resolve novel problems; consequently, other untypical or non-novel issues and their reasons will be deleted in guiding cases. For example, the original judgment of Guiding Case No. 11 involves two corruption crimes, bribery and embezzlement.[100] However, only the crime of embezzlement has precedential value, clarifying the interpretations of "taking advantage of one's position" and "public property";[101] thereby, the reasons supporting the crime of bribery are deleted.

Additionally, under the *Provisions*, the key points of judgment in guiding cases are not restricted to the reasons of the original judgments. According to Art. 2 of *Provisions*, the standards for guiding cases only focus on the novelty, complexity and representativeness of the cases themselves, and not much attention is given to the quality of the judgments; this means the SPC can complement or modify the reasons based on the key points of judgment that they refine.[102] In some cases, the SPC incorporates the non-final courts' reasons in the guiding case version; in other cases, the SPC modifies or supplements the reasons from the original judgments; and for some cases the SPC even rewrites reasons. For example, although Guiding Case No. 11 has a typical significance for the interpretation of "taking advantage of one's position" and "public property", the reasoning in its original judgment comprises only 262 words.[103] The SPC has almost completely rewritten the reasoning in the guiding case version, with it now being 1,223 words.[104]

Academics have charged that modifying or rewriting the reasoning of an original judgment is a departure from judicial nature.[105] But some authors have also argued that it is necessary to enhance and supplement the reasoning and argumentation of the guiding cases at the beginning stage of a case law system. This not only gives the SPC an opportunity to illustrate its views on cases decided by lower courts, but also can serve to encourage lower courts to change their style and improve the quality of their judgments.[106] However, that is only a temporary expedient; over the long term the essential and ultimate solution must be improving the quality of judg-

[100] See (2009) Zhexing Erzhong Zi No. 34 (浙刑二终字第34号).

[101] Notice on the Issuance of the 3rd Batch of Guiding Cases (supra note 76), (the key points of judgment of Guiding Case No. 11: (1) In the constitution of a crime of embezzlement, "taking advantage of one's position" means taking advantage of the powers in one's position to take charge of, manage and handle public property and the related conveniences, including not only taking advantage of one's own position in taking charge of and managing public property but also taking advantage of the positions of other state personnel with a subordinate relationship in positions. (2) Land use rights are property interests within the meaning of "public property" as mentioned in paragraph 1, Article 382 of the Criminal Law and may be the objects of embezzlement.).

[102] See *HU Yunteng* (supra note 84), p. 85.

[103] See (2009) Zhexing Erzhong Zi No. 34 (supra note 100).

[104] Notice on the Issuance of the 3rd Batch of Guiding Cases (supra note 76), No. 11 guiding case.

[105] See *MOU Lüye* (牟绿叶), The Effect of Guiding Cases (论指导性案例的效力), Contemporary Law Review (当代法学) 2014, No. 1 pp. 114–16.

[106] See *TANG Wenping* (汤文平), The Editing of Guiding Cases: Taking Guiding Case No. 1 as an Example (论指导性案例之文本剪辑——尤以知道案例1号为例), Law and Social Development (法制与社会发展) 2013, No. 2, pp. 52–54.

ments. Recently, this kind of situation has tended to change gradually. In the latest round of judicial reform, strengthening the reasoning of judgments has become an important goal.[107] Furthermore, concerning the standard of guiding cases, Art. 2 and Art. 3 of the *Rules for Implementation* have also moved towards the quality of judgments, emphasizing especially the correct application of the law, the sufficiency of reasoning and the names of the judges. The quality of judgments has become the primary criterion for guiding cases, and the final guiding case version should reflect the original judgment.

4. The Citing of Guiding Cases

4.1. General Situation regarding the Citation of Guiding Cases

Over the past several years, the citation of guiding cases has become a hot topic among academics. On the one hand, that is because the *Provisions* only require subsequent judges hearing similar cases to "refer to" guiding cases and have not clarified whether the judges must cite the guiding cases or how this is to be done.[108] Thus, academic research is trying to solve these problems.[109] On the other hand, the academic focus has shifted from relative macro-issues, such as criticizing and questioning the unreasonableness of the case guidance system as a whole, to concrete issues such as normalizing the citation of guiding cases.[110] This situation is an important indicator that domestic academics have accepted the case guidance system as the basic framework for the Chinese case law mechanism.

The year 2015 was a landmark for the citation of guiding cases because the SPC released the *Rules for Implementation*, clarifying the detailed requirements for the citation of guiding cases: firstly, the courts have the obligation to cite relevant guiding cases when they decide similar cases; secondly, the guiding cases only can be cited in the reasoning section of judgments, instead of being cited as the basis of ruling; thirdly, the subsequent judges only need to cite the numbers and key points of judgment in relevant guiding cases; fourthly, the subsequent judges are to respond in the reasoning section of a judgment if any litigant quotes guiding cases.[111] Such rules for the citation of guiding cases indicate that they have been incorporated in the practical functioning of the judicial process, which is pivotal for the overall establishment of a case law mechanism since without subsequent citation the guiding cases have no chance to realize their functions at all.

Therefore, the issuance of the *Rules for Implementation* is a watershed for the citation of guiding cases. In order to demonstrate that, we have identified two limited periods for analysis: one is from the release of the 1st batch of guiding cases up until the issuance of the *Rules for Implementation* (December 20, 2011 – May 13, 2015), the other is from the issuance of the *Rules for Implementation* to the end of 2015 (May 13, 2015 – December 31, 2015).Then, we performed a search for the word "guiding case" in the database "Judicial Opinions of China"[112] for these two periods. Consequently, during the first period, running 42 months, a total of 255 judgments can be found; during the second period, only seven-and-a-half months long, 159 judgments can be found. Hence, because of the *Rules for Implementation*, the awareness of and willingness to cite guiding cases has strikingly increased in judicial practice.

Regarding the detailed situation on the citation of guiding cases, a workgroup of "pkulaw" has released an annual report from 2015, namely *The 2015 Annual Judicial Application Report on Guiding Cases from the SPC* (hereinafter the *Annual Report*), based on data in "pkulaw".[113] Based on the data and conclusions in the *Annual Report*, the following sub-sections (4.2 and 4.3) will analyze the situation regarding the citing of guiding cases and the manner of citing judicial practice.

4.2. Analysis of Cited Guiding Cases

According to the *Annual Report*, up to the end of the 2015, among all 56 guiding cases, there are 25 guiding cases, in aggregate, that have been cited in subsequent decisions. Additionally, Chart 4.2.1 shows that Guiding Case No. 24 is an exception among all cited guiding cases, its having been cited

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[107] See Comprehensively Deepening Reform of the People's Courts (supra note 36), (Art. 34 For those first instance cases that are seriously disputed by the parties and that have significantly attracted public attention, all second instance cases, all retrial cases, and cases that are discussed by the judicial committee of each courts, the reasoning of judgments shall be strengthened … [the judiciary should] build a profound mechanism to force and encourage the judges to improve the reasoning of judgments, build a relevant evaluation system, and let the level of reasoning of judgments become an important factor that can influence the evaluation and promotion of judges.)

[108] The Provisions (supra note 2), Art. 7.

[109] See *MOU Lüye* (supra note 105), pp. 116–18. *SONG Xiao* (supra note 60), pp. 68–72.

[110] *HUANG Zemin* (黄泽敏)/*ZHANG Jicheng* (张继成), A Normative Study on Citation Methods for Guiding Cases: Focusing on Treating the Key Points of Judgment as Exclusive Reasons for Ruling (指导性案例援引方式之规范研究——以将裁判要点作为排他性判决理由为核心), Studies in Law and Business (法商研究) 2014, No. 4. *ZHANG Qi* (张骐), Further Discussion on Judging Similar Cases and Applying Guiding Cases: From the Perspective of Contemporary Judges' Experiences on How to Apply Guiding Cases (再论类似案件的判断与指导性案例的使用——以当代中国法官对指导性案例的使用经验为契口), Law and Social Development (法制与社会发展) 2015, No. 5.

[111] The Rules for Implementation (supra note 4), Arts. 9, 10, 11.

[112] Since this database was established on July 1, 2013, its collection of older judgments is presumably incomplete.

[113] The 2015 Annual Judicial Application Report on Guiding Cases from the SPC (最高人民法院指导性案例司法应用年度报告（2015）), December 22th, 2015, (available at <http://eproxy2.lib.tsinghua.edu.cn/rwt/160/http/P75YPLUDNBVX6ZLMMF5XT5UGN6YGG55N/Notices/NoticeFulltext.aspx?NoticeId=1383&listType=2> visited January 6th, 2016).

Chart 4.2.1: Citing Frequencies of Guiding Cases (2015)

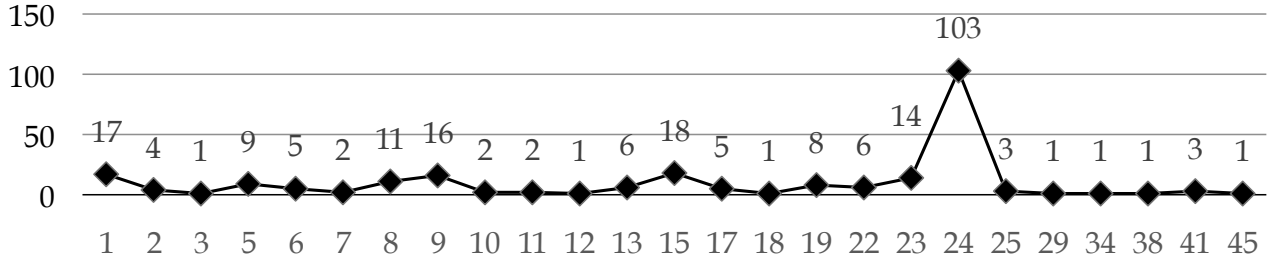


Chart 4.2.2: Instances of Cited Guiding Cases

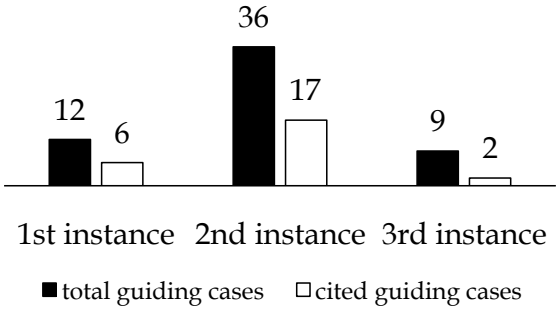
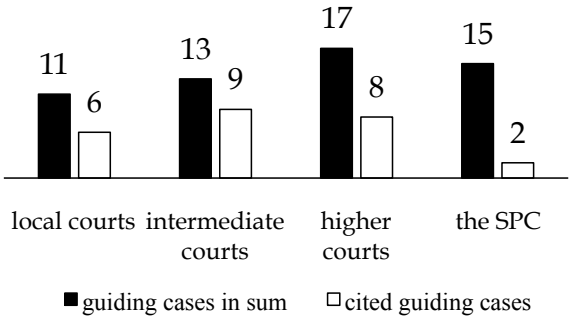


Chart 4.2.3: Hierarchies of Cited Guiding Cases



103 times in a single full year; the citing frequencies of the other 24 guiding cases are relatively low, with all being under 20 times and only five cases having been cited more than 10 times.[114] Thus, we may conclude that the citing rate of guiding cases is still very low in judicial practice, whether in respect of the quantity of cited cases or the citing frequencies of such cases.

Combining Chart 4.2.2 and Chart 4.2.3, it is easy to determine that most cited guiding cases are from second instance cases that were decided by intermediate courts and higher courts; at the same time, this two levels of courts have also produced more guiding cases than other two levels. Additionally, although the SPC issued more guiding case judgments than local courts, more local court guiding cases have been cited than those from the SPC. As has been discussed, the first instance cases or cases from local courts are not proper candidates for guiding cases; nevertheless, these kinds of cases do meet with a certain market need in judicial practice. In order to simultaneously maintain the judicial nature of the case guidance system and meet the practical needs of the lower courts, future improvement can be achieved by selecting more second instance cases from intermediate courts instead of first instance cases from local courts. Illustrative here is Guiding Case No. 24, a second instance case decided by an intermediate court that exhibits the highest citing frequency.

4.3. Analysis of Citing Practice

According to the statistics provided in the *Annual Report*, for the year 2015; 235 of judgments cite guiding cases when the judges make decisions. However, among those 235 judgments, only 79 judgments cite guiding cases expressly, with 59 cases citing guiding cases on the judges' own initiative and the other 20 cases citing guiding cases in response to the litigants' requests. By contrast, judges do not cite guiding cases explicitly in the other 156 cases. Under this kind of situation, the litigants have demanded the application of guiding cases in their own arguments; if the judges agree to apply a guiding case, they usually do not cite the guiding case explicitly in the ruling/reasoning, instead deciding the case at hand with the approaches or rules in the guiding cases. Chart 4.3.1 shows that only 27% of the cases cite guiding cases on the judges own initiative, whereas 73% of the cases cite guiding cases as a result of their having been raised by the litigants.[115] Thus, although the *Rules for Implementation* require that judges must respond in the reasoning of judgments if any litigant refers to guiding cases, the cit-

[114] Id.

[115] Id.

Chart 4.3.1: Citing Subjects

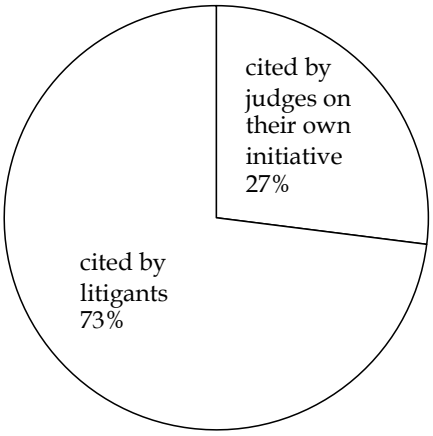


Chart 4.3.2: Hierarchical Position of Citing Courts

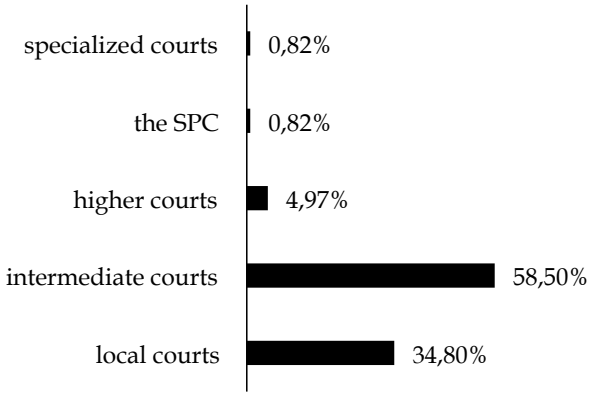
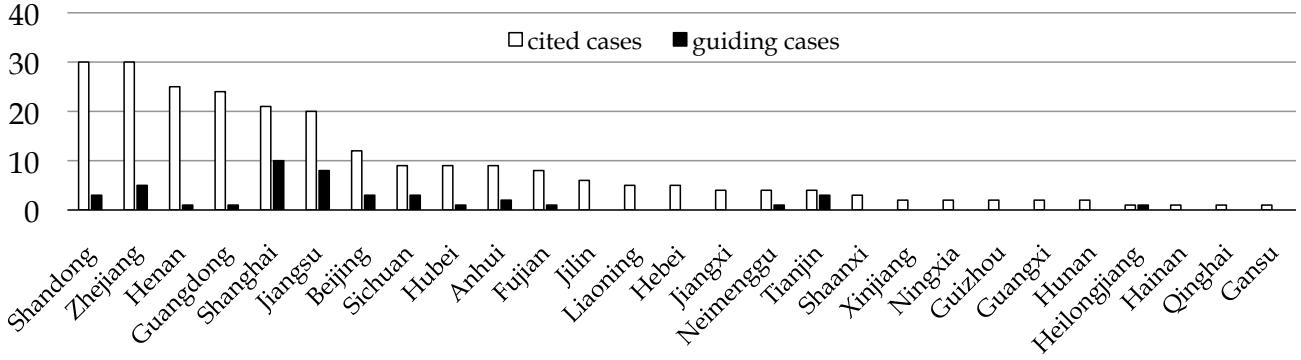


Chart 4.3.3: Geographic Distribution of Cited Cases



ing practice still has some ways to go to reach such requirement.

From Chart 4.3.2,[116] it is quite obvious that the local courts and intermediate courts are the main citers of guiding cases. Although the higher courts and the SPC have produced more guiding cases than the two lower court levels, their citing rate is pretty low.

Chart 4.3.3[117] shows the geographic distribution of where guiding cases have been cited. Although only 14 provinces have produced guiding cases, there are already 27 provinces that have cited guiding cases in their judicial practice, covering the majority of provinces of China. However, the overall quantity of cited cases is relatively low, for most provinces there are less than 10 cited cases. Furthermore, those provinces where the quantity of cited cases is relatively higher are normally the more developed areas, such as Shanghai, Zhejiang, Jiangsu and Guangdong, although also including He'nan, where the economic development is not so remarkable. Finally, except for Tianjin, the provinces which have produced guiding cases generally cite guiding cases more frequently than the other provinces that have not produced guiding cases.

VI. Conclusion

In ancient China, because of empirical philosophy, case law played an important role. However, in recent several centuries, beginning with the decline of the old empire this legal tradition faced serious threat. Over more or less the last one hundred years, China embarked on a process of transplanting the legal philosophy, conceptions and rules of western countries, especially from civil law countries; during this process, the old case law tradition was almost wholly cast aside. After several decades of peaceful and high-speed development, China has rebuilt its comprehensive influence in global affairs. Simultaneously, in the domestic context, China is facing a kind of transition period, encompassing the economic, political and legal systems. At this point, both academics and the judiciary have noticed the attractions of case law. Internal to the judiciary, case law mechanisms can strengthen judgments' con-

[116] Id.
[117] Id.

sistency, judicial efficiency and adjudicatory quality. External to the judiciary, case law mechanisms can help to harmonize the relationship between the judiciary and other governmental branches, and it also can stimulate the further establishment of the legal community by encouraging cooperation between the judiciary and academics. Furthermore, at a macro-level, case law can help China not only to rebuild legal beliefs, tradition and culture, but also to maintain stability in the whole society. All of the above reasons are significant in China's quest to go through the transition period smoothly. However, because of the centralized power structure, the special judicial organization and the strong authority of the SPC, the mechanism of case law in China is different from other currently existing case law models. The SPC has designed the case guidance system as an extra-adjudicatory mechanism in its reform of case law and is implementing the system with a top down approach.

In reviewing the past five years of the case guidance system – from 2010 to 2015 – it is quickly ascertainable that achievements and inefficiencies coexist across the whole system. Generally, the case guidance system has gained increasing acceptance in both the judiciary and academia. The standards for selecting, editing and citing guiding cases are gradually improving, an example being the declining percentage of cases from first-instance decisions or local courts; the SPC divisions have gained more substantive authority during the selection process; more guiding cases are selected from "star cases" inside the judiciary; the conformity between guiding case versions and their original judgment counterparts is increasing as well; and the requirements for citing guiding cases is becoming more clear. Nonetheless, the case guidance system is ultimately in only the beginning stage and many problems remain unsettled. For example, the output of guiding cases is low and unstable; the participation of academia is very limited; the quality of some candidate cases, especially in their reasoning, is not refined enough; and guiding cases are not yet widely applied in judicial practice.

At the current stage, every step in the progress of the case guidance system relies heavily on the institutional authority of the SPC, which is acceptable and necessary at the initial stages of this reform. However, from a long-term perspective, a more profound case law environment needs to be fostered. This process requires the cooperation of all relevant actors, including the SPC, each of the court layers, and academia. Moreover, the cases guidance system needs to reach a stage where it advances as a process of natural evolution instead of – as is currently the case – relying heavily on the reform-oriented design of the SPC; only then can it fully achieve its intended functions, such as enhancing the rule of law, promoting independent legal development and rebuilding legal beliefs and tradition.

* * *

Analyse der ersten fünf Jahre des Systems der Anleitungsfälle

War noch im alten China das Fallrecht von großer Bedeutung, verlor sich diese Tradition über die letzten gut 100 Jahre hinweg fast gänzlich. Nach Dekaden einer stabilen und rasanten Entwicklung befindet sich die Volksrepublik heute in einer Übergangsphase. Wissenschaft und Rechtsprechung entdecken die Vorzüge des Fallrechts, die für einen reibungslosen Ablauf dieser Übergangsphase wichtig sind, wieder. Aufgrund der zentralstaatlichen Struktur des Landes, der speziellen Organisation der Rechtsprechung und der starken Stellung des Obersten Volksgerichts ist der Fallrechtsmechanismus jedoch nicht mit den bislang existierenden Systemen identisch. Das Oberste Volksgericht hat das System der Anleitungsfälle außerhalb seiner Rechtsprechungstätigkeit zum Ausbau des Fallrechtssystems erschaffen und verwirklicht so einen Top-Down-Ansatz. Untersucht man dieses System der Anleitungsfälle der letzten fünf Jahre – von 2010 bis 2015 – so wird rasch deutlich, dass dessen Vorzüge und Ineffizienzen im gesamten System koexistieren. Da sich das System der Anleitungsfälle noch in den Anfängen befindet, bestehen weiterhin zahlreiche Probleme. Jeder Entwicklungsschritt des Anleitungssystems hängt insbesondere weitgehend von der institutionellen Autorität des Obersten Volksgerichts ab. Auf lange Sicht wird es nötig sein, ein breit angelegtes Fallrechtsumfeld zu begründen, sodass das System der Anleitungsfälle einen Reifegrad erreicht, der einem natürlichen Evolutionsprozess gleichkommt.