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## Towards the Rule of Law: Judicial Lawmaking in China

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## **Abstract**

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## **Keywords**

legislation, common law, reform, legal system, guiding cases

# Towards the Rule of Law: Judicial Lawmaking in China

VAILLO LO\*

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## Abstract

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## I Introduction

The sources of law vary among jurisdictions. Nevertheless, the two most common sources of law are legislation and court decisions. Since legal norms are central to any legal system, the importance of understanding the sources of law cannot be overstated. Indeed, a basic knowledge of the sources of law of a foreign jurisdiction is indispensable to an understanding of its legal system.

In a common law jurisdiction, such as Australia, judges may develop law in deciding cases. Thus, the major sources of Australian law are legislation and case law. Like other transition economies, China transformed its legal system from being entirely socialist to essentially civil-socialist law over a span of almost four decades. Chinese judges, like their counterparts in civil law countries, are to apply, rather than interpret, legal norms. Although the bulk of Chinese law is composed of legislation, lawmaking is not completely beyond the reach of the Chinese

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judiciary. Over the years, the Supreme People's Court ('SPC') has promulgated judicial interpretations (司法解释) to elucidate statutory provisions. Moreover, the introduction of the system of guiding cases (指导案例制度) has raised the question of whether China has adopted, or will espouse, the doctrine of case precedent, thereby creating an avenue for the Chinese judiciary to engage in lawmaking. This article, therefore, has two objectives: (1) to ascertain whether the promulgation of judicial interpretations makes judicial lawmaking possible in China, and (2) to examine what constitutes the system of guiding cases and to explore whether that system may create case precedents as another source of law in China.

Toward these aims, this article consists of five substantive parts. Part II provides a succinct account of judicial interpretations in China. Part III discusses the system of guiding cases and its implementation progress to date. Part IV investigates the relationship between judicial interpretations and guiding cases (指导性案例). Part V explores the role of judicial interpretations and guiding cases in China's ongoing legal reforms. Part VI draws conclusions.

## II Judicial Interpretations

According to the *Chinese Constitution* and the *Legislation Law*, the National People's Congress ('NPC') (and its Standing Committee) are to enact and amend basic laws (基本法);<sup>1</sup> the State Council and its ministries and committees are to formulate and promulgate administrative regulations (行政法规) and rules (规章);<sup>2</sup> the local people's congresses

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<sup>1</sup> The NPC has the power to enact and amend basic laws relating to criminal matters, civil affairs, and government organs, as well as other types of basic laws. Moreover, the NPC Standing Committee has the power to enact and amend laws other than those that should be made by the NPC, and while the NPC is not in session, to supplement and amend those laws made by the NPC. Examples of matters to be regulated by basic law include crimes and punishments; deprivation of political rights; basic systems relating to economics, fiscal policy, taxes, customs, finance, and foreign trade; and litigation and arbitration systems. «中华人民共和国宪法» [Constitution of the People's Republic of China] arts 62, 67; «中华人民共和国立法法» [Legislation Law of the People's Republic of China] (People's Republic of China) National People's Congress, Order No 31, 15 March 2000, arts 7–8.

<sup>2</sup> The State Council is empowered to enact administrative regulations to implement basic laws as well as regulations regarding matters falling within its administrative power. Moreover, the NPC and its Standing Committee can authorise the State Council to enact administrative regulations on those matters for which laws have not been made. «中华人民共和国宪法» [Constitution of the People's Republic of China] art 89; «中华人民共和国立法法» [Legislation Law of the People's Republic of China] (People's Republic of China) National People's Congress, Order No 31, 15 March 2000, art 65. Furthermore, ministries and commissions under the State Council, the People's Bank of China, the State Audit Office, and administrative organs directly under the central government may enact rules on matters falling within their respective administrative powers so as to implement laws as well as the State Council's administrative regulations, resolutions, and decrees: «中华人民共和国宪法» [Constitution of the People's Republic of China] art 90; «中华人民共和国立法法»

(and their standing committees) in provinces and municipalities directly under the central government<sup>3</sup> are to enact local regulations (地方性法规);<sup>4</sup> and the local people's congresses in autonomous regions and counties have the right to enact self-governing regulations (自治条例) and separate regulations (单行条例) in the light of local political, economic, and cultural circumstances.<sup>5</sup> Nonetheless, neither the *Chinese Constitution* nor the *Legislation Law* states that the Chinese judiciary is empowered to enact and amend laws.

With respect to statutory interpretation, the *Chinese Constitution* and the *Legislation Law* vest the interpretive power in the NPC Standing Committee,<sup>6</sup> and the interpretations of the NPC Standing Committee have the same legal effect as that of law.<sup>7</sup> Even so, the NPC has authorised the SPC to interpret laws relating to their specific application at trial.<sup>8</sup> To carry out its mandate, the SPC promulgated the *Several Provisions regarding the Work of Judicial Interpretations* ('*Jl Provisions*'), first in

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[Legislation Law of the People's Republic of China] (People's Republic of China) National People's Congress, Order No 31, 15 March 2000, art 80.

<sup>3</sup> In China, provinces and municipalities directly under the central government (namely, Beijing, Tianjin, Shanghai, and Chongqing) are at the same level in the administrative hierarchy.

<sup>4</sup> People's Congresses and their standing committees of provinces, autonomous regions, and municipalities directly under the central government may enact local regulations in the light of the actual circumstances and practical needs of their respective administrative areas: «中华人民共和国宪法» [Constitution of the People's Republic of China] art 100; «中华人民共和国立法法» [Legislation Law of the People's Republic of China] (People's Republic of China) National People's Congress, Order No 31, 15 March 2000, art 72. In addition, the People's Governments of provinces, autonomous regions, and municipalities directly under the central government, and similar bodies may enact local government rules (地方政府规章) to implement basic laws, administrative regulations and local regulations, and to deal with concrete administrative matters within their respective administrative districts: «中华人民共和国立法法» [Legislation Law of the People's Republic of China] (People's Republic of China) National People's Congress, Order No 31, 15 March 2000, art 82.

<sup>5</sup> «中华人民共和国宪法» [Constitution of the People's Republic of China] art 116; «中华人民共和国立法法» [Legislation Law of the People's Republic of China] (People's Republic of China) National People's Congress, Order No 31, 15 March 2000, art 75.

<sup>6</sup> «中华人民共和国宪法» [Constitution of the People's Republic of China] art 67; «中华人民共和国立法法» [Legislation Law of the People's Republic of China] (People's Republic of China) National People's Congress, Order No 31, 15 March 2000, art 45.

<sup>7</sup> «中华人民共和国立法法» [Legislation Law of the People's Republic of China] (People's Republic of China) National People's Congress, Order No 31, 15 March 2000, art 50.

<sup>8</sup> «全国人民代表大会常务委员会关于加强法律解释工作的决议» [Resolution of the Standing Committee of the National People's Congress regarding Strengthening the Work of Statutory Interpretation] (People's Republic of China) National People's Congress Standing Committee, 10 June 1981. See also «中华人民共和国人民法院组织法» [Law of the People's Republic of China on the Organisation of the People's Courts] (People's Republic of China) National People's Congress, Order No 3, 5 July 1979, art 32. Although the Supreme People's Procuratorate is authorised to issue interpretations of laws relating to their specific application in procuratorial work, this article deals only with judicial interpretations promulgated by the SPC.

1997 and then again in 2007.<sup>9</sup> The *Ji Provisions* not only outline the procedure for formulating judicial interpretations,<sup>10</sup> but also clearly state that judicial interpretations have legal effect.<sup>11</sup> Moreover, if a judicial interpretation is used as the basis for adjudication, it should be cited in the judicial document; if a judicial interpretation and the relevant law are used as the bases for adjudication, the court should cite the relevant law first, and then the judicial interpretation.<sup>12</sup> Arguably, the SPC may engage in lawmaking by promulgating judicial interpretations relating to the application of law at trial.

As stated in the *Ji Provisions*, judicial interpretations should be formulated according to law and the relevant legislative spirit and in the light of the practical needs arising from adjudicatory work.<sup>13</sup> Likewise, the *Legislation Law* provides that judicial interpretations should be directed primarily to specific legal provisions and should accord with the legislative purpose, principle, and original intent.<sup>14</sup> For many years, judicial interpretations could be promulgated in three different forms: interpretation (解释), provision (规定), and reply (批复).<sup>15</sup> Interpretations are used to explain how a particular law should be applied or how the law should be applied to the same type of cases and the same type of issues.<sup>16</sup> Provisions are issued when it is necessary to provide standards or opinions regarding trial work.<sup>17</sup> Where the high people's courts or the military courts have submitted requests for instructions regarding specific application of law at trial, the SPC will issue replies.<sup>18</sup>

As of 2007, judicial interpretations can be promulgated in four different forms: interpretation, provision, reply, and decision (决定).<sup>19</sup> Interpretations are used to explain how a particular law should be applied or how judicial interpretations should be applied to a particular kind of case or a particular type of issue.<sup>20</sup> Examples of interpretations are the *Interpretation regarding Several Issues of the Application of the Guarantee Law*,<sup>21</sup> and the *Interpretation regarding Several Issues of the*

<sup>9</sup> «最高人民法院关于司法解释工作的若干规定» [Supreme People's Court's Several Provisions regarding the Work of Judicial Interpretation] (People's Republic of China) Supreme People's Court, 23 June 1997 (repealed in 2007) ('1997 *Ji Provisions*') and 9 March 2007 ('2007 *Ji Provisions*').

<sup>10</sup> 1997 *Ji Provisions*, arts 3, 5–8; 2007 *Ji Provisions*, arts 8–24.

<sup>11</sup> 1997 *Ji Provisions*, art 4; 2007 *Ji Provisions*, art 5.

<sup>12</sup> 1997 *Ji Provisions*, art 14; 2007 *Ji Provisions*, art 27.

<sup>13</sup> 2007 *Ji Provisions*, art 3.

<sup>14</sup> «中华人民共和国立法法» [Legislation Law of the People's Republic of China] (People's Republic of China) National People's Congress, Order No 31, 15 March 2000, art 104.

<sup>15</sup> 1997 *Ji Provisions*, art 9.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> 2007 *Ji Provisions*, art 6.

<sup>20</sup> *Ibid.*

<sup>21</sup> «最高人民法院关于适用《中华人民共和国担保法》若干问题的解释» [Supreme People's Court's Interpretation regarding Several Issues of the Application of the Guarantee

*Application of the Administrative Procedure Law.*<sup>22</sup> Based on legislative spirit, provisions are issued to provide standards, opinions, and so forth regarding trial work.<sup>23</sup> For instance, the *Several Provisions regarding Case Numbers of the People's Courts* standardise the compilation, usage and management of case numbers,<sup>24</sup> and the *Several Opinions regarding Transparency in the Enforcement Process of the People's Courts* explain how information about the enforcement process should be provided.<sup>25</sup> Where the high people's courts or the military courts have submitted requests for instructions regarding specific application of law at trial, replies should be used.<sup>26</sup> For example, the SPC has replied to the High People's Court of Sichuan Province regarding how to count the time-period in which arbitration of personnel disputes should be applied.<sup>27</sup> Decisions, however, should be used to amend or repeal judicial interpretations.<sup>28</sup> One example is the *Decision Regarding the Repeal of the Eleventh Batch of Judicial Interpretations and Judicial Interpretation-Type Documents*.<sup>29</sup>

Since only the Adjudicatory Committee of the SPC can issue judicial interpretations through a standardised procedure (including such steps as putting the interpretation on the agenda, discussion, drafting, and revision), judicial interpretations consist primarily of rules, principles, or guidelines with general applicability.<sup>30</sup> Over the years, the SPC has promulgated numerous judicial interpretations for various areas of law in order to: (1) explain specific legal provisions;<sup>31</sup> (2) provide particulars to

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Law of the People's Republic of China] (People's Republic of China) Supreme People's Court, 8 December 2000.

<sup>22</sup> «最高人民法院适用《中华人民共和国民事诉讼法》若干问题的解释» [Supreme People's Court's Interpretation regarding Several Issues of the Application of the Administrative Procedure Law of the People's Republic of China] (People's Republic of China) Supreme People's Court, 22 April 2015.

<sup>23</sup> 2007 *Jl Provisions*, art 6.

<sup>24</sup> «最高人民法院关于人民法院案件案号的若干规定» [Supreme People's Court's Several Provisions regarding Case Numbers of the People's Courts] (People's Republic of China) Supreme People's Court, 13 May 2015.

<sup>25</sup> «最高人民法院关于人民法院执行流程公开的若干意见» [Supreme People's Court's Several Opinions regarding Transparency in the Enforcement Process of the People's Courts] (People's Republic of China) Supreme People's Court, 3 September 2014.

<sup>26</sup> 2007 *Jl Provisions*, art 6.

<sup>27</sup> «最高人民法院关于人事争议申请仲裁的时效期间如何计算的批复» [Supreme People's Court's Reply regarding How to Count the Time Period for Applying for Arbitration of Personnel Disputes] (People's Republic of China) Supreme People's Court, 12 September 2013.

<sup>28</sup> 2007 *Jl Provisions*, art 6.

<sup>29</sup> «最高人民法院废止部分司法解释和司法解释性文件（第十一批）的决定» [Supreme People's Court's Decision regarding the Repeal of Some Judicial Interpretations and Judicial Interpretation-Type Documents (11th Batch)] (People's Republic of China) Supreme People's Court, 12 January 2015.

<sup>30</sup> To facilitate the administration of justice, the SPC may authorise high people's courts to formulate specific rules for lower-level people's courts within their jurisdictions.

<sup>31</sup> See, eg, «最高人民法院审理拒不支付劳动报酬刑事案件适用法律若干问题的解释» [Supreme People's Court's Interpretation regarding Several Issues of the Application of

principled provisions;<sup>32</sup> (3) fill statutory gaps;<sup>33</sup> (4) resolve common problems encountered in adjudicatory work;<sup>34</sup> and (5) standardise judicial conduct of lower court judges.<sup>35</sup> In other words, judicial interpretations are promulgated to explicate legal norms, foster the uniform application of law, and enhance professional competency.

Consequently, judicial interpretations in China are different from interpretations made by judges in Australia and other common law jurisdictions. First, judicial interpretations in China can be promulgated only by the SPC, but not made by judges who are interpreting legal provisions to find solutions to legal problems. Second, the SPC issues judicial interpretations whenever it deems it appropriate, not while deciding actual cases. Although the Chinese judiciary does not develop law by adjudging cases, the *JI Provisions*, as discussed above, clearly state that judicial interpretations have legal effect and can be used by lower people's courts as the basis for a judgment (裁决) or ruling (裁定).<sup>36</sup> As a result, the Chinese judiciary can, in effect, participate in lawmaking through the promulgation of judicial interpretations.<sup>37</sup>

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Law in Adjudicating Refusal to Pay Labour Remuneration in Criminal Cases] (People's Republic of China) Supreme People's Court, 16 January 2013 (explaining the terms of 'evasion of paying labour remuneration to labourers by such means as transfer of property, fleeing, and hiding', 'the amount is relatively great', and 'causing serious consequences').

<sup>32</sup> See, eg, «最高人民法院于审理劳动争议案件适用法律若干问题的解释（四）» [Supreme People's Court's Interpretation regarding Several Issues of the Application of Law in Adjudging Labour Dispute Cases (4)] (People's Republic of China) Supreme People's Court, 18 January 2013 (giving specific instructions on how various issues in labour disputes should be handled).

<sup>33</sup> See, eg, «最高人民法院于审理环境侵权责任纠纷案件适用法律若干问题的解释» [Supreme People's Court's Interpretation regarding Several Issues of the Application of Law in Adjudicating Environmental Infringement Liability Disputes] (People's Republic of China) Supreme People's Court, 1 June 2015 (providing guidelines for granting remedies in environmental infringement cases).

<sup>34</sup> See, eg, «最高人民法院于《中华人民共和国企业破产法》施行时尚未审结的企业破产案件适用法律若干问题的解释» [Supreme People's Court's Interpretation regarding Several Issues of the Application of Law in Adjudicating Pending Enterprise Bankruptcy Cases When the Enterprise Bankruptcy Law of the People's Republic of China Was Implemented] (People's Republic of China) Supreme People's Court, 25 April 2007 (explaining how to deal with various bankruptcy issues in pending cases that have been filed before the implementation of the Enterprise Bankruptcy Law).

<sup>35</sup> See, eg, «最高人民法院于人民法院登记立案若干问题的规定» [Supreme People's Court's Provisions on Several Issues regarding Registering and Docketing of Cases in People's Courts] (People's Republic of China) Supreme People's Court, 15 April 2015 (providing standards for the registering and docketing of civil, administrative, and private criminal prosecution cases in people's courts); «最高人民法院于人民法院在互联网公布裁判文书的规定» [Supreme People's Court's Provisions regarding the Publication of Adjudicatory Documents by People's Courts on the Internet] (People's Republic of China) Supreme People's Court, 21 November 2013 (providing standards for the publication of judgments by people's courts on the Internet).

<sup>36</sup> In most cases, the people's court renders a written judgment after a trial. However, the people's court is to render a ruling on such issues as refusal to accept a case, jurisdictional challenge, approval or disapproval of withdrawal of a lawsuit, suspension and termination of enforcement, and denial of enforcement of an arbitration award: «中华人民共和国民事诉讼法



### III The System of Guiding Cases

In 2005, the SPC raised the concept of guiding cases in its Second Five-Year Reform Outline (2004–2008).<sup>38</sup> In 2010, the SPC promulgated the *Provisions regarding the Work of Guiding Cases* ('GC Provisions'), officially launching the system of guiding cases to summarise adjudicatory experiences, unify the application of law, enhance the quality of adjudication, and safeguard the impartial administration of justice.<sup>39</sup> In 2015, the SPC promulgated the *Detailed Rules on the Provisions regarding the Work of Guiding Cases* ('Detailed Rules') to further explain who can recommend cases for consideration to be published as guiding cases and how recommendations should be submitted.<sup>40</sup> According to the *Detailed Rules*, guiding cases are judicial decisions that have come into effect, embody clear findings of facts and correct application of law, provide sufficient explanation of the judgment, yield good legal and social effects, and furnish general guidance for adjudging similar cases.<sup>41</sup> This Part, therefore, highlights what major purposes the introduction of guiding cases tries to serve, what selection criteria are to be used, and how recommendation is to be made.

To a large extent, the system of guiding cases is created to address problems arising from the non-uniform application of law. Owing to the phenomenon of 'different adjudicatory outcomes for the same type of cases or different interpretations for the same law' (同案不同判, 同法不同解), which has a negative impact on the credibility of the judiciary, as well as the abstractness and targetless orientation of judicial interpretations, guiding cases are used to properly guide judges and to

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讼法》[Civil Procedure Law of the People's Republic of China] (People's Republic of China) National People's Congress Standing Committee, Order No 44, 9 April 1991, art 154.

<sup>37</sup> Thus, it has been suggested that the 'legal effect' of judicial interpretations be clarified by legislation to prevent conflicts in the application of law, and that the SPC confine its interpretive power within the scope of authorisation, that is, interpreting concrete statutory norms in accordance with their legislative purpose, principle, and original intent: 王成 [Wang Cheng], «最高法院司法解释效力研究» [The Study of the Effect of Judicial Interpretation by the Supreme Court] (2016) 28(1) 中外法学 *Peking University Law Journal* 263.

<sup>38</sup> «最高人民法院人民法院第二个五年改革纲要» [Supreme People's Court's Second Five-Year Reform Outline for the People's Courts] (People's Republic of China) Supreme People's Court, 26 October 2005.

<sup>39</sup> «最高人民法院关于案例指导工作的规定» [Supreme People's Court's Provisions regarding the Work of Guiding Cases] (People's Republic of China), Supreme People's Court, 26 November 2010, Preamble. For a discussion on the forerunners of guiding cases, see Editorial Note, 'Chinese Common Law?' Guiding Cases and Judicial Reform' (2016) 129(8) *Harvard Law Review* 2213, 2215–17.

<sup>40</sup> «最高人民法院关于案例指导工作的规定实施细则» [Detailed Rules on Supreme People's Court's Provisions regarding the Work of Guiding Cases] (People's Republic of China) Supreme People's Court, 13 May 2015.

<sup>41</sup> *Detailed Rules*, art 2.

unify the standards for the application of law.<sup>42</sup> Moreover, as a result of the complexity and volatility of disputes arising from social transformations, the existence of statutory lacunae, and the inevitability of exercising judicial discretion, guiding cases will not only provide judges with direction and guidance in adjudging disputes, but can also restrict the scope of judicial discretion and standardise adjudicatory conduct, thereby effecting predictability and uniformity of adjudication.<sup>43</sup> In other words, guiding cases are meant to illustrate how specific legal norms should be applied or how certain types of disputes have been resolved.

To be eligible for recommendation, a court decision must have attracted widespread attention from society; the statutory provision(s) in question must be relatively principled; the case must be typical, difficult, complicated or of first impression; or the case must have some 'guiding effect'.<sup>44</sup> Legally effective cases are to be recommended by the basic and intermediate people's courts to the high people's courts, which, in turn, will select and recommend cases (including their own cases) to the Office of Work on Guiding Cases in the SPC ('OGC').<sup>45</sup> Similarly, the various adjudicatory units of the SPC may recommend SPC cases or lower court cases to the OGC.<sup>46</sup> Furthermore, deputies to the People's Congresses, People's Assessors, lawyers, scholars, members of the Committee of Experts in the Work of Guiding Cases, and so forth may also recommend cases to the courts of original jurisdiction or to the OGC.<sup>47</sup> To discharge the mandate of recommending cases, the people's courts should appoint special staff to deal with the work of guiding cases or to serve as a liaison.<sup>48</sup>

Within the SPC, the OGC is to solicit, select, examine, publish, study, and compile guiding cases, as well as coordinate and direct the work of guiding cases.<sup>49</sup> The Adjudicatory Committee of the SPC will then discuss the recommended cases and decide on which ones should be selected and published.<sup>50</sup> The text of the guiding cases should have eight components: a title, key words, the gist of the judgment, relevant legal rules, basic facts, the adjudicatory outcome, the reasoning for the

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<sup>42</sup> 王利明 [Wang Liming], «我国案例指导制度若干问题研究» [The Study of Several Questions about Our Country's System of Guiding Cases] (2012) 1 法学 *Legal Science* 71, 72; 陈景辉 [Chen Jinghui], «案例指导制度与同案同判» [The System of Guiding Cases and Same Judgments for the Same Type of Cases], 理论周刊 *Theory Weekly*, 29 January 2014, 16.

<sup>43</sup> 陈景辉 [Chen Jinghui], above n 42; 王利明 [Wang Liming], above n 42, 72–4.

<sup>44</sup> *GC Provisions*, art 2.

<sup>45</sup> *GC Provisions*, arts 3–4; *Detailed Rules*, art 4. The Adjudicatory Committee of the High People's Court is to deliberate on alternative cases for recommendation, or half of the Adjudicatory Committee members may agree on what cases should be recommended.

<sup>46</sup> *GC Provisions*, art 4.

<sup>47</sup> *GC Provisions*, art 5; *Detailed Rules*, art 5.

<sup>48</sup> *Detailed Rules*, art 4.

<sup>49</sup> *Ibid.*

<sup>50</sup> *GC Provisions*, art 6; *Detailed Rules*, art 8.

judgment, and an appendix of the names of the judges.<sup>51</sup> Guiding cases are to be distributed to the high people's courts and published in the Gazette of the Supreme People's Court, the People's Courts Daily, and the website of the SPC.<sup>52</sup>

Although various cases have previously been published by the SPC and other courts or entities as 'reference' (参考) or 'typical' (典型) cases, guiding cases are different from those cases in two respects. First, only cases meeting the selection criteria and having been subject to the selection, compilation, and publication procedures set forth in the *GC Provisions* can be designated as guiding cases.<sup>53</sup> Second, the effect of a case being designated as a guiding case is that it can be cited in the reasoning section of the adjudicatory documents in similar cases, but 'reference' or 'typical' cases cannot be cited.<sup>54</sup> In fact, the *GC Provisions* state that cases published by the SPC prior to the implementation of the system of guiding cases will be sorted out, selected, and compiled as guiding cases.<sup>55</sup> As a result, guiding cases are more authoritative and stand out as an important feature of China's legal reform.

According to the *GC Provisions*, the people's courts at various levels 'should refer to' (应当参照) the adjudicatory key points of guiding cases in their adjudication of similar cases.<sup>56</sup> As such, two questions inevitably emerge: First, what constitutes 'similar cases'?; and second, what does 'refer to' mean? The *Detailed Rules* explain 'similarity' in terms of basic facts and application of legal rules,<sup>57</sup> and state that 'refer to' means 'guiding cases should be cited in the adjudicatory reasoning, but not be used as the adjudicatory basis' in similar cases.<sup>58</sup> According to Hu Yunteng of the SPC, 'similar cases' are cases having similar facts or cases having similar issues in dispute.<sup>59</sup> Further, 'refer to' does not direct the courts to refer to the adjudicatory outcome of the guiding cases, nor does it mean citations; instead, the courts should refer to its adjudicatory key points and the value derived from the spirit of the case.<sup>60</sup> It has also been argued that 'similarity' should denote similar basic facts, similar legal

<sup>51</sup> *Detailed Rules*, art 3.

<sup>52</sup> *GC Provisions*, art 6; *Detailed Rules*, art 8.

<sup>53</sup> 胡云腾 [Hu Yunteng], «关于案例指导制度的几个问题» [Several Questions regarding the System of Guiding Cases], 理论周刊 *Theory Weekly*, 29 January 2014, 16. High people's courts may publish 'reference cases' to provide lower courts with guidance, while intermediate people's courts and basic people's courts may select and compile 'typical cases' for judges to study and conduct research.

<sup>54</sup> *Ibid.*

<sup>55</sup> *GC Provisions*, art 9. In 1985, the SPC commenced the publication of cases in the Gazette of the Supreme People's Court. 张建伟 [Zhang Jianwei], «<指导性案例>的功能定位与判例化前景» [The Functional Positioning of 'Guiding Cases' and the Outlook for Setting Case Precedents], 理论周刊 *Theory Weekly*, 29 January 2014, 16.

<sup>56</sup> *GC Provisions*, art 7.

<sup>57</sup> *Detailed Rules*, art 9.

<sup>58</sup> *Detailed Rules*, art 10.

<sup>59</sup> 胡云腾 [Hu Yunteng], above n 53.

<sup>60</sup> *Ibid.*

relationships, similar points in dispute, and similar disputed legal issues.<sup>61</sup> In other words, guiding cases should be used in similar cases to aid the judges in their exposition of the adjudicatory decision, but will not become another source of law.

In this connection, a corollary question is whether China has, or will have, case law — that is, whether the decisions of higher-level courts will bind the same court or lower-level courts in cases dealing with the same or substantially similar issues or facts. Although this article does not attempt to expound the differences between guiding cases and case law in common law jurisdictions, two points are highlighted. First, guiding cases are different from case law in Australia and other common law jurisdictions because the adjudicatory principles or key adjudicatory points are promulgated by the Adjudicatory Committee of the SPC (not in the spirit of *stare decisis* as handed down by the judges in individual cases) to maintain the uniformity and authority of judicial interpretations and application of law.<sup>62</sup> Second, although the court accepting a case should examine the relevant guiding case(s) and may cite the guiding case(s) in the reasoning section of the adjudicatory document, it is not necessary to cite the guiding case(s), unless the parties, their *agents ad litem*, or public prosecution organs have so requested.<sup>63</sup> In the latter case, the court must reply whether or not it has referred to the guiding case(s) together with reasons.<sup>64</sup> Hence, the system of guiding cases can strengthen the reasoning of judges in adjudicating disputes.<sup>65</sup>

Indeed, the question of whether China should create a system of case precedents is a controversial one.<sup>66</sup> On the one hand, advocates argue that judicial decisions should be recognised as a source of law and have binding effect.<sup>67</sup> On the other hand, opponents maintain that the provision of binding effect would stifle the activism of judges, and that adjudicatory cases are merely examples of how law should be applied.<sup>68</sup> Arguably, the fact that guiding cases are meant to provide guidance only does not necessarily prevent them from having certain hidden binding effect in practice.<sup>69</sup> Even so, it has been argued that given the nature and characteristics of China's current legislative and judicial systems, guiding cases cannot be a source of law, and that the nomenclature of 'guiding cases' rather than 'binding cases' or 'case precedents' reflects that guiding cases are not legally binding.<sup>70</sup> Moreover, it has been argued that guiding

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<sup>61</sup> 王利明 [Wang Liming], above n 42, 78–9.

<sup>62</sup> 胡云腾 [Hu Yunteng], above n 53. See also 王利明 [Wang Liming], above n 42, 77.

<sup>63</sup> *Detailed Rules*, art 11; 胡云腾 [Hu Yunteng], above n 53.

<sup>64</sup> *Ibid.*

<sup>65</sup> 王利明 [Wang Liming], above n 42, 73.

<sup>66</sup> See 张建伟 [Zhang Jianwei], above n 55.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> 王利明 [Wang Liming], above n 42, 71, 75.

cases ‘bear more than a passing resemblance to civil law practices’ that seek to promote the uniform application of law, and that the requirement of the ‘Relevant Legal Rules’ section in a guiding case reinforces ‘the code supremacy of the Chinese legal system’.<sup>71</sup> Guiding cases, therefore, fall short of being judicial precedents as understood in Australia and other common law jurisdictions.

With the promulgation of the *GC Provisions*, the system of guiding cases has been implemented for six years. As of October 2016, the SPC has promulgated 14 batches of guiding cases — a total of 69 cases.<sup>72</sup> These cases deal with a variety of legal issues, such as administrative law and procedure,<sup>73</sup> civil procedure,<sup>74</sup> company law,<sup>75</sup> consumer protection,<sup>76</sup>

<sup>71</sup> ‘Chinese Common Law?’, above n 39, 2231–3. Although civil law systems do not have *de jure* binding case precedents, some of them rely on the doctrine of *jurisprudence constante*, which gives authority to a series of cases that continuously and uniformly apply the same law, to promote adjudicatory consistency. Thus, although supreme court precedents in some civil law countries have *de facto* binding effect, judges have lesser authority and legal codes constitute the sources of law.

<sup>72</sup> The 14 batches of guiding cases were promulgated on the following dates: first batch on 20 December 2011 (Cases No 1 to No 4); second batch on 9 April 2012 (Cases No 5 to No 8); third batch on 18 September 2012 (Cases No 9 to No 12); fourth batch on 31 January 2013 (Cases No 13 to No 16); fifth batch on 8 November 2013 (Cases No 17 to No 22); sixth batch on 26 January 2014 (Cases No 23 to No 26); seventh batch on 23 and 26 June 2014 (Cases No 27 to No 31); eighth batch on 18 December 2014 (Cases No 32 to No 37); ninth batch on 25 December 2014 (Cases No 38 to No 44); tenth batch on 15 April 2015 (Cases No 45 to No 52); eleventh batch on 19 November 2015 (Cases No 53 to No 56); twelfth batch on 20 May 2016 (Cases No 57 to No 60); thirteenth batch on 30 June 2016 (Cases No 61 to No 64); and fourteenth batch on 19 September 2016 (Cases No 65 to No 69). These guiding cases are accessible on the website of the SPC <<http://www.court.gov.cn/shenpan-gengduo-77.html>>. For English translations of guiding cases (except the most recently promulgated ones), see Guiding Cases in Perspective, *Stanford Law School China Guiding Cases Project* <<https://cgc.law.stanford.edu/guiding-cases/>>.

<sup>73</sup> See, eg, Case No 38 «田永诉北京科技大学拒绝颁发毕业证、学位证案» [Tian Yong v Beijing University of Science and Technology — Refusal to Grant Certificates of Graduation and Degree Case] <<http://www.court.gov.cn/shenpan-xiangqing-13222.html>> (a higher education institute should follow the proper procedures in disciplining students and in refusing to award degrees); Case No 42 «朱红蔚申请无罪逮捕赔偿案» [Zhu Hongwei’s Application for Compensation Based on Arrest without Guilt Case] <<http://www.court.gov.cn/shenpan-xiangqing-13226.html>> (what factors should be taken into consideration in determining compensation for emotional distress as a result of arrest and detention without being found guilty).

<sup>74</sup> See, eg, Case No 7 «牡丹江市宏阁建筑安装有限责任公司诉牡丹江市华隆房地产开发有限责任公司、张继增建设工程施工合同纠纷案» [Mudanjiang City Hongge Construction and Installation Co Ltd v Mudanjiang City Hualong Real Estate Development Co Ltd and Zhang Jizeng — Dispute over Construction Engineering Work Contract Case] <<http://www.court.gov.cn/shenpan-xiangqing-4220.html>> (the parties could revoke their protest against an effective judgment if they had settled their dispute); Case No 25 «华泰财产保险股份有限公司北京分公司诉李志贵、天安财产保险股份有限公司河北省分公司张家口支公司保险人代位求偿权纠纷案» [Beijing Branch Office of Huatai Property Insurance Co Ltd v Li Zhigui and Hebei Province Zhangjiakuo Branch Office of Tianan Property Insurance Co Ltd — Dispute over Insurer’s Subrogation Right to Compensation Case] <<http://www.court.gov.cn/shenpan-xiangqing-13329.html>> (the court situated in the place where the tort occurred or where the defendant resided had jurisdiction over a subrogation case).

contract law,<sup>77</sup> criminal law,<sup>78</sup> intellectual property (trademark, patent, copyright, and utility model),<sup>79</sup> labour and employment,<sup>80</sup> maritime law,<sup>81</sup>

<sup>75</sup> See, eg, Case No 10 «李建军诉上海佳动力环保科技有限公司公司决议撤销纠纷案» [Li Jianjun v Shanghai Jiadongli Environmental Protection Technology Co Ltd — Dispute over Revocation of Company Resolution Case] <<http://www.court.gov.cn/shenpan-xiangqing-13307.html>> (the court respected corporate autonomy and would not review a board resolution, unless the convening and voting procedures violated laws, administrative regulations or the articles of association, or the content of the resolution contravened the articles of association); Case No 15 «徐工集团工程机械股份有限公司诉成都川交工贸有限责任公司等买卖合同纠纷案» [Xugong Group Engineering Machinery Co Ltd v Chengdu Chuanjiao Industrial and Trading Co Ltd — Dispute over Sale Contract Case] <<http://www.court.gov.cn/shenpan-xiangqing-13321.html>> (related companies whose personnel, business, finance, etc. were mixed up would lose independent legal existence and be jointly and severally liable for debts).

<sup>76</sup> See, eg, Case No 17 «张莉诉北京合力华通汽车服务有限公司买卖合同纠纷案» [Zhang Li v Beijing Heli Huatong Automobile Services Co Ltd — Dispute over Sale Contract Case] <<http://www.court.gov.cn/shenpan-xiangqing-6003.html>> (if an automobile seller fraudulently represented a used or repaired car as a new car, the buyer who purchased the car for living needs would be entitled to compensation under consumer protection law); Case No 23 «孙银山诉南京欧尚超市有限公司江宁店买卖合同纠纷案» [Sun Yinshan v Jiangning Store of Nanjing Oushang Supermarket Co Ltd — Dispute over Sale Contract Case] <<http://www.court.gov.cn/shenpan-xiangqing-13326.html>> (the retailer or manufacturer of unsafe products must pay a compensatory amount equal to ten times the price, regardless of whether the purchaser knew that the safe-use period had already expired and still purchased them).

<sup>77</sup> See, eg, Case No 64 «刘超捷诉中国移动通信集团江苏有限公司徐州分公司电信服务合同纠纷案» [Liu Chaojie v Xuzhou Branch Office of Jiangsu CMCC Co Ltd [China Mobile Communications Corp] — Dispute over Telecommunication Service Contract Case] <<http://www.court.gov.cn/shenpan-xiangqing-27571.html>> (if a business operator did not explicitly state the limitations of its goods or services in a standard form contract, and it did not clearly inform the consumer of such limitations at the time of the formation of contract to obtain consent, such limitations would not be valid).

<sup>78</sup> See, eg, Case No 27 «臧进泉等盗窃、诈骗罪案» [Zang Jinquan — Theft and Fraud Case] <<http://www.court.gov.cn/shenpan-xiangqing-13333.html>> (creating false links on the Internet to deprive others of property and selling non-existent goods and services online constituted the crimes of theft and fraud, respectively); Case No 32 «张某某, 金某某危险驾驶案» [Zhang X and Jin X — Dangerous Driving Case] <<http://www.court.gov.cn/shenpan-xiangqing-13228.html>> (vile car racing constituted 'dangerous driving' even though there was no loss of life or property).

<sup>79</sup> See, eg, Case No 46 «山东鲁锦实业有限公司诉鄞城县鲁锦工艺品有限责任公司、济宁礼之邦家纺有限公司侵害商标权及不正当竞争纠纷案» [Shandong Lujin Industry Co Ltd v Juancheng County Lujin Crafts Co Ltd and Jining Lizhibang Home Textile Co Ltd — Dispute over Trademark Infringement and Unfair Competition Case] <<http://www.court.gov.cn/shenpan-xiangqing-14244.html>> (what factors should be considered in determining the geographical generic name of a commodity); Case No 49 «石鸿林诉泰州华仁电子资讯有限公司侵害计算机软件著作权纠纷案» [Shi Honglin v Taizhou Huaren Electronic Information Co Ltd — Dispute over Copyright Infringement of Computer Software Case] <<http://www.court.gov.cn/shenpan-xiangqing-14247.html>> (where the defendant refused to provide the source code and object code without a legitimate reason and it was difficult for the plaintiff to produce objective evidence, infringement can be found based on the substantive similarity of the computer software).

<sup>80</sup> See, eg, Case No 18 «中兴通讯(杭州)有限责任公司诉王鹏劳动合同纠纷案» [ZTE (Hangzhou) Co Ltd v Wang Peng — Dispute over Labour Contract Case] <<http://www.court.gov.cn/shenpan-xiangqing-6002.html>> (a hiring unit could not terminate

property law,<sup>82</sup> torts,<sup>83</sup> and unfair competition.<sup>84</sup> How the guiding cases provide guidance on relatively principled statutory provisions and typical, difficult, complicated or new cases can be exemplified by reference to a selection of these cases.

In Case No 52,<sup>85</sup> a married couple decided to undergo artificial insemination using the sperm of a third party. Later, the husband was diagnosed with cancer and asked the wife to abort the child. The wife refused to do so, and the husband, in his will, stated that he did not want the child and bequeathed his real property to his parents. The child was born after his death. Applying the *Inheritance Law*,<sup>86</sup> the SPC reasoned that, although the will of the deceased should be followed, property

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a labour contract based on the employee's getting a low score in an internal examination because being ranked at the bottom was not the same as being 'unqualified for the job').

<sup>81</sup> See, eg, Case No 31 «江苏伟伦航运股份有限公司诉米拉达玫瑰公司船舶碰撞损害赔偿纠纷案» [Jiangsu Weilun Shipping Co Ltd v Miranda Rose Co — Dispute over Compensation for Damages Resulting from a Ship Collision Case] <<http://www.court.gov.cn/shenpan-xiangqing-13350.html>> (the determination of liability in the case of a marine collision should be based on international law, even though the parties had agreed not to follow an international practice prior to collision).

<sup>82</sup> See, eg, Case No 53 «福建海峡银行股份有限公司福州五一支行诉 长乐亚新污水处理有限公司、福州市政工程有限公司金融借款合同纠纷案» [Fuzhou Wuyi Branch of Fujian Haixia Bank Co Ltd v Changleyaxin Sewage Treatment Co Ltd and Fuzhou Municipal Engineering Co Ltd — Dispute over Financial Loan Contract Case] <<http://www.court.gov.cn/shenpan-xiangqing-16095.html>> (franchise revenues could be used as a pledge).

<sup>83</sup> See, eg, Case No 19 «赵春明等诉烟台市福山区汽车运输公司、卫德平等机动车交通事故责任纠纷案» [Zhao Chunming v Yantai City Fushan District Automobile Transportation Co, Wei Deping — Dispute over Automobile Traffic Accident Liability Case] <<http://www.court.gov.cn/shenpan-xiangqing-6001.html>> (an automobile owner or person-in-charge who let others use his car registration number, or who did not stop others from using his car registration number, would bear joint and several liability for torts).

<sup>84</sup> See, eg, Case No 29 «天津中国青年旅行社诉天津国青国际旅行社擅自使用他人企业名称纠纷案» [Tianjin China Youth Travel Service v Tianjin Guoqing International Travel Service — Dispute over Unauthorized Use of Another Enterprise's Name Case] <<http://www.court.gov.cn/shenpan-xiangqing-13345.html>> (the unauthorised use of the well-known abbreviated name of an enterprise, which caused confusion among the relevant section of the public, constituted unfair competition); Case No 45 «北京百度网讯科技有限公司诉青岛奥商网络技术有限公司等不正当竞争纠纷案» [Beijing Baidu Netcom Science and Technology Co Ltd v Qingdao Osun Network Technology Co Ltd — Dispute over Unfair Competition Case] <<http://www.court.gov.cn/shenpan-xiangqing-14243.html>> (advertisements forced their ways onto the search results site of a search engine station constituted unfair competition); Case No 47 «意大利费列罗公司诉蒙特莎(张家港)食品有限公司、天津经济技术开发区正元行销有限公司不正当竞争纠纷案» [Italy Ferrero Co v Montresor (Zhangjiagang) Food Co Ltd and Tianjin Economic and Technological Development Zone Zhengyuan Marketing Co Ltd — Dispute over Unfair Competition Case] <<http://www.court.gov.cn/shenpan-xiangqing-14245.html>> (Montresor's imitation of Ferrero's well-known packaging and decoration constituted unfair competition).

<sup>85</sup> Case No 50 «李某、郭某阳诉郭某和、童某某继承纠纷案» [Li X and Guo Mouyang v Guo Mouhe and Tong X — Dispute over Inheritance Case] <<http://www.court.gov.cn/shenpan-xiangqing-14248.html>>.

<sup>86</sup> «中华人民共和国继承法» [Inheritance Law of the People's Republic of China] (People's Republic of China) National People's Congress, Order No 24, 10 April 1985.

jointly owned during marriage should be distributed half-and-half between the deceased and his spouse; that a will trying to dispose of another person's property would be ineffective; and that a will should provide for any heir who did not have the ability to work and had no other means of livelihood. Thus, the wife could receive her half interest in the real property, the child should be given his share, and the remainder would be distributed in accordance with his will.

In Case No 40,<sup>87</sup> the plaintiff was asked to pick up someone from the airport. To carry out this job assignment, he had to walk from the eighth floor to the parking lot, where the car was parked. He was injured on the first-floor due to 'lack of concentration'. The Labour and Personnel Bureau determined that he had not sustained 'work injuries' under the *Regulations on Work Injury Insurance*.<sup>88</sup> Three questions were before the court: what constituted 'workplace'; what was 'work-related' or 'due to work'; and whether the negligence of an injured worker should affect the recognition of work injuries. The SPC reasoned that 'workplace' should include the areas that a worker must pass through between work sites in order to carry out a job assignment; that 'work-related' meant there was a connection between the job assignment and the injuries; and that the negligence of an injured worker should not be taken into account in certifying whether or not work injuries had occurred.

In Case No 61,<sup>89</sup> the SPC had to determine what punishment should be meted out for securities trading by a fund investment manager with not-yet-public information. Paragraph 4 of art 180 of the *Criminal Law* stated that if the crime of using not-yet-public information in securities trading was 'of serious nature', it should be punished in accordance with para 1. Paragraph 1 of art 180 provided that in the case of insider trading or disclosure of inside information, sentencing should be made in view of whether the crime was of a 'serious nature' or 'particularly serious nature'. Since para 1 provided different levels of punishment for crimes of a 'serious nature' and 'particularly serious nature', the main issue was how to properly understand the citation of para 1 in para 4. In its reasoning, the SPC explained that in interpreting statutory provisions (para 4 citing para 1), the court should seek conformity with the legislative purpose, meaning of the statutory provisions, and the legislative techniques.

Furthermore, Case No 24 distinguished 'fault' from 'pre-existing condition' and held that the compensatory damages for injuries sustained in a traffic accident should not be reduced just because the victim's

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<sup>87</sup> Case No 40 «孙立兴诉天津技术产业园区劳动人事局工伤认定案» [Sun Lixing v Tianjin Technology Industrial Park Labour and Personnel Bureau — Certification of Work Injury Case] <<http://www.court.gov.cn/shenpan-xiangqing-13224.html>>.

<sup>88</sup> «工商保险条例» [Regulations on Work Injury Insurance] (People's Republic of China) State Council, 27 April 2003.

<sup>89</sup> Case No 61 «马乐利用未公开信息交易案» [Ma Le's Using Not-Yet-Public Information in Trading Case] <<http://www.court.gov.cn/shenpan-xiangqing-27541.html>>.



osteoporosis had aggravated her injuries.<sup>90</sup> Case No 8 elucidated the concept of ‘experiencing serious difficulties in business operations’ for the purposes of dissolving a company by stating that it did not refer only to lack of capital and financial losses, but that the non-functioning of shareholders’ meetings, serious obstacles faced by internal management, and a corporate deadlock also constitute ‘serious difficulties in business operations’.<sup>91</sup> Case No 56 dealt with the typical issue of when the jurisdiction of a court could be challenged, and its key points were that jurisdiction must be challenged during the defendant’s reply period, and that the determination of jurisdiction was not to be affected by any subsequent change of domicile or habitual residence.<sup>92</sup>

Apparently, the current pool of guiding cases reflects the concerns of China’s policymaking elite, including matters regarding China’s growth priorities and social problems.<sup>93</sup> According to a study conducted by the Peking University Legal System Information Centre, guiding cases have been cited by subsequent cases either explicitly or implicitly.<sup>94</sup> As of November 2015, 25 guiding cases have been cited, but 31 cases have not been cited.<sup>95</sup> The total number of cases citing guiding cases is 241, of which 79 have explicitly cited the relevant case(s), 156 implicitly cited them, and 6 discussed them in the commentary or analysis appendix.<sup>96</sup> Of the 241 cases, most of them deal with civil matters, followed by administrative cases.<sup>97</sup> The most cited guiding case is Case No 24,

<sup>90</sup> Case No 24 «荣宝英诉王阳、永诚财产保险股份有限公司江阴支公司机动车交通事故责任纠纷案» [Rong Baoying v Wang Yang and Jiangyang Branch of Alltrust Property Insurance Co Ltd — Dispute over Automobile Traffic Accident Liability Case] <<http://www.court.gov.cn/shenpan-xiangqing-13327.html>>.

<sup>91</sup> Case No 8 «林方清诉常熟市凯莱实业有限公司、戴小明公司解散纠纷案» [Lin Fangqing v Changshu City Kailai Industrial Co Ltd and Dai Xiaoming — Dispute over Dissolution of Company Case] <<http://www.court.gov.cn/shenpan-xiangqing-4221.html>>.

<sup>92</sup> Case No 56 «韩凤彬诉内蒙古九郡药业有限责任公司等产品责任纠纷管辖权异议案» [Han Fengbin v Inner Mongolia Jiujun Pharmaceuticals Co Ltd — Jurisdictional Challenge to Product Liability Dispute Case] <<http://www.court.gov.cn/shenpan-xiangqing-16098.html>>.

<sup>93</sup> ‘Chinese Common Law?’, above n 39, 2225.

<sup>94</sup> 北京大学法制信息中心 [Peking University Legal System Information Centre], 指导性案例研究组 [Guiding Cases Study Group] (December 2015), 北大法律信息网 [Peking University Law Information Net] <<http://www.chinalawinfo.com/Notices/NoticeFulltext.aspx?NoticeId=1383&listType=2>>.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid. ‘Explicitly’ refers to cases in which the judges clearly cite the relevant guiding cases in their reasoning. ‘Implicitly’ refers to cases in which the judges do not clearly cite the relevant guiding cases in their reasoning, but the adjudicatory outcomes are consistent with the spirit of the guiding cases. ‘Discussed in the commentary or analysis appendix’ refers to cases in which the relevant guiding cases are not cited in the text of the judgment, but they are discussed in the commentary or analysis appendix. Of the six cases discussed in the commentary or analysis appendix, one case was discussed prior to the implementation of the system of guiding cases, and three cases were discussed prior to their being published as guiding cases. Ibid.

<sup>97</sup> Ibid.

whereas the remainder have been cited less than 20 times.<sup>98</sup> Thus, it has been argued that, given the slow pace of issuance and low citation rate, the impact of guiding cases remains quite limited.<sup>99</sup>

Although the low citation rate may be attributable to the lack of suitable guiding cases, the reason for the slow pace of issuance is not clear. At this stage, it is judicious not to speculate as to the underlying reasons for the low citation rate and the slow pace of issuance without further empirical research. To improve the system of guiding cases, the aforementioned study recommends the following: clarifying the citation format to end the current confused state of citing guiding cases in different ways; establishing a training system for the application of guiding cases; and setting up supervisory and rewarding mechanisms to implement the system of guiding cases.<sup>100</sup>

#### **IV The Complementary Relationship of Judicial Interpretations and Guiding Cases**

Both judicial interpretations and guiding cases are meant to explain the law; however, a clear demarcation between them has not been made.<sup>101</sup> Nevertheless, judicial interpretations and guiding cases are different in two major respects. As previously discussed, judicial interpretations issued by the SPC can be an important source of law in China, but guiding cases are not a source of law because China does not espouse the doctrine of case precedent. Moreover, judicial interpretations are formulated and promulgated by the SPC to provide lower people's courts with general guidance, but guiding cases demonstrate how specific and concrete problems have been dealt with in real-life cases.

Notwithstanding these differences, judicial interpretations and guiding cases are complementary. First, owing to the generality of judicial interpretations and the impossibility of judicial interpretations covering all likely issues or anticipating all possible contingencies, guiding cases can provide judges with more operable guidelines. Second, although there may be relevant judicial interpretations, there is no guarantee that when judges exercise judicial discretion, they will end up with the same adjudicatory outcomes in cases having the same or similar facts or issues. In this context, guiding cases can serve as a bridge between judicial interpretation and judicial discretion in relation to the application of statutory provisions in specific cases.

It has been argued that the generality of judicial interpretations may generate theoretical debate over how certain statutory norms should be interpreted, but principles derived from concrete cases may avoid such a

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<sup>98</sup> Ibid. Fig 9.

<sup>99</sup> 'Chinese Common Law?', above n 39, 2226. See also Guiding Cases Study Group, above n 94.

<sup>100</sup> Guiding Cases Study Group, above n 94.

<sup>101</sup> 胡云腾 [Hu Yunteng], above n 53.

drawback, thus realistically safeguarding the correct application of law.<sup>102</sup> Moreover, given the abstractness, generality, and ‘lagging-behind’ nature of judicial interpretations, judicial interpretations must coalesce with guiding cases in order to bring into play their intended function.<sup>103</sup> Indeed, one view is that guiding cases can generate breakthroughs based on ‘active judicature’ (能动司法) and the spirit of exploration.<sup>104</sup>

Basically, both judicial interpretations and guiding cases are measures designed to provide guidance to lower people’s courts. It has been pointed out that the drafts of judicial interpretations are often submitted to the NPC for clearance prior to their final promulgation, whereas guiding cases are selected through a process that expects no formal role for the NPC.<sup>105</sup> As such, although the Party endorses the standardisation of judicial decision-making, the system of guiding cases will likely meet resistance if there is a clear expansion of judicial authority.<sup>106</sup> In any event, the complementary nature of judicial interpretations and guiding cases will result in more uniform, well-reasoned judgments and the correct application of law.

## V Legal Reforms, Judicial Interpretations, and Guiding Cases

At the end of the 1970s, China decided to undertake economic and legal reforms. To bring legal anarchism to an end in the aftermath of the Cultural Revolution, China had to enact legal norms and build the necessary legal infrastructure. As the NPC and local people’s congresses focused on enacting legislation, one of the urgent tasks was to rebuild the country’s judicial system — restoring the court system and reopening law schools to train legal professionals. Owing to the shortage of judges in the ensuing years, many people who had not received legal training, such as retired military personnel, entered the judiciary.<sup>107</sup>

In the 1980s, apart from enacting numerous laws and administrative regulations, China commenced efforts to reform its adjudicatory process and professionalise the administration of justice, including such measures as strengthening the functionality of trial, increasing the openness of court

<sup>102</sup> 王利明 [Wang Liming], above n 42, 74.

<sup>103</sup> 王利明 [Wang Liming], above n 42, 73.

<sup>104</sup> 胡云腾 [Hu Yunteng], above n 53. ‘Active judicature’ (能动司法 or 司法能动) is not the same as judicial activism as understood in common law jurisdictions. Under ‘active judicature’, judges are encouraged to be people-oriented and innovative in resolving existing disputes and preventing potential disputes by undertaking extra-adjudicatory activities: see Vai Io Lo, ‘Judicial Activism in China’ in John Haley and Toshiko Takenaka (eds), *Legal Innovations in Asia: Judicial Lawmaking and the Influence of Comparative Law* (Edward Elgar, 2014) 164, 171–5.

<sup>105</sup> ‘Chinese Common Law?’, above n 39, 2227.

<sup>106</sup> Ibid 2228. The ‘Party’ is the Communist Party of China (CPC).

<sup>107</sup> 张健 [Zhang Jian], «能动司法时代的法官职业化建设» [Building the Professionalisation of Judges during the Active Judicature Era] (2012) 27(3) 上海政法学院学报：法治论丛 *Journal of Shanghai University of Political Science and Law: The Rule of Law Forum* 99, 101.

hearings, enhancing the defence that the accused received from their lawyers, and building up a team of professional judges.<sup>108</sup> With the authorisation of the NPC, the SPC also started promulgating judicial interpretations so as to guide lower people's courts in their application of general or principled statutory norms.

In the mid-1990s, as the legal academia raised the issues of specialisation and professionalisation for judges,<sup>109</sup> the *Judge Law* was passed, outlining the obligations, rights, qualifications, appointment, and removal of judges,<sup>110</sup> which served as a prelude to more coordinated efforts to professionalise the bench. Meanwhile, China adopted the policies of 'governing the country in accordance with law' (依法治国) and 'constructing a socialist legal system' (社会主义法制建设), which initiated various measures to carry out judicial reforms (司法改革) and to safeguard the judiciary's independent exercise of adjudicatory power.

During the 2000s, having enacted copious laws, administrative regulations, and rules to deal with issues arising from economic and social changes, China began to focus on reforming the overall judicial system (司法体制改革). In this context, the SPC indicated that the professionalisation of judges was a main thread in the institutional building of the court.<sup>111</sup> Thus, starting from 2004, China undertook uniform reform measures to perfect the establishment of judicial organs, the differentiation of functions and powers, and the judicial management system.<sup>112</sup> To refine the deployment of judicial functions and powers, the courts adopted the separation of the registration of cases (a division to put cases on the docket), adjudication of disputes (criminal, civil and administrative divisions), and enforcement of judgments and rulings (a bureau to execute judgments).<sup>113</sup> Moreover, China introduced a uniform, national judicial examination, which aspiring judges, procurators, lawyers and notaries must pass in order to become qualified.<sup>114</sup> The central and provincial governments also set up judicial training institutes, and those who assumed particular positions for the first time and those who would be promoted must receive the required training.<sup>115</sup>

Nonetheless, an imbalance in the development of China's economy and society still exists, as do discrepancies in the competency of judicial personnel, the incomplete elimination of local protectionism, non-

<sup>108</sup> 中华人民共和国国务院办公厅 [The Information Office of the State Council of the People's Republic of China], «中国的司法改革白皮书» [*White Paper on China's Judicial Reform*] (White Paper, 2012) s 1(2) [4] ('White Paper').

<sup>109</sup> 张健 [Zhang Jian], above n 107, 101.

<sup>110</sup> «中华人民共和国法官法» [The Law of the People's Republic of China on Judges] (People's Republic of China) National People's Congress, Order No 38, 28 February 1995.

<sup>111</sup> 张健 [Zhang Jian], above n 107, 103.

<sup>112</sup> White Paper, s 1(2) [5].

<sup>113</sup> Ibid, s 2(1) [2].

<sup>114</sup> Ibid, s 4 [2].

<sup>115</sup> Ibid, s 4 [4].

transparency in exercising the judiciary's discretionary power, and the non-standardisation of judicial conduct.<sup>116</sup> Thus, a number of initiatives have been launched in recent years to further judicial reforms. Apart from the system of guiding cases, the initiative of 'open judicature' (司法公开) is to establish platforms to promote transparency in three areas: adjudicatory processes (such as providing information about the court, judges, trial agenda, fees, and alternative dispute resolution); adjudicatory documents (such as publishing judgments on the SPC's China Judgments Website, to which the websites of local people's courts will link); and enforcement progress (such as having an enforcement journal).<sup>117</sup>

Moreover, it has been reported that the upcoming rounds of judicial reforms will include 'de-administrativisation' (去行政化) (such as preventing the court president and the court-division presidents from interfering with the collegial bench in adjudging individual cases and abolishing the requirement for lower people's courts to ask for instructions from higher people's courts) and will explore the possibility of 'de-localisation' (去地方化) (such as enabling the provincial high people's court to directly manage the human and financial resources of lower people's courts).<sup>118</sup> If these two measures are undertaken, judges presiding in individual cases will be able to execute their adjudicatory power independently, and the judiciary will be subject to less or limited interference from local governments.

In essence, all these reform initiatives are designed to enhance the Chinese judiciary's professional competency, increase its credibility, and raise its socio-economic status. As discussed above, the promulgation of judicial interpretations may, to a certain extent, allow the Chinese judiciary to participate in lawmaking. The SPC may also submit legislative bills to the NPC or its Standing Committee.<sup>119</sup> In this way, the Chinese judiciary may indirectly participate in lawmaking. Thus, participation in lawmaking, whether direct or indirect, is not completely beyond the reach of the Chinese judiciary. Although guiding cases cannot be considered a source of law, they complement judicial interpretations, thereby promoting adjudicatory consistency, facilitating the proper exercise of judicial discretion, and ensuring the correct application of the law. Considering that judicial interpretations can fill statutory lacunae,

<sup>116</sup> Ibid, s 2(2) [1].

<sup>117</sup> «最高人民法院关于推进司法公开三大平台建设的若干意见» [The Supreme People's Court's Several Opinions regarding the Establishment of Three Large Platforms for Promoting Open Judicature] (People's Republic of China) Supreme People's Court, 21 November 2013.

<sup>118</sup> «司法改革关注去行政化地方化, 规范审判权, 促公正» ['Judicial Reform Concerns De-Administrativisation and De-Localisation, Standardise Adjudicatory Power, Urge Justice'], 中国新闻周刊 *China News Weekly* (online), 20 November 2013 <<http://news.sina.com.cn/c/sd/2013-11-20/142728762224.shtml>>.

<sup>119</sup> «中华人民共和国立法法» [Legislation Law of the People's Republic of China] (People's Republic of China) National People's Congress, Order No 31, 15 March 2000, arts 12, 24.

and that guiding cases can facilitate the uniform application of the law and the sensible exercise of judicial discretion, judicial interpretations and the system of guiding cases do play significant roles in China's ongoing legal reforms.

## VI Conclusions

To fulfil its aspiration as a rule-of-law country, China has undertaken various legal reforms, focusing on the primacy of law and institution building. On the one hand, China has promulgated numerous legislative enactments and amendments in order to meet the needs arising from changing economic and social circumstances. The Chinese judiciary has, to a certain extent, contributed to lawmaking through the promulgation of judicial interpretations. On the other hand, institution building entails reforms in the judiciary, legal education, and enforcement agencies, thereby achieving the impartial and effective administration of justice. The guiding cases are short of being case precedents. However, the introduction of guiding cases signifies an important stage in China's course of legal reform, namely, moving its focus from 'having law that can be followed' (有法可依) to 'having law that must be followed, enforcing law strictly, and pursuing liability for breach of law' (有法必依, 执法必严, 违法必究).<sup>120</sup> In 2013, the Third Plenary Session of the Eighteenth CPC Central Committee called for the rapid establishment of a 'just, highly efficient, and authoritative socialist legal system' (公平, 高效率, 权威的社会主义法制).<sup>121</sup> The Chinese judiciary, through ongoing and upcoming reforms, will play a significant role in the accomplishment of this historic endeavor.

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<sup>120</sup> 王利明 [Wang Liming], above n 42, 72.

<sup>121</sup> «中共中央关于全面深化改革若干重大问题的决定» [CPC Central Committee's Decision on Several Important Questions regarding the Comprehensive Deepening of Reforms] (People's Republic of China) CPC Central Committee, 12 November 2013.