

GUIDING CASES AND BUREAUCRATIZATION OF JUDICIAL PRECEDENTS IN CHINA

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Abstract: *Although China's socialist legal system largely follows the civil law tradition, the Supreme People's Court (SPC) nevertheless established a novel guiding case system in 2010. According to the SPC's specific rules, all courts should refer to a guiding case in the reasoning part of a judgment if it is similar to the case at hand, with the proviso that under no circumstances can a guiding case be treated as a legal basis for judicial decision-making. In the literature, much attention has been paid to the guiding case system, particularly to its similarities with precedential case systems in both common law and civil law traditions. However, primarily based on my extensive fieldwork in China's courts through in-depth interviews with judges, this article finds that guiding cases hardly perform the function of a type of case law. Moreover, judges are generally reluctant to refer to a judicial precedent, including a guiding case, in the process of making a judicial decision owing to the fact that China follows a collective model of judicial decision-making and judges are discouraged from making clear and independent statements of the rule of law from cases that come before them. In addition, this article reveals that a guiding case system has effectively crystallized a bureaucratic system of judicial precedents in which guiding cases are at the top of the pyramid. Such a bureaucratic system is mainly grounded on the political hierarchy of the courts and a nationwide typical-case-selection movement in which the lower courts are politically responsible for submitting a certain number of typical cases selected from within their respective jurisdictions to the SPC annually. Finally, this article establishes a bureaucratic theory of judicial precedents centered on guiding cases which clearly fits into China's authoritarian context and is*

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substantially different from any other type of case law in a liberal context.

Keywords: Guiding case system; Supreme People's Court; judicial precedents; case law; bureaucratization

I INTRODUCTION

Accompanied by China's economic rise since 1978, China has been building up a comprehensive legal system with so-called socialist characteristics. At the same time, the Supreme People's Court (SPC), as the highest judicial player, has committed itself to in-depth professional reforms, such as adopting a national judicial exam system and creating transparency by placing judgments online, all of which have the aim of improving the competence of the judiciary. The guiding case system, which was established by the SPC in 2010, is a novel judicial reform that aims at a more professional court system even though traditionally China has followed a civil law tradition in which case law is totally absent in practice. The goal of the guiding case system, as clearly stated in the *Provisions of the Supreme People's Court Concerning Work on Guiding Cases* (hereinafter "*Provisions*"), is to summarize adjudication experiences, unify the application of the law, enhance the quality of adjudication and safeguard judicial justice.¹ In 2015, it was further specified in the *Detailed Rules for the Implementation of the Provisions of the Supreme People's Court on Case Guidance* (hereinafter "*Detailed Rules*") that once a precedential case that was recommended and submitted by a lower court was selected and ultimately determined as a guiding case by the SPC, the judges shall refer to the "Main Points of Adjudication" (hereinafter "MPA") (裁判要點) of the guiding case in the judgment if the case being handled is similar to the guiding case in terms of basic facts and application of the law.² Moreover,

¹ Zuigao Renmin Fayuan Guanyu Anli Zhidao Gongzuo de Guiding (最高人民法院關於案例指導工作的規定) [Provisions of the Supreme People's Court Concerning Work on Guiding Cases] (promulgated by the Sup. People's Ct., Nov. 15, 2010, effective Nov. 26, 2010), CHINA GUIDING CASES PROJECT, ENGLISH GUIDING CASES RULES, June 12, 2015, <http://cgc.law.stanford.edu/guiding-cases-rules/20101126-english> [perma.cc/ZE9U-D3LF].

² Zuigao Renmin Fayuan Guanyu Anli Zhidao Gongzuo de Guiding Shishi Xize (《最高人民法院關於案例指導工作的規定》實施細則) [Detailed Rules for the Implementation of the Provisions of the Supreme People's Court on Case Guidance] (promulgated by the Sup. People's Ct., Apr. 27, 2015, effective May 13,

the court shall quote the guiding case only in the reasoning part of a judgment instead of citing it as a legal basis for the judgment.³ In theory, the guiding case then has a binding force on the courts when adjudicating similar cases. On this basis, the SPC is able to interpret the related legal rules in the MPA of the guiding case—an additional part added by the SPC to the original judgment—as a way of exercising a type of substantial legislative power. For example, in Guiding Case 66⁴, the related legal rule interpreted in the MPA by the SPC was Article 47 of the *Marriage Law of the People's Republic of China*. The MPA states: “Where, during or before a divorce lawsuit, one party to the marriage conceals, transfers, sells, or destroys the joint property of the husband and wife or fabricates debts in an attempt to appropriate the other party’s property, the court may, in accordance with Article 47 of the *Marriage Law of the People's Republic of China*, give a smaller or even no share of the property to the party carrying out any of the aforementioned acts, when the joint property of the husband and wife is divided in a divorce.”⁵ This indicates clearly that it is a unique type of case law of a legislative nature.

Much literature has been produced in both Chinese and English on the guiding case system. A large amount of attention has been paid to the normative function of the guiding case, sometimes optimistically.⁶ In particular, analysis of the guiding case system is often made in relation to case law in either common law or civil law

2015), art. 9, CHINA GUIDING CASES PROJECT, ENGLISH GUIDING CASES RULES, June 12, 2015, at 4, <http://cgc.law.stanford.edu/guiding-cases-rules/20150513-english/> [perma.cc/HUL8-7G8U].

³ *Id.*

⁴ Guiding Case No. 66, STAN. L. SCH. CHINA GUIDING CASES PROJECT, <https://cgc.law.stanford.edu/guiding-cases/guiding-case-66/> [https://perma.cc/N2RC-SENL] (last visited Jan. 31, 2019).

⁵ *Id.*

⁶ Björn Ahl, *Retailing Judicial Professionalism: The New Guiding Cases Mechanism of the Supreme People's Court*, 217 CHINA Q. 121 (2014); Xingliang Chen, *China's Guiding Case System*, 1 PEKING U. L. J. 215 (2014); Jinting Deng, *Functional Analysis of China's Guiding Cases*, 14 CHINA: AN INT'L J. 44 (2016); Susan Finder, *China's Evolving Case Law System in Practice*, 9 TSINGHUA CHINA L. REV. 245 (2017); Mark Jia, *Chinese Common Law? Guiding Cases and Judicial Reform*, 129 HARV. L. REV. 2213 (2016); Yang Li, *Practice and Theory of the Guiding Case System in China*, 46 HONG KONG L. J. 307 (2016); Mo Zhang, *Pushing the Envelope: Application of Guiding Cases in Chinese Courts and Development of Case Law in China*, 26 PAC. RIM L. & POL'Y J. 269 (2017).

traditions.⁷ However, over the past five years, although it is clearly stipulated otherwise, the guiding case system has not been as effective as a type of “case law”. To begin with, their rate of use is extremely low, almost negligible, and more than half of them are never referenced in the trial practice. Cohen offers the following statistics which confirm this:

“If one compared the nationwide references to guiding cases using, as an example, the 561 opinions referencing a guiding case out of 8,723,182 cases on the China Judgments Online website for 2016 (using a simple keyword search to “guiding case”), the citation rate would be about 0.0006%.”⁸

In addition, as to the way of citing guiding cases in the trial practice, judges are reluctant to cite them directly in the judgment’s reasoning in accordance with the *Detailed Rules*. Moreover, when quoting guiding cases, judges normally only refer to the MPA—a form of statutory interpretation—in the judgement.⁹ In fact, judges normally respond to the litigants’ quotation of guiding cases and explain the reasons *outside* the judgments, although the final judicial decision may, in principle, be compatible with the rules of the guiding case, as provided and defended by the litigants.¹⁰

To some extent, the inconsistent use of guiding cases contrasts with the routine mechanism of judicial precedents in both common law and civil law jurisdictions. The civil law doctrine of precedent, which seems more comparable with China’s system, can

⁷ Some scholars have likened guiding cases to common law cases, or even argued that the guiding case system may bring China’s system into closer alignment with the common law tradition. Ping Yu and Seth Gurgel, *Stare Decisis in China? The Newly Enacted Guiding Case System*, *READING THE LEGAL CASE: CROSS-CURRENTS BETWEEN LAW AND THE HUMANITIES*, 142 (Marco Wan ed., Routledge, 2012); Jocelyn E.H. Limmer, *China’s New “Common Law”: Using China’s Guiding Cases to Understand How to Do Business in the People’s Republic of China*, 21 *WILLAMETTE J. OF INT’L L. AND DISP. RESOL.* 96, 133 (2013); Deng, *supra* note 6; Jia, *supra* note 6.

⁸ Mark Cohen, *Spring Time for IPR Case Law in China?*, *CHINA IPR* (Mar. 2, 2017), <https://chinaipr.com/2017/03/12/spring-time-for-ipr-case-law-in-china/> [perma.cc/26M2-7QF4] (last visited Oct. 17, 2017).

⁹ For more details, see *Zuigao Renmin Fayuan Zhidao Xing Anlie Sifa Yingyong Niandu Bijiao Fenxi Baogao* (最高人民法院指導性案例司法應用年度比較分析報告), BEIDA FABAO (北大法寶), <http://weekly.pkulaw.cn/Admin/Content/Static/47c5757c-54c8-4543-bc40-1f14040a50e7.html> [https://perma.cc/G4WZ-SM4T] (last visited Feb. 8, 2019).

¹⁰ Zhao Xiaohai (趙曉海) & Guo Ye (郭葉), *Zuigao Renmin Fayuan Minshangshi Zhidaoxing Anli de Sifa Yingyong Yanjiu* (最高人民法院民商事指導性案例的司法應用研究), 1 *J. OF L. APPLICATION* 56 (2017).

be used as an example.¹¹ Normally, although civil law jurisdictions do not adopt the principle of *stare decisis* in adjudication, precedents do have a persuasive role. This is because “civil law courts are expected to take past decisions into account when there is a sufficient level of consistency in case law. Generally speaking, when uniform case law develops, courts treat precedents as a source of ‘soft’ law, taking them into account when reaching a decision.”¹² Due to the fear of appellate reversal, the doctrine of *jurisprudence constante* has arisen in civil law systems. This gives authority a series of cases that continuously and uniformly apply the same rule of law and crystallizes legal rules through autonomous judicial action.¹³ Regardless of the legal system, the principle “treat like cases alike” is central to the notion of justice and is often associated with the rule of law which is in turn seen as a central feature of a liberal state.¹⁴ Judges normally have a tendency to refer to prior cases for decision-making. As noted by Merryman, judges in both civil law and common law systems have some features in common, i.e., they may be sufficiently impressed by the authority of the higher court; they are more likely persuaded by the reasoning of precedents in particular if the rule of the precedents has been repeated with practical consensus; they are too lazy to think through the problem themselves and find a justification for the departure of the principle “treat like cases alike” by themselves; or they normally do not want to risk the decision being reversed on appeal, etc.¹⁵ Of course, these doctrines of precedent, either binding in a common law tradition or persuasive in a civil law tradition, are based on the experience of legal customs and formed in a decentralized way, mostly in a liberal context where there is judicial independence.

¹¹ As China follows a civil law tradition, it is argued that China’s guiding case system has more comparators with civil law systems of this kind. Jia, *supra* note 6.

¹² For more details about the role of judicial precedents in civil law jurisdictions, see Vincy Fon and Francesco Parisi, *Judicial Precedents in Civil Law Systems: A Dynamic Analysis*, 26 INT’L REV. OF L. & ECON. 519 (2006).

¹³ Maria Angela Jardim de Santa Cruz Oliveira & Nuno Garoupa, *Stare Decisis and Certiorari Arrive to Brazil: A Comparative Law and Economics Approach*, 26 EMORY INT’L L. R. 555, 576–77 (2012).

¹⁴ RONALD DWORKIN, LAW’S EMPIRE, 219–24 (1998); David Strauss, *Must Like Cases be Treated Alike?* (U. of Chi. Pub. L. & Legal Theory Working Paper No. 24, 2002), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=312180 [perma.cc/L8WG-B3GA] (last visited Oct. 31, 2018).

¹⁵ JOHN H. MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEM OF WESTERN EUROPE AND LATIN AMERICA 47 (1985).

In contrast, institutionally speaking, there is no judicial independence in China's single-party system like that in liberal democracies. The courts, though created by and responsible to China's people's congresses at the corresponding levels and though they exercise adjudicative power independently in accordance with the Constitution,¹⁶ are actually operating under the leadership of the Communist Party of China (CPC) in practice. Specifically speaking, the appointment and removal of the leading group members (領導班子成員) of the courts, normally including presidents and vice presidents, are virtually entirely determined by the CPC's organization department, followed by the "approval" of the people's congress or its standing committee which is also under the leadership of the CPC politically, in accordance with the Constitution and relevant laws. As of 2017, all presidents of the courts at basic and prefecture levels are principally administered by the CPC's organization department at the provincial level directly. For other leading group members, some of them are administered by the CPC's organization departments at the provincial level, while others are administered by the organization departments at the prefecture level as delegated by the provincial level.¹⁷ Moreover, personnel issues of judges who are not leading group members are normally determined by the leading group of the courts where the president, who normally serves as the Party secretary of the court at the same time, plays a leading role therein. Also, personnel issues, such as appointment, will be "approved" by the or its standing committee at the corresponding level afterwards according to the Constitution. In addition, due to most judges holding Party membership, it is not difficult to understand that the judges must insist on the leadership of the CPC and may be influenced by it in reality. Also, it is understandable that the CPC's Political and Legal Committee at the corresponding level, where the presidents of the courts are members, may exert its influence over or even guide the work of the courts politically within the domain of law in practice. However, this is not to deny the fact that, having realized the significance of judicial credibility for strengthening the socialist legal system under the

¹⁶ XIANFA art. 126 (1982) (China).

¹⁷ Zhou Bin (周斌), *Zhongjiceng Fayuan Yuanzhang Junyou Shengji Dangwei Guangli* (中基層法院院長均由省級黨委管理), LEGAL DAILY (July 3, 2017, 10:19 AM), http://www.legaldaily.com.cn/index/content/2017-07/03/content_7229420.htm?node=20908 [<https://perma.cc/5J9C-C7EK>].

leadership of the CPC, most cases are and can be handled by judges independently in practice, which to some extent is a feature of a dual state. As far as the importance of independent adjudication is concerned, the CPC reiterates that:

“Party and government organs and leading cadre must all not allow judicial organs to do things in violation of their statutory duties or that impede judicial fairness; judicial organs must all not enforce requests to interfere in judicial activities from a party or government organ or leading cadre. Party or administrative disciplinary actions will be given for interference in judicial cases; and where it causes in an unjust, false, and wrongfully decided case, or other serious consequences, criminal responsibility will be pursued in accordance with the law.”¹⁸

This suggests that, in an authoritarian state, even though politically sensitive cases are more likely to be judged in an arbitrary manner, private parties in conventional legal disputes, e.g. property and contract, may gain fair judicature, occasionally even against oppressive institutions.¹⁹

Having said this, it can be seen that the case law theory of routine practice of precedents in a liberal democracy with judicial independence cannot thoroughly explain judges’ inconsistent reference to guiding cases in China or be applied to it, as the guiding case, although it has a normative binding force, can easily be disregarded by Chinese judges in practice.²⁰ Undoubtedly, the function of the guiding case system or broadly the role of judicial precedents can only be explained thoroughly in China’s specific context, notwithstanding the comparisons that can be made with other jurisdictions. Therefore, relevant context-specific issues of the

¹⁸ For further information about independent adjudication, see Zhonggong Zhongyang Guanyu Quanmian Tuijin Yifa Zhiguo Ruogan Zhongda Wenti de Jueding (中共中央關於全面推進依法治國若干重大問題的決定) [CCP Central Committee Decision concerning Several Major Issues in Comprehensively Advancing Governance According to Law] (promulgated by the 4th Plenary Session of the 18th Central Committee of the Chinese Communist Party, Oct. 23, 2014) COMMUNIST PARTY OF CHINA NEWS, at 3, <http://cpc.people.com.cn/n/2014/1029/c64387-25927606-3.html> [perma.cc/4ST5-J5ZR].

¹⁹ See Gábor Attila Tóth, *Authoritarianism*, MAX PLANK ENCYCLOPEDIA OF COMP. CONST. L. ¶ 30, <http://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e205?prd=MPECCOL> [perma.cc/WCE3-TX6X] (last updated Feb. 2017) (explaining the relationship between authoritarianism and fair jurisprudence).

²⁰ See Qingtao Xie, *An Empirical Study of the Application of China Guiding Cases in Trial*, Master Thesis for the degree of Master of the Science of Law at Stanford Law School (May 2016) (citing other important studies).

guiding case system need to be addressed, such as, given the controversy over its legitimacy, how is the SPC able to find an appropriate way to create a self-empowering instrument to interpret the law by establishing the guiding case system in China's authoritarian context in which the courts act merely as executants of the legislature under the leadership of the CPC? In addition, given that the system appears to be malfunctioning over the last five years, why is it so difficult for guiding cases to be implemented routinely in trial practice? Moreover, given the SPC's consistent commitment to developing the guiding case system, what is the practical effect that has been achieved, notwithstanding its dysfunction as a type of case law? Furthermore, besides the guiding case, what is the role of non-guiding cases in practice and is there any context-specific theory that can provide a holistic view and explain the function of China's judicial precedents? Obviously, due to the disparity between the norm and the reality, the issues above cannot be easily addressed without in-depth empirical legal studies in the context of China.

II DATE AND METHODS

Since the establishment of the guiding case system in 2010, SPC has selected and issued batches of guiding cases every once in a while, totaling 87 as of March 2017. The number of guiding cases that the courts refer to can be expected to increase in the foreseeable future.²¹ However, as mentioned above, the rate of citing guiding cases is extremely low, which to some extent indicates the dysfunction of the guiding case system as a type of case law. For example, since the first batch of guiding cases was issued on December 20, 2011, more than 31 million judgments have been uploaded and made available to the public on *China Judgments Online* (中國裁判文書網), as required by the *Provisions on the Issuance of Judgments on the Internet by the People's Courts*. This states that legally effective judgments shall be issued on the Internet.²² However, only a few hundred judgments have cited

²¹ Finder, *supra* note 6, at 14.

²² Guanyu Renmin Fayuan zai Hulianwang Gongbu Caipan Wenshu de Guiding (關於人民法院在互聯網公佈裁判文書的規定) [Provisions on the Issuance of Judgments on the Internet by the People's Courts] (promulgated by the Sup. People's Ct., July 25, 2016, effective Oct. 1, 2016) SUP. PEOPLE'S CT., <http://www.court.gov.cn/zixun-xiangqing-25321.html> [<https://perma.cc/2YBS-FLW6>].

relevant guiding cases in their reasoning.²³ Nevertheless, these indicators are not sufficient to make an accurate determination of the extent to which judges are looking to guiding cases or non-guiding cases explicitly or implicitly in practice.²⁴

In order to reflect regional diversity, the data collected in the fieldwork investigations in March and December 2016 are from courts of three different levels in Guangxi Autonomous Region (hereinafter “Guangxi”), Guangdong province (hereinafter “Guangdong”) in South China, and Jiangsu province (hereinafter “Jiangsu”) on the east coast of China. Guangxi is in mountainous terrain in the far south of China, bordering Vietnam, and its economy often languishes behind coastal provinces in China. Data from 2016 shows that its per capita GDP was 37,712 yuan (US\$ 5,678), being ranked 26th among 31 provinces of Mainland China.²⁵ Since 2011, Guangdong has had the highest GDP among all provinces of Mainland China, with Jiangsu ranked second in 2016.²⁶ Both Guangdong and Jiangsu are widely regarded as two relatively developed provinces by the Human Development Index,²⁷ while Guangxi is at a relatively underdeveloped level. Consequently, the professional level of judges from Guangdong and Jiangsu is normally higher than that of Guangxi. For example, judges from Guangxi said that the quality of judgments from Guangdong is relatively high, and newly-appointed judges from Guangxi often take the judgments of Guangdong courts as a sample to learn how to write a quality judgment (41GL; 31GKFCG). Also, the judges from Guangdong are confident about the high quality of their judgments when compared with other provinces (49GZGD).²⁸ In addition, Jiangsu Higher

²³ Only 659 judgments are returned from a search for the term “guiding cases” (指導案例, 指導性案例) in the reasoning of the judgments rendered on China Judgements Online from Dec. 21, 2011 to Aug. 12, 2017; *See generally* Zhongguo Caipan Wenshu Wang (中國裁判文書網) [China Judgements Online], <https://wenshu.court.gov.cn/> [https://perma.cc/6F6S-LKYU].

²⁴ Finder, *supra* note 6, at 10, 14.

²⁵ *See generally* National Data, NAT’L BUREAU OF STAT. OF CHINA, <http://data.stats.gov.cn/english/> [https://perma.cc/5X2V-ATKT] (last visited Feb. 8, 2019).

²⁶ For more details about the GDP of Chinese provinces, see *Id.*

²⁷ *See generally* Global Data Lab, <https://hdi.globaldatalab.org/areadata/shdi/> [https://perma.cc/4KDJ-G7QR] (last visited Feb. 8, 2019).

²⁸ In the following text, two separate forms are used to number the interviews which are coded as, for example, “41GL”, in which, the number “41” refers to the number of the interview; and the letter “GL” refers to the location and level of the court (“GL” for GL Intermediate People’s Court in Guangxi; “GKFCG” for GK district court of FCG city in

People's Court is the forerunner with regard to its performance in the typical-case-selection movement and has established its own reference case system (參考案例). From this, it selects and publishes a certain number of reference cases in its gazette regularly. The number of SPC guiding cases and its gazette-published cases submitted by Jiangsu courts means that the province is often ranked 1st nationwide.²⁹

The fieldwork was conducted in three prefecture-level courts in GL city, FCG city and QZ city in Guangxi, a basic level court of HZ city in Guangdong, and the Higher People's Court of Jiangsu respectively. Normally, China's legal system is a closed regime and the internal documents and mechanisms regarding the system of selection and submission of prior cases are non-transparent.³⁰ However, the relevant internal documents and archive regarding the local submission and selection of guiding cases and non-guiding cases in these courts was made accessible to this research because the author was a Co-Investigator of an internal research project of the Higher People's Court of Guangxi that investigated the effectiveness of guiding cases in collaboration with senior judges of this court. In addition, the fieldwork at the courts was largely facilitated by the author's personal connections with senior judges through the SPC's Senior Judges Training Program in Hong Kong where the author is a supervisor.

Moreover, apart from the collection of the relevant unpublished documents during the fieldwork at the courts, semi-structured interviews with fifty judges in total were conducted from two Higher People's Courts, seven Intermediate People's Courts and nine basic level courts in the provinces of Guangxi, Guangdong,

Guangxi; "GZGD" for GZ Intermediate People's Court in Guangdong; "HZ" for HZ district court in Guangdong; "JNSD" for JN Intermediate People's Court in Shandong; "JS" for JS Higher People's Court; "NN" for the Higher People's Court in NN city; "FCG" for FCG Intermediate People's Court in Guangxi; "QZ" for QZ Intermediate People's Court in Guangxi).

²⁹ See Xu Qianfei (許前飛), *Jiangsusheng Gaoji Renmin Fayuan Gongzuo Baogao* (江蘇省高級人民法院工作報告) [Work Report of Higher People's Court of Jiangsu], CHINA CT.,

<https://www.chinacourt.org/article/detail/2014/01/id/1206996.shtml>

[<https://perma.cc/HNR5-7D7G>] (last visited Jan. 31, 2019), for details regarding the twelve prior cases that were selected by the SPC as guiding cases in 2016.

³⁰ See Jia, *supra* note 6, at 2220 (emphasizing that given the non-transparency of internal deliberations, it is hard to know for certain the internal operations of China's legal system).

Jiangsu and Shandong respectively. Among them, 37 interviews were conducted in workplaces during the period of the fieldwork, while the remaining were conducted in restaurants or teahouses or through phone calls—in ways that were most comfortable or convenient. Each interview lasted between 30 and 60 minutes, with the consent of the interviewee that the data would be kept for future research purposes. The court system is generally not open to outsiders, so the author considered it appropriate to take notes instead of recording the interviews.

It is possible that the data collected from the courts may not provide a specific and detailed picture of the operation of the guiding case system and typical-case-selection movement in other courts which are not covered by the fieldwork. However, in combination with other empirical methods, including media and documentary analysis, we believe that utilizing the methodology is helpful to answer crucial questions, such as why the SPC is able to self-empower itself with a distinctive legislative power through the guiding case system; why does the guiding case system malfunction as a type of case law in the sense that judges are reluctant to refer to a guiding case or a prior case for judicial decision-making; what are the incentives of the SPC to further strengthen the case guidance system; and how is the typical-case-selection movement run inside the courts? By addressing such issues, the research indicates that, given the absence of case law in China, the SPC has formed a case hierarchy within the case guidance system. Moreover, it has formed a bureaucratic model of judicial precedents centered on guiding cases. At a political level, such a model is being run through the national typical-case-selection movement, and it appears to suit China's authoritarian regime well.

III PARADOX OF LEGITIMACY OF GUIDING CASE SYSTEM IN CHINA

Traditionally, no form of case law has existed in China. This parallels the situation in countries with a civil law tradition in which the courts are mere executants of the legislature according to the Constitution. Institutionally, two main instruments have been used by the CPC to maintain its authoritarian regime with a facade of Chinese rule of law. One is the “legal instrument”, that is, according

to the Constitution, the courts are created by and responsible to the People's Congress system, with the strictly defined role as mere executants of the legislature, and independent adjudicative power that can be exercised according to the Constitution and laws.³¹ The other is the "political instrument" based on the principle "Party manages cadres" (黨管幹部), according to which the cadres of the courts, in particular the president and vice presidents, and the cadres of the people's congress system, are managed by the CPC's organization departments.³² These two instruments are in fact intertwined and interdependent in practice.

Against this background, the SPC in itself has no legislative power of any type unless it is delegated by and subject to the final approval of the National People's Congress (NPC) or the Standing Committee of the NPC (NPCSC). As illustrated above, there might be a fear that if the SPC were to gain legislative power in practice, the "legal instrument" in favor of authoritarianism might be undermined. However, paradoxically, the guiding cases determined by the SPC do have a binding force over all courts, according to Article 9 and 10 of the *Detailed Rules*, and so the SPC can be said to have self-empowered itself as a law-maker.³³

Interestingly, given that this principle of "treating like cases alike" has been overwhelmingly accepted as a central notion of justice,³⁴ it is definitely appropriate for the SPC to justify the need for a guiding case system on the ground of this notion.³⁵ Furthermore, as the precedent-related issues fall into the specialist domain of the courts as opposed to the NPC or NPCSC, it seems that it is the SPC's responsibility to create and implement the system appropriately.³⁶

³¹ XIANFA art. 3, 126, (1982) (China).

³² Shucheng Wang, *Guiding Cases as a Form of Statutory Interpretation: Expansion of Supreme People's Court's Judicial Lawmaking Authority in China*, 3 H.K. L.J. 1067, 1094 (2018).

³³ Zuigao Renmin Fayuan Guanyu Anli Zhidao Gongzuo de Guiding Shishi Xize (《最高人民法院關於案例指導工作的規定》實施細則) [Detailed Rules for the Implementation of the Provisions of the Supreme People's Court on Case Guidance] (promulgated by the Sup. People's Ct., Apr. 27, 2015, effective May 13, 2015), CHINA GUIDING CASES PROJECT, ENGLISH GUIDING CASES RULES, June 12, 2015, at 4, <http://cgc.law.stanford.edu/guiding-cases-rules/20150513-english/> [perma.cc/HUL8-7G8U].

³⁴ Strauss, *supra* note 14.

³⁵ Wang, *supra* note 33, at 1091.

³⁶ *Id.*

Moreover, the CPC Central Committee Decision concerning Several Major Issues in Comprehensively Advancing Governance According to Law (hereinafter “Decision”), which was passed at the 4th Plenary Session of the 18th Central Committee of the CPC,³⁷ states that, in order to guarantee judicial fairness and raise judicial credibility, it shall take effective measures to strengthen and standardize judicial interpretation and case guidance and unify standards for application of the law.³⁸ And organs within the Party and government (at all levels) and leading cadres need to support the courts in exercising their functions and authorities independently and justly in accordance with the law.³⁹ Given the official endorsement of the CCP, it’s understandable that, in the context of China, the SPC was bold enough to develop the guiding case system and, as described, has not encountered obstacles from the legislature.⁴⁰ Definitely, with regard to the legitimacy of such a reform, “in a single party state the ‘legal instruments’ including the Constitution may give way to the ‘political instruments’, in particular if the reform is to be or has been endorsed by the CPC’s Central Committee.”⁴¹ In fact, it has been perceived that, although the courts are normally a passive actor in politics, they can effectively enhance their authority and apply the laws innovatively if they can seek support from the Party and, if this is achieved, other agencies will adjust their behavior accordingly.⁴²

To be true, since its inception, it is fair to say that the legitimacy of the guiding case system has not been contested in practice, and there seems no political or constitutional barriers to the SPC moving forward and continuing to build up a more comprehensive system of Chinese precedents centered on guiding cases. For example, using the current guiding case system, the SPC

³⁷ Zhonggong Zhongyang Guanyu Quanmian Tuijin Yifa Zhiguo Ruogan Zhongda Wenti de Jueding (中共中央關於全面推進依法治國若干重大問題的決定) [CPC Central Committee Decision concerning Several Major Issues in Comprehensively Advancing Governance According to Law] (promulgated by the 4th Plenary Session of the 18th Central Committee of the CPC, Oct. 23, 2014) CPC News, <http://cpc.people.com.cn/n/2014/1029/c64387-25927606.html> [<https://perma.cc/P5MB-UCPJ>].

³⁸ *Id.*

³⁹ *Id.*, ¶ IV.

⁴⁰ Wang, *supra* note 33, at 1092.

⁴¹ *Id.*

⁴² Xin He, *Judicial Innovation and Local Politics: Judicialization of Administrative Governance in East China*, 69 THE CHINA J. 20 (Jan. 2013).

established the Research Base (Beijing) for Intellectual Property Case Guidance (hereinafter “Research Base (Beijing)”) in 2015, based in the newly established Beijing Intellectual Property Court. It has also moved to establish a comprehensive intellectual property case guidance system, including guiding cases and reference cases (參考案例).⁴³ According to the *Outline of the Juridical Protection of Intellectual Property in China (2016-2020)* (hereinafter “Outline”), the intellectual property case guidance system incorporates the following precedents: (1) the intellectual property guiding cases published by the SPC; (2) the prior cases published in the SPC’s Gazette; (3) representative/typical cases (典型案例) published by the SPC’s Intellectual Property Division;⁴⁴ (4) prior cases published by the SPC’s Research Base (Beijing); and (5) representative intellectual property cases published by the SPC’s Judicial Case Academy.⁴⁵ In addition, specific rules and mechanisms for case selection, the level of legal force of different types of precedents, the authority of different publishing institutions, and the publication methods have been defined accordingly. The extent to which China has formed a holistic system of judicial precedents will be discussed below.⁴⁶

⁴³ Tao Kaiyuan (陶凱元), *Tansuo Wanshan Juyou Zhongguo Tese de Zhishi Chanquan Anlie Zhidao Zhidu* (探索完善具有中國特色的知識產權案例指導制度) [Explore Intellectual Property Guiding Case System with Chinese Characteristics] *THE SUP. PEOPLE’S CT. OF CHINA* (Apr. 24, 2015, 3:40 PM), <http://www.court.gov.cn/zixun-xiangqing-14266.html> [https://perma.cc/9T36-MCS5].

⁴⁴ For the purpose of this article, the terms prior case, judicial precedents, precedents may be used interchangeably. In addition, the term “typical case”, instead of the identical terms “representative case” and “model case”, is used in this article.

⁴⁵ Judicial Case Academy (司法案例研究院), formally affiliated with the Supreme People’s Court, was established in September 2016. The aim of the academy is to collect and carry out research on China’s judicial precedents and build up a comprehensive database of China’s precedents to facilitate the adjudication in practice. For more details, see the Website of the Judicial Case Academy at <http://anli.court.gov.cn/static/web/index.html#/yjyjk> [https://perma.cc/5XBD-HNUV] (last visited Aug. 18, 2017).

⁴⁶ For more details about the practice of the intellectual property case guidance system, see Yang Jing (楊靜), *Anlie Zhidao Zhidu zai Zhishi Chanquan Lingyu de Shijian Tansuo* (案例指導制度在知識產權領域的實踐探索) [The Pilot Practice of Case Guidance System in the Field of Intellectual Property], *People’s Ct. Daily* (July 26, 2017, 10:07 AM), <https://www.chinacourt.org/article/detail/2017/07/id/2935072.shtml> [https://perma.cc/TEA9-W6NX].

IV DYSFUNCTION OF THE BINDING FORCE OF GUIDING CASES

Although, normatively, guiding cases have binding force, they are not effectively referred to by the judges as discussed above. The crucial issue to be addressed is why this is the case.

A. Identification of Similarities between Cases and Judicial Independence

Article 9 of the *Detailed Rules* states that, “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 main points of adjudication in the relevant guiding case”.⁴⁷ Levi notes that, as a method of reasoning necessary for law, there is a three-step process under the doctrine of precedent: “similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case”.⁴⁸

The first points to the precondition for judges to implement the guiding case system. However, the identification of similarities between cases is largely based on judges’ discretion because in the event of ambiguities between statutes, in the main the specific issues presented by the controversies are complex and difficult and there are a wide range of possible decisions.⁴⁹ For example, as far as the sentencing of convicted criminals is concerned, there is no general agreement about “whether some factors should be taken into account, such as whether the offenders came from disadvantageous social or economic circumstances. And there was nothing approaching general agreement about what weight was to be given to the various

⁴⁷ Zuigao Renmin Fayuan Guanyu Anli Zhidao Gongzuo de Guiding Shishi Xize (《最高人民法院關於案例指導工作的規定》實施細則) [Detailed Rules for the Implementation of the Provisions of the Supreme People’s Court on Case Guidance] (promulgated by the Sup. People’s Ct., Apr. 27, 2015, effective May 13, 2015), art. 9, CHINA GUIDING CASES PROJECT, ENGLISH GUIDING CASES RULES, June 12, 2015, at 4, <http://cgc.law.stanford.edu/guiding-cases-rules/20150513-english/> [perma.cc/HUL8-7G8U].

⁴⁸ Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 501–02 (1948).

⁴⁹ Strauss, *supra* note 14.

factors that were relevant to a sentencing decision”.⁵⁰ In this sense, it can be argued that the choice surrounding how to “treat like cases alike” is just a variation of the dilemma over rules and standards, i.e., whether decisions should be governed by relatively determinate rules or by standards that allow more discretion.⁵¹

Of course, some rules may be so clear that judges have no room for interpretation in the process of applying it to a particular case. However, as far as legal reasoning is concerned, some legal rules are never clear in reality and, “if a rule had to be clear before it could be imposed, society would be impossible”.⁵² It is simply not true that the law is a system of known rules applied by a judge. In fact, “it is only folklore which holds that a statute if clearly written can be completely unambiguous and applied as intended to a specific case”.⁵³

Due to the inevitability of ambiguity in both the statute and Constitution, as well as the case law, it is often a primary task for a judge when making a decision to figure out the way of clarifying the ambiguities involved either explicitly or implicitly. Obviously, given the fact that contemporary jurists have increasingly recognized and articulated the lawmaking functions of the courts, as well as the independence of the judiciary as stipulated in the Constitution in particular in liberal democracies, the judges are able to articulate a dictum in the judgments in the domain of their discretion.

In this regard, even with the traditional notion that judges are merely in place to apply the law made by the legislature, to a limited extent, judges are able to change or even subvert the governing norm without breaching the rules that govern their institutional role.⁵⁴ As far as case law is concerned, the dynamics of this are described as follows:

These characteristics become evident if the legal process is approached as though it were a method of applying general rules of law to diverse facts—in short, as though the doctrine of precedent meant that general rules, once properly determined, remained unchanged, and then were applied, albeit imperfectly, in later cases. If this were the doctrine, it would be disturbing to find that the rules

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Levi, *supra* note 48, at 501.

⁵³ *Id.* at 505.

⁵⁴ Strauss, *supra* note 14.

change from case to case and are remade with each case. Yet this change in the rules is the indispensable dynamic quality of law. It occurs because the scope of a rule of law, and therefore its meaning, depends upon a determination of what facts will be considered similar to those present when the rule was first announced. The finding of similarity or difference is the key step in the legal process.⁵⁵

In relation to the reasoning of case law, in the process of determining the controlling similarity or difference between the present and prior case, the rules have been discovered and the case to a large extent has been decided.⁵⁶ This actually shows that the case law mechanism, to a large extent, is grounded on judicial independence where the judges are able to create a rule or a legal category out of the present case. By the same token, a judge in the present case may find the existence or absence of facts which a prior judge thought significant to be irrelevant. Therefore, the judge is not bound by the statement of the rule of law made by the prior judge even in the controlling case.⁵⁷

Historically, the emergence of case law in England largely occurred in parallel with judges' independence and representative government.⁵⁸ In addition, in modern civil law countries, the prior case became increasingly significant and took on a persuasive force over the courts in deciding similar cases subsequently. It is also largely ascribed to the judges' independence and the representative government in that the judges are able to make a statement of the rule of law out of a case independently in a liberal context.

In contrast, as China does not have a decentralized model case law system like those in liberal democracies, the courts are principally executants of the legislature and cannot make an explicit statement of the rule of law out of a case. This was reflected in the SPC's statement that China has not adopted any kind of case law system. What is distinctive about the guiding case system is that it is not the trial judge but the SPC that makes a specific statement of rule of law out of the original judgment. In this sense, the guiding case system, by its nature, is not a type of case law through which the judges are able to make a specific statement of rule of law out of a

⁵⁵ Levi, *supra* note 48, at 501.

⁵⁶ *Id.* at 502.

⁵⁷ *Id.*

⁵⁸ RUSSELL KIRK, THE ROOTS OF AMERICAN ORDER, 189 (Wilmington: ISI Books, 4th ed. 2003).

present case, but merely a form of statutory interpretation in that the SPC is able to interpret the law by adding an additional part, the MPA, to a selected guiding case. Obviously, this is a centralized model in the sense that the relevant “rule of law” out of a guiding case is exclusively issued by the SPC, as opposed to the decentralized model in a liberal context where normal judges are free to make a specific statement of rule of law out of a case in hand.

Against this background, it is not logical for judges to explicitly refer to a prior case in a judgment as, to some extent, it challenges the widely accepted principle that China has no case law system. In an authoritarian context, judges, as cadres of the State, will be primarily concerned about whether they have enforced the legal rules issued by the sovereign political authority faithfully.⁵⁹ As far as case law reasoning is concerned, according to the *Detailed Rules*, it seems that judges are able to “identify” the similarity between a present case and a guiding case so as to refer to the MPA issued by the SPC.⁶⁰ However, it is not possible to apply case law reasoning to the guiding case system. On the one hand, it is a fact that “in case law, when a judge determines what the controlling similarity between the present and prior case is, the case is decided”.⁶¹ At the same time, the construction and application of law has been

⁵⁹ Provisions of the Supreme People’s Court on Citation of Such Normative Legal Documents as Laws and Regulations in the Judgments (最高人民法院關於裁判文書引用法律、法規等規範性法律文件的規定) (promulgated by the Sup. People’s Ct., Oct. 26, 2009, effective Nov. 4, 2009) PKU L.

<http://en.pkulaw.cn/display.aspx?cgid=122772&lib=law>

[<https://perma.cc/Z7XR-K9UD>]. These include all sources of Chinese law as defined by the SPC in the Provisions on Citation of Such Normative Legal Documents as Laws and Regulations in the Judgments. Specifically speaking, Article 2 states that, “If several normative legal documents are cited in parallel, the citation sequence shall be as follows: laws and legal interpretations, administrative regulations, local regulations, regulations on the exercise of autonomy or separate regulations, and judicial interpretations.” In addition, Article 6 states that, “Where the normative documents other than those as prescribed by Articles 3, 4 and 5 of these Provisions are confirmed as legal and effective upon examination in accordance with the needs for case trial, such normative documents may be taken as a ruling and reasoning basis.”

⁶⁰ Zuigao Renmin Fayuan Guanyu Anli Zhidao Gongzuo de Guiding Shishi Xize (《最高人民法院關於案例指導工作的規定》實施細則)

[Detailed Rules for the Implementation of the Provisions of the Supreme People’s Court on Case Guidance] (promulgated by the Sup. People’s Ct., Apr. 27, 2015, effective May 13, 2015), CHINA GUIDING CASES PROJECT, ENGLISH GUIDING CASES RULES, June 12, 2015, <http://cgc.law.stanford.edu/guiding-cases-rules/20150513-english/perma.cc/HUL8-7G8U>.

⁶¹ Levi, *supra* note 48, at 505.

made either implicitly or explicitly. Also, “the rules are discovered in the process of determining similarity or difference”.⁶² In this regard, assuming that the controlling similarity has been determined by the judge, then there is no longer a need to impose an additional rule in the form of the MPA from outside on the judge. On the other hand, as the SPC has clearly made a specific rule of law—the MPA—out of a guiding case, and what the judges shall do afterwards is just apply the specific rule to the present case, then the facts and legal reasoning involved in a guiding case would actually play only a supplementary role to facilitate judges’ understanding of the MPA when applied by judges. In other words, this is merely a process of applying a specific rule of the SPC rather than a process of case law reasoning.

Therefore, due to the fact that China has not adopted any type of case law and judges are largely reluctant to make a specific and explicit statement of rule of law out of a case independently, any attempt to develop the centralized guiding case system into a decentralized type of case law is doomed to be ineffective in reality. In practice, the judges interviewed stated that, when they were asked or even challenged by the plaintiff or defendant that a similar prior case should be referred to in the judicial decision-making, they easily defended their disregard of a prior case by saying that “China is not a case law jurisdiction”. From the judge’s point of view, it is much safer for them not to refer to a prior case. To a certain extent, this has been demonstrated by the malfunction of the guiding case system over the past five years.

B. Collective Model of Judicial Decision-making and Public Discourse

Although judges in China are reluctant to make a specific and explicit statement of rule of law out of a case, this does not mean that they cannot make a judicial decision independently in most situations. Indeed, adjudicative independence has been increasingly emphasized by the CPC in recent judicial reforms in a way that further enhances the credibility of the judiciary and builds up a more professionalized court system.⁶³ Moreover, the fact that judges are

⁶² *Id.* at 502.

⁶³ Zhonggong Zhongyang Guanyu Quanmian Tuijin Yifa Zhiguo Ruogan Zhongda Wenti de Jueding (中共中央關於全面推進依法治國若干重大問題的決定) [CCP Central

able to make a judicial decision independently does not mean they can do it arbitrarily without any limits.

Historically, in contrast to written statutes issued by a sovereign political authority, case law has never been a corpus of acts passed by the legislature or the like but has grown out of practical cases over centuries, which have been sanctioned by popular assent to their fairness. To put it another way, because case law has arisen out of centuries of judges' decisions and is based on what people believed to be just, it can be said to have grown organically on the basis of custom and precedent over a very long period of time. Thus, that there is no need for Parliament or some comparable political authority to ratify such a "people's law".⁶⁴ Kirk argues that in a free society:

For a body of law to be really enforceable, it must receive the willing assent of the mass of people, living under such a law. Stable government grows out of law, not law out of government. If the political power decrees positive laws without reference to general consent, those laws will be evaded or defied, and respect for law will diminish, so that force must be substituted for justice.⁶⁵

The mechanism of legal reasoning of case law has actually accepted different views on the ambiguities of words in the forum under the "adversary" model of legal proceedings. In this sense, a significant function of the forum is to protect the parties and communities and make sure that the different arguments can be presented before the court. Broadly speaking, for the mechanism of case law reasoning:

The examples or analogies urged by the parties bring into the law the common ideas of the society. The ideas have their day in court, and they will have their day again. This is what makes the hearing fair, rather than any idea that the judge is completely impartial, for of course he cannot be completely so. Moreover, the hearing in a sense compels at least vicarious participation by all the

Committee Decision concerning Several Major Issues in Comprehensively Advancing Governance According to Law] (promulgated by the 4th Plenary Session of the 18th Central Committee of the Chinese Communist Party, Oct. 23, 2014), ¶ IV, COMMUNIST PARTY OF CHINA NEWS, at 3, <http://cpc.people.com.cn/n/2014/1029/c64387-25927606-3.html> [perma.cc/4ST5-J5ZR].

⁶⁴ Kirk, *supra* note 58, at 184–185.

⁶⁵ *Id.* at 189.

citizens, for the rule which is made, even though ambiguous, will be law as to them.⁶⁶

Therefore, although judges are able to reinterpret a prior case and in doing so reject the idea of a prior judge, or convert a legal category out of a prior case into something, such a reasoning process is one “in which the ideas of the community and of the social sciences, whether correct or not, as they win acceptance in the community, control legal decisions.”⁶⁷ In this way, it can be seen that the judicial decision-making process, though judge-centered, is actually situated in the public discourse. In other words, in a liberal context, the courts are bound by the statutes and carry the burden of all participants into the forum, in a broad sense of the public in particular through the mechanism of judicial transparency, where judges have to respond to them in the public sphere when identifying the similarities between cases or justifying the differences if the judicial decision departs from a prior case.

Such a public discourse of legal enforcement can also be illustrated by the jury system in a free society in the following way:

“Guilt or innocence must be determined in open court, by free men whose determination the judge cannot reverse. Whatever the deficiencies of the jury method, serving on juries became a powerful instrument for instructing the public in the nature of law. Jury service, besides, is a form of popular representation in public affairs.”⁶⁸

In this way, people can assert a share of public concern, and a state-appointed judge cannot enforce the policies of the political authority without the sanction of a jury which comprises independent citizens.⁶⁹ Therefore, the fact-finding jury can fundamentally prevent the judges from making an arbitrary decision. Due to this burden from the public, the judges, although they have discretion, “will not be permitted to create laws or to decide cases arbitrarily, or to favor particular persons in particular circumstances. They must abide by the accumulated experience of legal custom, so that the law will be no respecter of persons, and so that people may be able to act in the certitude that the law does not alter capriciously.”⁷⁰

⁶⁶ Levi, *supra* note 48, at 504.

⁶⁷ *Id.*

⁶⁸ Kirk, *supra* note 58, at 185–186.

⁶⁹ *Id.* at 186.

⁷⁰ *Id.* at 185.

In contrast, in an illiberal context, the primary concern of the courts is the enforcement of legal rules issued by a sovereign political authority, rather than the consensus of the people in the community. In this regard, when ambiguities of law arise, given the absence of judicial independence, the judges will normally report the case, if it is complicated and difficult enough, to a higher-level judicial authority for a solution, rather than relying on local customs or consensus of the community. For example, in China, if a case becomes so complicated that the judges feel that it is too risky to handle it directly based on their discretion, it is more likely that they will submit it to the highest decision-making body of the courts, the Adjudication Committee, or seek a solution from the next level court. In this way, the judges may shift away their burden from the public or elsewhere.⁷¹ Of course, judges may take into account the public concern, but in an authoritarian context this would be limited.

In addition, in an illiberal context, an “inquisitorial” model of legal proceedings is often adopted by which the judicial authority is often actively involved in investigating the facts of the case. In line with this, a collective model of judicial decision-making is used, and the judges do not normally provide a detailed reasoning in the judgment to the public. As a result of the lack of judicial independence and judges’ reluctance to make a specific and explicit statement of the rule of law out of a case in the judgment, judicial decisions are normally very short, only giving basic information on the parties and authorized agents *ad litem*, procedural history, claims, facts, grounds, the legal basis for the judicial decision, the disposition of the judicial decision, and finally the signature of trial judges and the official seal of the court. There is little detailed reasoning about how the factual and legal issues were determined by the judges. Also, the judgment does not include any dissenting opinions of individual judges but is rendered by the court in a collective way through the phrase “the Court holds . . . “.⁷² Such a concise model of judicial decision has clear advantages for judges in the sense that it prevents litigants raising further disputes that would ensue from written

⁷¹ Xin He, *Black Hole of Responsibility: The Adjudication Committee’s Role in a Chinese Court*, 46 L. & SOC’Y REV. 681, 712 (2012).

⁷² For details about the structure of China’s judgements, in particular, the civil ones, see *Specifications for Preparing Civil Judgments by the People’s Courts* (人民法院民事裁判文書製作規範), issued by Sup. People’s Ct., Jun. 28, 2016.

judgments.⁷³ Therefore, although the western style of judgments with detailed reasoning has been guided and encouraged by the SPC for over two decades, the concise style of Chinese judgments, as discussed above, remains almost the same as before.⁷⁴ Judges in the same collegiate panel have the right to express dissenting opinions during the closed-door meetings of the panel, during which the majority rule for the final judicial decision-making would be taken, in case of different opinions among the judges.⁷⁵ However, under such a collective model, any dissenting or minority opinions of judges would not generally be included in the judgment and made known to the public. In this regard, in the event of ambiguities of laws, judges normally construe the law implicitly behind closed doors and will not disclose their detailed reasoning, if any, to the public in the judgment. On the surface, this shows that judges are merely to declare—rather than make—the law given by the legislature.

This is being played out against the reality of an ongoing tension between more cases and fewer judges (案多人少) in practice (14HZ).⁷⁶ For example, from January to October 2015, the courts in Jiangsu employed 10,000 judges but received over 1.6 million cases,

⁷³ Ling Bin (凌斌), *Faguan Ruhe Shuoli: Zhongguo Jingyan yu Pubian Yuanli* (法官如何說理：中國經驗與普遍原理) [How Judges Reason: A Chinese Story and Principles], 5 CHINA LEGAL SCI. (中國法學) 99, 101 (2015).

⁷⁴ Since 1993, the SPC has issued the *Fayuan Susong Wenshu Yangshi* (法院訴訟文書樣式) [Models and Styles of Litigation Documents], in order to provide guidance on how to prepare and improve the quality of judgments. In 2016, the SPC issued new guidance on this. For more details, see *Renmin Fayuan Minshi Caipan Wenshu Zhizuo Guifan* (人民法院民事裁判文書製作規範) [Specifications for Preparing Civil Judgments by the People's Courts and the Style of Civil Litigation Documents] (promulgated by the Sup. People's Ct., June 28, 2016, effective Aug. 1, 2016), SUP. PEOPLE'S CT..

⁷⁵ In 2015, the SPC issued a judicial interpretation, stating that judges are free to express their dissenting opinion independently when determining the factual and legal issues. The judges shall enjoy the right not to be removed or demoted from the post or dismissed, and right to not be given a sanction without a statutory basis and without going through statutory procedures. See *Zuigao Renmin Fayuan Guanyu Wanshan Renmin Fayuan Sifa Zeren Zhi de Ruogan Yijian* (最高人民法院關於完善人民法院司法責任制的若干意見) [SPC's Opinion on How to Improve the Judicial Responsibility of the People's Courts] (promulgated by the Sup. People's Ct., Sept. 21, 2015, effective Sept. 21, 2015), SUP. PEOPLE'S CT. for more details.

⁷⁶ Susan Finder, *Signals in Zhou Qiang's 2017 NPC Report*, SUP. PEOPLE'S CT. MONITOR, <https://supremepeoplescourtmonitor.com/2017/03/18/signals-in-zhou-qiangs-2017-npc-report-part-1/> [<https://perma.cc/35V8-3Y3V>] (last visited Aug. 25, 2017).

meaning that each judge had to handle 160 cases.⁷⁷ As a guide, at the grassroots level, it is common for a judge to handle more than 200 cases per year. In addition, given the simplified style of the judgments in common practice, it is extremely difficult to identify how the factual and legal issues are determined by the judges in a prior case. As the judges stated, “a prior case involves a variety of factors, which cannot be revealed fully in the judgment and presented before the judges in handling a present case. Actually, no cases are the same although there may exist some facts in common.”⁷⁸ Therefore, it is more realistic for a judge to follow the concise style of the judgment as mentioned above and unrealistic for him to refer to a prior case with detailed reasoning for judicial decision-making because searching for similarities and differences between cases may be an arduous and fruitless endeavor.

Therefore, referring to a guiding case in the judgment can hardly be accepted as routine practice in China. However, in terms of the occasional practice of referring to a guiding case or a prior case, the situation is different. Some judges said that, as a means of supporting their decision, they may search out prior cases only after they had decided the case in their mind but were still uncertain about it. Other judges stated that, when handling controversial cases, they may use a guiding case or a prior case as a kind of defense for their judicial opinion, in particular if they wanted the Adjudication Committee to accept their judicial opinion, even though a similar case submitted could easily be disregarded by the Adjudication Committee because of the absence of a case law system. In addition, some new judges, in particular at the grassroots level courts of Guangxi, said they may use high quality judgments of Guangdong to learn how to make judicial decisions and write judgments. In short, referring to a guiding case or a prior case is mostly an inconsistent practice and normally not included in the judgment in China.

It can be seen that the lack of judicial independence has been the main barrier for judges to make an explicit and specific statement of the rule of law out of a case at hand in a way that would develop

⁷⁷ Jin Hao (金豪), “Yuan E Zhi” Huo Yin “Anduo Renshao” Zhuanjia Kaichu “Chufang” (「員額制」或引「案多人少」專家開出「處方」) [Quota System May Lead to “More Cases but Less Judges” Experts Gave Out A “Prescription”], SHANGHAI L.J. (Dec. 1, 2015), <http://www.shzfz.net/node2/zzb/shzfz2013/yw/u1ai936111.html> [<https://perma.cc/3AAS-B4U2>].

⁷⁸ Yang, *supra* note 46.

case law in China. At the same time, given the collective model of judicial decision-making in the event of ambiguities of laws, the judges' primary concern is not about the public consensus in the community but the will of the higher authority. Consequently, the concise style of the judicial decision without very detailed reasoning has become an obvious way for judges to protect themselves in the sense that it can, to a certain extent, avoid potential legal disputes based on the judicial decision from litigants and the public, and avoid the political risks that may occur otherwise in an authoritarian context. It has been a common practice for judges to exclude details on determining factual and legal issues, including their construction of laws and the reasoning, from the judgment. This then makes it extremely difficult for the judges to identify the similarities between cases which is a precondition for the legal reasoning of case law. Following this logic, the guiding case can hardly function as case law, but its main legal function is in fact through the MPA, which is added by the SPC and is a form of statutory interpretation. It can be foreseen that, in such an authoritarian context, the case law function of the guiding case system is doomed to ineffectiveness and is used in an inconsistent way, if it is applied at all.

V GUIDING CASES AND SPC'S TYPICAL-CASE-SELECTION MOVEMENT

The guiding case system does not work effectively as a sort of case law, but this does not mean that it is of no value in other ways. The guiding case system has in fact acted to solidify the national typical-case-law selection movement in that a certain number of typical cases, preliminarily selected and submitted mostly by lower courts, are submitted to the SPC for final selection and determination.

It appears that the guiding cases do not arise spontaneously from the trial practice, as opposed to the decentralized model of case law which is binding once rendered by the judges. The guiding cases are artificially selected from lower courts and passed up to the SPC for final determination. In order to make the selection movement run smoothly, there must at least exist some mechanism that ensures a certain number of typical cases are selected and submitted to the SPC periodically.

Interestingly, legally speaking, it is not compulsory for the lower courts to submit a certain number of typical cases to the SPC

periodically. Nonetheless, it has been common practice for provincial level courts to submit a certain number of typical cases from within their own respective jurisdiction to the SPC for final selection and publication. These cases, which are selected and determined by the Research Office of the SPC, have *de facto* the highest authority among all typical cases for they have gained a clear legal status with a binding force. They are then finally endorsed by the highest judicial decision-making body—the Adjudicative Committee of the SPC. In addition, the SPC has issued a specific official notice, the *Notice of the Research Office of the Supreme People’s Court on Issuing the Opinions on Style for Compiling and Submitting Guiding Cases and the Format for Guiding Cases*, to give all provincial level courts details on the style for compiling, submitting and formatting guiding cases.⁷⁹ In this regard, owing to the higher political authority of the SPC, it is natural for provincial level courts to select and submit some preliminarily selected guiding cases to the SPC for final determination.

This type of typical-case-selection movement inside the court system has been running in a bureaucratic manner for decades. Due to the higher political status of the SPC, the SPC or its relevant departments are able to issue relevant policies or notices informing and mobilizing lower courts to engage with the typical-case-selection movement. In 1992, the SPC’s Training Center for China’s Senior Judges (中國高級法官培訓中心), which is currently called National Judges College (國家法官學院) (hereinafter “NJC”), formally established a typical-case-selection mechanism, under which the provincial level courts, in principle, have a liaison judge who is in charge of selecting a certain number of typical cases from within its jurisdiction to the NJC for the final selection and annual publication of *China Case Trial Highlights* (中國審判案例要覽) (hereinafter “*Highlights*”). The *Highlights* is co-edited by senior judges from SPC tribunals and renowned law professors from China’s prestigious law school at Renmin University of China (RUC) in Beijing. The

⁷⁹ Zuigao Renmin Fayuan Yanjiushi Guanyu Yinfa Guanyu Bianxie Baosong Zhidaoxing Anli Tili de Yijian, Zhidaoxing Anli Yangshi de Tongzhi (最高人民法院研究室關於印發《關於編寫報送指導性案例體例的意見》、《指導性案例樣式》的通知) [Notice of the Research Office of the Supreme People’s Court on Issuing the Opinions on Style for Compiling and Submitting Guiding Cases and the Format for Guiding Cases] (promulgated by the Sup. People’s Ct., Dec. 30, 2011, effective Dec. 30, 2011), RES. OFF. OF THE SUP. PEOPLE’S CT.

director of the editorial board of the *Highlights* is the SPC's President Zhou Qiang and the editors-in-chief are the Vice Presidents of the SPC and RUC.⁸⁰ The high political authority of the editorial team clearly indicates the importance of the *Highlights* among the courts.

In addition, China Institute for Applied Jurisprudence (中國應用法學研究所) (CIAJ), a subordinate institute of the SPC, has selected a certain number of typical cases for the publication of *Selected Cases from the People's Courts* (人民法院案例選) (hereinafter "*Selection*") since 1991. This became a monthly issue in 2016. It also established a stable typical-case-selection mechanism, under which provincial level courts, as well as many prefectural level courts, normally appoint one or two liaison judges who are in charge of periodically selecting a certain number of typical cases for the SPC from within their respective jurisdictions.⁸¹ The advisory board of the *Selection* includes the SPC's Executive Vice President and Vice Presidents, and the editors are generally chief judges of the SPC, which to some extent also shows the high authority of the *Selection* among the courts.

As far as the departmental interests are concerned, given that the NJC and CIAJ are not trial divisions of the SPC, the *Highlights* and *Selection* have become extremely significant for the two. Over the past decades, the CIAJ has issued relevant official documents, such as the *Notice on How to Edit and Submit Prior Cases to the Selected Cases from the People's Courts* issued in 2012, to regulate and fuel its typical-case-selection movement with regard to the submission style, format requirement, criteria, etc.⁸² The typical-case-selection work of the CIAJ has been officially stressed and supported by the SPC. For instance, in 2005, the General Office of the SPC issued a specific official notice to all provincial level courts,

⁸⁰ See, e.g., ZHONGGUO SHENPAN ANLI YAOLAN (中國審判案例要覽) [China Case Trial Highlights] 1 (Nat'l Judges C. & Remin U. of China Sch. of L. eds. 2014), Beijing, Renmin University Press, 2016, p 1.

⁸¹ For the names of these judges, see 95 RENMIN FAYUAN ANLI XUAN (人民法院案例選) [Selected Cases from the People's Courts] 258-60 (2016).

⁸² Guanyu Yinfa Renmin Fayuan Anlie Xuan Anli Bianxie Tili yu Baosong Guifan de Tongzhi (關於印發《人民法院案例選》案例編寫體例與報送規範的通知) [Notice on How to Edit and Submit Prior Cases to the Selected Cases from the People's Courts], (promulgated by the China Inst. for Applied Juris., 2012) PINGDINGSHAN SHI XINHUA QU RENMIN FAYUAN (平頂山市新華區人民法院) [People's Court of Xinhua District, Pingdingshan], Apr. 1, 2016, <http://xhqfy.hncourt.gov.cn/public/detail.php?id=996> [<https://perma.cc/GCS8-PU43>].

stressing the authority of the CIAJ and the importance of its edited *Selection* and asking the courts to establish and improve the mechanism of liaison judges so that they can edit, select and submit quality typical cases regularly to CIAJ for the final selection, determination and publication in *Selection*.⁸³ In particular, the importance of *Highlights* has been constantly emphasized by the presidents of the SPC and its work has been appraised by state leaders, such as Xi Jinping, Hu Jintao, etc.⁸⁴

Due to this, these two typical case compilation and selection works have gained political significance among the courts and in practice the courts are cooperative. At present, it has become common practice for provincial level courts to engage with the selection movement and submit a certain number of typical cases to the NJC and CIAJ for their final selection and publication in *Highlights* and *Selection* respectively. For example, the Higher People's Court of Shandong province submitted 84 typical cases in total from within the province to *Selection* and 57 to *Highlights* between 2013 and 2017 (50JNSD).

Apart from these, the Gazette of the SPC is also held in high regard by the courts. This is due in no small measure to its editor-in-chief being the Executive Vice President of the SPC and it being administered by the General Office of the SPC. In practice, the courts normally treat a typical case, if selected and published in the Gazette, as more authoritative than those edited by other SPC institutes/tribunals, such as *Highlights* and *Selections* (03JS; 04JS; 05JS). For example, the Higher People's Court of Jiangsu stipulates that, if a typical case is selected as a guiding case or published in the Gazette, then both the judge and his or her court or tribunal will be awarded a Citation for Merit.⁸⁵ This indicates that the typical cases

⁸³ For explanation that the SPC has been officially supporting the typical-case-selection work of the CIAJ, see Zuigao Renmin Fayuan Bangongting Guanyu Jiaqiang Renmin Fayuan Anli Xuan Bianji Gongzuo de Tongzhi (最高人民法院辦公廳關於加強《人民法院案例選》編輯工作的通知) [Notice on the Editorial Work of the Selected Cases from the People's Courts], SUP. PEOPLE'S CT., <http://www.chinabaik.com/law/zy/sf/fy/1338361.html> [perma.cc/2VQD-WXVJ] (last visited Sept. 1, 2017).

⁸⁴ ZHONGGUO SHENPAN ANLI YAOLAN (中國審判案例要覽) [China Case Trial Highlights] 1 (Nat'l Judges C. & Remin U. of China Sch. of L. eds. 2014).

⁸⁵ Jiangsu Sheng Gaoji Renmin Fayuan Shenpan Weiyuanhui Huiyi Jiyao (江蘇省高級人民法院審判委員會會議紀要) [Conference Brief of Adjudicative Committee of Jiangsu Higher People's Court], No.15 (2012) (internal document).

in the Gazette and guiding cases are normally more authoritative than other forms of typical cases, to a large extent owing to the higher political authority of the competent authorities of the SPC.

In addition, mostly for political, policy and even market reasons, the SPC or its tribunals in the name of the SPC may organize some typical-case-selection awarding activities in adjudicative areas across the country. For instance, the Environment and Resources Tribunal of the SPC, in responding to the CPC's new policy with an emphasis on environmental protection, called on all legal professionals to submit quality judicial precedents in this area for the SPC's national award program of typical/model cases.⁸⁶ Receiving an award of this type is a title of honor for the trial judges and their court. These kinds of awarding activities are officially noted by the SPC's institutes and the judges/courts normally participate in them on a voluntary basis. Largely due to the SPC's high political authority and the influence of these types of national awarding activities, it has become common practice for the *Selection* to contain a special column in each issue for the publication of the typical cases selected from national awarding activities.

Most tribunals of the SPC play their own role in informing the judiciary by publishing specialist periodicals or book series in their respective areas of expertise, such as *Book Series of China Trial Guide* (中國審判指導叢書), which provide judges with newly released policies, judicial interpretations, typical cases, opinions on new or difficult legal issues, etc. For example, the SPC's criminal adjudication tribunals publish *Reference to Criminal Trial* (刑事審判參考), (hereinafter "*Reference*") bimonthly. Each issue of the *Reference* often contains special columns for publication of some typical/model cases with judges' specialist comments, as well as some representative judgments with a commentary summary of judges' reasoning therein. In addition, the periodicals or books of this type that are edited by the SPC's tribunals often contain some case notes that discuss new or difficult issues in each volume. Because the SPC has not officially recognized the importance of this type of

⁸⁶ See Zuigao Fa Gongbu Huanjing Xingshi Minshi Xingzheng Dianxing Anli (最高法公佈環境資源刑事、民事、行政典型案例) [The SPC Releases Typical Cases concerning Environmental Law], SUP. PEOPLE'S CT., June 22, 2017, <http://www.court.gov.cn/zixun-xiangqing-48782.html> [perma.cc/R9F9-84NJ] (detailing the typical-case-selection awarding activities organized by the Environment and Resources Tribunal of the SPC.)

periodical or book, in spite of them being edited by the tribunals of the SPC, they are often treated as significant reference books or periodicals among legal professionals. In practice, the typical cases of this type normally are further selected by SPC's relevant institutes for the publication on the *Selection* periodically.

Furthermore, SPC's publishing agencies, including its newspaper, *People's Court Daily* (人民法院報); the weekly magazine, *The People's Judicature* (人民司法); and the publishing company, *People's Court Press* (人民法院出版社), also publish some typical cases in their volumes periodically, as well as edited casebooks. For example, the *Collection of the SPC's Judicial Rules* (最高人民法院司法觀點集成), published by the People's Court Press, is in its 2nd edition and has become very popular among judges as a useful reference book for their judicial decision-making. In addition, as only a limited number of submissions can be published in the *Selection*, its editorial committee, to a certain extent motivated by the publishing market, has collaborated with a publishing company to publish the book series of *Annual Casebook of China's Courts* (中國法院年度案例) (hereinafter "*Annual Casebook*") in order to publish more submissions on it, which can actually include some published typical cases in the *Selection*.⁸⁷ For these types of typical cases, they are normally market-oriented with no political importance in the courts, and the purpose is mainly for legal education, rule-of-law propaganda, scholarly research, etc.

Based on the analysis above, it can be seen that the SPC has actually created a variety of typical-case-selection movements largely in a bureaucratic manner, and the guiding case has become a legalized form among all of the SPC's typical cases and has largely crystallized the typical-case-selection movement. The variety of SPC typical-case-selection movements is illustrated in Table 1.

⁸⁷ See Guanyu Zhengji Zhongguo Fayuan 2018 Niandu Anli Gaojian de Tongzhi (關於徵集《中國法院2018年度案例》稿件的通知) [Notice on Calling for Representative Cases of 2018], CHINA CASE TRIAL HIGHLIGHTS EDITORIAL BOARD (Dec. 5, 2016), <http://file.chinacourt.org/f.php?id=11619&class=file> [<https://perma.cc/PJG4-2DA6>] (detailing the editorial committee's effort to publish the Annual Casebook.)

Table 1: Variety of Typical-Case-Selection Movements of the Supreme People's Court

Type	Selection Institute	Group	Binding Force	Honor	Frequency
1. Guiding cases	SPC's Research Office (endorsed by the Administrative Committee)	SPC's statutory rules	Yes	Highest	Periodical on a batch basis
2. Typical cases in SPC's Gazette	SPC's General Office	Official document	No	High	Monthly
3. Typical cases in <i>China Case Trial Highlights</i>	SPC's National Judges College	Official document	No	Medium	Yearly

4. Typical cases in <i>Selection of People's Court Cases</i>	SPC's China Institute for Applied Jurisprudence	Official document	No	Medium	Yearly
5. Typical cases selected through national contest	SPC's relevant institutes/ tribunals	Official document	No	Medium	Occasional
6. Typical cases in SPC tribunals' edited publications	SPC's tribunals	Semi-official	No	Low	Periodical
7. Typical cases in other publications	SPC's publishing agencies and others	Market-oriented	No	Extremely low	Periodical/ aperiodic

It is widely accepted as a title of honor for a judge if his or her judgment is selected as a typical case for publication, especially in the first four types mentioned above. Such an honor is often treated as a bonus point for a judge or a court to compete for the SPC-

organized national awards, such as “National Model Judges”, “National Model Courts”, etc. In addition, some courts may take it as a performance indicator.

The *Detailed Rules* set out that the people’s courts at all levels will reward entities and individuals that have made outstanding contributions to case guidance work in accordance with the Judges Law of the PRC and other relevant provisions.⁸⁸ However, strictly speaking, there are no rigid regulations on the typical-case-selection movement. Normally, submitting a certain number of typical cases to the SPC is more like a political task for the lower courts. In this regard, the extent to which the courts are actively engaged with the movement may vary from province to province because it largely depends on the extent to which the provincial level court has taken effective incentive measures to motivate the courts within its jurisdiction to engage with the selection activities. The Higher People’s Court of Jiangsu⁸⁹ is an example of a court that has taken its case guidance work seriously and has issued the *Implementation Rules on Strengthening the Work of Case Guidance* (hereinafter “*Implementation Rules*”)⁹⁰. This encourages the courts of Jiangsu to establish a special fund to make awards to judges whose judgments are ultimately selected as an SPC typical case in the first four types in Table 1. Specifically, the judge will be given bonus points towards his or her annual performance score as well as this financial award. In addition, the court to which the judge is affiliated will be rewarded by the Higher People’s Court of Jiangsu. Furthermore, if a judgment is ultimately selected as a guiding case, he or she will be awarded a Citation for Merit Second Class, and if selected and published by the

⁸⁸ Zuigao Renmin Fayuan Guanyu Anli Zhidao Gongzuo de Guiding Shishi Xize (《最高人民法院關於案例指導工作的規定》實施細則) [Detailed Rules for the Implementation of the Provisions of the Supreme People’s Court on Case Guidance] (promulgated by the Sup. People’s Ct., Apr. 27, 2015, effective May 13, 2015), art. 14 CHINA GUIDING CASES PROJECT, ENGLISH GUIDING CASES RULES, June 12, 2015, <http://cgc.law.stanford.edu/guiding-cases-rules/20150513-english/> [perma.cc/HUL8-7G8U].

⁸⁹ Jiangsu Sheng Gaoji Renmin Fayuan Shenpan Weiyuanhui Huiyi Jiyao (江蘇省高級人民法院審判委員會會議紀要) [Conference Brief of Adjudicative Committee of Jiangsu Higher People’s Court], No.15 (2012) (internal document).

⁹⁰ Jiangsu Sheng Gaoji Renmin Fayuan Guangyu Jiaqiang Anli Zhidao Gongzuo de Shishi Yijian (江蘇省高級人民法院關於加強案例指導工作的實施意見) [Implementation Rules on Strengthening the Work of Case Guidance] (promulgated by Higher People’s Ct. of Jiangsu, Dec. 25, 2012, effective Dec. 25, 2012).

SPC's Gazette, a Third Class.⁹¹ In contrast, if a provincial level court does not adopt relevant policies or offer incentives to motivate lower courts to submit a certain number of quality typical cases to the SPC, the lower courts will obviously have fewer incentives and will not take the task seriously as an important part of their work, for example, in Guangxi (e.g. 22NN; 23NN; 24FCG; 33QZ). Moreover, as submitting a certain number of typical cases to the SPC has been somehow an assigned "political" task, in order to avoid unnecessary controversies from the public or even political risks from the higher-up, the judges normally follows the principle that the selected typical cases are not controversial and sensitive when considering which precedent falls within the category of "typical cases" (e.g., 01JS; 03JS; 05JS). This means that, submitting a socially controversial judicial precedent, though perhaps satisfying the conditions as a typical case, generally is not a rational choice for judges in the context of China.

VI A BUREAUCRATIC MODEL OF JUDICIAL PRECEDENTS CENTERED ON GUIDING CASES

It has been established that the effectiveness of the SPC's typical-case-selection work needs the active participation of the provincial level courts. In response to this, the SPC has delegated the development of a supplementary system on a formal basis to the provincial level courts, which is officially called the reference case system (參考案例), as distinguished from the guiding case system, in order to further strengthen its typical-case-selection work nationwide. Specifically, in 2010, the SPC issued the *Notice on Issuing the Several Opinions on Regulating the Trial Work Relations between the People's Courts at Different Levels*, clearly stating that the Higher People's Courts of each province shall guide the trial work of local courts at all levels within their respective jurisdictions by a

⁹¹ In this regard, it is understandable that some courts sometimes invited the editor of the SPC Gazette to deliver a lecture on how a precedent could be selected as a representative case by the SPC. See *Zhongyuan Yaoqing Zuigao Fayuan Gongbao Bianjibu Zhuren Sun Changshan Juxing Zhuanti Peixun Jiangzuo* (中院邀請最高法院公報編輯部主任孫長山舉行專題培訓講座) [Intermediate People's Court Invited the Editor of SPC's Gazette for Lectures], LIANYUNGANG SHI ZHONGJI RENMIN FAYUAN (連雲港市中級人民法院) [The Intermediate People's Court of Lianyungang] (Dec. 4, 2015), <http://www.lygfy.gov.cn/fyyw/2015/12/10114241434.html> [perma.cc/E6DL-463T] for more details.

variety of measures, including establishing a reference case system.⁹² Moreover, for the courts below the provincial level, they may select and publish a certain number of typical cases within their respective jurisdictions but certainly do not have any authority in the reference case system.⁹³

Although it is not yet common practice for provincial level courts to establish a formal reference case system, because of the SPC's constant emphasis on case guidance work some provincial level courts, such as the Higher People's Court of Jiangsu, have established a reference case system formally according to the SPC's rules on case guidance work. According to the *Implementation Rules* issued by the Higher People's Court of Jiangsu, besides the guiding cases two types of typical cases are categorized as reference cases: one is the typical cases published in the SPC's Gazette; and the other is those published in the Gazette of the Higher People's Court of Jiangsu.⁹⁴

The *Implementation Rules* has provided more details on the selection mechanisms of guiding and reference cases, relevant incentive measures, submission procedures, training programs on guiding and reference cases, etc.⁹⁵ In contrast, it does not provide details concerning the role of reference cases in judicial decision-making and merely states that the courts within the province may take a reference case into consideration when adjudicating similar cases on a voluntary basis.⁹⁶ Even though, such a legal statement to some extent can show that reference cases have more political importance

⁹² Guanyu Guifan Shangxiaji Renmin Fayuan Shenpan Yewu Guanxi de Ruogan Yijian (最高人民法院印發《關於規範上下級人民法院審判業務關係的若干意見》的通知) [Notice of the Supreme People's Court on Issuing the Several Opinions on Regulating the Trial Work Relations between the People's Courts at Different Levels] (promulgated by the Sup. People's Ct., Dec. 28, 2010, effective Dec. 28, 2010), art. 9 LAWINFOCHINA, <http://www.lawinfochina.com/display.aspx?lib=law&id=8695&CGid=https://perma.cc/8LNB-54XX> (last visited Feb. 1, 2019).

⁹³ Hu Yunteng (胡雲騰), Guanyu Anli Zhidao Zhidu De Jige Wenti (關於案例指導制度的幾個問題) [Several Issues on Case Guidance System], GUANGMING RIBAO (光明日報) [Guang Ming Daily] (Jan. 29, 2014, 4:08 AM), <http://theory.people.com.cn/n/2014/0129/c107503-24256964.html> [perma.cc/GVG3-RZF6].

⁹⁴ Jiangsu Sheng Gaoji Renmin Fayuan Guangyu Jiaqiang Anli Zhidao Gongzuo de Shishi Yijian (江蘇省高級人民法院關於加強案例指導工作的實施意見) [Implementation Rules on Strengthening the Work of Case Guidance] (promulgated by Higher People's Ct. of Jiangsu, Dec. 25, 2012, effective Dec. 25, 2012).

⁹⁵ *Id.*

⁹⁶ *Id.* ¶ 24.

than other general typical cases or judicial precedents. In any case, given the absence of case law in China, the practical effectiveness of the reference cases is not substantially different to other judicial precedents with no binding force. For example, they may occasionally be referred to as a reference implicitly in the judicial decision-making just as other scholarly articles or casebooks are. Nonetheless, politically, once a reference case system is established at the provincial level, it can definitely institutionalize the case guidance work within the province, and further strengthen the guiding case system of the SPC and fortify the typical-case-selection movement.

In addition, for the case guidance system of intellectual property law, the SPC has clearly stated in the *Outline of the Judicial Protection of Intellectual Property in China (2016-2020)* (中國知識產權司法保護綱要 2016-2020) that it will make efforts to build up a dynamic and interactive case guidance system comprising guiding cases and reference cases, with the latter including typical cases published in the SPC's Gazette, those published by the SPC's Intellectual Property Tribunal, those published by the SPC's Case Guidance and Research Base (Beijing) [知識產權案例指導研究(北京)基地] at Beijing Intellectual Property Court, and those published by the SPC's Judicial Cases Research Centre (司法案例研究院).⁹⁷ To some extent, such a practice has shown that, due to the higher political authority of the SPC, when the typical cases are selected by its tribunals or relevant institutes, they can become a main source for the selection of reference cases.

Based on the analysis above, it can be concluded that there has emerged a hierarchy in the case guidance system in China, which includes guiding cases, reference cases and general typical cases. This is illustrated in Table 2. Broadly, all these typical cases are selected from the judicial precedents through the national typical-case-selection movement.

⁹⁷ Zhongguo Zhishi Chanquan Sifa Baohu Gangyao (2016–2020) (中國知識產權司法保護綱要 (2016–2020)) [Outline of the Judicial Protection of Intellectual Property in China (2016–2020)] (promulgated by the Sup. People's Ct., Apr. 20, 2017, effective Apr. 20, 2017), [http://english.court.gov.cn/pdf/OutlineoftheJudicialProtectionofIntellectualPropertyinChina\(2016-2020\).pdf](http://english.court.gov.cn/pdf/OutlineoftheJudicialProtectionofIntellectualPropertyinChina(2016-2020).pdf), [perma.cc/KHC7-Y3DE].

Table 2: Hierarchy of Case Guidance System in China

Category	Publishing Authority	Nature	Level
Guiding cases	Supreme People's Court	Formal/binding	National
Reference cases	Provincial level Courts/Specialist Court	Formal/non-binding	Provincial
Typical cases	All level courts	Informal/non-binding	All levels

There is no strict requirement for a provincial level court to establish a formal reference case system within its jurisdiction, and there are no fixed and unified standards applicable to all provincial level courts. In practice, most provincial level courts have not yet established this kind of system, although such a system with incentive measures to a large extent is able to fortify the bureaucratization of judicial precedents. Moreover, it is understandable that, given the political importance of typical cases, the prefectural and grassroots level courts are more or less engaged with the typical-case-selection movement. More than that, given the importance of propaganda in authoritarian regimes, the typical case has somehow become an effective way for the courts to propagandize their judicial credibility and build up a good image in society (e.g., 01JS). For example, Suzhou Intermediate People's Court initiated a series of typical-case-selection activities for the purposes of propaganda that would enhance the court's image by informing the public that they can expect expertise, justice, fairness and impartiality from judges. Since 2015, the court has also published over 8,800 promotional articles to explain and propagandize the law through selected typical cases in state-owned media at the prefectural level and above. In addition, since the establishment of its own press conference system, Suzhou Intermediate People's Court has held press conferences 94 times and released 768 typical cases through this medium as well as through state-owned media.⁹⁸ In this regard, typical case selection activities

⁹⁸ Suzhou Zhongyuan Yi An Shi Fa Zhutui Suzhou Jianshe Xin Fazhan (蘇州中院以案釋法助推法治蘇州建設新發展) [Explain the Law to the Public Through Typical Cases: A Way to Promote Suzhou's New Achievements of Rule-of-Law Construction], SUZHONG SHI ZHONGJI RENMIN FAYUAN (蘇州市中級人民法院) [Intermediate Court of Suzhou] (July 14, 2017), <http://szzjrmfy.gov.cn/articles/20170714111348.php> [perma.cc/4YCN-PV6C].

at the grassroots level play a unique role in China's legal system politically.

VII CONCLUSION

Although China still follows a traditional civil law model, the SPC established a novel guiding case system in 2010. According to the SPC's specific rules, all courts should refer to a guiding case in the reasoning part of a judgment if it is similar to a case at hand. The aim of this is to achieve justice by "treating like cases alike", with the proviso that under no circumstances can a guiding case be treated as a legal basis for judicial decision-making. There has previously been debate about whether China's courts should have a distinctive legislative authority through such a guiding case system. Nevertheless, the SPC formally established and developed the system so that it could interpret the law directly by adding an additional part—the MPA—to its selected guiding cases. The CPC endorsed the SPC's work on case guidance at the fourth plenary session of the 18th CPC Central Committee, which has cleared the way for its further development.

In the literature, much attention has been paid to the guiding case system in terms of its similarities with precedential case systems in both common law and civil law traditions. However, primarily based on my extensive fieldwork in China's courts through in-depth interviews with judges, it was found that guiding cases hardly function as a type of case law—a quality which has been exaggerated in the literature. In fact, the guiding case system is substantially different from case law systems in other rule-of-law jurisdictions—systems which the SPC has officially rejected. Comparative studies can hardly explain the ineffectiveness of the guiding case system and particularly the political dynamics behind it.

Moreover, this article reveals that China's judges are generally reluctant to refer to a judicial precedent, including a guiding case, in the process of making a judicial decision. Given the absence of a case law system as opposed to a guiding case system, it would be irrational for China's judges to make a clear and independent statement of the rule of law from a case before them. Instead, they normally hide the understanding or reasoning with which they determined the factual issues and applied the law from the public for fear of being accused of exercising a lawmaking authority. By doing

so, judges can continue to cast themselves as “loyal executants” of the will of the legislature whilst ensuring that they are not held to account by the authorities in the event of legal ambiguities. In line with this, China follows a collective model of judicial decision-making; judges do not normally provide detailed reasoning expressly in judgments to avoid a “dialogue” with the public. As a consequence, judgments are normally technical and brief with no detailed reasoning and are not responsive to the public. It can be noted that responsiveness is the foundation of case law development in a liberal context.

However, the guiding case system is not wholly ineffective. The emergence of a guiding case system has crystallized a bureaucratic system of judicial precedents in which guiding cases are at the top of the pyramid. Such a bureaucratic system is based on a nationwide typical-case-selection movement in which the provincial level courts are politically responsible for submitting a certain number of typical cases selected from within their respective jurisdictions to the SPC annually. Furthermore, the SPC has been attempting to strengthen such a bureaucratic system through promoting a fluid reference case system which can be formally established and promoted by the provincial level courts. The extent to which such a bureaucratic system can be implemented at local levels largely depends on the extent to which local level courts have taken effective measures to achieve this. Given that judges’ caseload is heavy, in particular at the grassroots level, and the selection of typical cases is not an indicator used in the assessment of judges’ annual performance, judges normally just do the least required of them in the typical-case-selection movement.

As a whole, China actually has formed a vertical hierarchy of typical cases of different types which comprises guiding cases, reference cases and typical cases. The guiding case system has been formally institutionalized by the SPC, while the reference case system has emerged in some provinces under the SPC’s policy of emphasizing case guidance work. The typical cases, mainly selected through the typical-case-selection movement, have been the main source for guiding cases and reference cases. Moreover, given the absence of case law, China appears to have created a bureaucratic model of judicial precedents within which a case can achieve a certain degree of political importance if selected as a typical case.

The operation of such a bureaucratic system is mainly grounded on the political hierarchy of the courts in the context of China. In this regard, it is foreseeable that, provided the courts to some extent remain politically dependent on the authorities, and the judges are reluctant to make an explicit statement of the rule of law out of a case before them, it is unrealistic that China will embrace a vibrant case law system which is responsive to the public and has a tangible effect on judicial decision-making. Rather, stressing the so-called “Chinese characteristics” of the system is merely a way for the SPC or the higher-level courts to strengthen their political authority through the typical-case-selection movement. In this sense, the guiding case system, though not effective in judicial decision-making, has self-empowered the SPC with additional legislative authority and has mostly played a political role in strengthening the SPC’s political authority. More importantly, it has crystallized the bureaucratization of judicial precedents in China. Such a bureaucratic theory of judicial precedents centered on guiding cases clearly fits into China’s authoritarian context and is substantially different from any other type of case law in a liberal context. Of course, politically, the typical-case-selection movement can also have a positive effect on the propaganda of judicial credibility in an authoritarian regime.