From case to law: A study on how cases fulfil the role of a source of law in the Netherlands and its implications for China and comparative law
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Citation for published version (APA):

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Chapter 5

China’s quest for case law
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1. Introduction

The previous chapter placed the findings of the first part of this study (chapter one, two and three) in the context of the existing English-language comparative law literature related to the role of cases in civil law jurisdictions and explored the relevance of the first part of this study for this body of literature. The remaining part of this study will continue to explore the broader implications of the first three chapters by linking these findings with what has become a trend in China since the 1980s, i.e. a growing interest in developing and using case law in China, and by trying to draw insights from the experiences with case law in the Netherlands that may be useful for China to further enhance the use of cases.

Since the Communist Party founded the People’s Republic of China in 1949, cases no longer constitute a source of law in China. Neither in theory nor in practice do judicial decisions have normative force beyond the specific disputes in which the decisions are made. One of the reasons for rejecting cases as a source of law is that under the Chinese constitutional framework, courts are only authorized to apply the law, but not to make law.

Since the 1980s, however, courts and legal scholars in China have been demonstrating a growing interest in developing and using case law. A large volume of journal articles and books emerged that debate, among other things, the need for and the feasibility of case law in China’s codified legal system that formally rejects cases as a source of law. The growing interest in case law eventually led to the introduction of a new legal institution called the “Case Guidance System” by the Supreme People’s Court of China in November 2010. This new legal institution enables the Supreme People’s Court to select and publish “guiding cases” from a vast pool of candidate cases sent in by courts at various levels across China through a fairly complicated selection procedure. Once published, the guiding cases are supposed to be followed in later court practice.

This chapter seeks to understand what triggered the growing interest in case law in China and the introduction of a nationwide Case Guidance System by the Supreme People’s Court in 2010. Furthermore, this chapter will examine some of the key aspects of the Supreme People’s Court’s design of the Case Guidance System, as well as the evolution process that has led to this new legal institution in China. The final part of this chapter will briefly summarize the findings and reflect on the question whether the Case Guidance System will be able to successfully solve the problems that it is intended to address. By doing so, this chapter will set the stage for the next chapter.

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753 In Imperial China (prior to 1912) and the Republic of China (1912-1949), cases did constitute a source of law, see Wang 2005 and Wu 2010.
755 Art. 126 Constitution of the People’s Republic of China. See also Li 2009a.
756 See e.g. Wu 2004 and Shen 2009b.
757 Ibid.
758 The Chinese term is 案例指导制度 (Anli Zhidao Zhidu). The term Case Guidance System is my translation.
759 See Supreme People’s Court of the People’s Republic of China 2010b.
756 The Chinese term is 指导案例 (Zhidao Anli). Guiding cases is my translation.
757 For details, see the relevant paragraph in this chapter that discusses the Supreme People’s Court’s design of the Case Guidance System.
758 Art. 7 Provisions Concerning Work on Guiding Cases, see Appendix 5.
which will explore the question what the relevance of the case law mechanism in the Netherlands could be in the context of China.

The main method used was analysis of the relevant literature. Relevant Chinese-language literature has been found primarily by using online databases and search engines\(^{763}\) such as China Knowledge Resource Integrated Database (CNKI)\(^{764}\), China Law Info (Beida Fabao)\(^{765}\) and Baidu\(^{766}\). The snowball method was also used to find relevant literature. Moreover, I conducted interviews with seven Chinese legal scholars,\(^{767}\) five Chinese judges\(^{768}\) and four Chinese practising lawyers\(^{769}\) mainly to verify information found in the existing Chinese-language literature.\(^{770}\) The respondents were found through my personal contacts. Obviously, doubt can be cast on the representativeness of the small sample of respondents. However, it should be noted that literature review was the main source of information for this part of the research, whereas the interviews only played a supplementary role.

In addition to Chinese-language literature, I also consulted relevant English-language publications. These publications were found mainly by using Google Scholar\(^{771}\) and the snowball method. Also the website of the Stanford Law School China Guiding Cases Project\(^{772}\) was used as an important source of English-language information related to the Case Guidance System and the case law debate in China.

2. Problems in China that aroused a growing interest in case law

Whether China needs case law is a question that has triggered many publications in China since the 1980s.\(^{773}\) Proponents of a case law system in China identified various problems to which case law, as they argue, can provide an effective cure, such as the problem that like cases are not treated alike in different courts throughout China, lack of transparency in adjudication as well as corruption within the Chinese judiciary.\(^{774}\) Before examining these arguments separately, this paragraph will highlight a fundamental problem in the Chinese legal system, i.e. rejecting cases as a source of law causes the legislature in China to face an extremely difficult task of striking a proper balance between legislative and case law.

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\(^{763}\) Some of the search terms included “Anli Zhidao Zhidu” (Case Guidance System), “tongan bu tongpan” (like cases not being treated alike), “zhidao anli” (guiding cases), “anli yanjiu” (case research) and “anli jiaoxue” (using cases in legal education).

\(^{764}\) www.cnki.net.


\(^{766}\) www.baidu.com.

\(^{767}\) Interview codes: CN20110614, CN20110615, CN20110622, CN20110709, CN20110711-1, CN20110711-2 and CN20111205-1.

\(^{768}\) Interview codes: CN20110705, CN20110708, CN20110701-1, CN20110701-2, CN20130408 and CN20130920.

\(^{769}\) Interview codes: CN20110221, CN20110302, CN20110307 and CN20111205-2.

\(^{770}\) I verified, among other things, the workload of judges, the role of research judges and selection procedure for case publication.

\(^{771}\) The main search terms included “Case Guidance System”, “case law in China”, “guiding cases” and “judicial reforms in China”.

\(^{772}\) http://cgc.law.stanford.edu/

\(^{773}\) See e.g. Zhang 2002a and the publications collected in Wu 2004.

\(^{774}\) See the second, third and fourth subparagraph. The proponents’ arguments in favor of establishing a case law system in China discussed in this paragraph are not exhaustive. Enhancing efficiency of adjudication and raising public confidence in the judiciary, for example, have also been used as arguments to justify the necessity of case law in China, see e.g. Zhang 2004, p. 103, Shen 2009a, p. 5-6 and Hu & Yu 2009, p. 7-8.
balance in lawmaking among four competing requirements: adequacy, feasibility, certainty and adaptability.  

2.1 The top-down lawmaking process and difficulty for the legislature to strike a proper balance in legislation  

As Van Rooij rightly pointed out, good legislation must strike a proper balance between four requirements: adequacy, feasibility, certainty and adaptability.  

In China, a large and fast-developing country with a unitary legal system where lawmaking is largely a top-down process dominated by a relatively small group of powerful people, striking a proper balance among these four requirements is an extremely difficult task for the legislature.

As cases are neither recognized nor effectively used as a source of law, legislation in China needs to provide specific rules to attain certainty, because any room for interpretation leaves nearly full discretion to those applying the law. However, China does not have a pluralistic political system that allows for meaningful and broad public participation in the lawmaking. Consequently the end products of a primarily top-down legislation process may end up containing precise and specific rules that look strong and good on paper, but due to the lack of sufficient participation, the law does not enjoy support from the relevant interest groups and the precisely drafted rules do not fit the actual circumstances on the ground. Due to the lack of an institutionalized system through which societal norms can move bottom-up to become part of the national legal system, the legislature in China has to anticipate what happens at the bottom level and in future circumstances. This is an extremely difficult, if not impossible task, given the obstructed vertical information flow that characterizes a non-pluralistic political system and the rapid changes in China’s reform society.

Many Chinese legal scholars and judges have realized and pointed out this problem in their writings, although it should be noted that their writings tend to use relatively mild and neutral language to describe this problem, instead of directly criticizing the non-pluralistic political system and the top-down lawmaking process. A frequently used term in the Chinese-language literature to describe this problem is the “limitations of legislation”.

It has been frequently pointed out that legislation inevitably contains vague norms, flexible rules or even lacunas, and that it is impossible for the legislature to foresee all possible future problems, so that case law is needed as an instrument to counterbalance such limitations of legislation.

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775 Van Rooij 2006, p. 25-104.
776 Van Rooij 2006, p. 32-43.
777 Van Rooij 2006, p. 44-49.
778 Van Rooij 2006, p. 47.
779 See e.g. Alford & Liebman 2001 and Van Rooij 2006, p. 44-49.
780 The Land Management Act 1998 (Tudi Guanlifa) is a good example, see Van Rooij 2006, p. 54-67.
781 Van Rooij 2006, p. 47.
782 Ibid.
784 The Chinese term is 成文法的不足(chengwenfa de buzuo), see the literature cited in the previous footnote.
2.2 Like cases not treated alike

Treating like cases alike is often deemed as a fundamental principle of justice. In Chinese courts, however, similar cases have often been reported to reach (vastly) different outcomes. The following two examples found in the Chinese-language legal literature may provide a rough impression of the situation in China.

Example 1: Conditional contract cases in Shenyang city. Around the year 2002, the Intermediate People’s Court in the city of Shenyang in Northeast China decided two cases involving the same defendant (a real estate developer), who signed standardized relocation contracts with owners of houses that were demolished in a real estate development project. One of the key terms of the standardized contract was that the real estate developer would provide comparable housing to the owners of demolished houses. However, the contracts contained one conditional clause: the contracts would be invalid, if the house owners have other properties in Shenyang. Later, it turned out that two house owners did own other properties in Shenyang. The developer refused to perform, insisting that the contracts were void. The two house owners brought separate law suits to the Intermediate Court.

In the first case, the court found judgment for the plaintiff. The reason was that a condition upon which the validity of a contract depends, may only concern possible future facts. The fact that the plaintiff owned another property in Shenyang is one that already existed at the moment when the contract was concluded, which means it cannot constitute a condition for the validity of the contract. Consequently, the court held the contract to be valid and the defendant should perform. In the second case, however, the court gave a totally opposite judgment, holding the contract to be void due to the fulfilment of the condition specified in the conditional clause of the contract.

Example 2: Counterfeit medicine cases in Zhengzhou city. In 1998, a citizen of the city Zhengzhou in central China bought counterfeit medicine of the same kind and brand in three drugstores located in three different districts of Zhengzhou. He sued the drugstores in the three corresponding district courts, claiming punitive damages on the basis of Article 55 of the Consumer Protection Law. However, these three cases involved one complicating factor. The plaintiff, Mr Ge Rui, was a well-known consumer-rights activist in China, who deployed a strategy of fighting businesses that sold counterfeit goods by intentionally buying counterfeit goods from them and suing them subsequently for punitive damages. In other words, the plaintiff was not under deception when he bought the counterfeit medicine. Rather, he bought the medicine, knowing that it was counterfeited, with the intention to sue the sellers.

The first district court rejected the claim on the ground that the plaintiff did not buy the medicine for personal consumption. The second district court also rejected the claim, but on a different ground, i.e. the plaintiff failed to prove that the medicine was counterfeited. The last district court declared the contract void, because the plaintiff failed to prove that he bought the medicine for medical purposes. At first sight, the three cases seemed to have reached the same outcome, i.e. the plaintiff’s claim was rejected. However, the reasons underlying the judgments do demonstrate quite divergent understandings of the law.

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786 Hart 1961, p. 159.
788 The original court judgments in this example cannot be obtained, since they are not published. A description of the key facts and the outcomes can be found in an empirical report of the Intermediate People’s Court of Shenyang city. See Zhang 2009.
789 For a description of the key facts and court decisions in this example, see Liu 2006.
I have not been able to find systematic quantitative research in the Chinese-language literature that would be able to firmly establish the representativeness of the above-described examples. However, the vast volume of publications on the desirability and feasibility of case law in China does suggest that these examples are but the tip of an iceberg and that like cases not being treated alike is widely perceived to be a serious problem in China. A district court president, for example, said the following about this problem in an interview with the media: 790

It is not uncommon that similar cases reach different outcomes. Like cases may be treated differently by different judges in the same court. Even the same judge may give different judgments in similar cases at different times. This problem is all the more serious in novel and controversial cases.

This problem is perceived to be particularly damaging to the public’s confidence in the courts and in the legal system. 791 According to a senior judge of the High Court of Guangdong Province, widespread instances of like cases being treated differently, such as awarding different levels of compensation to the loss of lives under similar circumstances (同命不同价) and applying different punishments to similar crimes (同罪不同罚), have become the “primary factor that undermines the authority of the law”. 792

Many legal scholars and judges believe that introducing a case law institution is an effective cure to this problem, and they have conducted a vast amount of research on the desirability, feasibility and specific designs of a case law institution for China. 793 Many publications by Chinese legal scholars and judges indicate that they expect that once a case selected through an official procedure and backed by sufficient coercive force is published, lower courts will follow the case and apply the same standards to decide later similar cases, which will solve the problem that like cases are not treated alike. 794 This expectation has not only been expressed in journal articles and books, but also in official documents issued by the Supreme People’s Court. The Second Five-year Reform Outline issued by the Supreme People’s Court in 2005, for example, says that the Supreme People’s Court will attach great importance to the role of cases in “unifying the legal standards applied in adjudication”. 795 The very first sentence of the official document issued by the Supreme People’s Court in 2010 that marks the birth of the nationwide Case Guidance System says that the rules on the Case Guidance System are enacted with the purpose of “summing up adjudication experiences, unifying the application of the law, improving adjudication quality and upholding judicial justice”. 796 It seems fair to infer from the academic and official sources cited in this

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790 Liu 2007b.
792 Ding 2008b, p. 142.
793 See e.g. the publications collected in Wu 2004.
796 Italicized by the author of this study. “Unifying the application of the law” indicates that the Case Guidance System is introduced as an instrument to address the problem of like cases not being treated alike.
797 The Chinese text is 总结审判经验，统一法律适用，提高审判质量，维护司法公正(zongjie shenpan jingyan, tongyi falu shiyong, tigao shenpan zhiliang, weihu sifa gongzheng). See Appendix 5.
subparagraph that like cases not being treated alike is one of the problems that aroused a growing interest in case law in China.

2.3 Lack of transparency in adjudication

Lack of transparency is a criticism that the Chinese judiciary frequently incurs. It has, for example, long been a point of criticism that court decisions are inaccessible to the public, as many courts (used to) refuse to publish judgments or choose to publish only a small proportion of judgments that they deem “safe” for the public to know.\(^\text{798}\) Moreover, judgments in China have been frequently criticized for lacking (sufficient) legal reasoning.\(^\text{799}\) Consequently, even when judgments do get published, it is still difficult for the public to ascertain how the courts reached their decisions.

Proponents of a case law system in China argue that stimulating the use of cases in court practice as a source of law can help increase transparency in adjudication. Some authors, for example, submit that doing so would stimulate or even require courts to publish more and more judgments.\(^\text{800}\) Some proponents also expect that setting the goal of establishing a case law system in China can have the effect of raising the quality of legal reasoning in court judgments, as they believe that one of the conditions for case law to develop is that judgments must provide reasons.\(^\text{801}\)

2.4 Judicial corruption

Judicial corruption is a frequently reported problem in China. A striking example is the case of Huang Songyou (黄松有), former Vice President of the Supreme People’s Court, who was sentenced to life imprisonment due to corruption in 2010.\(^\text{802}\) An empirical study in 2010 shows that corruption occurs at almost all levels of the Chinese judicial system, involving all types of judges, regardless of their rank, level of education and income.\(^\text{803}\)

Proponents of a case law system in China argue that using cases as a source of law can help curtail judicial corruption.\(^\text{804}\) Two of the key assumptions underlying this argument is that abuse of judicial discretion is one of the (most crucial) causes of judicial corruption and that case law is an effective tool to standardize the exercise of judicial discretion, which will lead to less corruption.\(^\text{805}\)

\(^{798}\) See e.g. He 2005 and He 2006.

\(^{799}\) See e.g. Zong 2009 and Cheng 2012.

\(^{800}\) See e.g. Chen & Li 2003, p. 24.

\(^{801}\) See e.g. Chen & Li 2003, p. 24 and Chen & Wei 2004, p. 77-78. One may rightly question the validity of this argument, as it seems to rely on circular reasoning or a reserved causal relationship. It is, however, not the intention to engage in a debate with the authors that have explored the question why China needs case law. The purpose of this paragraph is simply to present the views of these authors to the readers and by doing so, to help the readers understand what Chinese legal scholars and judges perceive to be problems that need to be and can be addressed by case law.


\(^{803}\) Li 2010.

\(^{804}\) See e.g. Zhang 2002a, paragraph 4, Liu & Xu 2006, p. 16, Su & Li 2009, p. 12, Hu & Yu 2009, p. 8 and Ma & Cha 2011, p. 59

3. Basic design and evolution of China’s Case Guidance System

The Case Guidance System\(^{806}\) refers, in a loose sense, to a practice of the Chinese judiciary, which allows higher courts to select cases that are supposed to serve as models for lower courts to decide later similar cases.\(^{807}\) The selected model cases are called “guiding cases”.\(^{808}\) Guiding cases are not necessarily decided by higher courts themselves, as higher courts are free to appoint cases decided by lower courts as guiding cases.

The operation of the Case Guidance System consists of three phases:

1. selection,
2. publication, and
3. application.

How the three phases should exactly be designed has been an issue of debate in China for decades. This paragraph reviews how the debate evolved. The next paragraph will examine the answers of the Supreme People’s Court to the debated questions.

During the evolution process of China’s Case Guidance System, the Supreme People’s Court issued two official documents that are of particular importance. In 2005, the Supreme People’s Court issued the Second Five-year Reform Outline of the People’s Courts (2004-2008)\(^{809}\), announcing its plan to create a nationwide Case Guidance System. In 2010, the Supreme People’s Court issued the Provisions of the Supreme People’s Court Concerning Work on Guiding Cases, which marks the birth of a nationwide Case Guidance System.\(^{810}\) Accordingly, this paragraph will be divided into two subparagraphs. The first subparagraph reviews the period prior to 2005, and the second discusses the period between 2005 and 2010.

3.1 Court practices and academic debates prior to 2005

In 1985, the Supreme People’s Court started to issue its official publication the Gazette of the Supreme People’s Court of the People’s Republic of China\(^{811}\), hereinafter the Gazette). The Gazette contains not only relevant laws and decrees, but also model cases\(^{812}\) selected by the Supreme People’s Court.\(^{813}\) Prior to 1985, the Supreme People’s Court occasionally instructed lower courts to follow model cases selected by the highest court.\(^{814}\) However, cases that lower courts were instructed to follow used to be largely shrouded in secrecy before 1985, since they were mainly distributed to lower

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\(^{806}\) The Chinese term is 案例指导制度(Anli Zhidao Zhidu).

\(^{807}\) This is my definition based on the analysis of relevant literature. In particular, I consulted Hu & Yu 2009, p. 5 and Chen 2012b.

\(^{808}\) The Chinese term is 指导案例(Zhidao Anli).

\(^{809}\) See Supreme People’s Court of the People’s Republic of China 2005.

\(^{810}\) See Supreme People’s Court of the People’s Republic of China 2010b and Jiang 2011a.

\(^{811}\) The Chinese title of this publication is 中华人民共和国最高人民法院公报(Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan Gongbao). In the rest of this study, this publication will be referred to as the Gazette.

\(^{812}\) The published cases are not necessarily decided by the Supreme People’s Court itself. Many of them are decided by lower courts.

\(^{813}\) The Gazette also contains the Supreme People’s Court’s interpretations of laws, its policy documents and its replies to lower courts’ requests for clarification of specific points of law.

\(^{814}\) Zhou 2009, p. 141.
courts through internal channels within the judiciary, so that the public could not gain access to them.\textsuperscript{815}

It should be noted that the Supreme People’s Court has at no point declared the cases published in the \textit{Gazette} to be binding precedents. The official position of the Supreme People’s Court on the status of the cases published in the \textit{Gazette} is that these selected cases have reference value and can be used as an important tool to guide the adjudication practice in lower courts.\textsuperscript{816} The impact of the cases published in the \textit{Gazette} on the adjudication practice in China is generally perceived to be rather limited.\textsuperscript{817} This is of course not to say that publishing cases through the Gazette is a meaningless act. In fact, some Western observers regarded the Gazette as “probably the most important new publication on law” in China in the 1980s, as it was the first institutionalized channel through which cases selected by the Supreme People’s Court were made public.\textsuperscript{818}

Another interesting development within the Chinese judiciary prior to 2005 is that a number of lower courts took the initiative to experiment with what they called “Precedent Decision System”\textsuperscript{819} or “Precedent Guidance System”.\textsuperscript{820} These local experiments all involved selection and publication of certain earlier decided cases that are supposed to serve as a source of inspiration for courts to decide later similar cases.\textsuperscript{821}

The publication of cases in the \textit{Gazette} as well as the local experiments were, generally speaking, positively received in the Chinese academic world, although a number of commentators did question the authority of lower courts to select model cases.\textsuperscript{822} Between the mid-1980s and 2005, creating a precedent system in China was a hot topic among legal scholars. One of the key questions that attracted much attention was whether it is desirable and feasible for China to create a precedent system within its codified legal system.\textsuperscript{823} Another question of debate was how a Chinese precedent system should be designed.\textsuperscript{824}

It is noteworthy that prior to 2005 the term “precedent system”\textsuperscript{825} was frequently used in the case law discourse in China to refer to an envisaged new legal institution that would enable cases to fulfil the role of a \textit{de facto} source of law in China.\textsuperscript{826} In the Chinese legal language, terms such as “precedent”\textsuperscript{827} and “precedent system” carry a strong common law connotation and are closely associated with the doctrine of \textit{stare decisis}.\textsuperscript{828} Frequent use of the terms “precedent” and “precedent system” in the case law discourse may give the impression that judges and legal

\textsuperscript{815} Ibid.
\textsuperscript{816} Zhou 2009, p. 143.
\textsuperscript{817} See e.g. Zhu 2008, p. 44 and Mou 2014. In fact, some lower courts have such a limited budget that they cannot even afford a subscription to the \textit{Gazette}, let alone consulting and using the cases published in it, see Rao & Liao 2009, p. 119.
\textsuperscript{818} Tsia & Johnson, p276.
\textsuperscript{819} The Chinese term is 先例判决制度 (Xianli Panjue Zhidu), see Chen & Li 2003.
\textsuperscript{820} The Chinese term is 判例指导制度 (Panli Zhidao Zhidu), see Li & Meng 2002.
\textsuperscript{821} Chen & Li 2003 and Li & Meng 2002.
\textsuperscript{822} See e.g. Zhang 2008b and Jing e.a. 2005.
\textsuperscript{824} See the academic publications prior to 2005 collected in Wu 2004.
\textsuperscript{825} The Chinese term is 判例制度 (Panli Zhidu).
\textsuperscript{826} See the academic publications prior to 2005 collected in Wu 2004.
\textsuperscript{827} The Chinese term is 判例 (Panli).
\textsuperscript{828} See e.g. Liang 1991, Rao & Yan 2004 and Zhu 2008, p. 35.
scholars in China were trying to transplant the common law doctrine of precedent. However, a closer look at the court experiments and the academic publications prior to 2005 reveals that the common law doctrine of *stare decisis* was not seen as an ideal model for China to copy. What most people had in mind was an institution that would allow higher courts to select model cases that do not have formal binding force, but are supposed to be followed by lower courts when deciding later similar cases.  

3.2 Court practices and academic debates from 2005 till 2010

In 2005 the Supreme People’s Court issued the *Second Five-year Reform Outline of the People’s Courts*. It was in this Reform Outline that the term “Case Guidance System” first appeared in an official policy document of the Supreme People’s Court. The *Outline* announced that the Supreme People’s Court will issue an official document on a nationwide Case Guidance System, specifying guiding cases selection criteria, selection procedure, publication channels as well as application principles.

The 2005 *Reform Outline* opened a new chapter in the evolution of China’s Case Guidance System. As of 2005, the key issue is no longer *whether* case law is necessary or possible in China, but rather *how* a nationwide Case Guidance System should be designed. The Supreme People’s Court, local courts at various levels and legal scholars all joined this quest. A series of research projects and court experiments were launched soon after the publication of the 2005 Reform Outline.

Continuing its existing practice of selecting and publishing model cases, the Supreme People’s Court launched three research projects in 2005 on the use of cases in court practice, which generated some of the first nationwide empirical reports. Drawing upon these research results, the Research Department of the Supreme People’s Court made a first draft document in 2006, containing rules on operation of a nationwide Case Guidance System. The draft was circulated to judges, academics and the Standing Committee of the National People’s Congress for comments and suggestions. Legal Scholars were invited to submit academic draft versions. In five years’ time, the Research Department of the Supreme People’s Court produced about 40 drafts, before the final document was released in November 2010.

While the Supreme People’s Court was busy drafting rules on selecting and publishing model cases, lower courts at various levels started to experiment with their own Case Guidance Systems. It was reported that more than ten Higher People’s Courts as well as some Intermediate People’s Courts and District Courts devised their own case selection and publication mechanisms.

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829 See e.g. Wang 2004a and Zhao & Liu 2004, p. 536-537.
830 See Supreme People's Court of the People's Republic of China 2005.
831 The Chinese term is 案例指导制度 (Anli Zhidao Zhiyu).
832 See Supreme People's Court of the People's Republic of China 2005, paragraph 2.
833 The Supreme People’s Court did not carry out the research projects itself, but instructed three institutes that are affiliated to the Supreme People’s Court to conduct the research, see Jiang 2011a.
834 The research results were published in Research Department of the Supreme People's Court 2007.
835 Jiang 2011a.
836 Huang & Cao 2010, Jiang 2011a and interviews CN20110615, CN20110622, CN20110709.
837 Huang & Cao 2010 and interviews CN20110615, CN20110622, CN20110709.
838 Jiang 2011a.
839 Shen 2009a, p. 5.
The courts’ efforts to explore various designs of a Case Guidance System concurred with animated debates in the Chinese legal academic world. The remaining part of this subparagraph will examine some of the most debated issues.

I. Which courts should be authorized to select guiding cases?

The Chinese judiciary has a hierarchy of four levels:
(1) The Supreme People’s Court
(2) Higher People’s Courts (the highest court in each province)
(3) Intermediate People’s Courts (courts in cities) and
(4) District People’s Courts (courts in districts and counties)

Everyone agrees that the Supreme People’s Court should have the power to select guiding cases. The key issue of debate is whether courts of any other level(s) should also be authorized to select guiding cases. Roughly three opinions can be discerned:

*Opinion 1*: Only the Supreme People’s Court should be authorized to select guiding cases, because otherwise conflicts between guiding cases selected by different courts may erode the unity of the law, thus defeating the very purpose of the Case Guidance System.

*Opinion 2*: Higher People’s Courts should also be authorized to select guiding cases. The key argument is that there are vast regional differences in China. Insufficient account will be taken of these regional differences, if the Supreme People’s Court is the only court authorized to select model cases.

*Opinion 3*: Not only the Supreme People’s Court and Higher People’s Courts, but also Intermediate Courts in some large cities should be authorized to select guiding cases. One of the key arguments is again the vast regional differences in China.

II. What should be the selection criteria?

Various criteria have been put forward for the selection of guiding cases. The common ones are:

(1) Guiding cases should be representative/typical.\(^{840}\) This is believed to be one of the selection criteria used by the *Gazette*.\(^{846}\)

(2) Guiding cases should concern new issues.\(^{847}\) This is also believed to be one of the selection criteria used by the *Gazette*.\(^{848}\)

(3) Guiding cases should be those that deal with difficult issues.\(^{849}\)

(4) Guiding cases should be of significant influence.\(^{850}\)

(5) Guiding cases should be of general guiding value for the application of the law.\(^{851}\)


\(^{842}\) Li 2009b, p. 90 and Huang & Jiang 2009.

\(^{843}\) Shen & Liu & Fan 2009, p. 97 and Huang 2009, p. 50

\(^{844}\) Huang 2009, p. 50.

\(^{845}\) The Chinese term is 典型性(Dianxingxing).

\(^{846}\) Ding 2008b, p. 141.

\(^{847}\) The Chinese term is 新颖性(Xinyingxing).

\(^{848}\) Research Group of the Higher People's Court of Beijing 2007, p. 345.

\(^{849}\) The Chinese term is 疑难性(Yinanxing). See Qin 2007.

\(^{850}\) The Chinese term is 重大影响性(Zhongda Yingxiangxing). See Li 2009b, p. 88.

\(^{851}\) The Chinese term is 在法律适用上具有普遍指导意义(Zai falu shiyong shang you pubian zhidao yiyi). See Huang 2009, p. 54.
In general, it seems that there is a majority view that guiding cases can be most valuable where

(1) they fill loopholes in the law, i.e. they provide a good solution to a question of law to which the existing sources of law provide no answer, or
(2) they provide sensible interpretations to vague terms or rules in legislation.

III. What kind of force should be attributed to the selected guiding cases?

What kind of force should be attributed to the selected guiding cases is probably the most sensitive and difficult question in the debate on China’s Case Guidance System, because it touches upon the constitutional limits of the power of the judiciary in China. According to the Chinese constitution, the judiciary only possesses the power to apply the law, but not to make law. A conservative view in China holds that, attributing binding force to selected guiding cases would promote the selected cases to the status of a (quasi) source of law. Such a practice would be equal to granting lawmaking power to the judiciary, which is incompatible with the Chinese constitution.

The constitutional restraints contrast with a much felt practical need to attribute more than pure reference status to selected model cases. The fact that selected model cases do not have clearly defined binding force upon judges is perceived to be a key problem in local courts’ experiments. As the model cases do not have clearly defined force, lower judges do not take them seriously, according to some empirical reports. An empirical research on the experiments in Sichuan Higher People’s Court suggests that, given the weak force of the selected cases, it is unrealistic to expect lower judges to voluntarily consult and follow them. Another empirical report suggests that, as long as selected model cases do not have clearly defined force, they will eventually end up having no more value than cases in textbooks.

As a compromise between the constitutional limits and the practical need, attributing de facto binding force to selected guiding cases gained much support in the debate. Proponents of de facto binding force generally based their standpoint on three arguments:

(1) Although there is no sufficient legal basis to grant legal binding force to model cases, the current legal framework does not exclude the possibility of granting de facto binding force to guiding cases.
(2) The purpose of the Case Guidance System will be defeated if selected model cases are of no more than reference value.
(3) It is a common practice in civil law jurisdictions that cases (decided by the highest judges) have de facto binding force.

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852 Research Group of the Higher People's Court of Beijing 2007.
853 See Art. 126 of the Chinese Constitution.
854 Li Shichun sees this as a “constitutional risk” of the Case Guidance System, see Li 2009a.
855 Li 2009a.
856 See the literature cited in the following three footnotes.
858 Li 2009b, p. 93.
859 Liu 2009, p. 112.
IV. Should judges be allowed to cite guiding cases in their judgments?

A question that is related to the force of selected guiding cases is whether judges should be allowed to cite guiding cases in judgments. It has been a long-standing practice among Chinese judges that they do not cite previous cases in judgments, even if they have followed or drawn inspiration from previous judgments. In fact, some local courts that have experimented with selecting and publishing model cases (e.g. in Shanghai, Shenyang and Tianjin) explicitly forbid judges from citing published model cases in judgments. The courts seem to be concerned that the selected model cases, once cited, would rise to the status of precedents, thus giving the impression that the courts are making law.

However, proponents of a nationwide Case Guidance System realize that the purpose of the Case Guidance System may not be achieved if judges would not be allowed to cite the selected guiding cases in judgments. As a compromise, it was suggested that guiding cases could be cited as arguments or reasons in a judgment, but not as the (sole) legal basis upon which a judicial decision is made.

V. What should be the sanctions if judges refuse to follow applicable guiding cases?

Proponents of de facto binding force suggest that when lower judges refuse to follow applicable guiding cases, they must state in their judgments the reason(s) why they do not apply the guiding cases. Some of them even suggest that lower courts, if they do not follow a guiding case, should report to the higher courts that had selected the guiding case. Possible sanctions could, according to these proponents, include:

1. Litigants should be allowed to appeal a judgment on the ground that the judgment did not follow one or more applicable guiding case(s).
2. Higher courts should be authorized to reverse a judgment made by a lower court in an appeal procedure, if the judgment did not follow applicable guiding case(s) and reached an unjust result.
3. Refusing to follow applicable guiding case(s) should be made a relevant factor that could negatively influence the evaluation of judges.

In sum, creating a nationwide Case Guidance System involves a number of complicated issues. It took the Supreme People’s Court six years to draft an official policy document that clarifies the highest court’s position on some of the debated issues. The next subparagraph will examine the Provisions of the Supreme People’s Court Concerning Work on Guiding Cases released in November 2010 to ascertain the choices made by the Supreme People’s Court and the possible considerations that have shaped the Supreme People’s Court’s choices.

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862 Research Department of the Higher People's Court of Shanghai 2009, p. 65.
863 Zhang 2009, p. 133.
866 Hu & Yu 2009, p. 18 and Research Department of the Supreme People's Court 2007.
867 Hu & Yu 2009, p. 43.
869 Li 2009b, p. 93 and Research Group of the Editor's Office of People's Court Daily 2007.
3.3 The Supreme People’s Court’s design of a nationwide Case Guidance System

The Provisions of the Supreme People’s Court Concerning Work on Guiding Cases contains only 10 articles and 892 words. Obviously, it is impossible for such a short document to specify all the details of a nationwide Case Guidance System. It has been reported that the Supreme People’s Court is now drafting another document called the Implementation Details to the Provisions Concerning Work on Guiding Cases, which contains more detailed rules on the operation of the Case Guidance System. When the Implementation Details Document will be released was yet unknown at the time when this study was concluded in July 2014. The next subparts will take a closer look at the Provisions released by the Supreme People’s Court in 2010 by examining its legal basis and the specific rules contained in it.

3.3.1 The legal basis of the Case Guidance System

The Provisions Concerning Work on Guiding Cases refers to the Organic Law of the People’s Courts (hereinafter the Organic Law) and other laws as its legal basis, without further specifying which article(s) of the Organic Law or which other laws serve(s) as its legal basis. It can be reasonably inferred that the Supreme People’s Court at least intends to use Article 32 of the Organic Law as a legal basis. This article provides that “the Supreme People’s Court interprets questions concerning the specific application of laws and decrees in judicial proceedings.” The underlying reasoning seems to be that the Supreme People’s Court sees the practice of selecting and publishing guiding cases as a way of interpreting laws and decrees. This reasoning seems particularly attractive, as it tends to suggest that the Case Guidance System merely enables the Supreme People’s Court to interpret laws and decrees, but not to make law. The border between interpretation and judicial lawmaking is of course not clear-cut. However, by addressing the Case Guidance System as a mechanism of legal interpretation, the Supreme People’s Court at least avoids openly challenging the formal restraints on its power.

3.3.2 Details of the Supreme People’s Court’s design

The Supreme People’s Court’s design follows the existing three-phase pattern, dividing the operation of the Case Guidance System into selection, publication and application phases. The Regulations Concerning Work on Guiding Cases provides relatively clear rules on the selection and publication phases, but remains vague on the application phase. As will be discussed in greater detail below, in the 2010 document the Supreme People’s Court does not provide a clear answer to the crucial question as to what kind of force should be attributed to guiding cases.

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870 The Chinese term is 案例指导工作规定实施细则 (Anli Zhidao Gongzuo Guiding Shishi Xize), see Yuan 2013. This document will be referred to as the Implementation Details Document in the remaining part of this study.

871 The Chinese term is 人民法院组织法 (Renmin Fayuan Zuzhi Fa).

872 Gao & Cao 2010, paragraph 1.

873 My translation.

874 Gao & Cao 2010.

875 See the paragraph on the basic design and evolution of China’s Case Guidance System in this chapter.
3.3.2.1 The selection phase

The Regulations Concerning Work on Guiding Cases addresses three key aspects of the selection phase: case selection power, case selection criteria and case selection procedure. The remaining part of this subparagraph will examine these three aspects in greater details.

I. Case selection power

Article 1 of the Provisions makes it clear that only the SPC has the power to select guiding cases. One of the earlier drafts intended to extend case selection power to higher people’s courts and the military court, but obviously the Supreme People’s Court eventually decided not to go that far.

Restricting the case selection power to the Supreme People’s Court may be largely induced by the fact that the Organic Law of the People’s Courts only authorizes the Supreme People’s Court to interpret laws and decrees. Since the Supreme People’s Court seems to portray the Case Guidance System as a mechanism to fulfil its task of interpreting laws and decrees, it is not surprising that the case selection power is restricted to the Supreme People’s Court.

II. Case selection criteria

A minimum formal criterion is that a judgment must have taken legal effect before it can be considered as a candidate guiding case. In addition, a guiding case must meet at least one of the following substantive criteria:

1. it is of widespread concern in society;
2. it concerns issues on which legal provisions are of relatively general nature;
3. it is of a typical nature;
4. it involves difficult, complicated or new types of legal issues;
5. it can have a guiding effect in other ways.

The last criterion is obviously intended as a catch-all, so that the Supreme People’s Court will have the flexibility to develop new criteria in the future. The second, the third and the fourth criterion are not surprising, as both the Supreme People’s Court and local experimenting courts appear to have been using these criteria for years in their practice of selecting model cases. It is fairly plain that these criteria are relevant, as they concern cases that usually require interpreting legislative rules.

The relevance of the first criterion, however, is not self-evident. If a nationwide Case Guidance System is an instrument for interpreting laws and decrees, it is not

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876 Zhao 2009.
877 “Taking legal effect” means, in the Chinese legal language, that a judgment can no longer be reversed by a regular appeal procedure.
878 Article 2 Provisions Concerning Work on Guiding Cases.
879 Ibid.
880 The Chinese term is 社会广泛关注的 (Shehui Guangfan Guanzhude).
881 The Chinese term is 法律规定比较原则的 (Falu Guiding Bijiao Yuanzede).
882 The Chinese term is 具有典型性的 (Juyou Dianxingxingde).
883 The Chinese term is 疑难复杂或者新类型的 (Yinan Fuza huozhe Xin Leixingde).
884 The Chinese term is 其它具有指导作用的案例 (Qita Juyou Zhidao Zuoyong de Anli).
885 See the relevant passages in the previous subparagraph that review different proposals of selection criteria in the case law debate in China.
evident why extensive public attention or widespread public concern should be a decisive factor in the selection of guiding cases. After all, a case that attracts extensive public attention or raises widespread concern in society does not necessarily involve complicated issues of legal interpretation. Furthermore, it is striking that the social concern-criterion is placed at the top of the list. Such a prominent place may be related to the recent populist trend in the Chinese judiciary. As Liebman rightly observes, after three decades of legal reforms, there is a public perception in China that the law is inaccessible to the public and that the legal system served only those with power or influence. Courts in China are trying to ease the widespread public discontent with the judiciary by being more responsive to the needs and opinions of the public. Placing the public attention criterion as a top criterion may be induced by the Supreme People’s Court’s wish to portray itself as being responsive to the needs of the people.

III. Case selection procedure

A case normally needs to go through three stages before obtaining the status of a guiding case: the recommendation, the preliminary review, and the final decision stages. The Provisions Concerning Work on Guiding Cases provides that the Supreme People’s Court will set up a coordinating office called the Case Guidance Work Office to take care of, among other things, the administrative work of selection.

(1) The recommendation stage

It appears that the Supreme People’s Court intends to encourage broad participation in the recommendation stage. Article 4 of the Provisions allows courts at all levels to recommend cases for selection. Moreover, article 5 allows wide public participation: virtually everyone outside the judiciary is allowed to recommend cases for selection. This public participation approach seems to be an interesting innovation by the Supreme People’s Court. Up till the release of the Provisions, the public had not been able to participate in the selection of cases, as both the Supreme People’s Court and local experimenting courts have relied solely on cases recommended by their own judges or by lower courts.

(2) The preliminary review stage

All recommended cases arrive at the Case Guidance Work Office, which conducts a preliminary review. This Office makes an initial selection using the criteria in article 2 of the Provisions. Cases that, in the opinion of the Office, meet the criteria are then presented to the President or one of the Vice Presidents of the Supreme People’s Court, who will decide whether or not to present these cases to the Adjudication Committee of the Supreme People’s Court for final selection.

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886 Liebman 2011b, p. 171.
887 See e.g. Liebman 2011a and Liebman 2011b.
888 Art. 4 and Art. 5 Provisions Concerning Work on Guiding Cases.
889 The Chinese term is 案例指导工作办公室 (Anli Zhidao Gongzuo Bangongshi).
890 Art. 3 Provisions Concerning Work on Guiding Cases.
891 Technically speaking, only Higher People’s Courts and the Military Court are allowed to recommend cases directly to the Supreme People’s Court, whereas Intermediate People’s Courts and district courts must recommend cases to their immediate upper-level courts, see Art. 4 of the Provisions Concerning Work on Guiding Cases.
892 For a critical discussion of this provision see Duan 2012.
893 See e.g. Chen & Li 2003, Li & Meng 2002 and Fan 2009.
894 Art. 6 Provisions Concerning Work on Guiding Cases.
895 The Chinese term is 审判委员会 (Shenpan Weiyuanhui).
896 Art. 6 Provisions Concerning Work on Guiding Cases.
(3) The final decision stage

It is the Adjudication Committee of the Supreme People’s Court that has the final say in the selection procedure. The Adjudication Committee discusses the cases that have passed the preliminary review and makes a final selection decision, according to Art. 6 of the Provisions.897 Every court in China has an Adjudication Committee, which is the highest decision-making body in a court.898 The Adjudication Committee of the Supreme People’s Court consists of the president, the vice presidents, the chief judges of all the trial divisions and a number of senior judges of the Supreme People’s Court.899 The Supreme People’s Court’s Adjudication Committee is particularly powerful within the judiciary, since it is the only body that possesses the power to issue judicial interpretations.900 Judicial interpretations issued by the Adjudication Committee of the Supreme People’s Court can be cited as the legal basis in judgments901, so they have acquired the status of a source of law in China.902

For a long time, the Adjudication Committee of the SPC used to be the only body that had the power to decide which cases could get published in the Gazette.903 In 1998 however, the SPC relaxed the case selection procedure.904 As of that year, cases could get published in the Gazette with the approval of merely one vice president so that no discussion or approval by the Adjudication Committee was required any more.905

The Provisions Concerning Work on Guiding Cases reinstalls the Adjudication Committee’s discussion and approval procedure in a nationwide Case Guidance System. Reinstalling this “heavier” procedure is probably meant to strengthen the authority of the selected guiding cases.906 The underlying reasoning seems to be that cases selected by the highest decision-making body of the highest court should be taken very seriously. This procedure may also serve to enhance the formal legitimacy of the Case Guidance System. Since the Adjudication Committee already possesses the power to issue judicial interpretations, it can be argued that selecting guiding cases is but another way to exercise the power of judicial interpretation, so that the Supreme People’s Court does not exceed limits on its power by introducing a nationwide Case Guidance System.

3.3.2.2 The publication phase

Cases selected by the Adjudication Committee of the Supreme People’s Court will be published through three channels: the Gazette, the website of the Supreme People’s Court and the People’s Court Daily, according to Art. 6 Para. 2 of the Provisions.

897 Art. 6 Provisions Concerning Work on Guiding Cases.
898 Art. 10 Organic Law of the People’s Courts.
899 Art. 6 of the Opinions of the Supreme People’s Court on the Reform and Improvement of the Institution of Adjudication Committee, see Supreme People’s Court of the People’s Republic of China 2010c.
901 Art. 7 Provisions of the Supreme People’s Court on the Work of Judicial Interpretation, see Supreme People’s Court of the People’s Republic of China 2007.
903 Zhou 2009, p. 142-143.
904 Zhou 2004, p. 5.
905 Ibid.
906 Interviews CN20110615, CN20110622 and CN20110709.
Concerning Work on Guiding Cases. In addition, the Case Guidance Work Office will make a compilation of guiding cases every year, as Art. 9 of the Provisions prescribes.

3.3.2.3 The application phase

There is only one vague rule in the Provisions that concerns the application of guiding cases: when deciding similar cases, courts at all levels should “Canzhao (参照)” guiding cases issued by the Supreme People’s Court. This rule is confusing, as the term “Canzhao” is susceptible to different interpretations.

Literally, the term Canzhao can be translated as “consult” or “refer to”. Accordingly, a literal interpretation suggests that although judges must consult guiding cases, they have discretion as to whether or not they eventually follow the guiding cases. However, the director of the Research Department of the Supreme People’s Court, Hu Yunteng, expressed a different view in an interview with the media. Hu breaks the term Canzhao into two parts. The first part Can (参) means Cankao (参考, literal meaning: consult, refer), whereas the second part Zhao (照) means Zunzhao (遵照, literal meaning: obey, follow), according to him. Cankao means that, as Hu explains, while deciding cases that are not similar to guiding cases, judges may consult guiding cases for inspiration. While deciding cases that are similar to guiding cases, lower courts must follow (Zunzhao) guiding cases, explains Hu. He continues to stress that judges must state convincing reasons where they refuse to follow applicable guiding cases, otherwise litigants may appeal on that ground. In the interview Hu stresses that he was merely expressing his personal opinions. It is uncertain whether his personal views correspond with the official position of the Supreme People’s Court.

Furthermore, it is noteworthy that in the Provisions the Supreme People’s Court does not touch upon two of the most debated questions concerning the application of guiding cases: whether judges are allowed to cite guiding cases in judgments and what the sanctions are if judges refuse to follow applicable guiding cases. The future will tell whether the Implementation Details Document, which was still being drafted at the time this study was concluded, will provide more clarity on these crucial points.

4. Functioning of the Case Guidance System since 2010

By the time this study was concluded in July 2014, the Supreme People’s Court published 31 guiding cases. These cases cover civil, criminal and administrative law. As Figure 16 illustrates, the vast majority of the guiding cases was decided by
lower courts, while the Supreme People’s Court itself only decided two of the guiding cases.\footnote{For details see Gechlik 2014, chart 3.}

![Figure 16 Number of guiding cases per level of court](image)

The guiding cases are published in a format that consists of six parts:\footnote{For details see the example guiding cases in the Appendix 6 and 7 of this study.}

1. Key words
2. Main points of the judgment
3. Relevant legal rule(s)
4. Basic facts
5. Results of the judgment
6. Reasons for the judgment

It should be noted that the published guiding cases are not the original judgments, but are summaries of the original judgments edited by the Supreme People’s Court. Not only the main points of the judgment where a rule or principle is drawn from the judgment, but also the facts of the case and the reasons for the judgment have been edited by the Supreme People’s Court. The final part of every guiding case (reasons for the judgment) does not tell the readers why the Supreme People’s Court chose the judgment as a guiding case, but gives a summary of the reasons employed by the court that has made the judgment to justify its decision. In a sense, the Supreme People’s Court fulfils the role of a narrator that tells the reader what a guiding case is about and what rules or principles can be distilled from it, but it should be noted that the published guiding cases do not contain the Supreme People’s Court’s comments on the guiding cases, nor any explanation as to whether other courts have adopted alternative approaches in similar cases and if so, why the solution chosen by the court that has made the selected judgment is preferable.

The impact of published guiding cases on court practice in China is yet largely unknown.\footnote{Academic publications on the Case Guidance System have continued to emerge in China since 2010, but these publications contain largely normative discussions on, among other things, the interpretation of the Provisions Concerning Work on Guiding Cases and methods of using guiding cases, rather than empirical data on the actual application of guiding cases in court practice.} After all, the first batch of guiding cases were not published until late December 2011, which means that Chinese judges have had barely three years’ experience with guiding cases. Due to limited time and resources, I have not been able
to carry out systematic fieldwork in China to investigate how Chinese judges deal with published guiding cases. An empirical study by the China Guiding Cases Project of Stanford Law School indicates that the impact of published guiding cases on court practice in China has thus far been rather limited.\textsuperscript{920} The results of this study indicate that nearly half of the Chinese judges that have participated in the research have never read the\textit{Provisions Concerning Work on Guiding Cases}.\textsuperscript{921} The results also show that 43.8% of the participating judges have never discussed a guiding case with other judges, attorneys or legal experts, and that 61.8% of the judges reported that they had never considered guiding cases in their adjudication practice.\textsuperscript{922}

5. \textbf{Reflections on the Case Guidance System}

Media reports in China are largely very enthusiastic about the Case Guidance System. The \textit{Legal Daily}, a newspaper controlled by the Central Political-Legal Committee of the Communist Party, praises the Supreme People’s Court’s\textit{Provisions Concerning Work on Guiding Cases} as a “symbol of epoch-marking significance”.\textsuperscript{923} The title of another report in the same newspaper also radiates optimism, which says “Case Guidance, Adjudication Says Farewell to Like Case Being Treated Differently”.\textsuperscript{924}

The reaction of Chinese legal scholars to the nationwide Case Guidance System introduced by the Supreme People’s Court is less one-sided than the media. Some legal scholars did express critical thoughts on this newly introduced legal institution.\textsuperscript{925} The focus of the case law discourse is, however, on the improvement and refinement of the selection and application of guiding cases under the framework of the Case Guidance System instead of seeking alternative or supplementary instruments.\textsuperscript{926}

This study, however, doubts whether the Case Guidance System alone would be sufficient to solve the problems that it is intended to address. It is, in the first place, doubtful whether the Case Guidance System is able to produce a sufficient amount of guiding cases that can meet the vast demand in legal practice throughout China. As has been revealed in the previous paragraph, the Supreme People’s Court has only published 31 guiding cases in nearly four years. Given the fact that courts across China normally handle more than 12 million cases each year,\textsuperscript{927} it does not seem very likely that the very small number of guiding cases selected through the Case Guidance System would be able to eliminate all the possible uncertainties in court practice throughout China.

One may of course argue that the reason why only a very small number of guiding cases has been published so far is that the Supreme People’s Court has yet but limited experience with selecting guiding cases so that it adopts a cautious attitude towards case selection at the beginning. Once the Supreme People’s Court has gained sufficient experience with case selection, one may continue to argue, the number of published guiding cases is likely to increase.

\textsuperscript{920}Stanford Law School China Guiding Cases Project 2013.
\textsuperscript{921}Stanford Law School China Guiding Cases Project 2013, p. 3.
\textsuperscript{922}Stanford Law School China Guiding Cases Project 2013, p. 3-4.
\textsuperscript{923}Jiang 2011a.
\textsuperscript{924}Cao 2010.
\textsuperscript{925}See e.g. Huang 2011 and Lu 2011.
\textsuperscript{926}See e.g. Huang 2011, Lu 2011 and Mou 2014.
\textsuperscript{927}According to the statistics provided by the Supreme People’s Court, courts in China handled 12,396,632 cases in 2012, see http://www.court.gov.cn/qwfb/sfsj/201312/t20131213_190137.htm.
This argument, however, is not convincing. In the first place, it is not true that the Supreme People’s Court has but limited experience with selecting guiding cases. As has been revealed previously in this chapter, the Supreme People’s Court has been selecting model cases for the Gazette for almost three decades. One may of course argue that the case selection procedure for publication in the Gazette is different from that for the nationwide Case Guidance System. However, it should be noted that the purpose of and criteria for case selection for the Gazette do not differ fundamentally from those for the Case Guidance System. It is not unlikely that the Supreme People’s Court indeed adopts a particularly cautious approach towards case selection in the early years of the Case Guidance System. However, this cautious attitude is neither the only nor the most fundamental obstacle that prevents the Case Guidance System from producing a sufficient amount of guiding cases. The complicated and time-consuming selection procedure, as will be further analysed in the following passages, is a much more fundamental obstacle, which makes it unlikely that the Case Guidance System will be able to produce a sufficient amount of guiding cases that can satisfy the demand in court practice.

Art. 6 of the Provisions Concerning Work on Guiding Cases prescribes that a candidate case must ultimately be approved by the Adjudication Committee of the Supreme People’s Court before it can become a guiding case and gets published. As revealed earlier in this chapter, the Adjudication Committee of the Supreme People’s Court consists of the president, the vice presidents, the chief judges of all the trial divisions and a number of senior judges of the Supreme People’s Court. This is a group of around 30 persons. The Working Rules of the Adjudication Committee of the Supreme People’s Court provides that decisions of the Adjudication Committee are to be made at Committee meetings, and that no Committee meeting is to take place unless more than half of the members are present. A decision of the Adjudication Committee must be approved by more than half of the members of the Committee. Moreover, the Adjudication Committee is entrusted with a series of highly important tasks and responsibilities such as discussing and deciding death penalty cases submitted by higher people’s courts and the military court, discussing and deciding retrial cases, discussing and deciding counter appeal cases brought by the Supreme People's Procuratorate under the adjudication supervisory procedure as well as discussing and approving judicial interpretations. Given these procedural prescriptions and the heavy tasks and responsibilities of the Adjudication Committee, it is doubtful whether

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928 See the paragraph of this chapter on the evolution of the Case Guidance System.
929 Art. 6 of the Opinions of the Supreme People’s Court on the Reform and Improvement of the Institution of Adjudication Committee, see Supreme People's Court of the People’s Republic of China 2010c.
930 For a partial list of the members of the Adjudication Committee of the Supreme People’s Court and their responsibilities see http://www.court.gov.cn/jgsz/zgrmfyld/.
931 Art. 4 of the Working Rules of the Adjudication Committee of the Supreme People’s Court. The Chinese title of this official document is 最高人民法院审判委员会工作规则 (Zuigao Renmin Fayuan Shenpan Weiyuanhui Gongzuo Guize), see Supreme People’s Court of the People’s Republic of China 1993.
932 Art. 9 of the Working Rules of the Adjudication Committee of the Supreme People’s Court. It should be noted that this article provides that a decision needs the approval of more than half of the Committee members instead of half of the members that are present at a Committee meeting.
933 This list is not exhaustive. For a complete list of the tasks and responsibilities of the Adjudication Committee see Art. 2 of the Working Rules of the Adjudication Committee of the Supreme People’s Court.
the Adjudication Committee of the Supreme People’s Court is able to convene frequently enough and to have enough time to discuss and approve a sufficient amount of guiding cases each year to meet the demand in court practice throughout China.

In addition, it should be stressed that only a tiny proportion of guiding cases comes from judgments made by the Supreme People’s Court itself. The vast majority of guiding cases are selected from judgments made by lower level courts. According to the Provisions Concerning Work on Guiding Cases, candidate cases decided by a lower level court need to go through a selection procedure in the decision-making court itself and a selection procedure at each upper level court, which means that a case decided by a district level court needs to go through as many as four rounds of selection before it can ultimately become a guiding case and gets published. Given the fact that in each round of selection a positive decision by the Adjudication Committee of a lower level court is required and the Adjudication Committees of lower level courts not only need to follow practically the same working procedure as the Adjudication Committee of the Supreme People’s Court, but also are entrusted with many important tasks and responsibilities, it is plain that the vast majority of guiding cases need to go through a complicated and time consuming selection procedure, which further casts doubt on the ability of the Case Guidance System to generate a sufficient amount of guiding cases that are capable of meeting the vast demand for leading cases to clarify uncertainties and to enhance uniform application of the law in legal practice across China.

Not only is the selection procedure complicated and time-consuming, it is also a procedure shrouded in secrecy that lacks a transparent discourse. Although the public is allowed, at least in theory, to participate in the selection procedure by recommending candidate cases to the courts that have made the recommended judgments, the selection procedure is nearly an entire black box to the outside world. It is, for example, nearly impossible for the public to know how many candidate cases have been considered during the selection procedure and what kind of cases have been involved in the selection. It is also highly difficult, if not impossible, for the public to know whether courts have adopted alternative solutions to the legal problem(s) addressed in a guiding case and if so, why the approach of the guiding cases is preferable. In fact, even the full facts of a guiding case and the legal reasoning of the court that has originally made the judgment are not plainly available to the public, as the published guiding cases are not the original judgments, but rather summaries of the original judgments edited by the Supreme People’s Court.

Such a non-transparent selection procedure may prevent the Case Guidance System from adequately achieving its desired effects. Due to the secrecy of the selection procedure and a lack of rational discourse, it is difficult for judges to know the full facts and the legal reasoning of the original judgment of a guiding case and it is a procedure shrouded in secrecy that lacks a transparent discourse. Although the public is allowed, at least in theory, to participate in the selection procedure by recommending candidate cases to the courts that have made the recommended judgments, the selection procedure is nearly an entire black box to the outside world. It is, for example, nearly impossible for the public to know how many candidate cases have been considered during the selection procedure and what kind of cases have been involved in the selection. It is also highly difficult, if not impossible, for the public to know whether courts have adopted alternative solutions to the legal problem(s) addressed in a guiding case and if so, why the approach of the guiding cases is preferable. In fact, even the full facts of a guiding case and the legal reasoning of the court that has originally made the judgment are not plainly available to the public, as the published guiding cases are not the original judgments, but rather summaries of the original judgments edited by the Supreme People’s Court.

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934 So far, only two of the 31 published guiding cases are decided by the Supreme People’s Court itself, see Gechlik 2014.
935 For an impression of the tasks and the working procedures of the Adjudication Committees of lower level courts in China, see e.g. Intermediate People’s Court of Zhengzhou City 2003 and Higher People's Court of Guangdong Province 2008.
936 Art. 5 Provisions Concerning Work on Guiding Cases.
937 Occasionally, there are news reports that report how many cases have been considered, but they do not shed light on the exact type and content of the candidate cases that have been considered, see e.g. Zhang 2011.
938 The discussion within the Adjudication Committee is to be kept secret and the minutes of the Committee meetings are classified documents that are not accessible to the public, see Art. 13 of the Working Rules of the Adjudication Committee of the Supreme People’s Court.
939 See paragraph 4 of this chapter.
also difficult for them to ascertain why a guiding case is selected and what purpose(s) the Supreme People’s Court exactly intends to achieve with a selected guiding case. Consequently, judges may have difficulty in interpreting and applying the guiding cases, which means that different judges may interpret and apply the same guiding case differently, thus reducing the role of guiding cases in promoting consistent judgments.  

Another uncertainty that the non-transparent selection procedure causes is that guiding cases selected through such a procedure may not have the support of the relevant legal communities, thus having limited effect in practice. In the Netherlands, as has been revealed in chapter two of this study, the fact that the Supreme Court decisions are particularly influential is related to two factors. In the first place, the existence of a cassation system in the Netherlands makes sure that the Supreme Court has the final say in matters concerning legal points, so that judgments that ignore relevant Supreme Court decisions run the risk of being reversed in cassation appeal. Moreover, the selection of leading cases in the Netherlands takes place in a process of rational discourse, which means that pros and cons of previous cases are often discussed in later cases and in scholarly writings. Cases that win the most support in such a rational discourse are likely to be repeatedly followed and ultimately grow into leading cases. In other words, leading cases selected through such a process derive their influential status not only from the power of the author of the leading cases to reverse deviating judgments, but also from the substantive merits of the cases as evidenced in a certain consensus in the legal community expressed in a process of rational discourse. The Case Guidance System, however, does not involve an open discourse on the pros and cons of the candidate cases. The selection scheme is essentially top-down, putting considerable emphasis on the hierarchical status of the selectors, rather than on substantive arguments. It seems therefore fair to observe that the status of guiding cases selected under the Case Guidance System relies largely on the power of the selectors, but it is uncertain whether the selected cases do in fact enjoy support among the legal community. One of the reasons why many laws in China are poorly implemented is that they do not enjoy the support of the relevant (local) communities. Given the non-transparent and the rather top-down style of case selection, it is not unlikely that guiding cases selected through the Case Guidance System will not enjoy the support of the relevant communities and will face similar difficulties in the application phase as many statutes do.

One last remark that needs to be made in this context is that, contrary to the Netherlands, China does not have a cassation system. Art. 11 of the Organic Law of the People’s Courts provides that “(i)n the administration of justice, the people’s courts adopt the system whereby the second instance is the last instance”. This means that a litigant may launch an appeal against a judgment of the court of first instance, but there is in principle no legal remedy any more against a judgment of the court of second instance.

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940 The analysis of guiding cases no. 26 by Gechlik and Dai illustrates, for example, how important the full facts of the original judgment are for the interpretation of a guiding case, see Gechlik & Dai 2014.
941 See the paragraph on the way cases are used in adjudication in the Netherlands in chapter two of this study.
942 Ibid.
943 Ibid.
944 See e.g. Van Rooij 2004 and Van Rooij 2006.
945 Translation by the National People’s Congress of China, see http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384078.htm.
instance. Which level of court has jurisdiction in first instance depends on various factors. In ordinary civil cases, for example, district courts are usually the court of first instance, but if a civil case has a significant international aspect, it must be tried by an intermediate people’s court in first instance. Under circumstances, higher people’s courts and the Supreme People’s Court can try civil cases in first instance. In criminal cases, district courts normally have jurisdiction in first instance, but if a case concerns national security matters or terrorism, or if a case is likely to result in a sentence of life imprisonment or death penalty, it must be tried in first instance by an intermediate people’s court. Higher people’s court and the Supreme People’s Court may also try criminal cases in first instance, where the case can be deemed as “of major importance” in a province, respectively, in the entire country.

China’s trial system whereby the second instance is the final instance means that many cases may never have the possibility of reaching the Supreme People’s Court. Accordingly, it is not apparent how the Supreme People’s Court will be able to directly enforce the supposedly coercive force of guiding cases selected through the Case Guidance System. At least it does not seem possible for the Supreme People’s Court to enforce the supposedly coercive force of guiding cases by reversing judgments made by district courts and intermediate people’s courts that refuse to follow applicable guiding cases, as the existing trial system does not allow litigants to bring an appeal against judgments of these two levels of courts to the Supreme People’s Court. In other words, even if the Implementation Details Document that the Supreme People’s Court is drafting would eventually allow a court in second instance to reverse a judgment that refuses to follow an applicable guiding case as a sanction to courts that do not take guiding cases seriously, the power to enforce the supposedly coercive force of guiding cases through reversal of judgments would rest in the hands of hundreds of different courts across China. This raises the questions how consequently, willingly and effectively these various courts would exercise this power to enforce the supposedly coercive force of guiding cases that they themselves did not select or substantively endorse. Of course, it is not unthinkable that the Supreme People’s Court would design other instruments to enforce the coercive force of guiding cases, but even if the Supreme People’s Court does come up with such instruments to sanction courts and judges that refuse to follow guiding cases, the concerns raised earlier in this subparagraph on the limited amount of guiding cases, the risk of conflicting interpretations of guiding cases and the uncertainty of sufficient support in the legal community still cast considerable doubt on the ability of the Case Guidance System to achieve the desired effects.

What has been said in this paragraph does not mean that the Case Guidance System will have any positive effect at all. What should be stressed is that it may not be wise for Chinese legal scholars, courts and media to focus solely on the Case Guidance System. Such a focus may lead to an attitude that treats the vast body of cases that have not been selected through the Case Guidance System as wastes, i.e. unusable remains of

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946 See Art. 18 and Art. 19 of China’s Civil Procedure Code. When the Supreme People’s Court tries a case in first instance, its judgment is the final judgment that is not susceptible to appeal, see Art. 11 Para. 4 Organic Law of the people’s courts.
947 See Art. 20 and Art. 21 of China’s Civil Procedure Code.
948 See Art. 19 and Art. 20 of China’s Criminal Procedure Code.
949 The Chinese term used in the Criminal Procedure Code is 重大刑事案件 (Zhongda Xingshi Anjian), see Art. 21 and Art. 22 of China’s Criminal Procedure Code.
950 For an extensive yet still incomplete list of intermediate courts in China see http://www.court.gov.cn/jgsz/qgfyml/.
an official case selection procedure. A better view is to see the vast body of unselected cases as a hidden goldmine that may provide valuable materials for counterbalancing the limitations of legislation and for promoting consistency in judgments in China. A crucial question is how to develop proper ways to find and to make use of the treasures hidden in this vast body of unselected cases. The next chapter will elaborate on this point and will examine whether, and if so, what insights can be drawn from the experiences with case law in the Netherlands for China to further enhance its case law practice.

6. Concluding remarks

This chapter revealed that due to the lack of case law, the legislature in China has to take on an extremely difficult, if not impossible task of striking a proper balance in lawmaking among four competing requirements: adequacy, feasibility, certainty and adaptability. This fundamental problem in the Chinese legal system as well as some specific problems such as like cases not being treated alike, lack of transparency in adjudication and judicial corruption, caused Chinese legal scholars and judges to actively search for a new legal institution to enhance the use of cases in adjudication. In this quest, legal scholars and courts in China demonstrated considerable interest in the common law doctrine of precedent, but have not transplanted it to China. Instead, courts and legal scholars designed and experimented with a practice of allowing higher courts to select and publish model cases, which are supposed to be followed in later court practice. Such a practice is commonly referred to as the “Case Guidance System”. These efforts eventually resulted in a new legal institution, i.e. a nationwide Case Guidance System that allows the Supreme People’s Court to select and publish guiding cases from candidate cases recommended by courts at all levels throughout China.

It is doubtful whether the Case Guidance System alone would be sufficient to solve the problems that it is intended to address. The top-down case selection scheme and the exclusion of other actors such as legal scholars and practising lawyers cast doubt on the ability of the Case Guidance System to function as an institution through which societal norms can move bottom-up to become part of the national legal system. Due to the rigid and time-consuming case selection procedure, it is doubtful whether the Case Guidance System would be able to produce a sufficient amount of guiding cases that is able to satisfy the demand for case law in court practice throughout China. Moreover, it is doubtful whether the non-transparent case selection procedure that restricts the power to select guiding cases to a small group of people within the judiciary that occupy high positions would be able to generate guiding cases that can count on a desirable degree of consensus and support in the legal community. It was submitted that it would not be wise for Chinese judges and legal scholars to focus solely on the Case Guidance System and the selected guiding cases. The vast body of unselected cases may actually be a hidden treasure, containing valuable materials that,

\[951\] Van Rooij 2006, p. 25-104.

\[952\] See paragraph 3 of this chapter.

\[953\] Ibid.

\[954\] Ibid.

\[955\] The Chinese term is 案例指导制度 (Anli Zhidao Zhidu).

\[956\] Ibid.

\[957\] For an analysis of the need for an institution in China through which societal norms can move bottom-up to become part of the national legal system see Van Rooij 2006, p. 25-49.
if used properly, can supplement the Case Guidance System to achieve the purpose of counterbalancing the limitations of legislation and to enhance consistency in court judgments in China. The next chapter will elaborate on this last point.