

Yajun Tao

The Guiding Cases of China's Supreme People's Court



Nomos

Studien zu Recht und Rechtskultur Chinas

Herausgegeben von
Björn Ahl, Universität zu Köln

Band 10

Yajun Tao

The Guiding Cases of China's Supreme People's Court



Nomos

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

ISBN 978-3-7560-0603-8 (Print)
978-3-7489-4139-2 (ePDF)

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN 978-3-7560-0603-8 (Print)
978-3-7489-4139-2 (ePDF)

Library of Congress Cataloging-in-Publication Data

Tao, Yajun
The Guiding Cases of China's Supreme People's Court
Yajun Tao
458 pp.

ISBN 978-3-7560-0603-8 (Print)
978-3-7489-4139-2 (ePDF)



Onlineversion
Nomos eLibrary

1st Edition 2023

© Nomos Verlagsgesellschaft, Baden-Baden, Germany 2023. Overall responsibility for manufacturing (printing and production) lies with Nomos Verlagsgesellschaft mbH & Co. KG.

This work is subject to copyright. All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage or retrieval system, without prior permission in writing from the publishers. Under § 54 of the German Copyright Law where copies are made for other than private use a fee is payable to "Verwertungsgesellschaft Wort", Munich.

No responsibility for loss caused to any individual or organization acting on or refraining from action as a result of the material in this publication can be accepted by Nomos or the author.

Acknowledgements

This work was accepted by the Faculty of Arts and Humanities at the University of Cologne in the winter semester of 2022/2023 as a doctoral thesis. I would like to thank many people who supported me during these years.

First, I would like to thank my supervisor, Prof. Dr. Björn Ahl. He has given me a great deal of valuable advice during my writing of the thesis that helped me improve the dissertation considerably. I have gained a lot from his guidance and help during my PhD program.

Furthermore, I would also like to thank Prof. Dr. Benjamin Pißler, my second supervisor. His comments on the dissertation helped me refine the dissertation from a different perspective. Moreover, I thank Prof. Dr. Zhang Qi of Peking University for his encouragement and support. I am also very grateful for the valuable information that Assoc. Prof. Dr. Gao Shang of China University of Political Science and Law has shared related to the Guiding Cases System of China.

I would also like to thank Asst. Prof. Dr. Zhang Zixian of Peking University for helping and supporting me throughout my PhD program. Dr. Jasper Habicht, Dr. Eva Richter and Dr. Zhang Huanran have offered me a lot of useful advice and help in the final stage of my thesis submission. I would like to express my gratitude to them.

Finally, I thank my family. I could not finish this PhD program without their support.

Cologne, October 2022

Yajun Tao

Table of Contents

Chapter 1: Introduction	15
I. Subject matter	15
II. Central research question	20
III. State of research	23
1. The ambiguous binding effect as a reason for the low application rate	24
2. The limited number of guiding cases as a reason for the low application rate	26
3. Chinese legal education as a reason for the low application rate	28
4. The content of guiding cases as a reason for their low application rate	29
5. The quality of guiding cases as a reason for the low application rate	30
IV. Structure	32
V. Research methods	38
Chapter 2: The development of guiding cases in China	41
I. Introduction	41
II. State of research	43
1. Research on the cases issued by the SPC before 1985	43
2. Research on the typical cases in the SPC Gazette	44
a. Research on the objectives and content	44
b. Research on the structure	47
c. Research on the binding effect of guiding cases	49
3. Research on the objectives of the guiding cases system	51
III. Cases and policy	54

IV.	Typical cases in the Gazette of the Supreme People's Court	61
1.	The original objective of typical cases in the SPC Gazette	62
a.	Raising public awareness of trial work and the socialist legal system	62
b.	Providing guidance and reference to lower courts	64
2.	Selection of typical cases in the Gazette of the SPC	65
a.	Selection procedure	65
b.	Various types of typical cases	68
3.	The structure of typical cases in the SPC Gazette	71
a.	Abstract of adjudication	72
b.	Focus of dispute	76
4.	The impact of the SPC's Gazette typical cases	79
5.	The SPC Gazette's typical cases and guiding cases	81
V.	The establishment of the guiding cases system	83
1.	Experiments at the local level	83
a.	Experiment in Henan	87
b.	Experiment in Sichuan	93
aa.	Sichuan High People's Court	93
bb.	The Chengdu Intermediate People's Court	96
c.	Experiment in Tianjin	99
d.	Experiment in Zhejiang	101
e.	Evaluation of experimentation at the local level	103
aa.	Similarities of local experimentation	103
bb.	The SPC's attitude toward local courts' experimentation	104
2.	The SPC's guiding cases system	107
a.	The official establishment of the guiding cases system	107
b.	The regulations of the guiding cases system	113
c.	The SPC's objectives of establishing the guiding cases system	116
aa.	Limiting the discretion of judges	117
bb.	Replacing official replies and simple replies of the SPC	121
cc.	Introducing guiding cases in addition to typical cases	126
VI.	Similar-case searching system	127
1.	Development of the similar-case searching mechanism	128
2.	Practice of similar-case searching in local level courts	132

3. Combination of guiding cases and similar-case searching	134
VII. Summary	137
Chapter 3: The Binding Effect of Guiding Cases	141
I. Introduction	141
II. State of research	143
1. Research on the issue of legal binding effect and guiding cases	143
2. Research on the factual binding effect	144
3. Research on the reform proposals for guiding cases	148
a. Guiding cases as a new form of judicial interpretation	148
b. Replacing judicial interpretations with guiding cases	149
c. Guiding cases as a new legal source	150
III. The meaning of the term “shall refer to” in the Chinese legal context	152
1. “Refer to” in the context of the Administrative Litigation Law	152
2. “Shall refer to” in the context of the guiding cases system	154
a. “Shall refer to” and “can refer to”	156
b. “Shall refer to” and factual binding effect	157
c. The implementation of the factual binding effect	160
aa. Performance management and supervision by higher courts	160
bb. Full consideration of guiding cases	165
cc. Factual binding effect in the sense of the German legal system	170
d. Ambiguous binding effect and low application rate	174
3. Why guiding cases are not granted legal binding effect	175
a. The binding effect of guiding cases and China’s constitutional system	176
b. Legal binding effect of judicial interpretations	179
c. Guiding cases system based on self-empowerment of the SPC	187
aa. The SPC as the highest authority in the court system	187
bb. Legal basis for the guiding cases system according to the SPC	189
cc. Lack of authorization from the legislator	191

Table of Contents

d. Strategic adjustments of the SPC	197
4. Factual binding effect and key points of adjudication	200
a. Key points of adjudication	201
b. Scope of the factual binding effect of guiding cases	203
c. Key points of adjudication and application of guiding cases	206
IV. Summary	210
Chapter 4: The Procedure of Guiding-Case Selection	213
I. Introduction	213
II. State of research	215
1. Research on the selection procedure	215
2. Research on the editing of guiding cases	217
3. Research on the efficiency of the selection procedure	219
III. Overall selection procedure according to SPC documents	220
IV. Selection procedure of guiding cases	224
1. SPC Research Office	224
2. Case Guidance Office	226
3. Trial divisions of the SPC	229
4. Temporary procedure of the guiding cases system	232
5. SPC circuit courts	233
6. SPC adjudication committee	234
V. Recommendations from local levels	235
1. Unbalanced contribution to guiding case applications	235
2. High courts	237
3. Intermediate and basic courts	239
4. Search and preparation work relating to potential guiding cases	241
5. Directive cases of high courts	247
a. Application of directive cases	249
b. Publication of directive cases	253
c. Structure of directive cases	257
d. Trial work documents of high courts	261
e. Limited capacity of research offices at local levels	265

VI. Editing work of guiding cases	269
1. Keywords	270
2. Basic facts	271
3. Reasoning part	275
VII. Evaluation and rewards	278
1. Evaluation	279
2. Rewards	282
VIII. Summary	284
Chapter 5: Substantive criteria for the selection of guiding cases	289
I. Introduction	289
II. State of research	290
1. Research on the substantial standards of guiding cases	290
2. Research on the classification of guiding cases	291
III. General standards for the selection of guiding cases	295
1. Positive social effect	296
2. Avoiding controversial issues	298
3. Typicality and representativeness	301
IV. Different types of guiding cases	303
1. Cases repeating the content of law or judicial interpretations	305
a. Cases applying new law	305
b. Cases responding to public concerns	310
2. Cases correcting mistakes in applying the law	316
3. Cases that change the law	318
4. Cases supplementing the law	322
a. Providing definitions of legal concepts	324
b. Applying analogy and extensive interpretation	327
c. Filling legal loopholes	329
d. Providing evidence rules	334
V. Summary	336
Chapter 6: Application of Guiding Cases in Practice	339
I. Introduction	339

Table of Contents

II.	State of research	341
1.	Research on the general statistics	341
2.	Research on judges' guiding-case applications	342
3.	Research on parties' references to guiding cases	345
4.	Research on the comparison points	346
5.	Research on guiding cases and administrative organs	349
III.	Application of guiding cases by judges	349
1.	Active application	349
2.	Judges' preference for implicit application	350
3.	Pragmatic application of cases	353
4.	Insufficient research and practice relating to applying cases in trials	357
a.	Judges' training	358
b.	Legal education in colleges and universities	359
IV.	Strong motivation of parties to cite guiding cases	360
1.	In pursuit of interests by parties	360
2.	Guiding cases proposed by parties without response from judges	362
V.	Citation of guiding cases in judicial practice	364
1.	Key points of adjudication	366
2.	Guiding cases as arguments	368
3.	Citation of the reasoning part in guiding cases	370
4.	Flexible application of guiding cases	371
VI.	Rejection of guiding cases in court practice	375
1.	Difference in facts	379
2.	Difference in law application	380
3.	Insufficient proof	384
VII.	Influence of guiding cases on administrative organs	385
1.	Influence on regulations	385
a.	Influence on administrative regulation	385
b.	Influence on local government rules	386
2.	Influence on administrative organs in practice	389
a.	Influence on administrative organs in judicial practice	389
b.	Limited influence on administrative organs in executive practice	390

Table of Contents

VIII. Summary	393
Chapter 7: Conclusion	397
Appendix	411
List of References	427

Chapter 1: Introduction

I. Subject matter

This book investigates the guiding cases system (指导性案例 or 指导案例) of the Chinese Supreme People's Court (hereafter referred to as the SPC). Formally established by the SPC in 2010, this system is intended to unify the application of law in judicial practice by providing guidance to lower courts when adjudicating similar cases.¹ The SPC has avoided the term “precedent” (先例 or 判例), as Chinese scholars associate the term “precedent” with case law or “judge-made law” of common law systems.² As a result, the SPC adopted the concept of “guiding cases” or “case guidance” (案例指导) in order to avoid the misunderstanding of implementing a feature of common law systems.³ The SPC selects guiding cases and requires lower courts of all levels to recommend cases with a “guiding meaning” through the relevant next higher levels of courts. Thus, provincial high courts and the SPC trial divisions (审判业务单位), such as the First Civil Division (民事审判第一庭), have the authority to recommend cases directly to the SPC Case Guidance Office (案例指导办公室).⁴ Between 2011 and the end of 2021, the SPC issued a total of 178 guiding cases.

In general, the SPC is more than just the highest court in China. It has a broad range of authority, which includes adjudicative, legislative, and administrative competence. Aside from serving as a trial organ for

1 Article 1, Detailed Rules for the Implementation of the Provisions of the Supreme People's Court on Case Guidance (最高人民法院关于案例指导工作的规定实施细则, 法〔2015〕130号), 27 April 2015; Provisions of the Supreme People's Court on Case Guidance (最高人民法院关于案例指导工作的规定, 法发〔2010〕51号), 15 November 2010.

2 Liu Zuoxiang (刘作翔), Recent Developments in China's Case Guidance System and its Problems (中国案例指导制度的最新进展及其问题), *Oriental Law* (东方法学), 2015, No. 3, p. 40; Jiang Huiling (蒋惠岭), Several Specific Issues on Establishing Case Guidance System in China (建立案例指导制度的几个具体问题), *Journal of Law Application* (法律适用), 2004, No. 5, p. 10.

3 *ibid.*

4 Article 4, Detailed Rules for the Implementation of the Provisions of the Supreme People's Court on Case Guidance (最高人民法院关于案例指导工作的规定实施细则, 法〔2015〕130号), 27 April 2015.

final appeals as stipulated in Article 130 under the 1982 Constitution, the SPC releases judicial interpretations, participates in legislative activities and administers the entire court system.⁵ After the introduction of guiding cases, some would suggest that the SPC impacts lower courts in three ways, namely with regard to issuing judicial interpretations to supplement legislation, giving instructions to lower courts with the help of judicial documents, and using cases to guide lower courts.⁶ In addition, some point out that the SPC is more than just an adjudicator of final appeals, but, more importantly, with its power to issue judicial interpretations, the SPC serves as a public policy maker.⁷ Thus it is reasonable to argue that the SPC's influence on lower courts is all-encompassing. It is exercised not just through adjudications, but also through other channels. In 2018, the Court Organisation Law officially confirmed the SPC's authority to issue guiding cases.⁸ Consequently, it is questionable whether the competence of the SPC to adopt guiding cases falls within one of these categories or constitutes a new category.

Obviously, publishing guiding cases does not belong to the adjudicative competence or trial power of the SPC. Adjudications of the SPC do not become guiding cases unless those adjudications go through several rounds of review and receive approval from the SPC adjudication committee. The SPC considers the issuance of guiding cases as a form of supervision over the trial work of lower courts.⁹ Nevertheless, this argument cannot provide much information, as the SPC basically classifies all its measures as supervision

5 Finder, Susan, *The Supreme People's Court of the People's Republic of China*, *Journal of Chinese Law*, 1993, Vol. 7, No. 2, p. 223; Peerenboom, Randall, *China's Long March toward Rule of Law*, Cambridge University Press, 2002, p. 283.

6 Peng Ning (彭宁), *Reflections on the Judicial Governance Models of the Supreme People's Court* (最高人民法院司法治理模式之反思), *Studies in Law and Business* (法商研究), 2019, No. 1, pp. 55-58.

7 Fu Yulin (傅郁林), *On the Functions of the Supreme Court* (论最高法院的职能), *Peking University Law Journal* (中外法学), 2003, No. 3, p. 605; Hou Meng (侯猛), *China Supreme People's Court Study: From the Perspective of the Impact of Justice* (中国最高人民法院研究: 以司法的影响力切入), Law Press China (法律出版社), 2007, p. 173; Zhang, Taisu, *The Pragmatic Court: Reinterpreting the Supreme People's Court of China*, *Columbia Journal of Asian Law*, Vol. 25, No. 1, 2012, p 1; Ip, Eric C., *The Supreme People's Court and the Political Economy of Judicial Empowerment in Contemporary China*, *Columbia Journal of Asian Law*, Vol. 24, No. 2, 2011, p. 367.

8 Article 37, *People's Court Organisation Law* (《中华人民共和国人民法院组织法》), 26 October 2018.

9 Article 7, *Opinion of the Supreme People's Court of Implementation of the Spirit of the National Political and Legal Work Teleconference* (最高人民法院关于深入贯彻落实全国政法工作电视电话会议精神的意见, 法发〔2009〕59号), 25 December 2009.

over the trial work of lower courts, including making adjudications, releasing judicial interpretations and other judicial documents, holding conferences on trial work and organizing the training of judges.¹⁰

Actually, the SPC's competence to issue guiding cases is a combination of its competence to adopt judicial interpretations and its administrative competence as the highest court in the court system. Guiding cases and judicial interpretations have much in common, as both are published with the approval of the SPC adjudication committee and address the concrete application of law (法律适用)¹¹ questions in judicial practice. However, judicial interpretations are generally accepted as an official legal source of the Chinese legal system and have official legal force, while guiding cases do not.¹² Meanwhile, the binding effect of guiding cases is based on SPC documents, instructing that courts of all levels "shall refer to" (应当参照) guiding cases when dealing with similar cases.¹³ Therefore, with respect to their content, guiding cases are similar to judicial interpretations, but with respect to their binding effect, guiding cases show a feature of internal supervision of the SPC within the court system.

10 Article 1, 8, Several Opinions on Regulating the Trial Work Relations between the People's Courts at Different Levels (关于规范上下级人民法院审判业务关系的若干意见, 法发〔2010〕61号), 28 December 2010.

11 The so called "law application" or "application of the law" (法律适用) in judicial practice is a legal concept in the context of Chinese law. Basically, it refers to the situations in which judges or courts apply legal sources to specific legal disputes in a lawful way. This concept of "law application" depicts the trial work of judges and intentionally avoids using "law interpretation" (法律解释), as in China only the NPCSC has the power to interpret law. Meanwhile, the SPC is authorized by the Standing Committee of the National People's Congress (NPCSC) to make interpretations regarding the concrete problems in law application. Therefore, apart from the SPC, other courts in China do not have the competence to interpret the law, but only to apply it. See: Dong Hao (董皞), The Relationship between Judicial Interpretations and the Application of the Law (司法解释与法律适用之关系), *Law Review (法学评论)*, 1999, No. 3, p. 117; Shen Zongling (ed.) (沈宗灵), *Jurisprudence (法理学)*, Peking University Press (北京大学出版社), 2014, p. 369.

12 Zhou Yongkun (周永坤), *Jurisprudence: Global Perspective (法理学: 全球视野)*, Law Press China (法律出版社), 2016, p. 62; Shen Zongling (ed.) (沈宗灵), *Jurisprudence (法理学)*, Peking University Press (北京大学出版社), 2014, p. 369; Zhang Wenxian (ed.) (张文显), *Jurisprudence (法理学)*, Higher Education Press (高等教育出版社), 2018, p. 90.

13 Article 7, Provisions of the Supreme People's Court on Case Guidance (最高人民法院关于案例指导工作的规定, 法发〔2010〕51号), 15 November 2010; Article 9, Detailed Rules for the Implementation of the Provisions of the Supreme People's Court on Case Guidance (最高人民法院关于案例指导工作的规定实施细则, 法〔2015〕130号), 27 April 2015.

In terms of the content and structure of guiding cases, they consist of a title, keywords, key points of adjudication (裁判要点), relevant legal provisions, basic facts, judgement, the reasoning of judgement and the names of the judges engaged in the adjudication.¹⁴ Guiding cases are different from the original court decisions as the SPC and the courts that make the adjudications edit and restructure the content of the original court decisions in order to conform to the prescribed format for guiding cases.

For instance, Guiding Case No. 24 is entitled: Guiding Case No. 24 of the Supreme People's Court: Rong Baoying v. Wang Yang and Jiangyin Branch of Altrust Property Insurance Company Ltd. (Motor vehicle traffic accident liability dispute).¹⁵ As can be seen, the title of a guiding case summarizes the parties' names and designates the type of legal dispute. Following the title, it explicitly notes that this guiding case is approved by the SPC adjudication committee and states the publication date. The keywords of Guiding Case No. 24 are: civil lawsuit, traffic accident, and fault liability.¹⁶ Keywords can help judges retrieve appropriate guiding cases efficiently. Guiding Case No. 24 has only one key point of adjudication, which states that the impact of the victim's physical conditions on the accident's injury is not a statutory mitigating circumstance for the tortfeasor.¹⁷ As can be seen, the key points of adjudication in guiding cases are presented in the form of abstract rules that judges can reference in their judicial practice. In the section of relevant legal provisions, guiding cases list legal provisions of statutory law that are applied in the decision. Guiding Case No. 24 lists article 26 of Tort Law (侵权责任法) and article 76, paragraph 1, number 2 of Road Traffic Safety Law (道路交通安全法).¹⁸ The following three parts: basic facts, judgement, and the reasoning of the judgement of a guiding case, are all extracted from the original court decision and modified. For a better understanding of the content and structure of guiding cases, this study includes Guiding Case No. 24 as an example in the appendix.

In China, an ordinary court decision typically includes the following sections: basic information and statements of parties or indictments presented by the public prosecutor, evidence, facts confirmed by the court, a reasoning

14 Article 3, Detailed Rules for the Implementation of the Provisions of the Supreme People's Court on Case Guidance (最高人民法院关于案例指导工作的规定实施细则, 法〔2015〕130号), 27 April 2015.

15 Guiding Case No. 24 (指导案例24号).

16 *ibid.*

17 *ibid.*

18 *ibid.*

part, judgement and legal basis and the names of judges and court clerks at the end.¹⁹ Some court decisions make slight variations in the components. For instance, Guiding Case No. 24 is based on a second instance court decision. Apart from the components described before, judges of the second instance summarize the facts confirmed by the first instance court, its reasoning and its judgement at the beginning of the court decision.²⁰ Chapter Four will explain the editing process for guiding cases in depth.²¹

According to the Provisions of the Supreme People's Court on Case Guidance (hereafter the Provision on Case Guidance) and Detailed Rules for the Implementation of the Provisions of the Supreme People's Court on Case Guidance (hereafter the "Detailed Rules"), judges "shall refer to" the key points of adjudication of guiding cases if they deal with similar cases in terms of basic facts and the application of the law.²² Within the Chinese legal system, guiding cases do not belong to legal sources and shall not conflict with the laws issued by the National People's Congress (NPC) and its Standing Committee (NPCSC), the administrative regulations of the State Council, as well as judicial interpretations of the SPC.

According to the SPC, if judges refer to guiding cases in trial work, they shall identify the case number and cite the key points of adjudication of guiding cases in the reasoning part of court rulings, but they shall not apply guiding cases as a legal basis of the decision.²³ Meanwhile, if parties request that judges refer to guiding cases during trial, judges should respond to the parties' proposals with reasons.²⁴ Despite all these requirements specified by the SPC, judges do not always stick to the SPC's provisions in practice

19 See: Appendix.

20 Rong Baoying v. Yongcheng Property Insurance Co., Ltd, People's Court of Wuxi of Jiangsu Province, Motor Vehicle Traffic Accident Liability Dispute, (荣宝英与永诚财产保险股份有限公司江阴支公司等机动车交通事故责任纠纷上诉案民事裁定书, 2013 锡民终字第 0497 号), 21 June 2013.

21 See: Chapter 4, VI.

22 Article 9, Detailed Rules for the Implementation of the Provisions of the Supreme People's Court on Case Guidance (最高人民法院关于案例指导工作的规定实施细则, 法〔2015〕130 号), 27 April 2015; Article 7, Provisions of the Supreme People's Court on Case Guidance (最高人民法院关于案例指导工作的规定, 法发〔2010〕51 号), 15 November 2010.

23 Article 10, 11, Detailed Rules for the Implementation of the Provisions of the Supreme People's Court on Case Guidance (最高人民法院关于案例指导工作的规定实施细则, 法〔2015〕130 号), 27 April 2015.

24 Article, 11, Detailed Rules for the Implementation of the Provisions of the Supreme People's Court on Case Guidance (最高人民法院关于案例指导工作的规定实施细则, 法〔2015〕130 号), 27 April 2015.

and frequently disregard guiding cases or parties' requests for them to follow guiding cases.²⁵ In this book, guiding-case application refers to situations where judges mention guiding cases in the reasoning part of the judgement or follow the practice of guiding cases without mentioning guiding cases in court decisions, or judges mention guiding cases in published articles or comments regarding certain court decisions without mentioning guiding cases in court decisions, or where parties, public prosecutors, defense lawyers, or other participants (such as third parties) involved in litigation propose guiding cases.²⁶

II. Central research question

The goal of this study is to investigate why guiding cases are often neglected in the course of judicial practice. Guiding cases represent a unique method by which the SPC exerts influence upon lower courts. Though the SPC publicizes cases on a regular basis via various channels, including its Gazette, their official website, and the People's Court Daily (人民法院报), this is the first time the SPC has required judges to directly refer to and quote cases in court rulings when dealing with similar issues. Additionally, the SPC normally uses judicial interpretations or judicial documents to provide guidance to lower courts regarding trial work. Both instruments are presented as abstract rules. Meanwhile, a guiding case is composed of facts and reasoning from its original court ruling, which contains more than just abstract rules. As a result, judges of lower courts now have a whole new source of information, the guiding cases, to consult in judicial practice. However, this invention of the SPC does not appear to function smoothly, as many guiding cases are not fully considered in practice, according to the statistics that follow in the next paragraph. By the end of 2020, 34 guiding cases had never been applied in practice.²⁷ This study analyzes the factors that have contributed to the reluctant acceptance of guiding cases in judicial practice. The hesitant acceptance within the judiciary

25 Guo Ye (郭叶), Sun Mei (孙妹), Report on The Application in Judicial Proceedings of Supreme People's Court Guiding Cases (2020) (最高人民法院指导性案例 2020 年度司法应用报告), *China Journal of Applied Jurisprudence* (中国应用法学), 2021, No. 5, p. 135.

26 Guo Ye (郭叶), Sun Mei (孙妹), Report on The Application in Judicial Proceedings of Supreme People's Court Guiding Cases (2020) (最高人民法院指导性案例 2020 年度司法应用报告), *China Journal of Applied Jurisprudence* (中国应用法学), 2021, No. 5, p. 125.

27 *ibid.*

is reflected by the relatively low number of citations of guiding cases in court decisions that are publicly available in databases.

As stated previously, judges shall refer to the key points of adjudication of guiding cases when dealing with similar cases.²⁸ If parties, public prosecutors, defense lawyers or litigation representatives refer to a guiding case in a trial, judges shall explain whether they consulted the relevant guiding case for the present decision. However, current statistics indicate that guiding cases in general have quite a low application rate across the country. According to the most recent empirical analysis of the application of guiding cases, altogether 7,338 court decisions have cited guiding cases from 2011 to 2020.²⁹ The majority of guiding case applications come from basic and intermediate courts that adjudicate the majority of legal disputes in China, with 3,961 court decisions in intermediate courts and 2,406 court decisions in basic courts.³⁰ By the end of 2020, 77 percent of the guiding cases had already been applied, whereas 34 guiding cases had not been cited in court decisions that are available in court decision databases.³¹ For instance, Guiding Case No. 42, which was issued in 2014, had never been mentioned in court rulings by the end of 2020.³²

In the meantime, according to the annual work report of the SPC, local courts have accepted more than 30 million lawsuits, and resolved 28 million lawsuits in 2020.³³ Apparently, in comparison to the total number of cases filed each year in China, it is difficult to assert that guiding cases have a discernible and significant impact on contemporary judicial practice. Nonetheless, it is

28 Article 9, Detailed Rules for the Implementation of the Provisions of the Supreme People's Court on Case Guidance (最高人民法院关于案例指导工作的规定实施细则, 法〔2015〕130号), 27 April 2015.

29 Guo Ye (郭叶), Sun Mei (孙妹), Report on The Application in Judicial Proceedings of Supreme People's Court Guiding Cases (2020) (最高人民法院指导性案例 2020 年度司法应用报告), China Journal of Applied Jurisprudence (中国应用法学), 2021, No. 5, p. 121.

30 Guo Ye (郭叶), Sun Mei (孙妹), Report on The Application in Judicial Proceedings of Supreme People's Court Guiding Cases (2020) (最高人民法院指导性案例 2020 年度司法应用报告), China Journal of Applied Jurisprudence (中国应用法学), 2021, No. 5, p. 130.

31 Guo Ye (郭叶), Sun Mei (孙妹), Report on The Application in Judicial Proceedings of Supreme People's Court Guiding Cases (2020) (最高人民法院指导性案例 2020 年度司法应用报告), China Journal of Applied Jurisprudence (中国应用法学), 2021, No. 5, p. 125.

32 *ibid.*

33 Report on the Work of Supreme People's Court in 2020 (最高人民法院工作报告, 2020 年), see: <http://www.court.gov.cn/zixun-xiangqing-290831.html>.

worth mentioning that in comparison to the entire number of applications until 2018 (3,098 applications), the total number of applications in 2019 alone amounted to 2,006 applications, a significant increase in the number of guiding case applications in 2019.³⁴ In 2020, the number of guiding case applications increased further and amounted to 2,215.³⁵ The number of guiding case applications in these two years was more than the sum from 2011 to 2018. This may be because the SPC had imposed more duties on judges regarding guiding case applications.³⁶ However, this growth falls short of the total number of lawsuits filed in China.

Meanwhile, some studies indicate that judges tend to rely on cases for reference when confronted with difficult cases (疑难案件)³⁷ or new types of cases (新类型案件)³⁸ in judicial practice.³⁹ According to a survey conducted by the Sichuan High Court, more than 85 percent of judges that took part in

34 Guo Ye (郭叶), Sun Mei (孙妹), Report on The Application in Judicial Proceedings of Supreme People's Court Guiding Cases (2019) (最高人民法院指导性案例 2019 年度司法应用报告), *China Journal of Applied Jurisprudence* (中国应用法学), 2020, No. 3, p. 88; Guo Ye (郭叶), Sun Mei (孙妹), Report on The Application in Judicial Proceedings of Supreme People's Court Guiding Cases (2018) (最高人民法院指导性案例 2018 年度司法应用报告), *China Journal of Applied Jurisprudence* (中国应用法学), 2019, No. 3, p. 146.

35 Guo Ye (郭叶), Sun Mei (孙妹), Report on The Application in Judicial Proceedings of Supreme People's Court Guiding Cases (2020) (最高人民法院指导性案例 2020 年度司法应用报告), *China Journal of Applied Jurisprudence* (中国应用法学), 2021, No. 5, p. 121.

36 This part would be further discussed in Chapter Three.

37 There is no official definition of "difficult cases". In literature, difficult cases refer to all those non-simple cases for judges resulting from factors of the law itself (such as relevant legal provisions being unclear) and other social factors outside the law, see: Sun Haibo (孙海波), *Chinese Characteristics of the Adjudication of Difficult Cases* (疑难案件裁判的中国特点), *Oriental Law* (东方法学), 2017, No. 4, p. 53.

38 New types of cases usually refer to cases for which judges cannot find any legal sources to deal with and which are completely new to judges. Such cases usually arise with the development of a new industry or technology, for instance, cases involving the copyright of the content on short video platforms, or cases involving cheating in online games. See: Nie Zhenhua (聂振华), *An Empirical Study of Copyright Infringement Cases on Video Sharing Sites* (视频分享网站著作权侵权案件的实证研究), *China Journal of Applied Jurisprudence* (中国应用法学), 2021, No. 5, p. 222.

39 Lang Guimei (郎贵梅), *Several Basic Theoretical Problems with Regard to Guiding Cases in China* (中国案例指导制度的若干基本理论问题研究), *Journal of Shanghai Jiaotong University (Philosophy and Social Sciences)* (上海交通大学学报哲学社会科学版), 2009, No. 2, p. 26; Yang Hui (杨会), He Liping (何莉苹), *Empirical Research in Supply and Demand of Guiding Cases* (指导性案例供需关系的实证研究), *Journal of Law Application* (法律适用), 2014, No. 2, p. 96

the questionnaire supported the establishment of the guiding cases system and roughly 40 percent of judges admitted that typical cases in the SPC Gazette had the most significant impact on them.⁴⁰ Many local courts also maintain their own databases of cases. For instance, Shanghai high court has recently announced the establishment of an internal cases system for intellectual property law which can recommend influential cases to court leaders and allow judges to search for cases to further unify discretion, such as in cases for which they have to determine the amount of compensation.⁴¹ Thus, given the situation of judges' huge demand for cases to refer to in practice and the low application rate of guiding cases, this research seeks to explain why guiding cases are frequently overlooked in judicial practice.

III. State of research

From 2011 to 2020 there are altogether 7,338 court decisions that mention guiding cases, which is an insignificant number of cases when compared to the number of judgements in China each year. Even the most frequently applied guiding case, concerning a motor vehicle traffic accident, Guiding Case No. 24 (which court decisions mentioned 1,567 times between 2011 and 2020) is not comparable to the total number of lawsuits involving motor vehicle traffic accidents (4.5 million lawsuits from 2012 to 2015).⁴² Therefore, numerous scholars have already addressed the question of the low application rate of guiding cases.

40 Zuo Weimin (左卫民), Chen Mingguo (陈明国) (ed.), *The Research on the Guiding Case System in China* (中国特色案例指导制度研究), Peking University Press (北京大学出版社), 2014, pp. 284-286.

41 Shanghai High Court Launches Intellectual Property Case Management System to Create a "Complete Library in Four Sections," for Handling Cases (打造办案“四库全书”, 上海高院推出知识产权案件管理系统), see: http://www.xinhuanet.com/politics/2021-04/23/c_1127367127.htm

42 Guo Ye (郭叶), Sun Mei (孙妹), Report on The Application in Judicial Proceedings of Supreme People's Court Guiding Cases (2020) (最高人民法院指导性案例 2020 年度司法应用报告), *China Journal of Applied Jurisprudence* (中国应用法学), 2021, No. 5, p. 122; Report of Motor Vehicle Traffic Accident Legal Disputes (机动车交通事故责任纠纷案件报告), see: <http://www.court.gov.cn/fabu-xiangqing-88822.html>.

1. The ambiguous binding effect as a reason for the low application rate

To begin with, the low application rate of guiding cases is frequently related to the legal status and binding effect of guiding cases. Due to the ambiguous legal status and binding effect, judges are hesitant to apply guiding cases.⁴³ Some argue that the selection procedure of guiding cases is not effective because the guiding cases system is not based on an appellate system that could generate a binding effect.⁴⁴ However, many authors assume that judges disregard guiding cases mainly because there are no sanctions for not doing so.⁴⁵ Parties concerned also cannot exert pressure on courts to refer to guiding cases.⁴⁶ As guiding cases are not legally binding, judges apply them selectively and according to their present needs.⁴⁷ Therefore, it is argued that because the SPC does not prescribe sanctions for not applying guiding cases, judges

43 Beijing High People's Court (北京市高级人民法院), Focusing on Work Objectives and Key Points, Advancing Case Work in An All-Round Way (围绕工作目标抓重点 全面扎实推进案例工作), see: Yan Maokun (ed.) (颜茂昆), *China Case Guidance Vol. 4* (中国案例指导第4辑), Legal Press China (法律出版社), 2015, p. 282; Qin Zongwen (秦宗文), Yan Zhenghua (严正华), Empirical Research of Criminal Law Guiding Cases Operation (刑事案例指导运行实证研究), *Law and Social Development* (法制与社会发展), 2015, No. 4, p. 45; Zhang Qi (张骐), On the Necessity and Legitimacy of Transforming Chinese Case Guiding System into Judicial Precedent System (论中国案例指导制度向司法判例制度转型的必要性与正当性), *Journal of Comparative Law* (比较法研究), 2017, No. 5, p. 137.

44 Wu Yingzi (吴英姿), Beware of Possible Bottlenecks in the Case Guidance System (谨防案例指导制度可能的瓶颈), *Law Science* (法学), 2011, No. 9, p. 50.

45 Zhou Cui (周翠), Civil Law Guiding Cases: Research on Quality and Qualification (民事指导性案例: 质与量的考察), *Tsinghua University Law Journal* (清华法学), 2016, No. 4, p. 54; Chen Fucai (陈福才), He Jian (何建), Review and Improvement of the System of Guiding Cases in China (我国案例指导制度的检视与完善), *China Journal of Applied Jurisprudence* (中国应用法学), 2019, No. 5, p. 168; Qin Zongwen (秦宗文), Yan Zhenghua (严正华), Empirical Research of Criminal Law Guiding Cases Operation (刑事案例指导运行实证研究), *Law and Social Development* (法制与社会发展), 2015, No. 4, p. 51; Chen Xingliang (陈兴良) (ed.), *Research on Case Guidance System in China* (中国案例指导制度研究), Peking University Press (北京大学出版社), 2014, p. 521; Xiang Li (向力), From Rare Consulting to Constant Consulting (从鲜见参照到常规参照), *Studies in Law and Business* (法商研究), 2015, No. 5, p. 100.

46 Xiang Li (向力), From Rare Consulting to Constant Consulting (从鲜见参照到常规参照), *Studies in Law and Business* (法商研究), 2015, No. 5, pp. 100-101.

47 Lu Xingfu (陆幸福), Justification of the Legal Effect of the Supreme People's Court Guiding Cases (最高人民法院指导性案例法律效力之证成), *Law Science* (法学), 2014, No. 9, p. 98.

are not legally obligated to refer to guiding cases.⁴⁸ A similar argument points out that the SPC's use of the phrase "shall refer to" merely encourages judges to do so but that it is not a mandatory requirement.⁴⁹ According to another viewpoint, the SPC intends to adhere to the idea that guiding cases are neither judicial interpretations nor law, but nonetheless expects judges to refer to guiding cases.⁵⁰ It is also worth noting that an uncertain binding effect is likely to expose judges to some risk if they make reference to them in court rulings.⁵¹ Scholars advocate strengthening the binding effect of guiding cases; otherwise, judges may have reservations about applying guiding cases in practice⁵² and the current weak binding effect would continue to limit the influence of guiding cases on lower courts.⁵³ Some request the SPC to include further explanations and additional context for the phrase "shall refer to".⁵⁴

This study notes that scholars have reached a consensus that, as a crucial factor, the binding effect of guiding cases strongly influences their application rate and judges' attitude towards them. However, this approach cannot explain why certain guiding cases are more frequently applied in judicial practice, while many guiding cases have never been mentioned in court rulings. This study also agrees with the conclusion that the ambiguous legal status and binding effect of guiding cases have a negative impact on their application. Furthermore, it aims to trace the reasons for the situation

-
- 48 Zhou Cui (周翠), *Civil Law Guiding Cases: Research on Quality and Qualification* (民事指导性案例: 质与量的考察), *Tsinghua University Law Journal* (清华法学), 2016, No. 4, p. 54.
 - 49 Chen Fucai (陈福才), He Jian (何建), *Review and Improvement of the System of Guiding Cases in China* (我国案例指导制度的检视与完善), *China Journal of Applied Jurisprudence* (中国应用法学), 2019, No. 5, p. 168.
 - 50 Qin Zongwen (秦宗文), Yan Zhenghua (严正华), *Empirical Research of Criminal Law Guiding Cases Operation* (刑事案例指导运行实证研究), *Law and Social Development* (法制与社会发展), 2015, No. 4, p. 50.
 - 51 Chen Xingliang (陈兴良) (ed.), *Research on Case Guidance System in China* (中国案例指导制度研究), Peking University Press (北京大学出版社), 2014, p. 521.
 - 52 Zhang Qi (张骥), *On the Necessity and Legitimacy of Transforming Chinese Case Guiding System into Judicial Precedent System* (论中国案例指导制度向司法判例制度转型的必要性与正当性), *Journal of Comparative Law* (比较法研究), 2017, No. 5, p. 137.
 - 53 Sun Guangning (孙光宇), *Motivation of Case Guidance: from Recommendation to Application* (案例指导的激励方式: 从推荐到适用), *Oriental Law* (东方法学), 2016, No. 3, p. 27.
 - 54 Zhang Zhiming (张志铭), *The Jurisprudential Basis for the Construction of a Judicial Precedent System* (司法判例制度构建的法理基础), *Tsinghua University Law Journal* (清华法学), 2013, No. 6, p. 104; Chen Xingliang (陈兴良) (ed.), *Research on Case Guidance System in China* (中国案例指导制度研究), Peking University Press (北京大学出版社), 2014, p. 521.

regarding the binding effect and to discover the nature of guiding cases' binding effect, namely what kind of binding effect the SPC actually intends to grant guiding cases.

2. The limited number of guiding cases as a reason for the low application rate

In the ten years from 2011 to the end of 2021, the SPC had published 178 guiding cases, while the SPC had issued 145 judicial interpretations in 2020 alone.⁵⁵ Therefore, some studies also point out that the overall number of guiding cases still remains low, which also contributes to the low application rate of guiding cases.⁵⁶ It is pointed out that the number of guiding cases is almost negligible in relation to the entire number of lawsuits in China, as it is impossible with the limited number of guiding cases to cover the various legal disputes in basic courts in China.⁵⁷ According to a study based on the criminal law guiding cases of the SPC and Supreme People's Procuratorate (hereafter the SPP), there is considerable demand from judges and public prosecutors for guiding cases, but the supply of guiding cases remains limited, which makes it difficult for judges and public prosecutors to find appropriate ones.⁵⁸ Meanwhile, some scholars have already indicated some obstacles the SPC faces when releasing guiding cases. For instance, the number of guiding cases is unlikely to be large owing to the regional differences in China: the SPC expects guiding cases to be applied in the whole country, but some cases may have guiding value in certain regions, but not be appropriate for the whole country; this especially pertains to cases involving legal disputes of family

55 See: <https://www.pkulaw.com/case/>; <https://www.pkulaw.com/law/>.

56 Qin Zongwen (秦宗文), Yan Zhenghua (严正华), *Empirical Research of Criminal Law Guiding Cases Operation (刑事案例指导运行实证研究)*, *Law and Social Development (法制与社会发展)*, 2015, No. 4, pp. 48-49; Zhao Ruigang (赵瑞罡), Geng Xieyang (耿协阳), *Empirical Research of Application Problems of Guiding Cases (指导性案例适用难的实证研究)*, *Law Science Magazine (法学杂志)*, 2016, No. 3, p. 120; Lu Xingfu (陆幸福), *Justification of the Legal Effect of the Supreme People's Court Guiding Cases (最高人民法院指导性案例法律效力之证成)*, *Law Science (法学)*, 2014, No. 9, p. 98; Xiang Li (向力), *From Rare Consulting to Constant Consulting (从鲜见参照到常规参照)*, *Studies in Law and Business (法商研究)*, 2015, No. 5, p. 100.

57 Zhao Ruigang (赵瑞罡), Geng Xieyang (耿协阳), *Empirical Research of Application Problems of Guiding Cases (指导性案例适用难的实证研究)*, *Law Science Magazine (法学杂志)*, 2016, No. 3, p. 120.

58 Qin Zongwen (秦宗文), Yan Zhenghua (严正华), *Empirical Research of Criminal Law Guiding Cases Operation (刑事案例指导运行实证研究)*, *Law and Social Development (法制与社会发展)*, 2015, No. 4, p. 49.

and marriage, in which judgements would consider local customs or habits of ethnic minorities.⁵⁹ Another viewpoint is sceptical about whether the SPC has adequate resources apart from those that are reserved for trial work to generate sufficient guiding cases to fulfill the demands of judicial practice.⁶⁰ Some scholars attribute the low number of guiding cases to the problems of the selection procedure. For instance, there is an argument indicating that the stringent selection procedure makes guiding cases less suitable to respond to the current needs of judges. Judges would therefore cease to seek guiding cases if they were continuously unable to find the appropriate cases to consult.⁶¹ A similar viewpoint also argues that the selection procedure is inefficient in comparison to the case systems in many other countries, which allow precedents to be formed spontaneously during the judicial process, while a guiding case selection includes several rounds of evaluation and requires approval of the SPC adjudication committee.⁶²

This study notes that previous studies have already noticed that the limited number of guiding cases results from the selection procedure, which eventually has a detrimental effect on the application of guiding cases. However, these studies tend towards overall evaluations regarding the selection procedure of guiding cases and do not describe how exactly guiding cases are chosen by the SPC or recommended by lower courts, or which stage of the procedure holds back guiding case selections. In this regard, these criticisms are directed at the selection procedure as a whole and appear to be too general. Therefore, this book aims to analyze each step of the whole selection process and the different roles played by various internal organs of the SPC and local courts during the whole process so as to show their respective impact on the selection of guiding cases.

59 Liu Keyi (刘克毅), On the Production Mechanism of the Guiding Cases of the People's Courts (论人民法院指导性案例形成机制), *Science of Law (法律科学)*, 2018, No. 6, p. 191.

60 Song Xiao (宋晓), The Production of Precedents and Chinese Case Guidance System (判例生成与中国案例指导制度), *Chinese Journal of Law (法学研究)*, 2011, No. 4, pp. 63-64.

61 Ma Yan (马燕), On the Construction of a One-dimensional and Multi-tiered Case Guidance System in China (论我国一元多层次案例指导制度的构建), *Law Science (法学)*, 2019, No. 1, p. 187.

62 Xiang Li (向力), From Rare Consulting to Constant Consulting (从鲜见参照到常规参照), *Studies in Law and Business (法商研究)*, 2015, No. 5, p. 100; Song Xiao (宋晓), The Production of Precedents and Chinese Case Guidance System (判例生成与中国案例指导制度), *Chinese Journal of Law (法学研究)*, 2011, No. 4, pp. 63-64.

3. Chinese legal education as a reason for the low application rate

Researchers also analyzed the dimension of legal education and point out that the low application rates of guiding cases may be attributable to judges not being completely aware of how to apply and cite guiding cases or of not having formed the habit of applying cases.⁶³ Although judges may be inspired by the arguments in cases, they are not accustomed to applying cases in court decisions as a result of the statutory law tradition and their legal education.⁶⁴ In other words, judges in China are more adept at deductive reasoning and the application of statute law than at analogic reasoning with cases, which makes them apply guiding cases less frequently.⁶⁵ Furthermore, referring to guiding cases does not improve the efficiency of trial work, but rather requires judges to spend more time comparing cases.⁶⁶

These studies mainly refer to the influence of Chinese legal education and judges' argumentative approach on the application of guiding cases. This factor of legal education is emphasized by scholars mainly because statutory law is the source of law in China, while cases are not, which ultimately leads to the situation that legal education in China is based on statutory law and pays less attention to the role of cases in judicial practice. This study also acknowledges that legal education constitutes a factor influencing the guiding-case application. However, in practice, judges rarely make arguments regarding the similarity between guiding cases and

63 Li Honghai (李红海), *The Future of Case Guidance System and Government Capacity of Judiciary (案例指导制度的未来与司法治理能力)*, *Peking University Law Journal (中外法学)*, 2018, No. 2, p. 496; Zhao Ruigang (赵瑞罡), Geng Xieyang (耿协阳), *Emperical Research of Application Problems of Guiding Cases (指导性案例适用难的实证研究)*, *Law Science Magazine (法学杂志)*, 2016, No. 3, p. 120.

64 Li Honghai (李红海), *The Future of Case Guidance System and Government Capacity of Judiciary (案例指导制度的未来与司法治理能力)*, *Peking University Law Journal (中外法学)*, 2018, No. 2, p. 496.

65 Lu Xingfu (陆幸福), *Justification of the Legal Effect of the Supreme People's Court Guiding Cases (最高人民法院指导性案例法律效力之证成)*, *Law Science (法学)*, 2014, No. 9, p. 98; Ma Yan (马燕), *On the Construction of a One-dimensional and Multi-tiered Case Guidance System in China (论我国一元多层次案例指导制度的构建)*, *Law Science (法学)*, 2019, No. 1, p. 187; Sun Haibo (孙海波), *The Implicit Application of Guiding Cases and Its Correction (指导性案例的隐性适用及其矫正)*, *Global Law Review (环球法律评论)*, 2018, No. 2, p. 154; Sun Guangning (孙光宁), *Reflection on Application Practice of Guiding Cases (反思指导性案例的援引方式)*, *Law and Social Development (法制与社会发展)*, 2016, No. 4, p. 91.

66 Xiang Li (向力), *From Rare Consulting to Constant Consulting (从鲜见参照到常规参照)*, *Studies in Law and Business (法商研究)*, 2015, No. 5, p. 101.

pending cases when they follow the conclusion of guiding cases.⁶⁷ This study argues that analogic reasoning is not essential for judges to apply guiding cases. Instead, judges show a results-oriented tendency when it comes to the application of guiding cases.

4. The content of guiding cases as a reason for their low application rate

In terms of the content of guiding cases, scholars suggest that some guiding cases are commonly considered a mere repetition of previously released judicial interpretations or judicial documents of the SPC, which further discourages judges from using guiding cases.⁶⁸ Criminal law specialists continually emphasise this scenario. If guiding cases merely repeat the content of judicial interpretations,⁶⁹ judges do not have to refer to guiding cases because judicial interpretations are authoritative legal sources.⁷⁰ Moreover, it is argued that the SPC undermines the guiding function of guiding cases if the selected guiding cases only repeat the content of judicial interpretations.⁷¹

⁶⁷ The practice of guiding cases application would be discussed in detail in Chapter 6.

⁶⁸ Zhou Guangquan (周光权), Direction of Development of Criminal Law Case Guidance System (刑事案件指导制度的发展方向), *China Law Review* (中国法律评论), 2014, No. 3, p. 133; Zhang Qian (张倩), Research on Judicial Application of Criminal Law Guiding Cases (刑事指导性案例司法适用问题研究), *Journal of Law Application* (法律适用), 2014, No. 6, p. 26; Shao Donghao (邵栋豪), On the Improvement of Criminal Law Case Guidance System from Perspective of Guiding Case No. 13 (从指导案例 13 号看刑事案件指导制度的完善), *Journal of Gansu Political Science and Law Institute* (甘肃政法学院学报), 2016, No. 2, p. 125; Chen Xingliang (陈兴良), Study on the Key Points of Judgements in Criminal Law Case Guidance (刑法指导案例裁判要点功能研究), *Global Law Review* (环球法律评论), 2018, No. 3, p. 9; Fu Yuming (付玉明), Wang Sa Ri Nai (汪萨日乃), Justification of Binding Force of Guiding Criminal Cases and Their Application in Judicial Practice (刑事指导案例的效力证成与司法适用), *Law Science* (法学), 2018, No. 9, p. 169.

⁶⁹ By cases that repeat the content of law or judicial interpretations, this book refers to cases that summarize rules that can be applied in dealing with legal disputes and are not included in existing law or interpretations.

⁷⁰ Zhang Qian (张倩), Research on Judicial Application of Criminal Law Guiding Cases (刑事指导性案例司法适用问题研究), *Journal of Law Application* (法律适用), 2014, No. 6, p. 26; Chen Xingliang (陈兴良), Study on the Key Points of Judgements in Criminal Law Case Guidance (刑法指导案例裁判要点功能研究), *Global Law Review* (环球法律评论), 2018, No. 3, p. 10.

⁷¹ Shao Donghao (邵栋豪), On the Improvement of Criminal Law Case Guidance System from Perspective of Guiding Case No. 13 (从指导案例 13 号看刑事案件指导制度的完善), *Journal of Gansu Political Science and Law Institute* (甘肃政法学院学报), 2016, No. 2, p. 125.

However, scholars have also pointed out that criminal law guiding cases are subject to the principle of no penalty without law, as it forbids the SPC to create new rules⁷² with guiding cases that are in conflict with legal sources.⁷³ This is because in the field of criminal law, judges can only cite official legal sources in court rulings, while in the field of civil law, judges can also apply customs or mediation to solve cases.⁷⁴ This leaves little room for the SPC when releasing criminal law guiding cases.

This study notes that there is an excessive focus on the guiding cases' function of generating new rules in current research, indicating that guiding cases would be less frequently applied if they fail to fulfill this task. Surely, guiding cases that create new rules may receive a great amount of attention from scholars and judges. However, if we consider the findings of some empirical studies, guiding cases that create new rules do not always have a high application rate. Some of them have never been cited in court rulings. Therefore, this study does not consider whether guiding cases that create new rules are the most crucial factor that results in a high application rate.

5. The quality of guiding cases as a reason for the low application rate

Some scholars argue that the quality of guiding cases is also an important factor influencing guiding-case application. For instance, it is pointed out that certain guiding cases have incorrect arguments and lack sufficient reasoning.⁷⁵ As guiding cases are not a legal source, if guiding cases do not convey rightful adjudications and proper reasoning, judges will not be persuaded

72 By creating new rules or closing legal loopholes, it usually refers to the situation that such guiding cases do not repeat the content of current available legal sources, such as law and judicial interpretations. Instead, such guiding cases present rules that cannot be found in current legal sources.

73 Zhou Guangquan (周光权), Criminal Law Case Guidance: Problems and Prospect (刑事案例指导制度: 难题与前景), *Peking University Law Journal (中外法学)*, 2013, No. 3, p. 488; Fu Yuming (付玉明), Wang Sa Ri Nai (汪萨日乃), Justification of Binding Force of Guiding Criminal Cases and Their Application in Judicial Practice (刑事指导案例的效力证成与司法适用), *Law Science (法学)*, 2018, No. 9, p. 170.

74 Zhou Guangquan (周光权), Criminal Law Case Guidance: Problems and Prospect (刑事案例指导制度: 难题与前景), *Peking University Law Journal (中外法学)*, 2013, No. 3, pp. 487-488.

75 Xiang Li (向力), From Rare Consulting to Constant Consulting (从鲜见参照到常规参照), *Studies in Law and Business (法商研究)*, 2015, No. 5, p. 99.

and apply them.⁷⁶ Previously, prior to the establishment of the guiding cases system, there was a similar argument regarding the cases published in the SPC Gazette (最高人民法院公报). According to this research, judges do not refer to cases in the SPC Gazette mainly because they are not convinced by the reasoning and outcome of cases.⁷⁷ Some scholars believe some of the guiding cases may not be suitable for judicial practice. For instance, many guiding cases are not suitable to give guidance to judges because the individuals who work on guiding cases are unaware of the present needs of judges in lower courts.⁷⁸ A similar argument claims that because of the status of the SPC, it may have difficulty anticipating the impact of guiding cases in practice.⁷⁹ Furthermore, some studies focus on the impact of editorial work on guiding cases quality. For instance, some researchers indicate that guiding cases are no longer original court decisions and do not contain the necessary detailed information for judges to compare guiding cases with pending cases.⁸⁰ It is also likely that some key points of adjudication in guiding cases do not stick to the standards of the SPC and contain defects, such as being too abstract or too concrete, both of which restrict judges from applying guiding cases.⁸¹

Generally speaking, this study acknowledges that the quality of guiding cases can significantly affect the application rate, and that previous studies neglected judges' attitudes toward guiding cases and their vast discretion in concrete situations. This study also pays attention to the latter aspect. Surely it is the quality of the key points of adjudication in guiding cases that has the greatest influence on the application of guiding cases, as they are the most frequently applied part of guiding cases in practice. However, judges are quite flexible in applying guiding cases and key points of adjudication. For instance,

76 *ibid.*

77 Li Yougen (李友根), *Why Do Guiding Cases Not Have Binding Effect* (指导性案例为何没有约束力), *Law and Social Development* (法制与社会发展), 2010, No. 4, p. 93.

78 Yang Hui (杨会), He Liping (何莉苹), *Empirical Research in Supply and Demand of Guiding Cases* (指导性案例供需关系的实证研究), *Journal of Law Application* (法律适用), 2014, No. 2, p. 99.

79 Sun Guangning (孙光宁), *Reflection on the Summary Method of the Guiding Cases' Key Points of Adjudication* (指导性案例裁判要旨概括方式之反思), *Studies in Law and Business* (法商研究), 2016, No. 4, p. 115.

80 Qin Zongwen (秦宗文), Yan Zhenghua (严正华), *Empirical Research of Criminal Law Guiding Cases Operation* (刑事案例指导运行实证研究), *Law and Social Development* (法制与社会发展), 2015, No. 4, p. 43.

81 Sun Guangning (孙光宁), *Reflection on the Summary Method of the Guiding Cases' Key Points of Adjudication* (指导性案例裁判要旨概括方式之反思), *Studies in Law and Business* (法商研究), 2016, No. 4, p. pp. 111-112.

by making adjustments to key points of adjudication in court rulings, judges sometimes expand the use of certain guiding cases to pending cases.⁸²

IV. Structure

The statistics mentioned in the “central research question” of this chapter have already shown the limited impact of guiding cases in judicial practice. To address the previously stated central research question, namely why guiding cases are frequently overlooked in judicial practice, I investigated guiding cases from different perspectives.

Chapter Two focuses on the development of the guiding cases and outlines the history of the SPC’s case-related work. This chapter discusses why the SPC introduced guiding cases in the first place when it already had a variety of instruments to influence the lower courts. From this perspective, we can see how the SPC defines guiding cases and what kind of role the SPC expects guiding cases to play. In other words, the importance attached to guiding cases by the SPC determines the amount of support guiding cases receive, which in turn affects its application rate.

In order to answer this question, the chapter investigates some previous instruments of the SPC. This helps us understand the development of guiding cases as a continuous development of the SPC’s guidance of the trial work of lower courts through cases. This part discusses what roles the cases released by the SPC play in the early years of the People’s Republic of China (hereafter PRC). Therefore, this chapter will first examine the role of cases in judicial practice and the connections with other instruments of the SPC, such as its policy documents, judicial interpretations in the early years of the PRC, before 1985. This part argues that the SPC’s released cases, its policy documents, and judicial interpretations had much in common in form of publication and binding effect.

This chapter will further discuss the typical cases (典型案例) in the SPC Gazette,⁸³ including the SPC’s intention in publishing typical cases in its Gazette, the content of typical cases, the selection procedure, the structure of typical cases and the connection between typical cases and guiding cases. By investigating typical cases in the SPC Gazette, this part also intends to answer the question whether guiding cases are different from the typical cases in the

⁸² See: Chapter 6, V, 4.

⁸³ “Typical cases” in this book refer to the cases published in the SPC Gazette.

SPC Gazette and what the connection between guiding cases and typical cases is. It demonstrates that guiding cases are a reformed version of typical cases.

Furthermore, this chapter also focuses on some experiments with the mechanisms of different cases conducted by local courts before the SPC introduced the guiding cases system in 2010. This section includes the experimentation at all three instances of the local levels, such as the high courts in Zhejiang, Sichuan and Tianjin, Chengdu Intermediate Court and Zhengzhou Zhongyuan District Basic Court. By examining these experiments, this part investigates how these local cases mechanisms work and the intention of local courts regarding the introduction of cases systems. This part also aims to discover the attitude of the SPC toward local experimentation and the influence of these local cases mechanisms on the guiding cases system of the SPC in the future, such as in the aspects of the selection procedure, the various functions, and the structure of cases.

Moreover, this chapter focuses on the official introduction of the guiding cases. Following the discussion of the previous development of guiding cases, this chapter also gives a brief overview of the SPC provisions regarding guiding cases. It introduces important elements of guiding cases, such as the binding effect, the selection procedure and the publication of guiding cases. Furthermore, this part discusses the resistance against the SPC's introduction of guiding cases. With the permission of the party leadership, not only the SPC, but also the SPP and the Ministry of Public Security (MPS) established their own guiding cases systems so as to maintain "balanced development". This part will also give a brief introduction of the role of guiding cases in these two state organs. Both are less influential than the SPC guiding cases. After that, this part also explores the SPC's motivation for establishing guiding cases and the objectives that the SPC attempts to accomplish through the use of guiding cases. By investigating this issue, the chapter tries to explain what the possible advantages of guiding cases are in relation to other instruments of the SPC, such as judicial interpretations and typical cases in the SPC Gazette.

Finally, by focusing on the continued development of guiding cases, this chapter discusses how the SPC strengthens the guiding cases system. This part demonstrates how the SPC implemented the similar-case searching duty of judges in a top-down manner to enhance the guiding cases system. This part first outlines the development of the similar-case searching mechanism within the SPC and then its subsequent promotion to local courts. By investigating the similar-case searching mechanism, this part argues that there is a link between these two instruments and the support of similar-case searching for the guiding cases system.

Chapter Three deals with the binding effect of guiding cases. The binding effect is one of the most frequently debated questions among academics regarding guiding cases, as it is critical to the legal status and application of guiding cases in practice. While the SPC requires that lower courts shall refer to guiding cases when deciding similar cases, it neither applies a more explicit concept of the effects of guiding cases nor provides for sanctions for omitting the application of guiding cases.

First, this chapter discusses the question of what type of binding effect the SPC grants guiding cases and how the SPC intends to realize this binding effect. It aims to outline the SPC's strategy regarding the binding effect of guiding cases and how the SPC gradually enhances the binding effect via internal supervision and other supporting mechanisms, such as the similar-case searching mechanism. It also investigates why the SPC strives to maintain a low profile of the guiding cases. This part intends to demonstrate that the SPC attempts to minimize the potential political risks associated with being accused of adopting “judge-made law” (法官造法).

Secondly, this chapter will explain why the SPC does not confer a legal binding effect on guiding cases as it does with regard to judicial interpretations, even though both guiding cases and judicial interpretations are used to steer the application of the law in lower courts. It compares the binding effect of guiding cases with that of judicial interpretations and analyses the differences between these two SPC instruments in this aspect. To address this point, this chapter investigates how judicial interpretations came to have a legal binding effect in the first place and what the legal basis of guiding cases and judicial interpretations is.

Thirdly, this chapter will discuss the range of the binding effect of guiding cases, namely, which part judges shall refer to when applying guiding cases and how this arrangement affects the application rate of guiding cases. According to the SPC, only the key points of adjudication in guiding cases shall be referred to.⁸⁴ The key points of adjudication provide abstract rules for judges to refer to when deciding similar cases. This part analyzes the functions of key points of adjudication in guiding cases and argues that key points of adjudication are used by the SPC to establish a boundary for judges of lower courts when they interpret guiding cases, as well as to attempt to ensure a more predictable and consistent interpretation of guiding cases. Furthermore, this

⁸⁴ Article 9, Detailed Rules for the Implementation of the Provisions of the Supreme People's Court on Case Guidance (最高人民法院关于案例指导工作的规定实施细则, 法〔2015〕130号), 27 April 2015.

part also intends to demonstrate that the guiding-case application rate might be increased further if the SPC extends the range of the factual binding effect (事实上的拘束力)⁸⁵ to other parts of a guiding case, such as the reasoning part. Finally, this section argues that the SPC may not remove the restriction on the range of the binding effect in guiding cases.

Chapter Four discusses how guiding cases are selected and edited by the SPC. Examining this process helps us gain a better understanding of which departments or organs have influence over the selection of guiding cases, how they differ from their original judgements, and why there are only a small number of guiding cases. All these factors can potentially affect the application of guiding cases.

To begin with, Chapter Four focuses on the guiding-case selection and recommendation work at the highest level. This part investigates how recommended cases are reviewed within the SPC and explains what roles the various SPC internal departments play in the guiding-case selection, including the SPC Research Office (研究室), the Case Guidance Office in the SPC Research Office, the SPC trial divisions, the SPC adjudication committee and the SPC circuit courts. This part demonstrates that the SPC trial divisions play a more important role than other departments in the selection procedure at the highest level, as they have a strong incentive to steer the application of the law in lower courts and possess the relevant experience. Furthermore, the SPC trial divisions have the authority to take the initiative in selecting cases from all levels of courts. This part argues further that the huge influence of the SPC trial divisions on the selection of guiding cases contributes to the low application rate of guiding cases.

Secondly, this chapter focuses on the recommendation of guiding cases from local level courts. It addresses the question of how local courts facilitate the recommendation of guiding cases. This part argues that the procedure for the selection of guiding cases is a lengthy process and is not suitable to generate a large number of guiding case recommendations. It investigates various methods devised by local courts to facilitate the whole process and enhance the efficiency of guiding-case recommendations. This section argues that lower courts are incapable of generating a large number of court rulings that have the potential to be chosen as guiding cases given that the main function of intermediate and basic courts is to resolve legal disputes. Furthermore, this part focuses on the cases systems introduced by the high courts in order to support the work of the guiding cases system. This chapter

85 See: Chapter 3, III, 2, b.

demonstrates that the development of work related to guiding cases is highly unbalanced among different regions and it tries to argue that the directive cases (参考性案例 or 参阅案例) on the provincial level cannot serve as a supplement to guiding cases given the limited resources available in lower courts for their work with guiding cases and the weakness of the directive cases compared to the trial work documents (审判业务文件) of high courts.

Thirdly, this chapter discusses the process of editing guiding cases, including the editing of keywords, basic facts and the reasoning part. This section discusses the question of how different parts of a guiding case are organized and edited during their selection. By examining this question, it intends to discover the modifications made by the SPC to the original cases and argues that in a guiding case, all the components are organized and edited around the key points of adjudication, which may have an impact on judges' willingness to apply them.

Finally, this chapter demonstrates how lower courts facilitate the recommendations of guiding cases through rewards and performance evaluation. By examining different parts of the judges' performance evaluation and rewards concerning guiding cases, it argues that the tasks relating to the recommendation of guiding cases do not constitute a significant part of the performance evaluation of judges; furthermore, whether judges will be motivated by evaluation or rewards is highly dependent on the working focus of the courts.

Chapter Five addresses the question of what kinds of adjudications are selected as guiding cases. This chapter focuses on the content of guiding cases, as the content may have a direct impact on the application rate of guiding cases. Therefore, to answer this question, this chapter discusses two aspects: the substantial standards for court decisions to be selected as guiding cases and the different types of guiding cases.

To begin with, this chapter addresses which substantial standards the court decisions are required to meet in order to be selected as guiding cases, and how these substantial standards affect the application of guiding cases. Obviously, these substantial standards directly influence the content of guiding cases and, as a result, ultimately affect the application of guiding cases. By discussing these substantial requirements, this part argues that these substantial requirements limit the scope of potential cases and make it difficult for the SPC to use guiding cases to provide timely guidance to judicial practice.

Secondly, this chapter discusses the question of what types of guiding cases are currently available and how different types of guiding cases have an

impact on the guiding-case application rate. This part classifies guiding cases according to their functions and the SPC's rationale for selecting particular cases. Thus, the different types of guiding cases are as follows: those that demonstrate the application of new law or judicial interpretations, address public concerns, remedy mistakes in applying law, and amend or supplement existing law. This part also argues that the application rate of different types of guiding cases may vary to some extent. Furthermore, it also illustrates that whether guiding cases create new rules may have no direct positive influence on the frequency of their application.

Chapter Six investigated how guiding cases are applied and cited in practice. While the SPC asserts that guiding cases have a factual binding effect, data reveals that guiding cases have little impact and are not frequently applied in judicial practice. As a result, it is vital to comprehend how the guiding cases system actually operates and to ascertain the reasons behind it. This chapter argues that judges apply guiding cases merely as an instrument to meet their current needs in judicial practice. Furthermore, this part demonstrates that judges are not skilled in applying or citing cases in court rulings due to current legal education and the training of judges.

Secondly, this chapter focuses on how parties refer to guiding cases in practice. Statistics show that most of the applications of guiding cases come from parties, and not from judges. This section argues that parties may not know how to refer to guiding cases correctly and that they have a greater incentive to propose guiding cases to defend their interests in practice. Furthermore, this section argues that the number of guiding case applications might be higher than implied by current statistics. As the current empirical research regarding the application of guiding cases is based on openly published court rulings, not all that are proposed by parties during the trial process are counted, which may also explain their low application rate.

Thirdly, this chapter investigates the question of how guiding cases are cited in court decisions. It argues that when judges decide to follow guiding cases, they will not compare them with pending cases in court rulings. Furthermore, this part discusses the content of guiding cases that judges cite in court decisions. It also demonstrates that judges cite the key points of adjudication, case number and the reasoning part of the guiding cases. Moreover, this section demonstrates that judges are sometimes quite flexible in citing guiding cases and are not bound by the rules of the SPC. This part also discusses the question of how judges reject the application of guiding cases in practice. It argues that judges may have a great deal of discretion in determining whether to refer to guiding cases. It explains the reasons why

judges reject guiding cases in court decisions, including differences in facts and law application and inadequate evidence to apply guiding cases.

Finally, this chapter addresses the question to what extent guiding cases influence administrative organs. Two dimensions are addressed. It argues that, in judicial practice, administrative organs rarely propose guiding cases during trial owing to the fact that the majority of administrative law guiding cases defend individual rights, which is not in favor of administrative organs. With regard to administrative regulations and local government rules, this section demonstrates that guiding cases may be merely one of the factors that push changes to administrative organs forward.

V. Research methods

In order to answer the central research questions, this study mainly applies doctrinal methodology supported by empirical findings and comparison with foreign jurisdictions.

The doctrinal methodology has the function of organizing and systematizing legal sources.⁸⁶ For instance, to answer the questions regarding the binding effect of guiding cases, this study analyzes the legal sources of the Chinese legal system and provisions issued by the SPC regarding its instruments, such as guiding cases, judicial interpretations and the similar-case searching mechanism. Furthermore, to investigate different types of guiding cases and to find out the relationship between guiding cases and the contents of the already released judicial interpretations or law, this study analyzes the key points of adjudication in guiding cases, the relevant judicial interpretations and law, and compares them with each other in Chapter Five. The doctrinal method is also applied to outline the selection procedure of guiding cases and the operation of the similar-case searching mechanism.

This study also refers to the findings of several empirical studies to gain statistics on guiding cases in terms of their publication and application in judicial practice. With regard to quantitative empirical research, this study refers to empirical surveys conducted by various scholars or organizations. For instance, Chinalawinfo (北大法律信息网) publishes an annual report on the application of guiding cases and the publication of the previous year,

⁸⁶ Rütters, Fischer, Birk, *Rechtstheorie mit Juristischer Methodenlehre*, 11. Aufl., 2020, s. 204, Rn. 321.

from 2017 to 2021, all of which is based on publicly available court decisions.⁸⁷ Furthermore, the Sichuan High Court and Sichuan University collaborated on an empirical research project regarding the proportion of various types of cases in the SPC Gazette from 1985 to 2011.⁸⁸ Quantitative empirical research is mainly applied in Chapter Six to illustrate how judges and parties cite guiding cases in judicial practice. Furthermore, in comparing typical cases with guiding cases (see Chapter Two), quantitative empirical studies are also used to demonstrate the content of typical cases in the SPC Gazette.

In terms of qualitative empirical research, this study makes substantial use of news reports, documents or reports issued by state organs and articles written by officials to illustrate how court decisions are selected as guiding cases in practice. For instance, articles published by SPC officials are referred to in order to outline how the recommendations of guiding cases are initiated, submitted to the SPC, and finally actually approved, which makes them an important complement to the doctrinal method. This information originates from the seven volumes of Chinese Case Guidance, published between 2015 and 2019 by the SPC Research Office (最高人民法院研究室).⁸⁹

87 Guo Ye (郭叶), Sun Mei (孙妹), Report on The Application in Judicial Proceedings of Supreme People's Court Guiding Cases (2017) (最高人民法院指导性案例 2017 年度司法应用报告), *China Journal of Applied Jurisprudence* (中国应用法学), 2018, No. 3, pp. 108-133; Guo Ye (郭叶), Sun Mei (孙妹), Report on The Application in Judicial Proceedings of Supreme People's Court Guiding Cases (2018) (最高人民法院指导性案例 2018 年度司法应用报告), *China Journal of Applied Jurisprudence* (中国应用法学), 2019, No. 3, pp. 146-174; Guo Ye (郭叶), Sun Mei (孙妹), Report on The Application in Judicial Proceedings of Supreme People's Court Guiding Cases (2019) (最高人民法院指导性案例 2019 年度司法应用报告), *China Journal of Applied Jurisprudence* (中国应用法学), 2020, No. 3, pp. 88-118; Guo Ye (郭叶), Sun Mei (孙妹), Report on The Application in Judicial Proceedings of Supreme People's Court Guiding Cases (2020) (最高人民法院指导性案例 2020 年度司法应用报告), *China Journal of Applied Jurisprudence* (中国应用法学), 2021, No. 5, pp. 121-148.

88 Zuo Weimin (左卫民), Chen Mingguo (陈明国) (ed.), *The Research on the Guiding Case System in China* (中国特色案例指导制度研究), Peking University Press (北京大学出版社), 2014, p. 50.

89 Hu Yunteng (ed.) (胡云腾), *China Case Guidance Vol. 1* (中国案例指导第 1 辑), Law Press China (法律出版社), 2015; Yan Maokun (ed.) (颜茂昆), *China Case Guidance Vol. 2* (中国案例指导第 2 辑), Law Press China (法律出版社), 2015; Yan Maokun (ed.) (颜茂昆), *China Case Guidance Vol. 3* (中国案例指导第 3 辑), Law Press China (法律出版社), 2016; Yan Maokun (ed.) (颜茂昆), *China Case Guidance Vol. 4* (中国案例指导第 4 辑), Legal Press China (法律出版社), 2017; Yan Maokun (ed.) (颜茂昆), *China Case Guidance Vol. 5* (中国案例指导第 5 辑), Law Press China (法律出版社), 2017; Jiang Qibo (ed.) (姜启波), *China Case Guidance Vol. 6* (中国案例指导第 6 辑), Law Press China (法律出版社), 2018; Jiang Qibo (ed.) (姜启波), *China Case Guidance Vol. 7* (中国案例指导第 7 辑), Law Press China (法律出版社), 2019.

These publications provide sufficient background information as well as its interpretation by SPC officials, including recommendation work inside the SPC, the purpose of certain guiding cases and the work related to guiding cases in local courts. However, the current release lags behind the publication of guiding cases and covers only part of the guiding cases, namely from Guiding Case No. 1 to No. 96.

Additionally, this study makes limited use of comparative legal methodology. In terms of a historical perspective, Chapter One compares the guiding cases system with the cases in the SPC Gazette. Although guiding cases are a unique invention of the SPC,⁹⁰ some aspects of guiding cases can also be compared with similar mechanisms in foreign legal systems. Chapter Two compares the factual binding effect of guiding cases with the factual validity of cases in the German legal system.

⁹⁰ By “unique invention”, it mainly refers to the fact that the guiding cases are not necessarily the SPC’s adjudications and are issued through the approval of the SPC adjudication committee, but not created in the way of trial. Furthermore, guiding cases are no longer the original court decisions and have been edited and reorganized. Though guiding cases are not regarded as legal sources, the SPC indicates for the first time in its document that judges shall refer to guiding cases when dealing with similar cases. See: Article 3, 8, 9, Detailed Rules for the Implementation of the Provisions of the Supreme People’s Court on Case Guidance (最高人民法院关于案例指导工作的规定实施细则, 法〔2015〕130号), 27 April 2015.

Chapter 2: The development of guiding cases in China

I. Introduction

This chapter contextualizes guiding cases as it compares them with other instruments of the SPC to steer the adjudication in lower courts. Although many scholars describe the guiding cases mechanism as an original innovation of the SPC, the analysis reveals that most elements of guiding cases resemble pre-existing measures such as the “typical cases” that are published in the SPC Gazette. This leads to the question of why the SPC introduced the new category of guiding cases in the first place and did not simply adjust existing case guidance mechanisms, such as typical cases in the SPC Gazette, official replies, or simple replies to requests from lower courts.

To answer this question, the chapter asks: what roles did cases released by the SPC play before the SPC publicly issued cases; how are guiding cases different from the typical cases in the SPC Gazette and what is the connection between them; how do local courts’ experiments of different cases systems have an impact on guiding cases and what is the SPC’s attitude toward these local experiments; what are the possible advantages of guiding cases over the SPC’s other instruments; and, how could a similar-case searching mechanism support guiding cases?

This chapter first argues that in the early years of the PRC, the cases and judicial interpretations of the SPC shared a great deal in terms of binding effect, form of publication and purpose of implementing party policy and the filling of gaps in Chinese law.

In 1985, the SPC Gazette (最高人民法院公报) began publishing “typical cases” (典型案例) with the goal of increasing the transparency of the court’s everyday work and emphasizing the importance of judges conducting trial work strictly according to law. In this regard, many typical cases only repeat the content of legislation and judicial interpretations. Furthermore, typical cases are intended to serve as guidance to lower courts and to teach judges how to apply the law correctly. Before the formal introduction of guiding cases in 2010, typical cases in the SPC Gazette served the role of guiding cases. However, as the SPC Gazette has been publishing typical cases since 1985, the many typical cases are no longer relevant to current legal disputes and can potentially be in conflict with current law. In general, guiding cases

are a reformed and enhanced version of the SPC's typical cases, though the progress made by guiding cases is quite limited.

This part further argues that guiding cases are designed to restrain the judges' discretion and unify the application of the law. The SPC constantly related guiding cases to reforms in discretion and sentencing. Furthermore, the public is unsatisfied with the current state of "treating similar cases differently" and this situation casts doubts on the SPC's authority and the fairness of trial work. It demonstrates that the public has an urgent need for the consistent and unified implementation of law. According to some SPC officials, guiding cases are an effective and direct way to address public needs. Meanwhile, judicial interpretations are still presented in the form of abstract rules and are incapable of resolving issues regarding discretion and sentencing, ultimately resulting in "treating similar cases differently". Moreover, SPC has to commit additional resources and adhere to a more rigorous procedure to issue judicial interpretations nowadays.

Another important reason for introducing guiding cases is that they seek to replace the SPC's official replies (批复), a form of judicial interpretations, or simple replies (答复). In general, guiding cases are not intended to replace judicial interpretations. Both the guiding cases and the official replies or simple replies are based on certain cases. In contrast to the procedure of official replies or simple replies, the SPC takes the initiative to clarify its standpoints by publishing guiding cases. Furthermore, by introducing guiding cases, the SPC may avoid the negative reputation caused by official replies or simple replies. Current information also indicates that the SPC's Case Guidance Office (案例指导办公室) is currently coordinating with the relevant SPC internal departments that handle case requests (案件请示) from high courts in order to gather more potential guiding cases. However, at present, official replies and simple replies are unlikely to be fully abolished.

The SPC has also imposed a similar-case searching duty on judges, which has the potential to increase the guiding-case application rate. When assigned this duty, judges are more likely to do similar-case searches and refer to guiding cases when presented with difficult or new types of lawsuits. Because guiding cases are always listed first, they have a much larger chance of being consulted. On the other hand, the tiny number of guiding cases restrict the effect of similar-case searching.

Finally, guiding cases continue to be deficient in terms of more detailed regulations or support from other procedural law. The impact of guiding cases was not further strengthened until the SPC introduced a similar-case searching duty for judges several years after the introduction of guiding cases.

It demonstrates that the development of guiding cases stagnated for years. In order to encourage judges to apply guiding cases, the SPC should provide more specific rules addressing issues of guiding-case application, such as how to identify similar cases in practice. So far, no procedural law has included guiding cases as a factor in the trial process. Therefore, the guiding cases system is far from complete and is not being taken seriously in trial work.

II. State of research

1. Research on the cases issued by the SPC before 1985

Generally speaking, scholars and judges largely agree that the SPC has begun using cases to guide lower courts since the 1950s.⁹¹ The SPC published cases mostly as internal documents and required judges to refer to and cite them (比照援引) before the SPC published typical cases in its Gazette.⁹² Similarly, some argue that cases were binding inside the court system.⁹³ One argument points out that during this period, cases issued by the SPC mainly were aimed at implementing party policies such as the rehabilitation of victims of injustice committed during the Cultural Revolution or the Strike Hard Campaign (“严打”).⁹⁴ Meanwhile, there is also a viewpoint indicating that

91 Hu Yunteng (胡云腾), Yu Tongzhi (于同志), Research on Major Controversial Issues of Case Guidance System (案例指导制度若干重大疑难争议问题研究), *Chinese Journal of Law (法学研究)*, 2008, No. 6, p. 3; Zhou Daoluan (周道鸾), Historical Development of Chinese Case System (中国案例制度的历史发展), *Journal of Law Application (法律适用)*, 2004, No. 5, p. 4; Zhang Jun (张军), Making the Full Use of Case Guidance, Promoting a Fair, Efficient and Authoritative Socialist Judicial System (充分发挥案例指导作用 促进公正高效权威的社会主义司法制度建设), in: Hu Yunteng (ed.) (胡云腾), *China Case Guidance No. 1 (中国案例指导第1辑)*, Law Press China (法律出版社), 2015, p. 289; Shi Lei (石磊), Case System and Category of the People's Court (人民法院司法案例体系与类型), *Journal of Law Application Judicial Case (法律适用 司法案例)*, 2018, No. 6, p. 36.

92 Zhou Daoluan (周道鸾), Historical Development of Chinese Case System (中国案例制度的历史发展), *Journal of Law Application (法律适用)*, 2004, No. 5, p. 4; Shi Lei (石磊), Case System and Category of the People's Court (人民法院司法案例体系与类型), *Journal of Law Application Judicial Case (法律适用 司法案例)*, 2018, No. 6, p. 36.

93 Liu Keyi (刘克毅), Effectiveness and Systematization of Chinese Guiding Cases (论指导性案例的效力及其体系化), *Law and Modernization (法治现代化研究)*, 2017, No. 5, p. 123.

94 Li Shichun (李仕春), Another Path for the Case Guidance System: Restraint Application of Judicial Activism (案例指导制度的另一条思路——司法能动主义在中国的有限适用), *Law Science (法学)*, 2009, No. 6, p. 61.

besides implementing party policies, these cases were also used to establish standards for conviction and sentencing when no relevant statutes had been enacted, as criminal law and criminal procedure law were not issued at that time.⁹⁵ Those studies reveal that, in general, cases issued by the SPC during this period were not openly published, but rather served as administrative orders. Note that adjudications in the early years of the PRC have not gone public.⁹⁶ Due to this lack of transparency and limited information regarding cases and adjudications in the early years of the PRC, these studies are not able to reveal more detailed information about the SPC's case publication or their applications in court decisions.

2. Research on the typical cases in the SPC Gazette

Regarding the overall evaluation of the typical cases in the SPC Gazette, Zhou Daoluan's research and Yao Ying's essay in *People's Court Daily* shed significant light on the objective, the content and the selection procedure of typical cases in the SPC Gazette.⁹⁷

a. Research on the objectives and content

In terms of the objective and content of typical cases, it is widely believed that typical cases are primarily intended to promote the socialist legal system and summarize trial experience.⁹⁸ Concerning the precise meaning of “promoting

95 Shi Lei (石磊), *Case System and Category of the People's Court* (人民法院司法案例体系与类型), *Journal of Law Application Judicial Case* (法律适用 司法案例), 2018, No. 6, p. 37.

96 For instance, the earliest civil law adjudications included on China Judgement Online were from 1996. In 1999, the Beijing First Intermediate Court was the first court in China that allowed the public to have access to its judgements. See: Xu Cong (许聪), *Judicial Openness: Breaking the Backroom Deals and Accepting Supervision Proactively* (司法公开: 破除暗箱操作 主动接受监督), *People's Court Daily* (人民法院报), 2017. 3. 5, Edition. 5; <https://wenshu.court.gov.cn/>.

97 Zhou Daoluan (周道鸾), *Historical Development of Chinese Case System* (中国案例制度的历史发展), *Journal of Law Application* (法律适用), 2004, No. 5, pp. 5-6; Yao Ying (姚颖), *To Promote the Socialist Legal System with Cases* (以案例宣传社会主义法制), *People's Court Daily* (人民法院报), 2008. 06. 14, Edition. 02.

98 Zhang Jun (张军), *Making the Full Use of Case Guidance, Promoting a Fair, Efficient and Authoritative Socialist Judicial System* (充分发挥案例指导作用 促进公正高效权威的社会主义司法制度建设), in: Hu Yunteng (ed.) (胡云腾), *China Case Guidance Vol. 1* (中国案例指导第1辑), Law Press China (法律出版社), 2015, p. 289; Yao Ying

the socialist legal system”, it is pointed out that typical cases are utilized to provide outsiders some insights into SPC functions and to dispel some misconceptions about the SPC.⁹⁹ Essentially, “promoting the socialist legal system” highlights the need to establish a favorable reputation for the SPC and the Chinese legal system via the publication of typical cases.¹⁰⁰ Many scholars argue that typical cases mark the establishment of case guidance in China;¹⁰¹ furthermore, they close legal gaps, interpret law, provide guidance to lower courts and promote the development of the legal system.¹⁰² However, a more detailed argument states that typical cases mostly repeat the content of law and judicial interpretations, providing little guiding value to lower courts. This situation gradually changed only after the Second Five-Year Reform of the People’s Court was released, which changed the content of typical cases.¹⁰³ Other reasons for this change include China’s transformation from a planned to a market economy since the 1980s, the steady development of the Chinese legal system, the rising legal professionalism, the emphasis on cases and the legal educational value of typical cases.¹⁰⁴

(姚颖), To Promote the Socialist Legal System with Cases (以案例宣传社会主义法制), *People’s Court Daily* (人民法院报), 2008. 06. 14, Edition. 02; Zhou Daoluan(周道鸾), Historical Development of Chinese Case System (中国案例制度的历史发展), *Journal of Law Application* (法律适用), 2004, No. 5, p. 5.

99 Dong Hao (董皞), Opening the Window of Mystery: Cases of SPC Gazette as Subject (开启神秘之窗——以最高人民法院公报发布案例为对象), *Case Law and Research* (判例与研究), 2002, No. 3, p. 6.

100 Yao Ying (姚颖), To Promote the Socialist Legal System with Cases (以案例宣传社会主义法制), *People’s Court Daily* (人民法院报), 2008. 06. 14, Edition. 02.

101 Dong Hao (董皞), Opening the Window of Mystery: Cases of SPC Gazette as Subject (开启神秘之窗——以最高人民法院公报发布案例为对象), *Case Law and Research* (判例与研究), 2002, No. 3, p. 4; Shi Lei (石磊), Case System and Category of the People’s Court (人民法院司法案例体系与类型), *Journal of Law Application Judicial Case* (法律适用 司法案例), 2018, No. 6, p. 37; Hu Yunteng (胡云腾), Yu Tongzhi (于同志), Research on Major Controversial Issues of Case Guidance System (案例指导制度若干重大疑难争议问题研究), *Chinese Journal of Law* (法学研究), 2008, No. 6, p. 4.

102 Dong Hao (董皞), Opening the Window of Mystery: Cases of SPC Gazette as Subject (开启神秘之窗——以最高人民法院公报发布案例为对象), *Case Law and Research* (判例与研究), 2002, No. 3, pp. 6-9.

103 Li Shichun (李仕春), Another Path for the Case Guidance System: Restraint Application of Judicial Activism (案例指导制度的另一条思路——司法能动主义在中国的有限适用), *Law Science* (法学), 2009, No. 6, p. 62.

104 Yang Jianjun (杨建军), Change of Civil Cases Compiled in the “Supreme People’s Court Gazette”(最高人民法院公报选编民事案例的变化), *Modern Law Science* (现代法学), 2010, No. 4, pp. 189-191.

This argument involving content is supported by many empirical studies regarding typical cases. For instance, the earliest analysis, conducted in 2007, demonstrates that starting in 2004, an increasing number of typical cases began to interpret law or to close legal loopholes¹⁰⁵ rather than repeat the content of law or judicial interpretations.¹⁰⁶ Moreover, a similar empirical study conducted by Sichuan University and Sichuan High Court discovered that the majority of typical cases between 1985 and 2011 were used to interpret law, with only a small percentage of typical cases filling legal loopholes.¹⁰⁷

There are also some empirical studies regarding the content of typical cases in specific fields of law which also back up this argument. An empirical study, covering typical cases of intellectual property from 1985 to 2008, concludes that the most prevalent type of cases are those that demonstrate how to apply the law correctly.¹⁰⁸ In the field of civil law, an empirical survey covering typical cases in the field of civil law from 1985 to 2008 indicates that during the early period, namely from 1985 to 1999, these typical cases in the field civil law were mainly good examples of trial power being exercised strictly according to the law, whereas typical cases in the field of civil law in the 2000s began to employ a variety of interpretation methods to provide further explanations of legal concepts in law or to summarize more specific rules based on law.¹⁰⁹

105 Cases that close legal loopholes usually refer to cases that create new rules to fill legal gaps. For instance, Guiding Case No. 15 applies analogical interpretation to extend the application of the relevant articles regarding shareholders in Company Law to affiliated companies and close a legal loophole about affiliated companies; see Case Guidance Office (案例指导办公室), *Understanding and Reference of Guiding Case No. 15: Xuzhou Construction Machinery Group Co., Ltd. v. Chengdu Chuanjiao Industry and Trade Co., Ltd., et al.* (指导案例 15 号徐工集团工程机械股份有限公司诉成都川交工贸有限责任公司等买卖合同纠纷案的理解与参照), see: Yan Maokun (ed.) (颜茂昆), *China Case Guidance Vol. 2* (中国案例指导第 2 辑), Law Press China (法律出版社), 2015, p. 49.

106 Qin Wang (秦旺), *On the Construction and Application Methods of China's Case Guidance System* (论我国案例指导制度的构建和适用方法), see: Ge Hongyi (ed.) (葛洪义), *Legal Methodology and Legal Thinking Vol. 4* (法律方法与法律思维 第 4 辑), Law Press China (法律出版社), 2007, p. 217.

107 Zuo Weimin (左卫民), Chen Mingguo (陈明国) (ed.), *The Research on the Guiding Case System in China* (中国特色案例指导制度研究), Peking University Press (北京大学出版社), 2014, p. 54.

108 Yuan Xiuting (袁秀挺), *Operation and Analysis of Case Guidance System in China* (我国案例指导制度的实践运作及其评析), *Studies in Law and Business* (法商研究), 2009, No. 2, p. 106.

109 Yang Jianjun (杨建军), *Change of Civil Cases Compiled in the "Supreme People's Court Gazette"* (最高人民法院公报编选民事案例的变化), *Modern Law Science* (现代法学), 2010, No. 4, p. 188.