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System Construction and Technique Innovation:  
Challenges Our Guiding Cases System Is Facing*

**CHINA GUIDING CASES PROJECT**  
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In late 2010, the Supreme People’s Procuratorate and the Supreme People’s Court (“the SPC”) officially announced the Guiding Cases System as a new component in the Chinese legal system. The announcement did not end the debate over this new system, but raised questions about the legitimacy and potential effects of the Guiding Cases System in a Chinese context. The development of the system was shrouded in mystery for over a year, until December of 2011 when the SPC released the first four Guiding Cases to officially launch this system. The fact that the SPC spent over a year preparing the cases indicates that they invested a great deal of time considering challenges to the operational mechanics and technical viability of the cases, as well as their legal status and legitimacy. This paper will address the often overlooked technical issues involved in the Guiding Cases System, and argues that this new system will not succeed without the necessary technical support.

According to Article 7 of the Provisions of the Supreme People’s Court Concerning Work on Case Guidance (“Provisions on Case Guidance”), people’s courts at all levels should refer to the Guiding Cases released by the SPC when adjudicating similar cases. This means that, unlike those court cases published in the Gazette of the Supreme People’s Court, the Guiding Cases themselves are likely to have de facto binding effects on similar cases in the future. Therefore, they are likely to become a new source of law in the Chinese codified legal system. The relationship between the main body of codified law and this small new group of Guiding Cases, however, is still unclear. According to the preamble of the Provisions on Case Guidance, the system is intended to summarize adjudication experiences, unify application of law, enhance adjudication quality, and safeguard judicial justice. It is clear that the SPC intends to use this new system to introduce some elements of common law practice into the Chinese legal system while simultaneously, and intentionally, leaving the existing codified legal system unaltered. The ambiguous status and function of Guiding Cases in the Chinese codified legal system means that the Guiding Cases play only a supplemental role, by illustrating and improving the codified rules through cases. The Guiding Cases System, therefore, can be described as a new system within the judiciary, similar to, but different from the current system of judicial interpretation. The effects and status of judicial interpretation are not recognized through formal legislation directly on the topic, but are nonetheless recognized through other laws that have binding force.

If the Guiding Cases really have binding effects, on which courts are they binding? In

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2.  See Organic Law of the People's Courts of the People's Republic of China, adopted on July 1, 1979, amended the first time on Sept. 2, 1983, amended the second time on Dec. 2, 1986, and amended the third time and promulgated on Oct. 31, 2006. The third amendment came into effect on Jan. 1, 2007. See also Decisions of Interpretation of Law of the Standing Committee of the National People's Congress, adopted on June 10, 1981 and came into effect on the same day. These two pieces of legislation authorize the Supreme People's Court to issue judicial interpretations to cover topics relating to the application of law in the process of adjudication.
common law practice, a precedent is often set by an upper level court and is binding on that court and its lower courts for the adjudication of similar cases in the future. Unlike common law practice, however, the Guiding Cases seem to be binding on all courts because Article 7 of the Provisions on Case Guidance provides that “people’s courts at all levels should refer to the Guiding Cases … when adjudicating similar cases.” The Provisions on Case Guidance do not specify the level of the deciding court’s judicial authority or the scope of its jurisdiction. Such broad applicability raises structural questions, such as whether a lower level court’s judgment would be binding on an upper level court within the same jurisdiction, or whether a Guiding Case from one province is binding on courts in another province. It is also unclear where this binding force comes from. The most likely explanation is that, although Guiding Cases may come from courts of any level or any jurisdiction, once they are selected, processed, and released by the SPC, they are given a new status like that of judicial interpretations issued by the SPC. This new status makes them binding on all of the courts in the country in the same way that judicial interpretations are binding. If this explanation is correct, which specific parts of a released Guiding Case are binding? Is the entire Guiding Case binding, including the “basic facts” section, or is it the case that only the sections summarized by the SPC, namely, the “main points of the judgment” and “reasons for the judgment” sections, are binding?

The common law tradition relies on several principles and interpretive techniques which are not developed in the current Guiding Cases system. Stare decisis, for example, stands as the foundation for common law systems. Every new rule produced by a precedent is established on the basis of the court’s comprehensive analysis of a series of previous cases. In common law systems, upper level courts are frequently the courts of the final instance, and so, with respect to changing existing precedents, these courts adopt “cautious attitudes”. As such, in handling legally controversial cases, they very often adopt a wait and see attitude and will not issue a judgment that is precedential until there is public consensus or lower court decisions clarify the legal issues and their implications. In this regard, the current Guiding Cases System in China still lacks these significant foundations and sufficient judicial experience. There is no evidence to show that the SPC has done any such comprehensive analysis in the production of Guiding Cases, or has conducted investigations into the ability of lower courts to apply these cases before releasing these Guiding Cases.

The Guiding Case System is not currently equipped with techniques for finding and distilling rules or principles from the released Guiding Cases. A central skill involved in common law interpretation is the ability to distill and distinguish between the holdings (ratio decidendi) and the dicta (obita dicta) presented in prior decisions. Should this technique be explored by Chinese judges while applying a Guiding Case, or should they simply follow the “main points of the judgment” and “reasons for the judgment” sections in the Guiding Cases released by the SPC? If the “reasons for the judgment” section is what the SPC intends to bind lower courts to, why has the SPC chosen to use Guiding Cases rather than the existing system of judicial interpretation? Do other courts, in handling a concrete case, have the authority to decide which reasons for the judgment stated in the “reasons for the judgment” section carry the most guiding significance? It seems that the Guiding Case System needs to be supported by these
sorts of skills and techniques.

Another important technique in case law systems is drawing distinctions between the factual situations in different cases, a process by which a court identifies factual differences between a precedent and the current pending case to narrow the precedential effects of the precedent. The Guiding Case System again ignores this technique. As a matter of fact, the released Guiding Cases do not provide detailed facts for each case, but merely summaries prepared by the SPC. This method leaves out the more colorful and rich factual details of the original judgments, and may therefore make the Guiding Cases nothing more than guiding principles.

While the SPC may have intended to introduce some elements of the common law tradition into the Chinese legal system through the Guiding Cases, the current Guiding Cases System overlooks some of the common law’s most important embedded skills and techniques and this may impair meaningful interpretation of Guiding Cases in lower courts. These skills and techniques as used in common law systems to distinguish facts and to distinguish ratio from dicta, have provided common law courts greater leverage in applying precedents to reality. So far, the functions of the new Guiding Cases System do not go beyond those of the existing system of judicial interpretation. To make the Guiding Cases System work effectively, and give the judges in lower courts powers similar to those possessed by their counterparts in common law systems, the SPC and lower courts need to strengthen the research and development of those technical systems and system innovations concerning interpretation of cases. Only in this way will the Guiding Cases System take root in China’s judicial practice and further promote the development of China’s judicial system.