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Guiding by Cases in a Legal System Without Binding Precedent:
The German Example

CHINA GUIDING CASES PROJECT
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All legal systems embracing the principle of equality before law face the challenge of ensuring uniform application of law. A prerequisite of uniform application of law is uniform interpretation of law. The People’s Republic of China has developed a new legal tool in order to reach this goal: the Provisions of the Supreme People’s Court Concerning Work on Case Guidance. According to Article 7 of these provisions, “[p]eople’s courts at all levels should refer to the Guiding Cases released by the Supreme People’s Court when adjudicating similar cases.” The “soft” term “should” (“应当”) suggests that the guiding cases are not legally binding precedents.

The German legal order does not have a system of legally binding precedents either. Nevertheless, precedents play a major role in the practice of the German courts through judicial reference to previous judgments and headnotes (see below). This commentary briefly explains how uniform interpretation of law is ensured in the German legal order and how precedents have gradually acquired the significant status that they have in German courts today. It is hoped that the explanation of the system in Germany may shed some light on the potential role of the Guiding Cases System in China.

Legal Provisions Aimed at Uniform Interpretation

Germany has a court system with five supreme courts at the federal level:

(1) The Federal Supreme Court (Bundesgerichtshof), which adjudicates civil and criminal cases.

(2) The Federal Administrative Court (Bundesverwaltungsgericht).

(3) The Federal Tax Court (Bundesfinanzhof).

(4) The Federal Labor Court (Bundesarbeitsgericht).

(5) The Federal Social Court (Bundessozialgericht).

The Federal Constitutional Court (Bundesverfassungsgericht) rules on constitutional issues. It is not formally identified as a “supreme court” at the federal level, but is the highest court of the German court system as far as constitutional issues are concerned.

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Lower courts are established at the state level. Federal law is applied by not only the federal courts but also the state courts.

Under Article 31(1) of the Federal Constitutional Court Act, the decisions of the Federal Constitutional Court are binding upon all courts. While there is no analogous provision concerning the effect of the decisions of other courts, appeals on points of law can be used in all branches of the court system in order to ensure uniform adjudication.

If a court hearing an appeal on points of law refers the case back to a court of lower instance, the lower court is to base its new decision on the legal assessment on which the reversal of its previous judgment was based.

The appeal system is the most powerful mechanism for achieving uniform application of law in the German legal order. It puts the five federal supreme courts into a very strong position because it gives them the final say on the interpretation of almost every legal provision. Even where there has not yet been a referral back, the lower courts usually decide in line with the rulings of the upper courts to avoid reversal of their judgments and promote legal certainty.

To ensure uniform application of law at the level of the five federal supreme courts, a special system is in place. The five federal supreme courts established the Joint Panel of the Supreme Courts of the Federation (Gemeinsamer Senat der obersten Gerichtshöfe des Bundes; hereinafter referred to as the “Joint Panel”). If one of the five supreme courts wishes to deviate from a ruling made by another supreme court or the Joint Panel itself, it must request the Joint Panel to give a preliminary ruling. Within each of the five federal supreme courts, there is a similar mechanism that must be used if one division wants to deviate from a ruling issued by another division of the same court or by the joint panel of that court.

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2. Germany is composed of 16 states.


4. For example, according to Section 132(2) of the Code of Administrative Court Procedure (Verwaltungsgerichtsordnung), promulgated Jan. 21, 1960, last amended July 21, 2012, an appeal on points of law to the Federal Administrative Court against the judgment of a Higher Administrative Court (Oberverwaltungsgericht) shall be admitted if the legal issue is of fundamental importance or if the judgment deviates from a ruling of the Federal Administrative Court, of the Joint Panel of the Supreme Courts of the Federation, or of the Federal Constitutional Court, and is based on this deviation. According to Section 133(1) of that code, the non-admission of the appeal on points of law may be challenged by a complaint. The Labor Court Act (Arbeitsgerichtsgesetz), promulgated Sept. 3, 1953, last amended July 21, 2012, provides particularly ample possibilities for this kind of appeal: If the Federal Labor Court has not yet issued a judgment on a specific legal issue, leave to appeal must be granted where the judgment of the Higher Labor Court (Landesarbeitsgericht) deviates from a decision of another chamber of the same Higher Labor Court or of another Higher Labor Court, and is based on this deviation.

5. For information on the organization of the Joint Panel and its proceedings, please see the Act on Ensuring Judicial Consistency of the Federal Supreme Courts (Gesetz zur Wahrung der Einheitlichkeit der Rechtsprechung der obersten Gerichtshöfe des Bundes), promulgated on June 19, 1968, last amended on July 12, 2012.
Headnotes (Leitsätze) and Precedents

When lower courts want to ensure that they are deciding a case in line with the rulings of the upper courts, how can the lower courts readily determine whether there has already been a relevant ruling by an upper court? In Germany, this is mainly done via law reports and headnotes.

Law reports emerged in the German states during the early decades of the 19th century, when the duty incumbent upon the lower courts to give reasons for a ruling was for the first time pervasively extended to the upper courts. The courts themselves edited these law reports. The courts also began to create reference works listing the rulings of their various divisions, together with headnotes. These reference works followed the classification scheme of the laws to be applied. Their main purpose was to help judges locate precedents of the court where they worked. While the Prussian Upper Tribunal (Preußisches Obertribunal) also published its reference work as early as 1832, the later Supreme Court of the Empire (Reichsgericht) used its reference work solely as an internal tool and made public only its law reports.

The Supreme Court of the Empire’s law reports, which only contained the most important rulings, did not include headnotes, but rather questions that indicated the principal issue of the case. For example, in a case decided in 1892 concerning the crime of publicly inciting classes of the population to use violence against each other, the questions preceding the judgment were: “What are ‘classes of the population’ within the meaning of Section 130 Penal Code? Can this element be fulfilled by inciting violence against the ‘government’ or against the ‘rulers’?” It was not until the end of the 1930s that the Supreme Court of the Empire started using declaratory clauses as headnotes in its law reports. Here is an example from 1938: “There is also ‘creeping in’ within the meaning of Section 250(1) No. 4 of the Penal Code when the perpetrator has obtained open access to a building by means of ruse or deception.” The Federal Supreme Court, founded in 1950, replacing the Supreme Court of the Empire, has continued the practice of using declaratory clauses as headnotes in its law reports. Thus, headnotes have become a tool for guiding the lower courts towards uniform interpretation of law.

Nowadays, provisions governing law reports and headnotes can be found in the internal rules of the supreme courts. The internal rules of the Federal Labor Court may serve as an example. Section 14 of the Internal Rules of the Federal Labor Court provides that the regular judges of the division concerned decide which decisions shall be preceded by headnotes and

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8 Judgment of Oct. 27, 1938, 2 D 523/38, RGSt. 73, 9. Author’s translation.
formulate the wording.\textsuperscript{10}

The wording of headnotes is not always a verbatim quotation from the judgment. It can also be a concise summary of the legal reasoning. Legally speaking, the headnotes are not part of the judgment.

Not just the supreme courts but also the upper level state courts and sometimes even courts of first instance publish rulings with headnotes. However, the percentage of rulings which these courts select for publication is not high.

Rulings that include headnotes are disseminated in a variety of ways. Traditionally, the principal channels have been law reports and professional journals. These days, the Internet—especially the websites of the supreme courts—plays an ever-increasingly important role. Legal literature, such as commentaries on specific laws, often builds on the headnotes and thus guides the way to finding relevant cases.

The typical style of headnotes is rather similar to that of legal provisions. Following is an example taken from a ruling of the Federal Supreme Court involving a conflict between two publishers. The plaintiff published rulings by financial courts, preceded by headnotes, in cooperation with financial court judges who edited the rulings and formulated the headnotes. The defendant published a journal providing readers with tax saving tips. In her journal, the defendant also reproduced headnotes of rulings published by the plaintiff and offered the complete text of the rulings for a fee. Under Section 5(1) of the Copyright Law,\textsuperscript{11} officially composed headnotes do not enjoy copyright protection. The Federal Supreme Court referred the case back to the lower court for further assessment of facts and formulated the following headnotes for its ruling, which provide a representative illustration of modern headnotes in Germany:

Headnotes of court decisions unofficially composed are capable of being protected as adaptations pursuant to Section 3 of the Copyright Law like independent works.

A headnote is to be considered as officially composed within the meaning of Section 5(1) of the Copyright Law when it was formulated by a member of the panel of judges with the panel’s consent and made accessible to the public. It is immaterial whether there was an official duty to compose the headnote. It is only decisive whether the contents of the statement are cognizably attributable to the court and thus originate from a public authority.\textsuperscript{12}

\textsuperscript{10} The Federal Labor Court is composed of several divisions, each comprising regular judges as well as honorary judges from trade unions and employers associations.

\textsuperscript{11} Copyright Law (Urheberrechtsgesetz), promulgated on Sept. 9, 1965, last amended on Dec. 22, 2011.

\textsuperscript{12} Judgment of Nov. 21, 1991, I ZR 190/89, BGHZ 116, 136. Author’s translation.
If, in a future copyright case, a court is confronted with the same legal issue, these headnotes will help it quickly grasp the essence of the Federal Supreme Court’s judgment.

It is less the cases as such but rather the headnotes that guide the courts. Frequently, judges use the headnotes as if they were abstract interpretations. In other words, they use them without reading the entire case. Of course, there are situations where it may be helpful to read not just the headnotes but also the parts of the judgment revealing the context.

German judges seek to compose headnotes with maximum precision. This approach is different from that sometimes adopted by the Court of Justice of the European Union. When answering questions about interpretation in preliminary reference proceedings, the Court of Justice of the European Union not infrequently uses the formulation “in circumstances such as those at issue in the main proceedings”. German courts avoid such sweeping referrals to the circumstances of the underlying case in their headnotes. This facilitates work on future cases.

Without headnotes, the lower courts would drown in thousands of pages of upper court rulings. The headnotes help them to find (and remember) the interpretations of law adopted by upper courts. Given the usually heavy case load of German judges, this is not only a major contribution to legal certainty but also to meting out justice within a reasonable time.

In Germany, there are no provisions regulating what kind of legal texts can be cited in court rulings. German courts, including the supreme courts, quote headnotes without quotation marks and add the source in parentheses in the reasons adduced to support their rulings. When these courts refer to parts of the judgments themselves, these citations are dealt with in the same way. This does not signify that judges treat previous judgments and headnotes as a source of law. They just interpret the law as it was interpreted previously and make this clear.

In the rare cases where the supreme courts modify or even abandon an interpretation that they adopted in an earlier case, they usually indicate this in the headnotes. Thus the first headnote of a case decided by the Federal Supreme Court on April 27, 2012 reads: “The claim under Section 1179a(1), first sentence, of the Civil Code is bankruptcy-proof (abandonment of BGHZ 166, 139).”

A helpful culture of citation has developed in Germany. When a supreme court adopts the same interpretation of a law again and again, judges dealing with that same issue tend to cite the first judgment where that supreme court adopted the interpretation concerned and then add more recent judgments or at least the most recent one upholding that interpretation. This practice gives particular weight to landmark decisions.

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13 See, e.g., Judgment of July 12, 2012 in Case C-616/10, Solvay, available at http://eur-lex.europa.eu (“2. Article 22(4) of Regulation No 44/2001 must be interpreted as not precluding, in circumstances such as those at issue in the main proceedings, the application of Article 31 of that regulation.”).
In the German legal system, where parties’ identities are not revealed in published rulings because of privacy concerns, landmark decisions sometimes receive names chosen to facilitate remembering and discussing them. A particularly famous example is the “Gentleman Rider” case, concerning civil protection of the general personality right. In the past, it was legal scholars who created these fictional names. At present, judges themselves may include a case name along with the headnotes. Thus, in a recent patent case, judges of the Federal Supreme Court named a judgment “Container of Pallets II”.

**Concluding Remarks**

In sum, although the German legal system does not follow a general rule of *stare decisis*, the practice of publishing cases with headnotes and citing headnotes or quoting sections of judgments in the reasoning of court decisions, in conjunction with the appeal system, has created a situation where precedents of the supreme courts are treated by the lower courts as having *de facto* binding effects.

It is rare that lower courts intentionally deviate from rulings of the supreme courts. They do so only if they have very strong reasons for interpreting the law in a different way, such as when an upper court failed to account for prevailing European law.

The German headnotes and the “Main Points of the Adjudication” section of the Chinese guiding cases are rather similar insofar as both quote or summarize central parts of the legal reasoning of a particular judgment. But the appeal system in which the Chinese guiding cases are embedded is different from the German one. In the Chinese court system, with its four levels and only one opportunity for appeal, many important questions of interpretation will not reach the Supreme People’s Court via appeals.

There are, however, two aspects of the Chinese Guiding Cases System that make me think that the “Main Points of the Adjudication” section may have an impact comparable to that of the German headnotes if a steady flow of guiding cases is released. First, according to the *Provisions of the Supreme People’s Court Concerning Work on Case Guidance*, judgments rendered by the Supreme People’s Court are not the only source of the guiding cases that the highest court can release. Second, the authority of the guiding cases can be reinforced by special features of the Chinese legal system that do not exist in Germany, such as China’s adjudication committees. In the interest of equality before law, ample use should be made of this new tool and, in particular, all decisions by the Supreme People’s Court containing legal statements with importance beyond an individual case should be included among the guiding cases.

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