

# The Normative Reproduction Mechanism in the Practice of Judicial Precedent in Contemporary China

Zhenxian Li

Law School, Sichuan University, Scu Street, Chengdu, Sichuan, China

**Keywords:** Use of judicial precedent; Case guidance system; Normative reproduction; Judicial authority reproduction

**Abstract:** In the judicial practice of China, the phenomenon of spontaneous and institutionalized use of judicial precedent has become more and more widespread, which has led to the gradual transformation of the legal normative reproduction mechanism based on the statute system. Faced with the shortage of legal normative sources and the low degree of matching with reality, judges, lawyers and other subjects use the judicial precedent to activate the intellectual endowment of the judicial precedent, and the intellectual information of the judicial precedent can flow smoothly. Relying on the judicial system, the high-quality referee rules in the judicial precedent possess the attributes of individual judicial norms. In the end, those referral rules with the highest level of Abstraction and most importance will be subject to substantive examination and procedural recognition by the legislature, and obtain the qualifications of normative sources. The process is essentially the legalization of judicial experience and the rational faculty. At the same time, as the reproduction becomes normative, it also realizes the reproduction of judicial authority.

## 1. Introduction

As a typical written law system country, China has developed from a blank state of “Short of Laws to Follow” in the early days of reform and opening up, and has formed a relatively complete socialist legal system with Chinese characteristics. However, judicial practice still is faced with the severe test from the shortage of standardizing resources.

In order to effectively respond to the need for judicial resources to regulate resources, since the early 1980s, the Chinese court system has continuously guided the judicial trial through the publication of the “Gazette of The Supreme People’s Court of The People’s Republic of China”, the selection of “Compilation of Cases” from people’s courts at various levels, and the publication of typical cases and other approaches, to continue to explore and build a case guidance system with Chinese characteristics. In November 2010, the Supreme People’s Court of The People’s Republic of China officially issued the “Regulations on Case Guidance Work”, which marked that China officially established the guiding role of existing judgment documents on judicial trials at the institutional level. As of February 25, 2019, the Supreme People’s Court of The People’s Republic of China has issued 21 batches totaled 112 guiding cases, which to a certain extent have played the role of “Summarizing Judgment Experience, Unifying the Application of Law, Improving the Quality of Judgment, and Maintaining Judicial Fairness.” At the same time, the “Internet +” effect from the systematism of online-listing of the referee documents, drives judges, prosecutors, lawyers, and even litigants to keep the pursuit of best litigation or trial effects, who actively make use of the recognition of judicial precedent and the evaluation of cases waiting for lawsuit and pending cases, design litigation or trial ideas, demonstrate litigation or adjudication claims, strengthen and enrich litigation or referee reasons, and evaluate and measure referee outcomes, which are quietly emerging and in judicial practice, is becoming more and more common, and is gradually emerging [1].

It contains the symbols and opportunities for the transformation and evolution of contemporary legal norms of China in the phenomenon and order of overall judicial precedent that is widely used. However, the relevant researches at this stage only attach stress on the existence of the guiding cases under the case guidance system as a normative form and its impact and change on the possible

system. The guiding cases are becoming the “The Third Rule” coexisting with the legislative and judicial interpretations in the legal norm system of China. However, the normative attributes of the guiding cases and their association with the legislative norms have not been basically revealed. It is worth noting that the relevant researches have made an in-depth review and discussion on the legal source attributes of the guiding cases. According to the tradition of jurisprudence, the effectiveness of legal norms generally includes both of legal qualifications and legal restraint [2]. Many scholars regard these two aspects as equivalent [3]. In general, the legal source of the guiding cases comes from three aspects: First, the indirect authorization of the statute law obtained by the Supreme People’s Court of The People’s Republic of China and its Judicial Committee is less effective than legal and judicial interpretation, and therefore it constitutes a quasi-legal source [4]. Second, the Supreme People’s Court of The People’s Republic of China as the main body of the publishing authority and the legitimacy of the selection and distribution procedures to give guiding cases to institutional authority [5]. Third, the case guidance system in China to share the basic concepts and principles of the extra-territorial case (law) system, is based on the judicial precedent’s influence on the self-occurrence of the latter case [6]. However, we still can’t construct a systematic and feasible “Evolution” mechanism between these three sources. The main reason is that we can’t solve the following two problems: First, under the written law system of China, at most one kind of guiding case can obtain (relative to the statute law) discounting “incomplete effect”, which is not legally qualified, and its binding power can only be supported by the limited support of the judicial system. The effectiveness of the guiding cases can only be indirectly attached to the statute law, and the “Class Division” in the impact effectiveness spectrum has encountered insurmountable obstacles on the road to the official legal source, so that the judicial precedent system delivering legal qualification and legal binding force loses the foundation of its construction. Second, the guiding cases seem to either tend to be a judicial interpretation system at the practical level, or can only be compared to the case law system for Anglo-American Law at the theoretical level, thus falling into the both-side separating logic. It is in accordance with this both-side separating logic that the legal source attributes of the guiding cases are divided into two types. Representative generalizations and definitions include cognitive law sources and normative law sources [7], influential judicial precedent and normative judicial precedent, persuasive law sources and binding law sources, cognitive understanding and policy tools, rational authority and institutional authority [8].

In fact, the implementation of the case guidance system and the use of guiding cases are the concentrated expression and typical form of the institutional application of the judicial precedent. On this basis, the quasi-institutional application of the judicial precedent should be applied, that is to take into consideration different levels of selection of the judicial precedent mainly focused on the commune cases. The most important thing is that only the pursuit of non-institutional and spontaneous use of judicial precedent can it correctly grasp the normative reproduction mechanism under the application of judicial precedent. Based on the above judgments and understandings, this thesis will make a basic revealing and explanation of the causes, characterization, essence, mechanism and influence of the normative reproduction mechanism in the practice of judicial precedent in contemporary China.

## **2. The Demand for normative reproduction in the written law system of China**

A very interesting and worthwhile phenomenon is that the “Emergence” of the use of judicial precedent takes place precisely during the period when the socialist legal system with Chinese characteristics has basically taken shape. Compared with the era of “Short of Laws to Follow”, it is necessary to use judicial precedent to fill the legislative blank. Then why is the demand for judicial precedent more intense in the era of “There must be laws for people to follow”? The reason is that the written law system requires that judicial trials must be based on statutes. However, even the best legislative techniques will leave room for judicial filling, leaving hidden ambiguities and uncertainties for interpretation by judges. However, judges cannot simply interpret laws and create rules based on equity or any other broad and inherently empty value symbols. It is the most natural and inexpensive way to seek intellectual support from the judicial experience accumulated in the

judicial precedent. Thus, the positive correlation between the use of expansion and legislative expansion has become the inevitable result of the self-production and reproduction of the written law system [9]. In addition to the need for legislative self-expansion, the deeper reason is that legislation is difficult to meet the growing demand for norms in the state and society, and it is necessary for the judiciary to rely on its production norms of “self-supply system”.

The most important feature of the written law system of China is to produce legal norms through legislation and judicial interpretation, thus facing the shortage of standardized resource supply in judicial practice and its low matching with actual demand, mainly reflected in the following aspects: First, The lack of legislation needs to be compensated by using judicial precedent. The lack of legislation has been widely and fully studied and recognized, mainly including three aspects: One, the legislation is crude. Two, the gap of legislation has always existed, there are still many social areas that have not been covered by law. Three, the degree of matching specific legal provisions with the situation in social and economic exchanges is low, and it is difficult to accurately adjust. Conflicts and disputes in society are not brought to court because of the absence of the above-mentioned legislation. Moreover, in most cases, the court must accept and decide, no matter what it is based on. Second, the limitations of judicial interpretation need to be overcome by using judicial precedent. It is precisely because of the limitations of legislation that China has established a system of judicial interpretation. Judicial interpretation has the function of correcting and remedying legislation, promoting the development of law, and also being a transponder adapted to the complex and ever-changing social contradictions [10]. It is necessary to discuss this slightly, because the application of the judicial precedent has a similar function in this respect, and it is a further supplement and extension. The complex and changeable social life and the legislation have formed a sharp contradiction with the unchanging limitations. Judicial interpretation is regarded as the specification and supplement of legislation, and it is important to adjust the contradiction between the two, the key device to link the law-making and the law application. However, judicial interpretation is essentially an abstract rule similar to legislation. Therefore, the judicial difficulties and judicial interpretations exist to varying degrees. In other words, judicial interpretation always needs to be “reinterpreted”. The most obvious example is the Judicial Interpretation and Application of the Judiciary, edited by the Supreme People’s Court of The People’s Republic of China. Its purpose is to enable the legal community to more accurately understand the specific provisions of judicial interpretation. Third, the legal norm-generating mechanism needs to be improved by using judicial precedent. Through a brief analysis of the inadequacy of legislation and judicial interpretation of China, it is not difficult to find the incompleteness of legal norms of China, and the deep problem behind this is the imperfection of the legal norm generation mechanism. The current legal norm-generating mechanism is a type of “legislation + judicial interpretation”. Since the case guidance system has not been created for a long time, it also has a series of congenital problems, so it has not become an important component of the legal norm-generating mechanism at the actual level.

In general, the current legal norm-generating mechanism focuses on the specification of abstract rules, while ignoring the abstraction of specific rules. On the one hand, both legislation and judicial interpretation are abstract rules formulated by a very small number of people. In fact, in the process of rule-making, a considerable part of the rules are formulated from abstract to abstract, especially in the “transplantation” aspect of extraterritorial law. Therefore, a considerable number of specific rules generated in judicial practice are ignored. On the other hand, because the abstract rules lack the support of specific rules, when they are continuously embodied through judicial interpretation, they are inevitably faced with difficulties that are difficult to be specified.

### **3. The essence of reproduction norms through the use of judicial precedent**

The normative reproduction through the use of judicial precedent is essentially the process of judicial experience and rational legalization and the structural adjustment of the legal system brought about by it. Its regular characteristics mainly include the following aspects: First, it is the normative reproduction based on the legislative norm system. The socialist legal system with

Chinese characteristics as the initial normative system is the basis. Second, the essence of reproduction is continuous production, and the conditions of production are also the conditions for reproduction. On this basis, new conditions are added. Society will not stop the need for legal norms, so the legal system will not stop producing legal norms. Therefore, every production process, from the frequent contact and its constant update, is also the reproduction process. For the so-called production and reproduction, that is, the cycle of production, which grows in the cycle. Third, legislation, legislative interpretation, judicial interpretation, judicial policies, and judicial precedent are all elements of regulated reproduction. Different arrangements, interactions, and weights form different reproduction mechanisms. Fourth, the norm will have a preference and tendency to concentrate, that is, to regulate the inherent laws of production and reproduction itself. Under the statute system, the norms will naturally concentrate, appear, and rise to formal legal norms, so that a self-consistent, planned, self-generated, and large-scale legislative self-improvement mechanism will be formed and become more and more mature. Fifth, regulated reproduction is a normative self-reproduction and self-reproduction of the legal system.

The mechanism has the following main features: First, increase the density and intrinsic viscosity (correlation) of the canonical structure by increasing the type of specification. Normative reproduction is a process and mechanism for the continuous expansion (expansion) of the legal norm system, which can be divided into an intensional reproduction mechanism and an extensional reproduction mechanism. The former refers to the increase of the quantity and quality of legal norms, and the increase of its density and internal viscosity (degree of association), and the latter refers to the increase of the types of legal norms. It is precisely because of the complexity of the normative components that the norms are integrated into one and are contiguous. Second, positively increase individualization and materialization. At the same time, it increases the generalization and abstraction in the opposite direction, and cycles between individualization and generalization to promote the extension of the legal norm system. Third, supplement the mandatory authority with persuasive authority. Fourth, the closure of the legal system is complemented by the openness of cognition and structure.

#### **4. The mechanism of using re-production forms through judicial precedent**

Plainly speaking, only the judicial precedent is widely used, and its theoretical source of endowment can gradually emerge, manifest itself in judicial practice, and may eventually become a source of reality. In the application of the judicial precedent, the normative reproduction mechanism is mainly embodied in: Relying on the continuous accumulation of judicial experience and rationality, the intellectual endowment of the judicial precedent is activated. With the promotion of judicial institutional resources, the judicial precedent has jurisdiction and attributes of individual norms. In the end, those rules with the highest level of and most important abstraction will be subject to substantive examination and procedural recognition by the legislature, and obtain the qualifications and status of normative sources. In order to achieve the reproduction of legal norms, the judicial precedent must first be transformed into judicial intellectual information, and then converted into referee rules, in order to create sufficient conditions for the ultimate access to normative legal sources. In the scope of the practice of judicial precedent, it is mainly reflected in the judicial precedent as the flow of intellectual information and its transition to the referee rules.

##### **4.1 The flow of intelligence information for the judicial precedent**

The primary response to the statute system is to regulate the resource demand. It is not the collective action of the court system to apply the precedent from the top-down institutionalization. It is the individual action of the diffuse use of judicial precedent based on judges and lawyers. For a long time, in the judicial practice of China, the mismatch between the weak liquidity of judicial precedent and the increasing size of judicial precedent constitutes the main contradiction in the application of judicial precedent, which seriously blocks the extensive and in-depth use of judicial precedent in judicial practice. Before the adjudication documents went online, the judicial precedent with a large base and rapid growth rate has been slashed in a single court. There are few ways for

judges to obtain judicial precedent from other judges and court, mainly the judicial cases compiled by the people's courts at various levels ( Including the "Gazette of Supreme People's Court of The People's Republic of China" case, the collection of court cases), the judicial cases published in the publications of the courts at all levels (such as "People's Judicature", "Applicable Law", "Shanghai Trial Practice" and other magazine publication cases), all levels judicial cases in the form of internal notices of the court (such as the case report of The First Intermediate People's Court of Shanghai and The Second Intermediate People's Court of Shanghai), the "Case Exchanges" of the courts of the Senior People's Court are regularly numbered to guide the case of this line trial, etc [11]. It can be seen that the main way for judges to obtain judicial precedent at the time was the compilation of judicial precedent based on paper printing materials within the court system. Lawyers are even less effective in obtaining judicial precedent. Therefore, the scale effect of the judicial precedent is difficult to fully exert. This kind of weak liquidity is mainly reflected in the following aspects: the judicial precedent is not open and unreachable. The information is dispersive. The high-value information is covered and diluted by low-value information, so that high-value information is concealed. The lack of value evaluation standards leads to scarcity of consensus. Insufficient institutionalization of information leads to unclear and often low benefits in the context of higher operating costs.

The power to eliminate the intellectual information flow barriers of judicial precedent stems from the combination of information technology development and judicial openness. Under the active role of the online system of refereeing documents (although it is "Unintentional Positive Outcomes", tens of millions of referee documents are presented to the public in an integrated manner, and the impact to form the overall judicial experience and rationality is difficult to estimate. It can be said that the characteristics of the era of the use of Chinese judicial precedent differ from the main countries of the extraterritorial precedent (law) system in that it is leaping into the Internet (Informationalization) Age of the judicial precedent after a period of printing that has been subjected to a short case study. In the new historical period, the use of judicial precedent is a product of the Internet era, and has been boosted by a new round of information technology revolution such as artificial intelligence. The use of the Internet age, artificial intelligence, and big data tools has an inestimable impact on traditional methods of judiciary. The use of Chinese judicial precedent follows and responds to this technological revolution, providing or opening up an important path or field for an effective combination of judicial methodological change and information technology revolution. In a word, the Internet has brought new dimensions to the use of precedents, which has profoundly changed the behavior, interaction, and form of individuals and organizations in judicial practice.

#### **4.2 The conversion of precedents to referee rules**

Why is the judicial precedent in the institutional application of judicial precedent almost invisible to the person, and always becomes a referee rule of a few sentences or a number of crosses through processing? Among the many factors, such as easy reference, improved efficiency, and wider coverage, the fundamental reason is that the court's institutional use of precedents is a responsive regulation of the disseminated flow of intellectual information. In a deeper sense, this responsiveness is reflected in the response to the spontaneous use of the judicial precedent, and on the other hand, in response to the regulatory requirements of the written law system. The rules of the referee itself, its refining process and the application process all reflect the adjustment, correction, regulation and monitoring of the use of the judicial precedent by the court system. Through regulation, the court system aims to achieve the following three main purposes: one is to regulate and guide the various behaviors and interactions in the spontaneous use of the judicial precedent. The second is to promote the benign operation and persistent improvement of the trial operation mechanism as an important means of trial management. The third is to improve the standardization of resources for legislation. In essence, the court system relies on the court's own institutional resource construction and the implementation of the judicial precedent application system through the response-based regulation of the referee rules, and then uses the referee rules as

institutional resources for court trial and trial management activities. Under the situation that the marginal benefit of the judicial system reform is getting smaller and smaller, the marginal benefit of the judicial trial behavior through the judicial experience and rationality and judicial system authority contained in the refereeing rules is getting more and more, and it is getting more and more attention from the judicial system.

## **5. Conclusion: the impact of normative reproduction on the use of precedents**

The widespread use of judicial precedent is continually changing the legal source structure and normative system of contemporary the legal system of China. Its impact is far-reaching and, most importantly, it is promoting the reproduction of judicial authority. Re-production of judicial authority refers to the production of the mandatory authority of the judiciary on the basis of strengthening the judicial persuasion authority by normalizing reproduction. First, the judicial precedent has accumulated so far, and the self-supply system of the endogenous resources of the court has been formed, and the court can use the accumulated experience, rationality, and wisdom determine cases from itself, which no longer rely solely on the supply of external legislative resources (and at the same time subject to legislation). Second, the widespread use of judicial precedent will change the inconsistency and incoherence of legal applications in the near future. The situation, on the qualitative level, achieves the unity of judicial standards, thereby strengthening public confidence in the people's courts. Third, the use of judicial precedent will create favorable conditions for relatively isolated external intervention, so that courts and judges can handle case disputes and make judicial rulings be more independent and better able to withstand pressure from outside parties. Fourth, the use of judicial precedent will establish a benign, close, and decoupled relationship within the court system, especially between judges and judges, which not only enhances cohesion within the court system, but also greatly improves the quality and efficiency of judicial adjudication with "waterfall effect" produced by the trend towards good precedents. We have reason to expect that the widespread and sustainable use of judicial precedent will greatly encourage the people's courts to become a more authoritative actor in the society, economy and even politics of China.

## **Acknowledgement**

This thesis is the phased result of the major project of the National Social Science Fund: "Theory and Practice of the Application of Judicial Precedent under the Written Law System of China" (18ZDA138).

## **References**

- [1] Gu Peidong. The Generation and Effect of the Spontaneous Use of Judicial Precedent. Chinese Journal of Law, 2, 2018, 76.
- [2] Lei Lei. Argumentation on Specification, Logic and Law. China University of Political Science and Law Press, 2016, 69.
- [3] Ma Chi. Analysis of the Concept of Legal Validity in the Legal Tradition - Legal Binding or Legal Qualification? Law and Social Development, 5, 2015, 122.
- [4] Lei Lei. Reviewing the Status of Guiding Case Laws. China Legal Science, 1, 2015, 283.
- [5] Zhang Qi. Re-argumentation on The Nature and Assurance of the Effectiveness of Guiding Cases. Law and Social Development, 1, 2013, 91.
- [6] Zhang Zhiming. The Jurisprudential Basis of the Construction of Judicial Precedent System, Tsinghua Law Review, 6, 2013, 94.
- [7] Su Yongqin. Several Situations for Judicial Law--A Case Study of Judicial Administration in

Two Cases from the Laws of Judges in the Two Legal Systems, in “Study on Sino-German Private Law (17): Judicial Law and Jurisprudence”, published by Peking University Society 2018 edition, 3-10.

[8] Yan Weijiang. Argumentation on the Effectiveness of Guiding Cases”, *Tsinghua Law Review*, 1, 2016, 22.

[9] Mono Conpeletti. *Judicial Procedures in the Perspective of Comparative Law*”, translated by Xu Xin and Wang Yi, Tsinghua University Press, 2005, 14.

[10] Dong Hao. *The Judicial Interpretation*, China University of Political Science and Law Press, 2007, 17-18.

[11] Ding Wenlian, Hu Xiaohong, Yu Dongai, et al. *The Actual Impact of the Case on the Chinese Judge’s Ruling Case - A Report from the Court of Shanghai on Empirical Investigation*. Containing the “Commercial Law Report (Volume I)”, CITIC Press, E. 2004, 111.