

A research review on applications of judicial cases in china

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Abstract

In the practice of litigation, a phenomenon began to appear in the last decade: both parties began to cite a large number of published cases, and judges and prosecutors should consider the complementary role of these cases to the statute law when handling cases. "The same case and the same sentence" and "utilitarian purpose" were the most obvious promotion reasons. Scholars generally believe that the guiding precedent system is only a summary of judicial experience, and it is a temporary measure in judicial reform that helps to enhance judicial credibility. Professor Gu Peidong's interpretation is quite different, and interpreted this phenomenon as a sprout of precedent system with Chinese characteristics. He comprehensively summarized the impact of case citation on judicial practice through the research on the current situation and reasons of spontaneous use of cases, the actual utility of case use, and the functional positioning of cases with different attributes, and prospected the future prospect of China's case system. There may be different ways to interpret the same phenomenon, but Professor Gu Peidong's research really deserves more consideration.

Keywords: Judicial Precedents, Judicial Principles, Legal Theory.

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Preface

There are three kinds of cases cited in China's judicial practice: the Guiding cases published by China's Supreme People's court and China's Supreme People's Procuratorate, the Exemplary cases published by provincial courts, and Ordinary cases which published online. The Guiding case system, which was established in 2010, initially aims at summing up judicial experience. However, a few cases have standardized and supplemented the substantive law and procedural law according to the right of legal interpretation. With the increase of the number of guiding cases, provincial courts began to increase similar cases around guiding cases, which became so-called Exemplary cases. Ordinary cases refer to the precedents published by courts at all levels to the "Judgment Document Network". In the "open trial

reform" started in 2014, every court was required to publish its judgment. In the process of judicial reform, the role of judicial precedents is gradually increasing. As a codification country without precedent and custom, the case can enter and effectively affect the judicial practice, which is undoubtedly an issue worthy of in-depth attention by the current academic circles. Professor Gu Peidong has long paid attention to the research on judicial reform in this country, having a high sensitivity to judicial practice, and his research will have enlightening effects on relevant researchers.

In 2018, Professor Gu Peidong published the article "The generation and effect of the phenomenon of spontaneous use of precedents" [1] mainly studies the current situation and causes of the spontaneous use of cases. In 2019, Professor Gu Peidong published another article named as "Reflections on the Application of Judicial Cases in China" [2]. It mainly studies the practical utility of guiding cases, exemplary cases and general cases in the application of judicial practice, and has normative functions such as "finding the law", "clarifying the law", "interpreting the law", "unifying the law" and "supplementing the law". The academic focus on the use of precedents should also shift from "effectiveness" to "utility", and recognize and determine the order of the use of precedents according to the utility. In 2021, Professor Gu Peidong published "the Functional Orientation of Cases with Different Attributes under China's written law system". This paper mainly studied the functional orientation of different attribute cases. In those papers, the three documents are referred to as "Case Spontaneity", "Case Application" and "Case

Function" (in the order of publication time, "The Generation and Effect of the Phenomenon of Case Spontaneity" are referred to as "Case Spontaneity"; "the Thinking on Some Problems of Case Application in China at present" is referred to as "Case Application"; "The Functional Orientation of Cases with Different Attributes under China's Written-Law System" is referred to as "Case Function").

From judgment to judgment basis

The prejudging effect of decided cases: In recent years, various cases publicly announced by the Chinese court system gradually have a certain color of judgment basis. It is mainly reflected in that the guiding cases, demonstration cases and general public cases have a certain pre-judgment effect on the cases in litigation and even not been sued and adjudicated. This kind of pre-determination function mainly comes from a certain utilitarian purpose, and "the same case, the same judgment" is its main reason. The purpose of lawyers, judges, prosecutors and parties actively searching, quoting or actively applying for the reference of case handlers for cases with roughly the same circumstances is to actively pursue their own favorable judgment results. This multi-agent active participation and result comparison for utilitarian purposes have become the main force to promote the effectiveness of case pre-determination. "The phenomenon of spontaneously and actively using precedents to recognize and evaluate pending cases, design litigation or trial ideas, demonstrate litigation or judgment claims, strengthen and enrich litigation or judgment reasons, and evaluate and measure judgment results is quietly rising, and has increasingly become the normal and universal practice in China's judicial activities." [3].

Normative role of precedents: Professor Gu believes that according to the authority of the case publishing authority, the above three cases have different scope of action for judicial adjudication. Authoritative cases have the similar nature of judicial interpretation, which can improve the sufficiency of the supply of judicial norms, maintain the comprehensiveness of the judicial norm system and realize the accommodation of the judicial norm system. The exemplary cases are mainly used to promote the uniform use of laws within the provincial level; General cases have the function of sharing judicial experience. This kind of classification emphasizes more on the ways of norm generation and the practical effect of norm generation of authoritative precedents.

From experience to specification supplement

In China's judicial practice, the guiding cases did not point to the construction of norms in the initial stage, but mainly to the purpose of unifying the judicial scale and accurately applying the law [4]. In the current judicial practice, there is neither "precedent constraint" nor "judge making law", which is the main premise to analyze the function of judicial precedent. Under this premise, how to realize and treat the guiding function of Guiding cases has become a problem that must be explained. There are essential differences between the case guidance system and case law. At the same time, it also shows that the Guiding cases are different from a large number of ordinary cases. "Its difference is the guiding value... It has multiple meanings such as reference, reference, demonstration, guidance, inspiration, standardization

and supervision, which need our comprehensive understanding and grasp." [5].

Judicial experience and normative supplement: The effectiveness of Guiding cases comes from the judicial interpretation power of the Supreme People's court and the Supreme People's Procuratorate. In the written law countries of the 19th century, it is generally assumed that the legislature has a perfect legislative state, and then limit the judge's legal choice and legal interpretation, and the judge can only strictly enforce the legal norms, so as to ensure that the "public opinion" represented by the legislature can be truly fulfilled. However, in the following 20th century, this assumption of omnipotent legislation proved to be inconsistent with the actual situation: legislation is difficult to achieve a "perfect state", and the legislative process is actually more accurate. The interpretation and even development of law by judges is considered to be the most important part of the judicial process. The adjustment of legislative results in the judicial process is both inevitable and reasonable. The legislative process is regarded as a political process, which often means mutual compromise and unstable and unscientific positions.

The existing laws can not reach the "perfect" state, and it is difficult to provide the judiciary with standard answers to all practical problems, resulting in the judicial procedure having to carry out the necessary legal interpretation to adapt to the emerging new disputes. Taking the legislation since China's reform and opening up as an example, the relatively crude legislation basically conforms to the actual situation at that time: the society is undergoing great changes, while maintaining the relative stability of the law. The judicial judgment under this legislative mode has a large choice space in judicial interpretation and case judgment. In fact, authoritative precedents not only have the color of interpreting law as jurisdiction, but also have the color of judicial interpretation of law. Therefore, guiding cases can be regarded as an appropriate supplement to legal loopholes through judicial experience.

Formation of normative supplement: The generation of traditional norms generally refers to the systematic production of legal norms by the legislature in the process of legalization. In this systematic standard manufacturing, it is difficult to accurately estimate whether a specific standard conforms to social practice; It is also difficult to predict whether some norms can accurately prevent crime or deal with crime appropriately; The design of penalty and term of imprisonment takes more account of the past forms of crime, while it is impossible to accurately predict the possible crimes in the future. Guiding cases, exemplary cases and general cases provide the basis for the emergence of new norms. When a large number of precedents are selected by a certain standard, the consideration of the actual social effect of the judgment will inevitably become one of the conditions. This provides a long-term top-down observation, examination and thinking based on experience. Such thinking in specific cases may no longer be limited to the specific purpose of natural law morality and code systematization, but come from the empirical investigation of social practice. At the same time, the fact finding method and legal analysis method based on certain technology will also be reflected in the case judgment process and become an empirical summary of the judge's personal judicial process.

Therefore, the formation of "supplementary norms" is more in line with the basic law of "judge law".

From concrete to general: a new induction

Goethe said that theory is gray, but the tree of life is evergreen. From judgment to norm, it is likely to indicate the gradual maturity of a new legislative and judicial technology. For a long time, the contradiction between legal norms and the perspective of social life has not been solved. From the perspective of real life, China's political and economic way of life is still collective, which means that social organizational life and social perspective become the main consideration direction; However, when the law is legislated, it has to be standardized from the aspects of individual rights and obligations. This means that there are various unavoidable contradictions between the collective way of life and the perspective of individual rights in legal norms; In the long-term judicial practice, there is a lack of judge technology to combine the two, which will inevitably lead to "mechanical justice" or legislation that is difficult to implement.

Specific system supplement process: In the process of case formation, the cases faced by judges are realistic and specific. The judge's judgment process can be simplified into the process of fact finding and the process of law application. It is not only the process of interpreting the specific disputes in the case as various abstract norms to be applied, but also the process of concretizing the legal norms. The selection of authoritative precedents is a positive evaluation of the above "concretization process" and "interpretation process", and it is also a methodological guide for the abstraction of facts and legal concretization of subsequent pending cases. When authoritative precedents become a supplement to norms, it means that the above process and content are exemplary and binding. "The contribution of guiding cases to the comprehensiveness of the judicial norm system is mainly reflected in effectively making up for the deficiencies in the types of norms such as laws and regulations, legislative interpretation, judicial interpretation and judicial documents, such as unclear meaning, incomplete coverage, insufficient consideration of marginal effects and insufficient balance of interests". Through this technical supplement, the general norms are applied to individual cases, and thus become the consideration object of more judgments in the future, so as to avoid the high cost of the amendment procedure.

Specific system supplement process: There are two main procedures for the formation of specific authoritative precedents: one is the process of multi-party participation in the formation of precedents; The other is the choice of court hierarchy in the case selection procedure. At present, it is not clear about the latter procedure, but in the former procedure, it actually has different roles and contents from the legislative procedure, forming the procedure: the participation of the parties. Most of the

time, national legislation is actually presided over by relevant organs, and it is difficult for stakeholders to enter the legislative level to claim the legitimacy of their own interests; However, in the formation of precedents, there is no doubt that the judge has no right to prevent interested parties from expressing their opinions, or even that the judge must seriously consider the legitimate rights and interests of all parties and then specify the opinions in the formation of the judgment. Through the formation process of authoritative precedents, the defense opinions or rights and interests claims in the original case will enter the basis of future judgment.

Conclusion

The above three papers make an in-depth analysis of China's existing and emerging case system from different angles. Professor Gu Peidong's research has a very keen sense of problems. Be able to analyze more in-depth existing problems in common phenomena. And can conduct in-depth research in a long time, which is undoubtedly a great enlightenment in legal research.

Chinese existing role in normative supplement and referee reference is still very limited. This is the normative and realistic premise of the pre determination effect of precedents; Second, the optional nature of precedents is actually based on the court level, and further enhances the authority of higher courts (especially provincial courts) to lower courts in terms of legal interpretation and application, which is the authoritative condition for the emergence of pre judgment effect; Third, the conditions for the selection of cases are mainly based on the comparability of case facts in different cases, which provides a "consultation" operation space for the determination of facts on the premise of ensuring the unity of law. This is the realistic condition for the parties outside the public power organs to actively participate in the effectiveness of precedent pre-determination. The "guiding cases" published by the Supreme People's court have the same effect as judicial interpretation, which also seems to imply that the Supreme Court, as the court of final appeal, has more responsibilities in developing legal norms.

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