

# Comparison between the Ethiopian Model of Cassation Division Binding Legal Interpretation and the Chinese Model of Guiding Case

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## Abstract

*Both Ethiopia and China have introduced a system resembling a common law feature where the judiciary is involved in the development of case laws. This article is purported to compare and contrast the cassation model of Ethiopia and the Chinese guiding case system and to draw relevant lessons. Using doctrinal research methodology, the article examined relevant Ethiopian and Chinese laws, scholarly research findings and the literature in the field. After due analysis, the author concluded that China's guiding case system adopts a broad base of case selection systems involving the decision of lower courts whereas the Ethiopian system entirely depends on the Cassation division decision of the federal supreme court. In the Chinese system, both internal and external recommendation for a guiding case is allowed. The internal recommendation may come from various levels of courts besides the Supreme Court. Externally, the delegates of the lawmakers, experts, scholars, lawyers, and any other interested party could recommend a guiding case. Conversely, Ethiopia's system does not allow recommendations from other courts or an outsider stakeholder. Finally, China has detailed guidelines on the selection, recommendation, approval, and publication of a guiding case whereas Ethiopia's system lacks a comprehensive guideline. Therefore, this article argues that involving external recommenders, having an independent office and enacting detailed procedural directives are among the best practice that Ethiopia should learn from the Chinese guiding case system.*

**Key words:** Guiding Case, Cassation, Precedent, Ethiopia, China

## Introduction

China is largely a civil law country where the primary sources of law are the constitution followed by the laws promulgated by the National People's Congress (NPC) and its Standing Committee.<sup>1</sup> The administrative regulations

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<sup>1</sup>Mo Zhang, Pushing the envelope: application of guiding cases in Chinese Courts and development of case law in China, *Washington Journal of International Law Association*, Vol. 26 No. 2, (2017), p.282.see also Wang Chang *Inside China's legal system*, Madson, Nathan H. Oxford, UK Chandos Publishing, (2013), pp.56–7. China's legal system is largely a civil law system, reflecting the influence of Continental European legal systems, especially the German civil law

made by the State Council also serve as sources of law applicable nationwide.<sup>2</sup> Moreover, provinces and municipal people's congresses are entitled to adopt local regulations involving local concerns.<sup>3</sup> At the bottom of the hierarchy are the rules, decrees, or ordinances issued by various ministries as well as the executive branch of provincial governments.<sup>45</sup>

Despite its choice of the civil law approach, a new trend of guiding case system of common-law character has also been attempted in different periods.<sup>6</sup> Most importantly, case publication by the Supreme People's Court began as early as 1985 when the *Gazette of Supreme People's Court* was first introduced.<sup>7</sup> Back then, the Supreme People's Court published cases with the view to utilize guiding cases to help unify the standard application of the law, direct the adjudicative work of the lower courts in their adjudication of similar cases.<sup>8</sup> However, the issue of whether the guiding cases should have a binding effect over lower court decisions through out the country or it is a mere suggestion to lower courts was disputable.<sup>9</sup>

In response, the Supreme Court has issued rules *Concerning the work of guiding cases* in November 2010.<sup>10</sup> The rule aims at summarizing adjudication experiences, unifying the application of the law, enhancing adjudication quality,

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system in the 19th and early 20th centuries. On the other hand, Hong Kong still retains the common law system inherited as a former British colony, and Macau employs a legal system based on that of Portuguese civil law. This is part of the One Country, Two Systems theory. They have their own courts of final appeal. As such, respectively, they are not within the jurisdiction of the court system within China, which is only effective within mainland China.

<sup>2</sup> Mo Zhang, *supra* note 1, p.283.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Notice of Issuance of the Second Five-Year Reform Outline of the People's Courts (promulgated by Supreme People's Ct., October 26, 2005), (herein after called Five-Year Reform Outline of the People's Court(2005), available at <http://www.66law.cn/tiaoli/2915.aspx>, (accessed on 5 December 2021).

<sup>7</sup> Hu Yunteng and Yu Tongzhi, Study on Several Important and Complicated Issues Concerning the System of Case Guidance, *Jurisprudence Research Journal*, Vol.6, (2008), p.125.

<sup>8</sup> *Id.*

<sup>9</sup> Mo Zhang *supra* note 1, p.271.

<sup>10</sup> According to Article 1 of the provision of the Supreme People's court concerning work on the guiding case, the term Guiding Cases is defined as the case which has a guiding effect on adjudication and enforcement work in courts throughout the country, shall be determined and uniformly released by the Supreme People's Court. See Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance, passed by the Adjudication Committee of the Supreme People's Court Apr. 27, 2015, issued and effective May 13, 2015, (hereafter called Detail Implementing Rule), available at <http://cgc.law.stanford.edu/guiding-cases-rules/20150513-english> (accessed on 14 Dec 2020).

safeguarding judicial impartiality,<sup>11</sup> setting the standard and procedures for the selection of guiding cases.<sup>12</sup> Article 7 of the Guiding Case Provisions provides that the people's courts at all levels *shall refer* to the guiding cases when adjudicating similar cases.<sup>13</sup>

The Supreme People's Court adopted detailed rules for the implementation of the Guiding Case Provisions under its power of judicial interpretation.<sup>14</sup> The rules are designed to provide judges with instructions on how to refer to guiding cases in case of adjudications. Yet, this set of rules makes the status of the guiding case intentionally vague.<sup>15</sup> The provision in the detailed rules provides that when referring to the guiding cases during the adjudication of similar cases, the courts at all levels shall cite the guiding cases in their judgment reasoning, but may not use the guiding case as the legal basis for their judgments.<sup>16</sup> Despite the Supreme People's Court's efforts to clarify the matter, questions on the status of the guiding case remain widely open since the citation of guiding cases is required in judicial reasoning. Particularly, it remains unsettled whether a guiding case has the effect of binding precedent or remains merely a reference.<sup>17</sup>

Turning to Ethiopia, precedents did not have much attention in the Country's legal culture. Under the current Ethiopian Constitution, the House of Peoples' Representatives has legislative power in all matters assigned by the Constitution to Federal jurisdiction. Also, regional state councils have law-making power in all matters that belong to them.<sup>18</sup> According to Article 80 of the Constitution, the Federal Government has three-tier courts: Federal First Instance Court, Federal High Court, and Federal Supreme Court. The Constitution provides that "the Federal Supreme Court has a power of cassation over any final court decision

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<sup>11</sup> Provisions of the Supreme People's Court Concerning Work on Case Guidance, passed by the Adjudication Committee of the Supreme People's Court on Nov. 15, 2010, issued on and effective as of Nov. 26, 2010, (hereafter called Guiding case provision), English Guiding Cases Rules Edition, available at <http://cgc.law.stanford.edu/guidingcases-rules/20101126-English>, (accessed on 9 Dec 2021).

<sup>12</sup> Notice of Issuance of the Five-Year Reform Outline of the People's Court, *Promulgated by Supreme People's Court Gazette* (October 20, 1999), available at <http://sifaku.com/falvfagui/39/zcff03a163ec.html> accessed on 12 Dec 2020.

<sup>13</sup> Five-Year Reform Outline of the People's Court (2005), *supra* note 6, Article 7.

<sup>14</sup> *Id.*, p.28.

<sup>15</sup> *Id.*

<sup>16</sup> Detailed Implementing rule, *supra* note 10, Article 10.

<sup>17</sup> Mo Zhang, *supra* note 1, p.273.

<sup>18</sup> The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, *Federal Negarit Gazzeta*, (1995) Article 55(1), [hereinafter FDRE Constitution].

containing a basic error of law.”<sup>19</sup> The state supreme courts have the cassation power over any final court decision on State matters.<sup>20</sup>

While the elements of a civil law system have largely been in place over the decades, Ethiopia has also attempted several times to utilize uniform interpretation of laws through the adoption of Common law features in its judiciary. For example, Proclamation No. 195/1962 made the decisions of superior courts binding on all subordinate courts on matters of law.<sup>21</sup> The problem with this proclamation was that higher court decisions were not officially published nor their status as precedent was practically certain at the time. The second attempt was made during the Transitional period following the fall of the Dergue regime. The transitional government Proclamation No. 40/1993, under Article 24(4), provides that an *interpretation of the law made by a division of the Central Supreme Court constructed by no less than five judges shall be binding*.<sup>22</sup>

Yet, the most significant development has been made through the enactment of Proclamation No. 454/2005 to re-amend the federal court Proclamation No 25/1996. This Proclamation in its Article 2(1) states that interpretation of the law by the Federal Supreme Court (FSC) rendered by the Cassation Division with no less than five judges shall be binding on the federal as well as regional courts at all levels. The cassation division may however render a different legal interpretation some other time. By rendering binding interpretations of the basic errors of law, the Federal Supreme Court sets the tune for other federal and regional courts to follow the same approach.

The most recent law, Proclamation No.1234/2021, has repealed all previous laws but maintained the meaning of *binding interpretation*. According to Article 10(2), of the newly enacted proclamation, interpretation of law rendered by the

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<sup>19</sup> Id., Art. 80(3)(a). Concerning the Federal Supreme Courts' power of cassation over cassation, there have been for and against debate among Ethiopia legal scholars. For example, an author like Mehari Redai argues that the Federal Supreme Court has no legal authority having to review Regional State matters. See Mehari Radea, Observations of Federal Cassation Power Sources and Cassation over Cassation' (Amharic), *Journal of Ethiopian Law*: Vol.24. No.2, (2010), p. 201-213. Other authors like Abebe Mulatu argue in favor of cassation over cassation and justifies his argument by lack of expertise in regional state and the need to have a uniform interpretation of laws. The author's full version of the argument can be found in his work Abebe Mulatu, Apportionment of Jurisdiction under the 1994 Ethiopian Constitution, *Symposium Proceedings Ethiopian Civil Service College*, (2000), p.15.

<sup>20</sup> FDRE Constitution, *supra* note 19, Article 80 (3) (b).

<sup>21</sup> Proclamation No. 195/ 1962, *Negarit Gazette* 22<sup>nd</sup> year, No. 7, Article 15.

<sup>22</sup> A Proclamation to Provide for the Establishment of Courts of Central Transitional Government Proclamation No. 40/1993, *Negarit Gazette* 52<sup>nd</sup> year, No. 25, (1993), Article 24(4).

Cassation Division of the Federal Supreme Court with not less than five judges shall be binding from the date the decision is rendered. The Federal Supreme Court shall publicize decisions rendered by its Cassation Divisions on binding interpretation of laws via electronic and print Medias as soon as possible. This new proclamation under Article 26(4) also provides that interpretation of law rendered by cassation division presided by not less than seven Judges may review the same issue by not less than seven Judges.

Looking into the binding scope of precedents over the decades, one could observe variations. For example, Proclamation No. 195/1962 was broader than the other two legislations and it stipulates that all the lower courts are bound by the decisions of the higher courts although its practical application was in question.<sup>23</sup> The second and the third proclamations referred only to a cassation division within Central or Federal Supreme Court, which binds all courts. In other words, they limit themselves to a specific division, unlike the common law system where lower courts are generally bound by the decisions of higher courts according to their hierarchy.

So far, the Cassation division of the Ethiopian Federal Supreme Court has published 24 volumes of cases involving the interpretation of laws containing basic error of law.<sup>24</sup> Nonetheless, given the fact that the practice of judicial precedent has not yet been well developed, there are still many uncertainties. Among others, there are contentions over the constitutionality of cassation over cassation<sup>25</sup>, on clarity and persuasiveness of the decisions, and the lack of detailed procedures for selection and amendment of cassation.

Using doctrinal research methodology, this article compares the Ethiopian FSC cassation division binding interpretation system with Chinese guiding case law, and it identifies relevant practices and draws insights for better practices. The basic criteria for comparison are the way of establishing binding interpretation; the status of the binding interpretation; and repeal or amendment as they are the defining feature of binding interpretation. The comparative investigation is justified mainly on three grounds. First, both Chinese and Ethiopian courts do not have lawmaking power. Second, in terms of authority of setting a precedent, both countries have entrusted power only to the highest-level court. Third, in

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<sup>23</sup>Abdissa Dashura, Implication of Cassation over Cassation in the Ethiopian Federal Context: With Special Reference to Self-Determination', LL.M thesis( unpublished ), (2014), p.23.

<sup>24</sup> See the official website of Federal Supreme Court of Federal Democratic Republic of Ethiopia, <http://www.fsc.gov.et/Documents/Index1>, (accessed on 15 March 2021).

<sup>25</sup> Muradu Abdu, Review of decisions of state courts over state matters by the federal supreme court, *Mizan Law Review*, Vol. 1 No.1,(2007), p. 60.

both countries, the scope of precedent has continued to be the source of debate. Such parallel between the two systems would lend a way to identify relevant practices and to draw insights for better institutional practice.

In doing so, the article is organized under five main sections. Section one presents the essence of a precedent system in common law and civil law traditions. Section two reviews the procedures through which the guiding case and binding interpretation of the law are established in China and Ethiopia respectively. The third section is dedicated to comparing the two systems in terms of the legal effect of the guiding case and binding interpretation of the law by the Cassation Division. This section particularly aims to compare the circumstances where lower courts are bound to apply guiding cases and binding interpretation of the Cassation Bench. Section four compares the procedure of amendment or repeal of guiding cases and the Cassation Bench binding interpretation. Section five discusses the existing challenges in both systems. Finally, the article concludes by recapping the best practice of each system.

## 1. Precedent System: An Overview

### 1.1. Essence and Justification of Precedent System

A precedent is a principle or rule established in a previous legal case that is either binding or persuasive for a court or other tribunals when deciding subsequent cases with similar issues or facts.<sup>26</sup> It is based on the notion of “stare decisis”, derived from the full Latin maxim “*stare decisis et non quieta movare*”, which literally means to stand by a decision and not to disturb that which is settled. That is, when a particular point of law is decided in a case, all future cases containing the same facts and circumstances will be bound by that decision.<sup>27</sup>

In terms of effect, a precedent can have a binding or persuasive effect.<sup>28</sup> Binding precedents, also known as authoritative precedents, are previous decisions which must be followed by judges once a judgment is made whether they approve it or not. Conversely, in persuasive precedents, the lower courts are not bound to follow the decision of higher courts. It depends on the court to decide whether to rely on it or not. Persuasive precedents mostly apply in civil law tradition where

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<sup>26</sup> Black's Law Dictionary), 5<sup>th</sup> ed, (1979), p. 1059.

<sup>27</sup> Mary Garvey Alger, The Sources of Law and the Value of Precedent, *Louisiana Law Review*, Vol. 65, No.2, (2005),p.782.

<sup>28</sup> Sebastian Lewis, 'Precedent and the Rule of Law', *Oxford Journal of Legal Studies*, Vol. 41, No. 4 (2021), p. 875

judges consider precedent similarly but are not obliged to do so and are required to consider the precedent in terms of principle.

The most widely held justification behind precedent as a source of law rests on three basic grounds.<sup>29</sup> First, courts should ensure certainty in the law through which people could predict the legal consequences of their actions. Such predictability could be obtained if judges can be expected to follow precedent in making their decisions. A second justification holds that the use of precedent is necessary to ensure that similarly situated litigants are treated equally.<sup>30</sup> According to this justification, two cases adjudicated by the same court, occurring in the same place and at the same time, and arising out of facts that are identical except for the identity of the litigants, should be treated equally.<sup>31</sup> As a way to ensure this principle of equality before the law, courts are required to make conscientious inquiries into the cases at hand. The first inquiry required in this respect is whether the case to be decided has similar facts or raises roughly the same issue as a case that is a potential precedent. If the earlier case can be distinguished from the one at the bar, it is not a "like" case, and judges deciding the latter case need not follow it. Third, the doctrine of precedent is often defended on the ground that it promotes judicial efficiency. Earl Maltz, for example, argued that "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's course of bricks on the secure foundation of the courses laid by others who had gone before him".<sup>32</sup> Thus, precedent is said to reduce the burden of judges in the sense that judges can have guidance from the previously decided case on the interpretation and application of laws. Overall, whether it is civil law, common law, or other legal traditions, reliance on precedent is grounded in the rationale to create certainty and stability for parties operating in the jurisdiction. The doctrine of precedent is a vital part of English legal system as it provides certainty to the law and sets up the hierarchical structure of the court system.

## **1.2. The Position of Precedent in Common Law and Civil law Legal Tradition**

It is a common characteristic of the legal systems that a law enacted by a law-making body is a source of law for that jurisdiction.<sup>33</sup> When it comes to a

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<sup>29</sup> Maltz E, *The Nature of Precedent*, *North Carolina Law Review*, Vol. 66, No. 2, (1988), p. 369.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*, p. 369.

<sup>33</sup> Mary Garvey Algero, *supra* note 27, p.782.

precedent as source of law, however, jurisdictions have varied stances. Unlike most civil-law systems, common-law systems follow the doctrine of *stare decisis*<sup>34</sup>, by which most courts are bound by their own previous decisions in similar cases and all lower courts should make decisions consistent with previous decisions of higher courts.<sup>35</sup> The courts decide the law applicable to a case by interpreting statutes and applying precedent, which records how and why prior cases have been decided. The following section discusses the position of common law and civil law traditions in terms of the nature, function, and scope of the precedent as they are the dominant system and related to the subject under discussion.

### 1.2.1. Precedent in Common Law Tradition

In common law tradition, the doctrine of *stare decisis* commands judges to apply the law as it has been set out in one prior case when the prior decision was made by a court that is higher than and sometimes equal to the court rendering the present decision.<sup>36</sup> The part of the decision that is binding is the *ratio decidendi* or the rule of the decision, as opposed to extraneous comments of the judges that are not relevant to the court's decision.<sup>37</sup> England and the United State of America (USA) are jurisdictions with established practice of the precedent system. In England, the decisions of the court of appeal bind lower Courts in the hierarchy,<sup>38</sup> whereas the decision of high courts does not bind any other court but serves merely as persuasive authority for other high courts and lower courts.<sup>39</sup> Finally, decisions of the House of Lords are strictly binding on all lower courts and on the House of Lords itself.<sup>40</sup>

In the USA, forty-nine states, other than Louisiana, as well as the USA federal court system follow precedent as a source of law.<sup>41</sup> The doctrine of *stare decisis* requires the lower courts in those jurisdictions to be bound by the decisions of

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<sup>34</sup> Bryan A. Garner, *A Dictionary of Modern Legal Usage*, 2<sup>nd</sup> ed.(1995), P. 827.

<sup>35</sup> For example, in England, the High Court and the Court of Appeal are each bound by their own previous decisions, but the Supreme Court of the United Kingdom can deviate from its earlier decisions, although in practice it rarely does so. See also Mary Garvey Algero, *supra* note 27, p.782.

<sup>36</sup> Bryan A. Garner, *supra* note 34.

<sup>37</sup> James Dennis, Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent, *Louisiana Law Review*, Vol.54, issue.1, (1993), pp.4-5.

<sup>38</sup> Theodore F. T. Plucknett, *A Concise History of the Common Law*, 5<sup>th</sup> ed., (1956), p.326.

<sup>39</sup> *Id.*, p.327.

<sup>40</sup> Mary Garvey, *supra* note 27, p.782. The House of Lords issued a notice in 1966 stating its position on *stare decisis* and the use of precedent, which changed the practice that had been in existence since 1898.

<sup>41</sup> *Id.*, p.785.



the courts to which the lower courts' decisions are appealable. In these jurisdictions, the decisions have a force of law, judge-made law. Concerning overruling, the United States Supreme Court has the express power to overrule its own decisions," as do most of the state supreme courts.<sup>42</sup> Courts in the United States are allowed to deviate from strict adherence to precedent when the precedent appears to be outdated, when "the existing rule has produced undesirable results," or when "the prior decision was based on what is now recognized as poor reasoning."<sup>43</sup>

### 1.2.2. Precedent in Civil Law Legal Tradition

In civil law tradition, codes are the principal sources of law, and precedent is not formally recognized as a source of law. When considering precedent, courts are likely to look at prior decisions as mere interpretations of the law, and the courts are often free to decide consistently with the prior court's interpretation of the law or reject the prior interpretation.<sup>44</sup> If a court has adjudicated a consistent line of cases that arrive at the same holdings using sound reasoning, then the previous decisions are highly persuasive but not controlling on issues of law.

In some civil law systems, the doctrine of "*jurisprudence constante*" or "*giurisprudenza costante*"<sup>45</sup> calls on these courts to recognize the persuasive value of a long line of precedents. Therefore, a decision by a highly ranked court may carry considerable weight or even serve as a *de facto* binding authority due to the prevalence of availability of reported cases and the hierarchy of courts.<sup>46</sup> Both the Chinese and the Ethiopian legal system largely belong to the civil law system with codes and predefined rules in that judges seek the legislator's intention and the historical backdrop of the legislation to interpret the law.<sup>47</sup>

A close examination of French, Italian, Spanish, and Louisianan legal system reveals this fact. Principally, French courts are only bound to follow the official sources of law-the Constitution, European law, statutes, and codes-even though precedents are frequently cited by the courts to explain how to interpret and

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<sup>42</sup> Id.

<sup>43</sup> Id.

<sup>44</sup> Bryan A. Garner, *supra* note 34, p.126.

<sup>45</sup> Id., p.1217.

<sup>46</sup> *Mary Garvey*, *supra* note 27, p.788.

<sup>47</sup> Gebeyehu and Nadew Zerihun, 'How Does the Case Law System Fit into the Ethiopian Legal System?', <https://ssrn.com/abstract=2604475> or <http://dx.doi.org/10.2139/ssrn.2604475> accessed on 20 August 2022. See also Wang Chang, *Inside China's Legal System*, Madson, Nathan H. Oxford, UK Chandos Publishing, (2013), pp. 56–7

apply these sources.<sup>48</sup> Exceptionally, however, the decisions of higher courts in the French judicial system certainly have force on the lower courts whose decisions will be appealable to those same courts. The lower courts must conduct their analysis of the cases presented to them in light of the applicable enacted law, but they decide on cases knowing that the higher court may reverse them should they decide in a way inconsistent with the higher court's earlier decisions.<sup>49</sup>

Therefore, the lower courts are under implicit influence to follow the decisions of higher courts. In this regard, the decisions of the higher courts can provide an "authoritative argument" to the lower courts on how to interpret the enacted law, though "the lower court has no legal obligation to follow that argument."<sup>50</sup> This method of allowing precedent to play an important role, though not allowing it to bind courts, has been described as creating a "*de facto* obligation" to follow precedents, which arises from the hierarchy within the court system.<sup>51</sup>

Similarly, the Italian system considers precedents in much the same way as the French system. In the Italian legal system, no precedent may be considered strictly binding since there is no system based on the principle of formally binding precedent.<sup>52</sup> Italian courts are only bound to follow the official sources of law-codes, constitutions, and statutes. Precedents are frequently cited to the courts to justify how to interpret and apply the official sources of law.<sup>53</sup> However, the lower courts have a right, not an obligation, to apply the previous ruling. Thus, the decisions of the higher courts are instructive to the lower courts on how to interpret the enacted law.

In Spain, the fundamental principle of law is that the judge is bound by statutory law and not by precedent. The Civil Code of Spain lists legislation, custom, and the general principle of law as official sources of law.<sup>54</sup> However, Article 1(6) of the civil code recognizes "jurisprudence of the courts" as a "complement" to the legal order based on a doctrine constantly established by the Supreme Court. As such, these sources would be used in the interpretation of legislation, customs,

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<sup>48</sup> Michel Troper & Christophe Grzegorzczak, Precedent in France: in *Interpreting Precedents: A Comparative Study*, (1997), p. 130-31.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*, p. 111.

<sup>51</sup> *Id.*, p.790.

<sup>52</sup> *Id.*

<sup>53</sup> Mary Garvey, *supra* note 27, p.790.

<sup>54</sup> *Código Civil* (the Civil Code of Spain) provides in part:C.C. art. 1(1) (translation by . Julio Romanach, Jr., Lawrence Publishing Co. (1994), p.12.

and the general principles of law. Thus, although the legislature has not recognized precedent as a formal source of law, it has recognized its value.

The system of the state of Louisiana in the USA has a bit different stipulation. This legal system has developed in a way that most closely resembles the civil law traditions when it comes to the sources of law and the value of precedent with one exception-the express judicial recognition that Louisiana Supreme Court decisions are binding on the lower courts.<sup>55</sup> Much like the Civil Code of Spain, the Louisianan Civil Code identified legislation and custom as the sources of law. In the absence of legislation and custom, the Civil Code directs judges to "proceed according to equity."<sup>56</sup> Unlike other civil law jurisdictions, the Louisiana Supreme Court identifies its decisions as binding statements of Louisiana law. The decisions of the highest court in the system, which is the court of last resort, are considered statements of binding law on all of the lower courts, subject to change only by the highest court itself or the legislature, which is similar to the common law concept of *stare decisis*.<sup>57</sup> Other Louisiana court decisions are not considered binding on any court. This in effect is an aspect of the concept that incorporates the doctrine of constant jurisprudence. Finally, from a close observation of these features, one can notice considerable commonalities between the Louisiana system of precedent and the Ethiopian cassation bench binding interpretation.

Overall, in civil law tradition, courts are not obliged, at least as a matter of law, to follow precedents. Although precedents are not recognized by the legislature as sources of law, they still play important role in determining the meaning of laws. However, the lower courts in this legal tradition are free to take a different position on a legal issue from the position taken by the higher courts, but they are expected to adequately explain the reasons for disregarding the high court's prior interpretation of the law.

## **2. Comparison between Chinese Guiding System and Cassation System of Ethiopia**

### **2.1. Establishing the Guiding Cases Vis-à-Vis Cassation Binding Interpretation**

In the Chinese system, there is a well-established rule that governs the processes of establishing guiding cases. The 2010 Guiding Case Provision primarily

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<sup>55</sup> Mary Garvey Algero, *supra* note 27, p.790.

<sup>56</sup> Louisiana Civil Code (1999), Article4.

<sup>57</sup> Mary Garvey Algero, *supra* note 27, p.891.

establishes the basic requirement that needs to be satisfied with the quality as a guiding case. Accordingly, a given case must satisfy two requirements as a guiding case status.<sup>58</sup> First, the judgment has to be already taken into effect.<sup>59</sup> Second, the judgment should have one of the following features: (a) the judgment is of great social concern; (b) it involves the issue for which the legal provision is relatively general; (c) the judgment is typical; (d) the judgment is difficult, complicated or of a new type; or (e) it contains other quality of guidance.

If a case satisfies these criteria, a three-step selection process of guiding case would follow.<sup>60</sup> The first step is case recommendation by internal or external bodies. There is a broad base for making such a recommendation in China's guiding system. Under the Guiding Case provisions and the detailed rules, the recommendation could be made either internally or externally. The internal recommendation may come from the adjudication divisions of the Supreme People's Court, the High People's Courts, and military courts.<sup>61</sup> The people's courts at intermediate and trial levels may also make recommendations through their corresponding High People's Court.<sup>62</sup> Externally, the recommenders could be the delegates of the NPC(National Peoples' Congress), members of the CPPCC(Committee of Peoples' political Consultative Committee), experts, scholars, lawyers, and any others who are interested in the adjudication and enforcement work of people's courts.<sup>63</sup> Therefore, China's guiding case law system is more participatory than it is only the issues of the Supreme People's Court.

The second step of establishing a guiding case in the Chinese system is the selection and review stage, which is different from the common law system. In typical case law systems such as England, binding precedents could be generated by other courts of higher status in addition to the House of Lords.<sup>64</sup> In cases where precedents are made by lower courts, the courts of the higher

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<sup>58</sup> Guiding Case Provision, *supra* note 11, Article 2.

<sup>59</sup> *Id.*

<sup>60</sup> Detailed Implementing Rule, *supra* note 10, Article 5.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*, Article 4.

<sup>63</sup> *Id.*, Article 5.

<sup>64</sup> In the English legal system, the House of Lords makes precedents binding all courts in the hierarchy of courts. The European Courts of Justice's decisions bind the House of Lords. Lower courts such as the Court of Appeal, Divisional Courts and High Courts, in turn, make precedents that are binding on courts that are lower in the hierarchy of English courts. See Slapper and D. Kelly, 'The English Legal System', (2009), p.123-132.

hierarchy may consider such precedent though not bound to follow them as binding on such a higher court.<sup>65</sup>

The Chinese system of guiding cases takes a different approach than the typical case law system. In the Chinese system, even cases decided by the lower court can be selected as a guiding case to courts of all hierarchies. Institutionally, the Chinese Supreme People's Court has created an office to facilitate the guiding case selection. Members of the Guiding Case Office are the judges designated by the Supreme People's Court. The guiding case office is in charge of the solicitation of case recommendations and is responsible for collecting, selecting, and reviewing the cases recommended by internal and external bodies.<sup>66</sup> Besides, the Guiding Case Office has the authority to coordinate the guiding case selection process and provide instruction to the work on guiding cases nationwide.<sup>67</sup> Upon its review of the recommended cases, the guiding case office makes a selection and then submits the selected cases to the Judicial Committee of the Supreme People's Court for approval.<sup>68</sup> However, if, in its view, the case needs further discussion or research, the Office may send these cases to relevant government entities, social organizations, members of the guiding case advisory committee, and other experts and scholars for opinions and comments.<sup>69</sup> Therefore, the role of the Supreme Court in the Chinese system is to process the selection of the already decided cases either by itself or by other lower courts. As such, except for cases that are entertained by the Supreme Court, the role of the court is limited to endorsing the interpretation of the lower court and giving the status of a guiding case.

The final step in establishing a guiding case is publication and distribution. If the Judicial Committee of the Supreme People's Court determines that a proposed Case satisfies the applicable criteria, it approves it as a guiding case and orders publication and distribution. Thus, the guiding case provision contains a standard format that such cases should pass through before they are published and distributed. Article 3 of the detailed rules states that a guiding case must contain: (a) a title; (b) keywords; (c) main points of adjudication; (d) relevant legal provisions; (e) basic facts of the case; (f) the result of adjudication; (g) the judge's reasoning; and (h) the name of judges appearing on the judgment that

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<sup>65</sup> Id., p. 117.

<sup>66</sup> Detailed Implementing, *supra* note 10 Article 4.

<sup>67</sup> Id., Article 5.

<sup>68</sup> Id., Article 8.

<sup>69</sup> Id., Article 7.

has taken effect.<sup>70</sup> Once the case takes this format, the guiding cases is sent in the form of notice by the Supreme People's Court to all of the High People's Courts. Finally, it will be published in the *Supreme People's Court Gazette*, *People's Court Daily*, and on the Supreme People's Court website.<sup>71</sup>

Coming back to the Ethiopian system of establishing cassation precedent, the system is not well established with a detailed set of rules. The proclamation that introduced the binding interpretation system had very general provisions as to how such binding interpretations of law are to be made. According to the recently changed federal court re-amendment proclamation, binding interpretations of law are made by the Federal Supreme Court cassation division where *it is rendered by a panel of not less than five judges*.<sup>72</sup> The federal Supreme Court in Ethiopia has labor, criminal, and civil divisions which are collectively called regular divisions. However, the cassation division of the Federal Supreme Court has the power to decide over any final decision with a basic error of law.<sup>73</sup> It is only this cassation division that has the power to pass binding precedent on federal as well as regional courts of all levels.<sup>74</sup> The power to make binding interpretations of law concurs with the power of the Federal Supreme Court cassation division to decide on cases of fundamental error of law. Such interpretations are made only if the case reaches the Cassation Division of the Federal Supreme Court alleging a basic error of law. The recently enacted Federal court establishment proclamation has not come up with substantial differences from its predecessors.

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<sup>70</sup>ZuigaoRenmin and FayuanGongbao, Project Report on the Supreme People's Court Detailed Rules for the Implementation of the Provisions of Guiding Cases, Stanford Law School has an on-going "China Guiding Cases Project" ((2015), p.32.. In one of its online publications, it explains the required elements as follows: 1. "Keywords" (to list keywords that indicate the nature of the dispute, etc.); 2, "Main Points of the Adjudication" (to include general principles prepared by the Supreme People's Court that it expects other courts to refer to); 3, "Related Legal Rule(s)" (to list the legal rule(s) considered in the GC); 4, "Basic Facts of the Case" (to summarize the most important facts of the GC); 5, "Results of the Adjudication" (to report the outcomes of legal proceedings); and 6, "Reasons for the Adjudication" (to summarize the reasons for the final ruling/judgment). See Stanford law school: china guiding cases project, available at <https://cgc.law.stanford.edu/guiding-cases-analytics/issue-4/>, accessed on 30 Jan 2021. See also Ethiopian Federal Court Cassation division Publications, <<http://www.fsc.gov.et/Documents/Index1>>, accessed on 12 March 2020.

<sup>71</sup>Id., p.15.

<sup>72</sup> Federal Court Proclamation Re-Amendment Proclamation, Proclamation No. 454/2005, Federal Negarit Gazzet, year 11, no. 42, (2005) Article 59[hereinafter called Federal Court Proclamation Re-Amendment Proclamation No. 454/2005].

<sup>73</sup> Mehari Redae ,*supra* note 19, p.15.

<sup>74</sup> Federal Court Proclamation Re-Amendment Proclamation, *supra* note 72. Article 2 of the proclamation indicates that the power of passing binding precedent is the sole authority of the Cassation Division of the Federal Supreme Court. The cassation division may, however, render a different legal interpretation some other time.

However, the new proclamation provides criteria to illustrate what constitutes a basic error of law to make a case subject to review by the cassation division of the Federal Supreme Court. The proclamation under Article 2(4) defines basic or fundamental error of law as an error of law that includes final judgment, ruling, order or decree which may be filed in the Federal Supreme Court Cassation division according to Article 10 of the Proclamation and/ or contains either one or similar basic errors and grossly distress of justice. As provided in Article 2(4), basic or fundamental errors of law includes violation of the constitution; misinterpreting a legal provision or applying an irrelevant law to a case; not framing the appropriate issue or framing an issue irrelevant to the litigation; denying an award judgment to a justifiable matter; giving an order in execution proceedings unwarranted by the main decision; rendering judgment in the absence of jurisdiction over the subject matter of dispute; an administrative act or decision rendered in contradiction with the law; and finally, any decision contravening the decision of the Cassation Bench.

Looking into these qualifiers, one could see that Proclamation No. 454/2005 does not provide any clue as to which cases could be seen by Federal Supreme Court Cassation Divisions. Thus, providing a non-exhaustive list of criteria about basic or fundamental errors of law in the current proclamation will help both the disputing parties and judges to have more room and clarity about cases to be seen by cassation benches.

From the above discussion on the precedent establishment, is clear that in both Chinese and Ethiopian systems, the Supreme Court has the power to formulate such precedent though the scope of involvement varies. However, the Chinese guiding case system has significant differences compared to the Ethiopian cassation decision in establishing the precedent. First, according to China's guiding case system, the selection of cases can be made only when the judgment of the case has been taken into effect and no one knows which case has the potential to be a guiding case. In the Chinese system, the Supreme People's Court, upon the recommendation of internal or external parties, selects guiding cases. However, in Ethiopia, the criteria for a cassation decision to be a binding precedent is legislatively determined as "*[a]ny interpretation on the basic error of law by the Federal Supreme Court cassation division with not less than five judges.*" Here, the lawmaker decides the criteria and the federal Supreme Court does not have the power to choose which cassation decisions are going to be a precedent. The discretion of the Federal Supreme Court remains only to decide as to which cassation cases need to be seen by more than five judges. In doing so, the requirement is that a case should contain a basic error of law for it to

qualify for cassation. Then, three judges are supposed to screen those cases of fundamental importance.<sup>75</sup> Besides, once judges refer a case to the cassation division, at least five judges are expected to review it and give the verdict.<sup>76</sup> Then, the decision of the cassation concerning the interpretation of law shall have automatically a binding effect on Federal and Regional courts.

Second, unlike the Chinese guiding case system, Ethiopia does not allow both internal recommendations other than the Supreme Court and any external recommendations. There is only an internal screening mechanism where the three judges in the Supreme Court are supposed to screen and refer the case to the cassation division. Because of the absence of a set standard, judges in the Supreme Court could dismiss the review of the case by cassation division.. By incorporating a non-exhaustive list of criteria, the new federal court proclamation tries to minimize the work of judges screening the matter. Other courts are passive recipients of the binding interpretations of the Federal Supreme Court cassation division.

In the Chinese system, though it is the Supreme People's Court's exclusive jurisdiction to approve a guiding case,<sup>77</sup> other lower courts and external stakeholders are also allowed to recommend a candidate case. Lower courts in China can recommend cases that are decided by them including people's high courts and intermediate people's courts. Indeed, the assistance of an external recommender would be essential in Ethiopia as the cassation decisions have become laws and affect not only the particular litigants in that case but the legal system involving a range of interests.<sup>78</sup> The cassation decision has a long-lasting effect and requires serious scrutiny. Thus, in establishing a case, the Supreme Court Cassation Division should consider and can benefit from external recommendations as the Chinese Supreme Court does.

External stakeholders such as law schools, research institutes, law firms and civil societies may file an *amicus* brief in which they provide their opinion on upcoming Cassation decisions instead of giving critics thereafter. It is further important to note, in this connection, that Article 53 of Proclamation No.

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<sup>75</sup> Bililign Mandefro, The System of Cassation in Ethiopia, *Hegawinet Law Journal*, Vol. No. 1, (1989), p. 51

<sup>76</sup> *Id.*, p.50.

<sup>77</sup> Li Shichu, 'China's Guiding Cases System: Dilemmas and Solutions, Speech at the "Frontiers of Civil and Commercial Law," *Forum at China's Renmin University* (2009), <http://old.civillaw.com.cn/article/default.asp?id=44157>[<http://perma.cc/XV8H-UYPN>, (accessed 20 May 2019).

<sup>78</sup> Mulugeta Mengstie, 'if the doctrine of precedent did not exist, it would have to be invented', <<http://Abyssinia.com>>, (accessed on 26 Jan 2020).



454/2005 empowers the Federal Supreme Court to establish external advisory board. Accordingly, the Court may establish a council composed of ex-judges of the federal courts, highly experienced and qualified legal professionals, and university professors who could serve in the council.. The Advisory Council would support the administration of the court by providing non-binding recommendations and perform such other functions assigned to it.

Turning to the third point of comparison between the two systems, the Chinese guiding case system has established an independent guiding case officer in charge of the selection, screening, and publication of a guiding case. In contrast, the Cassation division of the Ethiopian Federal Supreme Court does not have an independent office.<sup>79</sup> It is only required, under Article 10(4), to publicize decisions rendered by its Cassation Divisions on a binding interpretation of laws via electronic and print media as soon as possible. Establishing an independent office would thus help to pass high quality cassation decisions, to achieve uniformity of judgment, and to persuade lower courts and the legal professionals to follow a binding interpretation of the cassation division.

Fourth, the Supreme People's Court of China has issued two separate guidelines: *the provisions of the Supreme People's Court concerning work on case Guidance* and the detailed implementing rules on the *Provisions of the Supreme People's Court Concerning Work on Case Guidance*. Both rules play a vital role in achieving the goals of uniform and standardized application of the law. In the case of Ethiopia, however, there is only a general statement under Article 4 of Proclamation No. 454/2005 authorizing the Federal Supreme court to *issue procedural directives necessary for its functions*. Nonetheless, the Federal Supreme court did not issue any procedural directives as per the proclamation. Moreover, the newly enacted federal courts establishment proclamation has also provided the same stipulation under Article 55, allowing the Federal Supreme Court to enforce the proclamation. Again, the proclamation has also authorized the Federal Supreme Court to issue a directive for the implementation of the proclamation and regulation. Despite these hosts of room to formulate a detailed procedural guideline helpful for more uniform and standardized decisions, the Ethiopian supreme court, unlike its Chinese counterpart, limits itself to general statements provided in the proclamation.

Lastly, in terms of format, the Chinese guiding case system provides detailed requirements on the contents of a guiding case. Upon publication, the case

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<sup>79</sup> Federal Suprem Court Administration and Directorates, <<http://www.fsc.gov.et/About-Us/Court-Administration-Directorates#>>, (accessed on 19 October 2021).

should contain a title; keywords; main points of adjudication; relevant legal provisions; basic facts of the case; the result of adjudication; the judge's reasoning; and the name of the judge. In Ethiopia, the cassation division of the Federal Supreme Court follows formats of ordinary civil and criminal procedure codes in composing and compiling its decisions. However, it is important to note that cassation decisions are more than ordinary cases and the Cassation Division of the Federal Supreme Court needs to pass detailed and persuasive decisions. In this respect, a cursory look into the volumes of cassation decisions of the Federal Supreme Court shows the continuous progress in the formatting of judgment. The common contents include messages of the President followed by a cluster of cases; a concise summary of the case, issues, appropriate law, interpretation of law, and decisions of the court. The length and depth of the decisions have improved a lot over time. However, the Federal Supreme Court needs to consider the special nature of the cassation decision and has to come up with detailed rules that comprehensively address the substantive content and formats of its decision.

## 2.2. Status of Guiding Cases and Cassation Decisions

Another notable line of comparison between the Chinese and Ethiopian systems is the status of the guiding case and cassation decision. The guiding case system established in China is different from the common law understanding of precedent. They are different not only in their naming but also in their nature. Some believe that guiding cases possess no legal force of law and thus should not be considered as a source of law.<sup>80</sup> In their view, because of their role of guiding and reference, the guiding cases have only persuasive effect,<sup>81</sup> and it is no more than a useful tool to help judges conduct legal research and exchange experiences of case adjudication.<sup>82</sup> Others, however, disagree. They argue that the guiding cases, once issued by the Supreme People's Court, should have a binding effect on all lower courts.<sup>83</sup>

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<sup>80</sup> Zhou Wei, Interpretation of Law through Cases: Development of the Supreme People's Court Guiding Case System', *Contemporary Law Review*, Vol.23, (2009), pp.134-139

<sup>81</sup> Yue Zhiyong, Construction of Guiding Case System of the Country, *Legal System and Social Studies Journal*, Vol.3,(2009), p.22.

<sup>82</sup> Cui Kai, Establishment of Guiding Case System in China: A Comparison with the Case Law in the West, *Journal of the Postgraduate of Zhongnan University of Economics and Law*, Vol. 4, (2006), pp.146-49.

<sup>83</sup> Dong Hao&HeXiaoyu, Teaching Probe into the Guiding Cases in Uniform Application of Law, *Journal of Jurisprudence*, Vol.11,(2008), p. 144.

Both arguments stem from the wording of guiding case provisions and the detailed rules that carry on a vague statement.<sup>84</sup> Article 7 of the detailed rules of implementation provides that all courts *should refer* to guiding cases when they adjudicate similar cases but this is the only provision that concerns the effect of guiding cases. Neither the "reference" nor the "similarity" is defined or explained. Some hold that "to refer to" shall be understood as "to follow," which would mean to be bound by the guiding case not to simply take the guiding case as a reference.<sup>85</sup> Concerning similarity, they are of the view that "similarity" shall include (a) similar facts; (b) similar legal relations; (c) similar disputes, or (d) similar legal issues involved.<sup>86</sup>

Others, on the other hand, argue that courts at all levels shall cite the guiding cases in their judicial reasoning and hence the application of guiding cases as a reference in similar cases is compulsory. According to the latter argument, guiding cases must be referred to by the lower courts. Yet, they are not, in themselves, authoritative. In other words, the *ratio decidendi* of guiding cases cannot be the legal ground for the lower courts' judgment. They can only be cited as a reason for explaining the judgment. The judgment of a guiding case is, therefore, more like an interpretation of specific provisions through which the higher courts clarify vague provisions and fill in legal loopholes. This approach is similar to the binding interpretation of the Federal Supreme Court in Ethiopia.

Another line of analysis in this respect is related to the spirit of the Chinese constitution. In the Constitution, the National People's Congress enjoys absolute sovereignty of law-making. Courts in China have no power to review primary legislation or secondary legislation, let alone the power to change or modify legislation. Thus, under the Constitution of China, the judges can't make law whilst judicial law-making is the essence of the Common Law tradition. For this reason, the Supreme People's Court creates a guiding case system instead of an authoritative precedent. The requirement of citing a guiding case in the judicial reasoning of a similar case is an indicator of the authoritative force of the guiding cases. Moreover, judges must quote the serial number of the guiding case and the main points of adjudication.<sup>87</sup> When litigating parties invoke a guiding case as a ground for the prosecution or defense, the judicial personnel should explicitly explain the decision to rely on or not.

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<sup>84</sup> Detail Implementing Rule, *supra* note 10, Article 10.

<sup>85</sup> Wang Limin, Study on Several Issues Concerning the Guiding Case System of China, *Legal Science Studies*, Vol.1, No. 71, (2012), pp. 75–76.

<sup>86</sup> *Id.*

<sup>87</sup> Detail Implementing Rule, *supra* note 11, Article 9.

In Ethiopia, there had been uncertainty regarding the legal status of precedents previously. The 1960 proclamation declared that lower courts should follow the decisions of the highest court. However, when this proclamation was amended to modify the court structure, that provision was omitted.<sup>88</sup> Besides, since then there was no uniformity of opinion on the position of the doctrine of precedent in the Ethiopian legal system. However, the promulgation of Proclamation No. 454/2005 had somehow clarified this issue. According to Article 2(4) of the proclamation, interpretation of a law by the Federal Supreme Court rendered by the Cassation Division with not less than five judges *shall be binding* on all levels of courts. Thus, lower Courts are statutorily obliged to follow the interpretation of law adopted by the Federal Supreme Court Cassation Division.<sup>89</sup> Similarly, the recently enacted Federal Supreme Court establishment proclamation, under Article 10(3), has adopted the same wording in terms of the status of binding interpretation..

Another related point is the hierarchy of guiding cases and cassation decisions with other laws. In the Chinese system, *the Detailed Implementing Rules* provide that a guiding case loses its guiding effect if it is (1) “in conflict with a new law, administrative regulation, or judicial interpretation” or (2) is “replaced with a new Guiding Case. However, no provision states explicitly that a guiding case loses its guiding effect if it is in conflict with a departmental rule issued by the State Council, a local regulation issued by a provincial legislature, or a local governmental rule issued by a local government. The lack of such provisions may prompt one to wonder whether guiding case rulings enjoy certain superiority over departmental rules, local regulations, and local government rules.

In Ethiopia, unlike the Chinese system, the proclamation does not explicitly provide the status of a cassation decision compared to other laws such as parliamentary legislation and regulation of the council of ministers. The proclamation only provides that the interpretation could be later amended or repealed by the same Court.

### **2.3. Repeal or Amendment of Guiding Cases *Vis-à-Vis* Cassation Court Binding Interpretation**

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<sup>88</sup> Mulugeta Mengstie, *supra* note 78.

How a guiding case or cassation decision could be amended or repealed is another important point of comparison between the Chinese and Ethiopian systems. As discussed before, in the common law tradition, courts of lower status are obliged to follow precedents set by superior courts unless the precedent is 'overruled' or 'distinguished'.<sup>90</sup> A precedent is said to be overruled when it is set aside by a higher court in the hierarchy. If, in deciding cases, judges make rules and lower courts follow such rules as precedents, overruling kills precedents, and such precedents are repealed and are not laws to be followed.<sup>91</sup>

Yet, overruling should not be confused with 'reversing' where a superior court sets aside the decision of a lower court on the same case. Hence, reversing does not in principle involve creating or setting aside a precedent apart from settling a case. On the other hand, judges may excuse themselves from following a precedent through 'the principle of distinguishing', where the facts of the case before the court are significantly different from the facts of the case cited as a precedent.<sup>92</sup>

In the Chinese guiding cases system, it is provided under Article 12 of the detailed implementing rules that a guiding case loses its guiding effect if it is (1) "in conflict with a new law, administrative regulation, or judicial interpretation" or (2) is "replaced with a new Guiding Case. Therefore, the detailed rule also has empowered the Supreme People's Court to replace the already established guiding case with the new one alongside other criteria.

In Ethiopia, partly in a similar vein with the common law legal system, the federal Supreme Court Cassation Division is not bound by its own past decisions.<sup>93</sup> In other words, the federal Supreme Court cassation division has the power to repeal or amend its past decisions. This is deemed necessary to ensure that the law is not static and the Cassation Division of the Federal Supreme Court should not become a slave to its past mistake.

### **3. Limitations of Chinese Guiding Case and Ethiopian Cassation Binding Interpretation**

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<sup>90</sup> Benjamin N. Cardozo, *The Nature of the Judicial Process*, Universal Law Publishing Co. Pvt. Ltd., (1961), p.139.

<sup>91</sup> Id.

<sup>92</sup> Id.

<sup>93</sup> Federal Courts Proclamation Re-Amendment Proclamation, Proclamation No. 454/2004, Federal Negarit Gazzeta ,(2005), Article 2(4).

Despite the concerted effort made by the Supreme People's Court to clarify the guiding case in China, there are still a number of limitations associated with it. Firstly, the numbers of guiding cases are small and address only a limited number of legal issues. As a result, guidance provided by the Supreme Court could not fully meet the needs arising from numerous legal disputes in the Country.<sup>94</sup> The second challenge is related to the limited application of the guiding case. Many judges are unwilling to use a guiding case because of the unclear legal status of these cases and/or are uncertain about how to use a guiding case in adjudication.<sup>95</sup>

Both challenges were rooted in the limitations of the *provisions of the guiding case*. As indicated earlier, Article 7 of the *provisions of guiding case, for example*, lacks expressions making judges formally bound by guiding case.<sup>96</sup> Yet, the 2015 Rules put an end to this debate, stipulating that lower courts “should quote the Guiding Case as a reason for their adjudication, but not cite it as the basis of their adjudication.”<sup>97</sup> In other words, guiding cases should be invoked not as an independent source of law but instead as a necessary aid to judicial reasoning. Hence, judges must cite the serial number of the guiding case and the main point of the guiding case.<sup>98</sup> Judicial personnel should also independently “inquire about relevant Guiding Cases for any issue involving similar facts or law.”<sup>99</sup> Litigating parties can also rely on guiding case as a ground for the claim, prosecution, or defense.<sup>100</sup> Therefore, the rules did much to legitimize the use and citation of guiding cases in lower court decisions while still supporting the view that guiding cases were binding *de facto* but not *de jure*.

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<sup>94</sup>Seminar Summary: On Building China's New IP Case System: A Discussion with Chinese Judges as well as Legal and Big Data Experts, Stanford Law School China Guiding Cases Project, Guiding Cases Seminars, Oct. 19, 2017, <<https://cgc.law.stanford.edu/event/guiding-cases-seminar-20171019>>, (accessed on 12 February 2021).

<sup>95</sup>Seminar Summary: On Building China's New IP Case System: A Discussion with Chinese Judges as well as Legal and Big Data Experts, Stanford Law School China Guiding Cases Project, Guiding Cases Seminar, Oct. 19, 2017, <<https://cgc.law.stanford.edu/event/guiding-cases-seminar-20171019>>, (accessed on 12 February 2021).

<sup>96</sup>Mei Gchlik *et al*, China's Case Guidance System: Application and Lessons Learned (Part I), Stanford Law School China Guiding Cases Project, Guiding Cases Surveys, Issue No. 3, (Mar. 1, 2018), <http://cgc.law.stanford.edu/guiding-cases-surveys> (accessed on 12 November 2020).

<sup>97</sup> Chinese judgments distinguish between a decision part and a reasoning part. The decision part includes the applicable sources of law and the reasoning part gives the detailed grounds of the decision.

<sup>98</sup> Detail Implementing Rule, *supra* note 11, Article 9

<sup>99</sup> *Id.*, Article 11.

<sup>100</sup> *Id.*

The detailed implementing rules still give rise to other uncertainties about the hierarchy of guiding case compared with other bottom-level departmental rule. These rules only delineate the hierarchy between guiding case and the law of the National Congress, administrative regulation, judicial interpretation. No provision explicitly stated that a guiding case loses its guiding effect where it is in conflict with a departmental rule issued by a ministry under the State Council, a local regulation issued by a provincial legislature, or a local governmental rule issued by a local government. The lack of such provisions may confuse the legal status of guiding cases vis-a-viz departmental rules, local regulations, and local government rules.<sup>101</sup> Moreover, there is a contention inherent in the new system. As analyzed previously, an act of law-making by judges is constitutionally impossible. It is argued that the judges are only supposed to interpret the legislation in the judgments. Yet, it is impossible to avoid creation when judges interpret legislation. The creative aspect of interpretation may be translated into familiar *law-making*. To avoid this happening, judges may write judgments more rigidly than before, for example by adopting the approach of rigid originals to interpret the legislation. Eventually, more regulatory documents need to be issued by the Supreme People's Court to address these issues to improve the case guidance system.

In Ethiopia, as the practice is a relatively new phenomenon, there are challenges inherent to it. The first challenge is the unsettled controversies over the power of the Federal Supreme Court on regional matters. Ethiopia follows a federal state with a parallel court system, both Federal and Regional Courts having three tries of Court structure with independent jurisdiction. However, the Federal Supreme Court Cassation Division intervenes in reviewing the final decisions of the cassation decisions of the Regional Supreme Courts, which is technically called 'Cassation over Cassation'. Under Article 80(3(b)) of the Ethiopia Constitution, the State Supreme Court has the power of cassation over any final court decision on State matters that contains a basic error of law. This constitutional stipulation gives the state courts autonomous authority on their respective state matters.

While this issue is a point of controversy, scholars take three different lines of argument on the power of Federal Supreme Court's power of cassation over cassation.<sup>102</sup> Authors such as Murado Abdo take the position that the Federal Supreme Court has the power of reviewing cases from the regional Supreme

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<sup>101</sup> Mei Gchlik *et al*, China's Case Guidance System: Application and Lessons Learned (Part I), Stanford Law School China Guiding Cases Project, Guiding Cases Surveys, Issue No. 3, (Mar. 1, 2018), <<http://cgc.law.stanford.edu/guiding-cases-surveys>>, (accessed on 24 April 2021).

<sup>102</sup> Id.

Courts. Murado holds that the Constitution authorizes the cassation division of the Federal Supreme Court to review Regional State laws. Yet, this is against the principle of justice and the very principle upon which the federal constitution is founded. Thus, according to this author constitutional amendment is necessary and the Federal Supreme Court should stop the review.<sup>103</sup>

The other group of scholars such as Mehari Redae takes a different view arguing that the Cassation Division of the Federal Supreme Court has no legal authority to review State matters and therefore the practice is against the constitution.<sup>104</sup> Still, another group argues in favour of cassation over cassation power of the Federal Supreme Court. They believe that the Federal Supreme Court's Cassation Division has the authority to review cases of regional matters. For example, Abebe Mulatu in one of his reflections states that:

*... since the Federal system is a new experience to Ethiopia and regions do not have a well-developed judiciary, it is sensible to confer on the Cassation Division to review state matters Without cassation overstate matters, the federal government will not be in a position to implement or interpret its laws uniformly.*<sup>105</sup>

While these divergent scholarly arguments are alive on the constitutional stipulations, the newly enacted Federal Courts establishment proclamation takes a slight shift from the arguments advanced so far. It allows the Federal Cassation Division to review only decisions of Regional cassation decisions on restricted grounds. Further evidencing this, the cumulative reading of Article 2(4) and Article 10 of the Proclamation provides the requirements for Federal Supreme Court before entertaining cassation over cassations. The first category of cases are (1) the final decisions of regional supreme court cassation divisions which violate the Constitution(Article 2 Sub –Articles(4)(a) of this Proclamation) or (2) the regional supreme court decisions which contravene binding decision of the federal supreme court cassation division.

The second category of cases are the final decisions of the Regional Supreme Court Cassation division that contain fundamental errors by misinterpreting a legal provision or by applying an irrelevant law to the case (Article 2 Sub – Articles(4)(b) of this Proclamation) and when such decisions of Regional Supreme Court Cassation cases involve *high public interest and national*

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<sup>103</sup> Muradu Abdo, *supera* note 25, p74.

<sup>104</sup> Mehari Radea, *supra* note 19, pp. 201-213.

<sup>105</sup> Abebe Mulatu, *supra* note 19, p. 150.



*importance*. However, the concept of *high public interest and national importance* is ambiguous. Unless further clarification is made by subsequent legislation, the scope and content of *public interest and national importance* will continue to be a point of disagreement in the future.

Looking more closely into the operation of the cassation practice, one can still observe more limitations such as the lack of depth in the decision from this division of the Supreme Court. The Cassation Division of the Federal Supreme Court is required to make a more detailed discussion of arguments and reasoning of the interpretation of laws. Also, the decision should not only be binding but also persuasive to lower courts and to legal practitioners to follow its interpretation. Yet, the writer observes that the majority of the decisions remain very brief and less persuasive.

This limitation is compounded with lack of an independent office for the selection, review, approval, and publication of cassation precedent. In spite the wide ranging effect of the cassation decision on the entire legal system and the society at large, there is no other stakeholder involvement in the process of establishing cassation-binding interpretation. Neither other courts nor external bodies can contribute *amicus brief* or any other form of opinion which would enhance the quality of decisions.

## **Conclusion**

This article maps out similarities and differences between the Chinese guiding case system and the Ethiopian Cassation binding interpretation. Both systems aim to maximize the advantages of common law and civilian systems. Unlike the common law precedent system in which the decisions of the higher courts are binding on lower courts, both the Chinese and Ethiopian system confer power to the Supreme Court to establish, amend, or repeal its own decisions. The two systems are different in some aspects. In the Chinese system, a guiding case could be selected from the decision of other lower courts while in the Ethiopian system it is only the federal Supreme Court's cassation decision that has a binding effect. Also, the two systems differ in institutional authority to suggest cases. In China, there is a broad base to suggest a guiding case either internally from the Supreme Court or externally from other interested parties. In Ethiopia, only panels of three judges in the Supreme Court can select and bring cases to the attention of the Cassation Division of the Federal Supreme Court. The other difference lays in the status of the guiding case and cassation decision. In the Chinese system, whether or not the Supreme Court imposes a compulsory

reference is not yet clearly addressed. However, in Ethiopia, the decision of the federal Supreme Court is binding as though it is a law.

Overall, the article has identified three main best practices that could be drawn from the Chinese guiding case system. One, the Federal Supreme Court should take lessons from China on the benefit of having detailed rules to govern the whole process. Hence, the Federal Supreme Court should issue procedural directives necessary for its functions as authorized by the proclamation. Issuing a directive would help to establish the standards for the selection, review, publication, and distribution of cassation cases. This, in turn, would help to pass detailed and persuasive judgment. Having the detailed procedural directive also helps judges that have been trained in the context of civil law not to apply cassation decisions mechanically. Two, the Federal Supreme Court should consider external opinions, like the Chinese system, before the case is published. In this regard, the Federal Supreme Court can benefit from the recommendation of the Attorney General Office, Law schools, or other stakeholders' deliberation before the case is published. This is necessary as the cassation decision affects not only the particular litigants in that case but also the whole legal system in the country. Finally, a lesson should be drawn from the practice of China such as establishing an independent office within the Supreme Court in Charge of collecting, selecting, reviewing, releasing, studying, and compiling cassation decisions.