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RESEARCH ARTICLE

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The legal status of decisions and judicial interpretations of the Supreme Court of China

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Abstract The decisions and the legislative interpretations of judicial interpretations of the Supreme Court of China can be considered as a part of Mainland China's customary law, and carried by decisions and judicial interpretations. Customary law is the very source of its normal force and they are supposed to be an informal source of the law for they have the required characteristics for substantiating customary law. Accordingly, the legislative judicial interpretations and decisions of the Supreme Court that are qualified to be promulgated in the Gazette of the Supreme Court should be standardized by the requisites of customary law and have the quality supposed to be universally fair.

Keywords judicial interpretations, decisions, customary law, legal force

摘要 最高人民法院的裁判和司法解释中的立法型解释, 可以构成中国以裁判和司法解释为载体的习惯法, 它们的普遍效力来源于习惯法, 并因具有习惯法的品格而成为法律的非正式渊源。基于此, 最高人民法院“立法型”司法解释和刊登于公报上的裁判, 应尽量以习惯法的构成要求为标准, 具备“人们普遍认为它是正确的”品质。

关键词 司法解释, 裁判, 习惯法, 法律效力

Judicial interpretations are legal articles. Those that are systematic, voluminous, and centrally promulgated are especially characteristic of China's legal articles. More than 20 years has passed since the Supreme Court of China (SCC) first made and promulgated judicial interpretations. Since judicial interpretations have

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the force of law and could be followed by the decisions, they constitute the "source of law" in Mainland China to some extent, and profoundly influence the economic and social development as well as the rights of social members. Therefore, it is absolutely necessary to analyze their status. Besides, the Court promulgates its decisions by various means, historically the Court has recorded its decisions in *the Gazette of the Supreme Court*. The decisions of the Supreme People's Court, especially those promulgated through their issued records have such an influence on judicial practice that we can't afford to overlook them. One should ask, what do we think about their status? And whether they can become precedents or not? These are the topics that both judicial circles and theorists are concerned about.

1 The types of the Supreme Court's judicial interpretations and their corresponding status

The basis for the Supreme Court to make judicial interpretations is the Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law, June 10, 1981. The resolution stipulates that "In cases where the limits of articles of laws and decrees need to be further defined or additional stipulations need to be made，the Standing Committee of the National People's Congress shall provide interpretations or make stipulations by means of decrees. Interpretation of questions involving the specific application of laws and decrees in court trials shall be provided by the Supreme Court. Interpretation of questions involving the specific application of laws and decrees in the procuratorial work of the procuratorates shall be provided by the Supreme Procuratorate." Accordingly, the Provisions of the Supreme Court on the Judicial Interpretation Work (the "Provisions") was issued in 1997, which further defines the nature, effects, classifications and procedures of the interpretations. I will cite some important provisions here to facilitate analysis:

Article 2: The questions of specific application of laws in court trials shall be interpreted by the Supreme Court.

Article 4: The judicial interpretations which are made and promulgated by the Supreme Court have the force of law.

Article 9: The three forms of judicial interpretations are "interpretation", "provision" and "reply." Interpretation of questions involving how to apply a certain law or how to apply laws to certain types of cases or issues, shall take the form of "interpretation". Norms and opinions on trial according to trial

practice's needs shall take the form of "provision." Replies to the higher courts and the PLA Military Courts' requests for instructions on issues in the specific application of laws in court trials shall take the form of "reply."

Among the above provisions cited, it is in Article 4 that locates the status of judicial interpretations, namely "The judicial interpretations which are made and promulgated by the Supreme Court have the force of law." This article specially aims at locating judicial interpretations' status. We come to realize after analyzing that, although tersely and rigidly expressed, is still it is too general and didn't take into account the various forms of judicial interpretations and different functions they should develop. It failed to state the status of judicial interpretations comprehensively and precisely. I shall attempt to specify:

Firstly, it's undoubtedly that the laws themselves have got legal force; conversely, the form of laws is not the only choice that will be endowed with legal force, rather, there are various other kinds of forms, such as lawful contracts, marriage certificates, government's approvals, etc. So although the Provisions indicate that "The judicial interpretations which are made and promulgated by the Supreme Court have the force of law," it neither states the exclusive character that judicial interpretations should have, nor answers what the judicial interpretations exactly are.

Secondly, judicial interpretations take different forms. According to Article 9 of the Provisions, "norms and opinions on trial according to trial practice's needs" that take the form of "provision" have the characteristics of court's regulations and are similar to "regulations" of the courts[1] since it's to meet "trial practice's needs," and merely applies to "trials." This "provision" shall be implemented by courts at all levels, but can't and needn't apply to the whole society, especially to a natural person. So it is doubted that whether all of this kind of judicial interpretations shall have "the force of law." In my opinion, they should not be given "the force of law" directly but be regarded as working rules that are recognized by law and the enforcement of which is guaranteed by administrative power. For example, the Provisions of the Supreme Court about Several Issues concerning the Civil Mediation Work of Court,[2] which was enacted "with a view of ensuring that the court mediate civil cases in a correct way and timely settle disputes, offering guarantees and convenience to the concerned parties for them to legally exercise their litigation rights," and should be implemented by courts at all levels during mediation work. But it doesn't concern the dealings outside of the courts, parties' rights and obligations which

[1] The judicial interpretations that take the form of "provision" can also be used to interpret the laws, but in this context they are merely "provisions" with the characteristics of working rules of the courts.

[2] Judicial interpretation [2004]12, issued by the SCC, 2004-9-16.

are not within its province. This provision was enacted according to Civil Procedure Law, so the relationship between them is similar to the one between Measures for Payment and Settlement Business by People's Bank of China and the Negotiable Instruments Law of PRC. Both the formerly mentioned are working rules enacted by state organs according to law, and implemented within the system. According to the discussions above, I believe that, these "provisions" are varied from the judicial interpretations on "the questions of specific application of laws and decrees", so the Supreme Court should develop new forms, ways of enactment and issuing outlets that are suitable for themselves, different from judicial interpretations and systematic ones according to the necessity for trials.

Thirdly, another type of judicial interpretations provided by the Provisions in Article 9 is "interpretation of questions involving how to apply a certain law or how to apply laws to a certain type of case or issue," which includes interpretations laws, such as Judicial Interpretations of the Supreme Court on Some Issues Regarding the Application of the Security Law of People's Republic of China,[3] as well as interpretations of problems on applications of laws to a certain type of case, such as the Provisions of the Supreme Court Concerning the Trial of Dispute Cases on Deposit Receipts,[4] and interpretations of problems on applications of laws to certain types of questions, such as the Provisions of the Supreme Court Concerning Some Issues on Freezing and Auctioning the State-owned Shares and Public Corporate Shares of Listed Companies.[5] Based upon current laws, the former is closely concerned with law and is drawn up according to law provisions; while the latter two reflect the major views and standards of the courts while dealing with certain types of cases or problems, and they don't deal with specific laws and there are not legal provisions to reference while interpreting. It is undisputedly that the force of the former originates from the law itself. Since the latter two are not based upon specific laws, where does their force come from? In practice, judicial interpretations of this type are generally divided into two categories: interpretations based upon general doctrines of written law, which could be seen as "subjective interpretations" according to the authorization rules of written law, are "supplementing loopholes" to written laws, so they are more legislative rather than interpretative. Such as the Reply of the Supreme Court on the Priority of Compensation of Construction Projects Costs[6], interpretations on the duration, starting point, scope and order of the rights in the Reply can not be found in Article 286 of

[3] Judicial interpretation [2000] 44, issued by the SCC, 2000-12-8.
[4] Judicial interpretation [1997] 8, issued by the SCC, 1997-11-25.
[5] Judicial interpretation [2001] 28, issued by the SCC, 2001-9-21.
[6] Judicial interpretation [2002] 16, issued by the SCC, 2002-6-11.

Contract Law of PRC which is parallel to it. It is the comprehensive results of the SCC after considering the factors of legislative intention, jurisprudence, professional opinions, and judicial experiences. Another category is the summary of the long-term judicial experiences within the judicial system. It aims at summarizing uniform standards that could be applied repeatedly while dealing with the same type of cases and problems. It is more like "summarizing the judicial experiences" because it lacks written laws and decrees as its basis. The Provisions of the Supreme People's Court Concerning the Trial of Dispute Cases on Deposit Receipts cited above is a clear example since it is enacted for the purpose of correcting deposit receipt dispute cases… drawing upon judicial experiences."

Either "supplementing loopholes" or "summarizing judicial experiences," this type of judicial interpretation is kind of legislative, and it conflicts with the judicial rule that "judicial legislation is not allowed" in our country, so it is scolded constantly by professionals and scholars. Besides, people's courts at local areas can't remain dependant completely, and some powerful organizations will give pressures to the courts even intervene the judicial powers. If there isn't support from written law, it is probably that the judicial interpretations with legislative characteristic will put the court in a dilemma. In practice, it could be seen that some local court circumvented a certain judicial interpretation during trial to escape criticisms from local powerful organizations. From an objective perspective, the "legislative" judicial interpretations of the SCC are enacted for the purpose of filling up deficiencies of written law, and the majority of which did provide efficient ways of resolving actual problems emerging from economic and social development.

Fourthly, not all the judicial interpretations are the ones focusing on "the specific application of laws and decrees in court trials" according to the demand of the Standing Committee of the National People's Congress. We found, in practice, that some judicial interpretations do not interpret the application of laws and decrees, but are interpretations on how to decide the facts by the judges. Namely, they are not interpretations on the "law" but the "fact," so they disobey the basic principle on judicial interpretations that they should be "interpretation of questions involving how to apply a certain law or the problems of how to apply laws to a certain type of case or questions." For example, Article 2 of the Reply of the Supreme Court on Issues Involving Application of Judicial Interpretations to Guarantee Dispute Cases and the Determination of Guarantee Liability Forms[7], stipulates that "in cases that there are express agreements in the guarantee contract that the guarantor will not take the guarantee liability until the debtor is incapable of performing the obligation, the guarantee shall be regarded

[7] Judicial interpretation [2002]38, issued by the SCC, 2002-12-23.

as a general guarantee. In cases that there are express agreements in the guarantee contract that the guarantor shall take the guarantee liability when the warrantee doesn't perform the obligation, and a general guarantee liability can't be presumed according to the parties' real intention when concluding the contract, the guarantee should be regarded as a joint guarantee." Through this provision we can see clearly that this judicial interpretation is about the content of the "agreement" in the guarantee contract which belongs to the issues of facts, so this judicial interpretation is interpreting the "facts" instead of "law," and its object is wrong. We must indicate that, it is not only the question that the objection of judicial interpretation is beyond its due scope, but also that owing to disparities between methods of contract interpretation and law interpretation, the act that mingling contract interpretation and law interpretation probably will lead to misunderstanding the intention of the parties concluding the contract, even will nuisance the principle of contract law in respect of party's autonomy.

According to the analysis above, it is obvious that among those promulgated by the SCC, the judicial interpretations of different forms and functions have different status. Some of them are interpretations for specific laws, and it is undoubtedly that their "force" is equal to the law, since they are made by the SCC whose right of making judicial interpretations is authorized by the supreme legislative body. Some of them are rules that are implemented within judicial system, whose status equals to "regulations" of the court, and must be administrated within courts at all levels not including the scope beyond the courts. Some of the judicial interpretations are instructions issued to judges on how to interpret a party's declaration of will, and make a determination. They don't have and needn't be given legal force, and could be regarded as trial methods provided by the SCC to courts at all levels, because the objections of interpreting is not the laws. The rest are "legislatures" taking the form of judicial interpretations that aim at meeting the demand of judicial practice. Apparently, the last "legislative" judicial interpretations are those that attract most people's attention, and they are also the focus of this article, which is a study on the status of judicial interpretations. I will extend my discussions on this matter after analyzing the status of decisions of the SCC.

2 The status of the decisions made by the SCC and the formation of customary law

The status of the decisions made by the SCC, especially those promulgated in the *Gazette of the Supreme Court* is a question that deserves some investigation.

The decisions' status is that, according to the judicial authority affirmed by the Constitution, decisions of the courts are a concrete form of that authority, and

decisions of the courts at all levels, including the SCC, are respected under the principle of *res judicata*, and their enforcement are guaranteed by state power. As far as the scope of effect and impact of *res judicata*, in principle the decisions of the courts in civil law countries including China merely bind the parties in instant cases. The judges are not authorized to make law, and the courts don't have to follow the precedent either, so the decisions of courts at all levels including the SCC can't constitute precedents, consequently, they are not an official source of law. Confronted with similar cases, the lower courts are not obligated to follow higher courts' past decisive cases, likewise, courts at all levels are not obligated to follow the SCC's past decisive cases, either. Therefore, a decision is binding only in an individual case. We will name this common sense as "the doctrine of *res judicata* in individual cases" for this paper.

However, reality often exceeds presumptions. In the judicial practice of our country, a certain amount of courts pay so much attention to decisions of higher courts especially decisions of the SCC that cite these decisions in deciding similar cases. In fact, it is not rare that lower courts decide cases based upon the decisions of higher courts or the SCC. So do the parties in litigation proceedings. The parties tend to look for effective decisions that favor themselves as defenses. Although the limited law resources have something to do with this phenomenon, we can still see for sure that, the effect of decisions of higher courts, especially of the SCC, has exceeded the scope of "individual cases," some of the decisions even have got the characteristic of "precedent" to some extent, although the very "precedents" have not the effect of "must be administrative" yet. Also some scholar claims that, China is not a case law country, but cases have indeed existed, if lower courts don't follow higher courts' existed decisions, especially those promulgated in the *Gazette of the Supreme Court*, they are due to explain this. The prominent civil law scholar named Liang Huixing is the very person who holds this claim. We can name it as "the doctrine of required explanation."

On the grounds of "the doctrine of *res judicata* in individual cases" and "the doctrine of required explanation," combining with different forms of law, I further propose a "customary law doctrine."

The prevailing doctrine believes that, the law takes two forms, namely laws and customary law (Larenz and Wolf, 1997). American philosophy of law Edgar Bodenheimer in *Jurisprudence: the Philosophy and Method of the Law* divided the sources of the law into two categories: the formal sources of the law and the informal sources of the law. The former indicates main legislature, while the latter includes customary law (Bodenheimer, 1967). Laws are the results of willful legislation of legislators by constitutional law, while customary law is formed through the actually implementing the beliefs of the law which play a leading role in the law community by its members. The court is the main body that implements these beliefs, and decisions are the major road leading to the

formation of customary law. Customary law could be transmitted orally by the members of the law community, but customary law that is constituted through decisions of the courts is passed down by written forms from generation to generation, which is decision customary law. Savigny believes in his *On the Task of Our Era in Legislation and Jurisprudence* that, in principle, the status of customary law should be higher than written law.[8]Bodenheimer believes that "customs play a reduced role as a source of law in civilized society today. This does not mean, however, that its law-producing force is exhausted or spent."[9] Karl Larenz claims that, after written law was drawn up, customary law is "still shaping and developing in significant areas," and "it comes into being through the so-called judicial practice, especially through those long-term cases of the Supreme Courts."[10] The long-term cases of the Supreme Court, according to Larenz's explanation, are cases that "have existed and put into practice for a long time"[11], and that are considered to be precedents in common law countries.

In common law countries that recognize precedent as a source of law, the long-term case namely the precedent are customs in essence, and a "precedent is only a custom that is proved or effective."(Carter J C, 1907) An intermediate position that has gained a considerable amount of backing on the European Continent maintains that a "judicial action persisted for some time and found more or less unqualified approval within and outside of the legal profession may become crystallized into a norm of customary law and thereby acquire the full force and effect of law.[12]" China is a country with civil law traditions, Larenz's enunciation that "cases of the Supreme Court generate laws" is of profound meaning. In spite of other courts, decisions of the Supreme Court in our country have " in individual cases." Besides, there should be the possibility that these decisions are "still shaping and developing in significant areas" into customary law, and they should have "the force of customary law" (the force of precedent in common law countries), though not all the decisions do not follow this model.

Then, on what conditions could decisions of the court develop into "long-term cases" and "customary law"?

John Austin believes that, "a customary practice is to be regarded as a rule of positive morality until the legislature or a judge has given it the force of law,"(Austin J, 1954), and he emphasizes the positivism and morality of laws. As the New York Court of Appeals has pointed out, "reasonableness is one of the requisites of a valid usage, and an unreasonable or absurd custom can't be set up

[8] See *supra* Note 8, 12.
[9] See *supra* Note 9, 497.
[10] See *supra* Note 8, 14.
[11] See *supra* Note 8, 17.
[12] See *supra* Note 9, 456.

to affect the legal rights of parties."[13] And it emphasizes the reasonableness of customs. It is Karl Larenz who has precisely enunciated the formation of customary law. He indicates in The *General Part of the German Civil Code (Allgemeiner Teil des Deutschen Burgerlichen Rechts*) that, "when applying laws, it's not sufficient for the judges to regard the laws as unchangeable data…, the judges should begin with actual facts that are to be decided and special issues emerging from the facts, and continuously make the standards of judgment contained in the laws definite, precise and concrete,[14] only on condition that a case is practical and is an inducement which can't be challenged,…can it have 'binding and regulative force.[15] Being a law and a binding regulation, customary law is as applicable as written law. When decisions of the courts have binding force and regulative force, customary law taking the form of the decisions will come into being thus decisions of the courts have experienced the great change from decisions that only have "*res judicata* in individual case" to customary law that has legal force. Naturally, this great change isn't happening all the time, in the contrary, it should be cautious and careful. only on condition that a case is practical and is an inducement which can't be challenged, namely it is right, can it have binding force and regulative force,[16] the conditions are: some rules in the case are accepted by the practice of bargain, and they will suit the general legal consciousness, be observed by the people universally; …to judge whether customary law exist or not, besides focusing on the practice, more importantly, we shall make sure that whether it has got 'compulsory certainty' or not, namely, whether people think it right or not.…Otherwise, the case can't generate binding rules no matter how long has it been existed or how long has it been put into practice."[17]

Summarizing Karl Larenz's enunciation on the compulsory conditions for the "long-term decisions of the Supreme Court" to generate customary law, I believe after my analysis that, the conditions to generate customary law could be divided into inner conditions and external conditions. The so-called inner conditions, is that "when applying the law, the judges should begin with actual facts that are to be decided and special issues emerging from the facts, and continuously make the standards of judgment contained in the law definite, precise and concrete," essentially, it is mandatory that the facts, like judging standards, are concrete and definite, just as the facts and judgments on the issues of laws must be definite and undoubted, without any uncertainty. The so-called external conditions are that "some rules in the case are accepted by bargaining, and they

[13] Fuller v. Robinson, 1881. 86 N.Y. 306, 40 Am. Rep. 540.
[14] See *supra* Note 8, 14.
[15] See *supra* Note 8, 15.
[16] See *supra* Note 8, 15.
[17] See *supra* Note 8, 16-17.

will suit the general legal consciousness, being universally observed by the people; …namely they are thought to be right by the general public." Apparently, the external condition's core requirement is that "they are thought to be right universally by people"! To put it another way, the case that will become customary law, shall be elaborate works inside, and from the outside shall be thought to be right universally by people, and "the reason why they are observed, is not that people are afraid to fail their cases if they behave otherwise, but that the rules are the requirements of laws which can't be denied."[18]

Weighing according to the inner conditions and external conditions required by customary law, among the decisions of the Supreme Court especially those promulgated in Gazette of the SCC, a certain amount do reach the requirements of customary law. We boldly suggest that, these cases are not merely the decisions which have "res judicata in individual cases," and they can't be ignored by lower courts after their "explanation," either. These cases are "binding" rules and customary law recorded by the decisions of the SCC, so lower courts must observe these rules. Of course, after weighing by the above standards, we will find that the decisions of the SCC by the majority including those promulgated in the Gazette of the Supreme Court may not meet the requirements of generating customary law, and can't constitute the informal source of law in our country, so lower courts are not obligated to obey. In my opinion, however it is not objective to deny that there is space for customary law to exist in our legal system, for we have a long history and prosperous judicial practice, and these are the very reasons that make it not objective either to deny that decisions of the SCC can generate customary law in our country. Since the conditions of generating customary law are "cautious," we have to confess that, only a minority of the "long-term cases" of the SCC can become customary law, while the majority else just have "res judicata in individual cases" or limited persuasive value instead of being binding rules. Besides, we should emphasis the point that it is neither the authority status of the SCC that makes its cases to become customary law, nor the fact that "people are afraid to fail their cases if they behave otherwise (don't accept the cases of the SCC), but because "they are thought to be right by the general public."

3 The source of force of "legislative" judicial interpretation and its relationship with customary law

According to the Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law that "interpretation of questions involving the specific application of laws and decrees in court trials shall be provided by the Supreme Court," and the stipulation in the Provisions of

[18] See *supra* Note 8, 16.

the Supreme Court on the Judicial Interpretation Work that ”the questions of specific application of laws in people’s court trials shall be interpreted by the Supreme Court,” from the day that came into existence, the judicial interpretations of the SCC are the interpretations to specific laws and decrees while the supreme judicial body is applying the laws. Since the SCC does not have legislative power, we can infer that the judicial interpretations can not have legal force in absence of specific laws and decrees as basis. However, combined with the analysis on the conditions that generate customary law, I believe that, it is not appropriate to suspect the force of the legislative judicial interpretation is indiscriminate. Since it is possible for SCC’s long-term cases to generate customary law, then, as the judicial interpretations of the SCC (which are to solve the difficulties in applying the specific laws) can become customary law in our country as well. It is universally acknowledged that, the SCC’s interpreting proceedings are very strict, and the job of interpreting needs caution. Difficulties are emerging in applying the laws to become a judicial interpretation, a range of tasks need to be done first, such as summarizing judicial experiences, asking for the opinions from relevant departments and occupations, asking for the legislature’s counsels, etc. Besides, the opinions of law professionals, even the opinions of the public through the media (website) are needed. The last step is to discuss and pass the interpretations by judicial committee, the supreme trial organization of the SCC. Compared with the decisions of the SCC, judicial interpretations are indeed the better ones in preciseness and professional both in width and in depth. Promulgating judicial interpretations is proposed to unify the application of laws in courts at all levels and make the courts to observe the interpretations, and the binding force is in accordance with the force of customary law. Therefore, judicial interpretations are absolutely capable of meeting the “inner conditions and external conditions” and developing into customary law. Of course, we must confess that not all the judicial interpretations can fulfill the requisites of customary law. In conclusion, we can say that the force of legislative judicial interpretations does not originate from the laws and decrees that they interpreted, but from the fact that they are customary law carried by judicial interpretations.

I will cite an example. In November 12, 1990, the Supreme Court issued the Answers to Issues of the Trial of Affiliated Contract Dispute Cases [1990] 27 (the Answers). In Article 4 “on the issues of the ground clauses in affiliated contract (2),” it stipulates that, “enterprise and institution as legal person invest in affiliated corporation as an affiliated party, but neither engage in the joint operation nor take the risk and responsibility of affiliated business, but withdraw their capital and interest or a fixed profit in due time in reference of gaining profit or offset, this act is in the name of affiliated corporation but loan in essence, and it violating relevant financial laws and regulations, the contract should be

invalidated. ” The Answers is a judicial interpretation, and after it is issued, Article 4(2) has become the basis for the courts at all levels to invalidate the lending and borrowing contract between the enterprises. But this provision is not based on any laws or decrees. Five years after the Answers was promulgated, the People’s Bank of China issued the General Principles on Loans that is with characteristics of department regulations in 1997, Article 61 stipulates that, “administrative departments, enterprises and institutions, economic cooperation organizations such as cooperative society of providing and selling, rural cooperative foundation and other foundations, must not engage in depositing or loaning or other financial business. The enterprises must not make direct or indirect loans to businesses against state’s regulations. ” Apparently, the force of Article 4(2) in the Answers does not originate from “the authorized interpretation of the laws and decrees,” for there aren’t any “laws and decrees” in China. According to the analysis in this article about the conditions of customary law, this provision has legal force because it is customary law for it fulfill the inner conditions of “definite, precise, and concrete” of customary law as well as the external conditions that “some rules are accepted by the practice of bargaining, and they will suit the general legal consciousness, being observed by the general public; …namely they are thought to be right by the public.” The application of Article 4(2) in the Answers was not for a short period of time but for a long period, and it is still considered to be the regulation of binding force. Article 61 in the General Principles on Loans of the People’s Bank of China in 1997 is just an adoption of the customary law generated from Article 4(2). Besides, the binding force of the latter is higher than the former which is a department regulation.

Judicial interpretations are legal articles and the specialty in them is that they have assembled the customary law carried by judicial interpretations. Drafting the “legislative” judicial interpretation according to the conditions of customary law will not only clarify the source of its force, but also strengthen its authority.

4 Conclusion

In conclusion, the status of decisions of the Supreme Court has two aspects: customary law and *res judicata* in individual cases (as per this article’s dichotomy). And as to the judicial interpretations of the Supreme People’s Court, we divide them into five categories:

(a) Judicial interpretations of the specific laws and decrees have the same status as the laws because they are authorized by legislature.

(b) Judicial interpretations made for “trial practice’s needs” within the courts is equivalent to the “department regulations” issued by the SCC, and must be observed and implemented by courts at all levels.

(c) Judicial interpretations that are interpreting the parties' intent (such as the real intent of the parties of the contract), or giving instructions on finding the facts, could be considered as methods and rules of trial provided by the SCC for courts at all levels, for their reference during trial and further improving their judicial abilities, since the objects of the interpretations aren't the laws.
(d) In response to the needs of judicial practice, "legislative" judicial interpretations without laws or decrees as their basis, that meets the inner and external conditions of customary law, can be the customary law in our country and carried by judicial interpretations, thus having legal force.
(e) The rest judicial interpretations that have no laws or decrees as basis or those that can't fulfill the conditions of customary law should be considered as judicial policies, which aim at instructing the judicial activities of the courts within a certain period.

We have to confess that judicial interpretations of the last category can be applied only for a short term, and they are not "thought to be right universally by people," so they merely have the effect of policy instead of the force of law.

They have the same quality with those judicial policies that instruct trials of courts within a certain period of time and scope through channels beyond judicial interpretations by the SCC. Such as the Notice of the Supreme Court on the Guarantee Period of Guarantees Occurred before the Guarantee Law, which took effect on August 1, 2002. This notice isn't judicial interpretation, but the policy was issued in order to correctly try the contract dispute cases concerning guarantees before the implementation of the guarantee law, and to safeguard the legal rights and interests of the creditors and other parties, with the consent of the Commission of Legislative Affaires of the Standing Committee of the National People's Congress. The problems for the notice to deal with are "under the circumstance that the parties didn't agree on the guarantee period or the agreement is unclear in the guarantee contract signed before the guarantee law took effect, if the creditor had claimed his right against the principal debtor not the guarantor within the statutory limitation," the debtor "may claim his right against the guarantor within 6 months from the day of promulgation of this Notice (from August 1, 2002 to January 31, 2003). Apparently, the notice can be applied shortly from August 1, 2002 to January 31, 2003.

We must emphasis that, just as weighing the decisions issued in the *Gazette of the Supreme Court* according to the inner and external conditions required by customary law, it is also necessary to analyze the judicial interpretations of the SCC by dichotomy. The act of totally denying that judicial interpretations have the force of customary law is not objective, while it is over-optimistic to admit all the "legislative" judicial interpretations are customary law. I believe that, the SCC should try to select those decisions that are in accordance with the inner and

external conditions of customary law and are not disputed universally to promulgate in *Gazette of the Supreme Court*. Likewise, as to the "legislative" judicial interpretations, they should be drafted according to the conditions of customary law and try to "be thought to be right universally by people," and try to be customary law that can be transmitted through generations recorded by judicial interpretations of the SCC. The decisions that don't fulfill the conditions of customary law, shall be promulgated through other channels except *Gazette of the Supreme Court*; in order to instruct judicial activities of courts within a certain period, those "legislative" judicial interpretations that don't fulfill the conditions of customary law, shall be promulgated as judicial policy instead of judicial interpretations by the forms and procedures that don't belong to judicial interpretations to show the difference, such as taking the form of notice.[19]

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[19] Notice of the Supreme Court of China on the issues that needs to be paid attention in the implementation of the Interim Measures on the Closed Loans and Interim Measures on Self-enclosing Loans to Foreign Trade & Economic Enterprises (Judicial Interpretation [2000] 4), is the judicial policy that is issued in the form otherwise judicial interpretation.