

Breaching the Taboo?
Constitutional Dimensions of the New Chinese Civil Code

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First Draft of March 14, 2022

Abstract

Chinese political and legal elites have celebrated the new Civil Code (January 1, 2021) as the most important statute in the nation's history, and the 'cornerstone' of the turn toward 'rule of law' and 'good governance'. The Code expressly binds all natural and legal persons in China, as well as public officials, and is judicially enforceable. The statute enshrines the rights to dignity, equality, freedom and personal liberty, property, and privacy, among others, and codifies duties to protect the environment and to evolve effective means to combat sexual harassment. Echoing the German Code, the statute also contains 'general clauses' that enable the courts to restrict enumerated rights and entitlements for reasons of 'good morals', 'public order', and the rights of others. While constituting an act of massive delegation to the courts, judges remain formally prohibited from directly enforcing the PRC's Constitution. The paper explores the relationship between the Code and Constitution, through a comparative analysis of: (i) the wider process of the 'constitutionalisation' around the globe; (ii) the scholarly discourse on the 'horizontal effect' of rights and the prohibition of constitutional judicial review in China; (iii) the normative structure of the Code itself; and (iv) the development of 'political' control mechanisms, to be deployed by the Communist Party of China and the highest organs of the state to constrain how judges use their interpretive powers.

On January 1, 2021, the People's Republic of China [PRC] promulgated a new Civil Code,¹ the longest and most ambitious piece of legislation in the history of the People's Republic of China (PRC). The Code is a massive legal edifice, involving 84 chapters, and 1,260 articles. It assembles and revises large swathes of law previously codified with great fanfare – of contracts, consumer protection, marriage and the family, property, security, and tort, while also covering new areas. Officials of the Communist Party of China [CPC] have celebrated the new Code as the would-be 'cornerstone' of 'national governance' and the 'rule of law'. The Civil Code expresses the 'fundamental social norms' of Chinese society, serving to 'enhance the humanistic spirit of China's law on the basis of human dignity', while 'protecting the rights of natural persons'.² Because the Code is fully justiciable, there is good reason to believe that it will become the 'real' economic constitution" in the PRC. Yet there is a great deal of uncertainty about how it will evolve, issues that will be debated by lawyers, social scientists, and students of business and governance for decades to come.

The Civil Code is the centerpiece of a series of recent, highly-publicized moves on the part of the CPC to strengthen statutes and the autonomy of courts, while pledging to maintain the party's tight control over the legal system's development. The effort reveals a basic tension. On one hand, *the charter of rights announced by the Constitution of the PRC is non-justiciable*; indeed, a Decision of the Supreme People's Court famously prohibited constitutional judicial review (CJR) in 2008.³ On the other hand, *the Civil Code is fully judicially-enforceable*, although the Code contains many of the rights included in the

¹ Civil Code of the People's Republic of China. Online at: english.www.gov.cn/archive/lawsregulations/202012/31/content_WS5fedad98c6d0f72576943005.html.

² SUN Xianzhong, 'Reflections on Function of National Governance of China's Civil Code' (2020) 6 China Law 81, 82-89.

³ Part II below.

Constitution, as well as most of the rights found in Western states where CJR operates routinely. This paper explores this tension in depth, through an analysis of relevant legal scholarship, the decision-making of the Supreme Peoples' Court, and the development of mechanisms of control available to the legislature, the National Peoples' Congress. As a matter of institutional analysis, the situation embodies a classic 'principal-agent' problem: rulers (as principals) have delegated expansive lawmaking authority to judges (as agents), yet retain the means to constrain that lawmaking when they see fit to do so.

As a matter of comparative law, the relationship between the Constitution and the Civil Code in China deserves to be considered in its wider context. As most Chinese scholars know, in the Federal Republic of Germany, the private law has been subject to steady 'constitutionalization'⁴ since the 1950s, under the tutelage of the German Federal Constitutional Court [GFCC].⁵ In China, legislators were heavily influenced by the German Civil Code, and legal scholars have recognized and debated the importance of the German situation. In recent decades, the basic features of the constitutionalization phenomenon diffused within Europe, as well as to the Americas and South Africa, and to South Korea and Taiwan in Asia.⁶ This comparative context is directly relevant to present-day China. Comparative materials have informed some Chinese legislative officials; many parts of the rest of the world will be keenly interested in how China implements its new Code; and comparison helps us to sharpen the focus of our analysis, while helping us to see the range of potential paths that might be taken. It bears emphasis in advance that we are not claiming that the PRC will follow in the footsteps of Germany or others. Indeed, as discussed, there are important reasons to doubt that such a result could occur, given the absence of rights-based CJR in the PRC. Nonetheless, comparative analysis raises important issues that Chinese authorities will soon face head on.

The paper proceeds as follows. Part I summarizes the process through which the private law was constitutionalized. Chinese elites were broadly aware of these developments, and they debated them with different degrees of sophistication during the drafting of the new legislation. In part II, we discuss the constitutional dimensions of the Chinese Code, which enshrine norms that are typically understood as fundamental rights outside of the PRC. These include human dignity, equality, freedom and personal liberty, property, and the protection of 'personality rights', which are comprised of rights to personal honor and reputation, name and likeness, and privacy. Echoing the German Civil Code (which dates from 1900), the Chinese Code also contains 'general clauses' that enable the courts to restrict enumerated rights and entitlements for reasons of 'good morals', 'public order,' and the rights of others. We then turn to discourse and practice. Part III describes and assesses the often fierce scholarly debate in the PRC on the wisdom and feasibility of linking the Constitution and the Civil Code. Part IV examines the means available to governing elites to control how the judiciary will interpret and apply such provisions, through the Supreme People's Court, the National People's Congress, and certain organs of the CPC itself. In part VI, we consider various prospects for the evolution of the legal system in light of these control mechanisms.

⁴ On the 'constitutionalization' process in Europe, see Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Western Europe* (Oxford University Press 2000) 114-122.

⁵ A classic account of the German case in English is Peter Quint (1989) 'Free Speech and Private Law in German Constitutional Theory' 48(2) *Maryland Law Review* 247.

⁶ Part I.B and I.C below.

I. THE “CONSTITUTIONALIZATION” OF THE PRIVATE LAW IN COMPARATIVE PERSPECTIVE

For present purpose, by ‘constitutionalization’ of the private law, we refer to the process through which (i) constitutional rights evolved as sources of private law, capable of being pleaded by litigants and enforced by the courts, and (ii) the techniques of constitutional interpretation became important modes of argumentation and decision-making in the judiciary, in particular when enforcing the Civil Code. Looking back on this process, two points stand out. First, decisions of a constitutional or supreme court to bestow horizontal effect to constitutional rights in the private law not only increase the importance of rights protection throughout the legal system, they enhance the relative powers and status of the constitutional court with respect to the parliament and all other judges. Second, virtually every powerful rights-protecting apex court in the world has sought to do so. Here we examine some of the main features of the ‘constitutionalization’ phenomenon.

A. *The Federal Republic of Germany*

Neither the founders of the Federal Republic’s Basic Law (1949), nor the members of its lower house of the Parliament (the *Bundestag*), meant for the Civil Code to be constitutionalized. Instead, the GFCC took the crucial steps in doing so, during the first decade of the Federal Republic. In Germany, this process destroyed certain orthodoxies of separation of powers, in particular notions to the effect that (i) the domains of ‘public law’ and ‘private law’ were to be kept strictly separate, and (ii) the Basic Law (1949) did *not* require the ‘ordinary (non-constitutional) judges’ to interpret and apply the Basic Law, which was the exclusive province of the GFCC.

The German legal system is comprised of multiple, ‘supreme’ courts, for: civil and criminal litigation; administrative law; tax and finance; labor law; and social security. From this perspective, the GFCC is a sixth high court, whose assigned task is to resolve constitutional disputes. According to the Basic Law, the GFCC is not formally a ‘judicial body’, but a specialized organ whose task is to give formal answers to constitutional questions, while possessing the power to invalidate any legal act it finds contrary to the Basic Law. At the same time, the GFCC is arguably the most important of all jurisdictions, as the authoritative interpreter of the Basic Law, whose charter of rights binds all public officials, including every judge.⁷

The constitutionalization process was driven by two major factors: inter-court rivalry; and the consequences of two landmark rulings of the GFCC. In *Elfes*,⁸ the GFCC held that Art. 2(1)⁹ of the Basic Law presumptively covered any action a person might choose, subject to permissible limitations on the part of state officials to protect the ‘rights of others’, and to defend the constitutional and moral orders. As applied in a long line of cases, the *Elfes* (1957) judgment made it clear that the charter was not restricted to rights enumerated in the Basic Law; indeed, Art. 2(1) comprised an open-ended recognition of general ‘liberty.’ Given the virtually unlimited scope of Art. 2(1), individual freedom and autonomy would naturally impact upon the private law. In its *Lüth* (1958) ruling,¹⁰ the GFCC stipulated that the charter of rights – which it characterized as a normative system constituted by ‘objective constitutional values’ –

⁷ Art. 1(3) of the Basic Law stipulates that: ‘The ... basic rights shall bind the legislature, the executive and the judiciary as directly applicable law’.

⁸ *Elfes* (16 January 1957), 6 BVerfGE 32. The ruling remains the longest yet rendered by the GFCC, at more than 300 pages.

⁹ Art. 2(1) of the Basic Law declares that: ‘Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law’.

¹⁰ *Lüth* (15 January 1958), BVerfGE 7, 198.

attaches to all societal relations, ‘radiating’ outward, from the constitution to the civil code. The Court stressed that these ‘values’ infused the private law in ways that bound the judiciary. Moreover, the GFCC insisted that the ordinary judges must ‘balance’ those rights (of the Basic Law) against the private autonomy of the parties (enshrined in the provisions of the Civil Code), or two contending right against each other, in the context of the litigation at hand. In hundreds of subsequent decisions, the GFCC would require that judges of the Civil Code enforce the proportionality principle when engaged in such balancing, and that the ‘correctness’ of such decisions would be reviewable by the GFCC through the constitutional complaint procedure.¹¹ Indeed, the diffusion of the proportionality principle went hand in hand with the consolidation of the horizontal effect of rights. The constitutional complaint has since become a routine cause of action against the judgments of ordinary courts, in essence, ‘appealing’ judicial rulings that fail adequately to apply constitutional rights, as conditioned by the GFCC’s case law.

The GFCC took these decisions in the context of fierce inter-court competition for prestige and policy influence. Upon the advent of the new Basic Law, the Federal Labor court had decided to enforce the charter of rights directly, without authorization from the GFCC or the legislator, in litigation between private parties. On the basis of the Labour courts’ theory – which articulated the position now known as the ‘horizontal direct effect’ of constitutional rights – the power of CJR could easily have diffused to all courts, converting the “concentrated” system of review¹² into something akin to the ‘diffuse’ system of CJR associated with the U.S.A.¹³ In this struggle for authority, the labour courts would have emerged the big winner, and the GFCC the loser. For their part, the civil courts had long treated the Civil Code as a ‘quasi-constitutional’ instrument of governance and nation-building,¹⁴ overtly deploying natural law notions when interpreting the Code, which had grown to include more than 2,300 sections. The supreme court – now called the *Bundesgerichtshof* [BGH] – had long possessed enormous prestige, however diminished by complicity with the recent Nazi horrors. In contrast, the GFCC was a fledgling newcomer. Hovering in the background was the classic ‘public’ versus ‘private’ law divide. Traditionalists assumed that the domain of public law was limited to issues revolving around the relative competences of state institutions and public authority. However, following from state theory developed during the Weimar Republic by Smend and others,¹⁵ the constitutional law could be conceived as a body of higher norms capable of unifying the juridical and political state, not least, as a matter of formal hierarchy and positive law. Indeed, Smend’s ideas of ‘constitutional integration’ of law and society heavily informed the GFCC’s early jurisprudence of objective constitutional ‘values’ in *Lüth*.

¹¹ The proportionality principle, which developed as an unwritten general principle of law in the 18th century, evolved into a master principle of constitutional legality under the GFCC’s tutelage, after the *Lüth* holding; see Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Constitutional Governance* (Oxford University Press 2019) 60-69.

¹² Forms of ‘constitutional review’ have deep roots in German legal history; see Klaus Von Beyme, ‘The Genesis of Constitutional Review in Parliamentary Systems’, in Christine Landfried (ed.), *Constitutional Review and Legislation: An International Comparison* (Baden-Baden, 1988), 21. The modern constitutional court is a product of the scholarship of Hans Kelsen and the Constitution of the Austrian Second Republic, which Kelsen drafted; see Alec Stone Sweet, ‘Constitutional Courts and Parliamentary Democracy’ (2002) 72 *West European Politics* 77.

¹³ For a discussion of distinctions between the ‘European’ and ‘American’ models of CJR, see Alec Stone Sweet, ‘Constitutional Courts’, in Michel Rosenfeld & Andras Sajó (eds.), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012): 816.

¹⁴ Jud Mathews, *Extending Rights’ Reach: Constitutions, Private Law, and Judicial Power* (Oxford University Press 2018) 24.

¹⁵ Rudolf Smend *Verfassung und Verfassungsrecht* [Constitution and Constitutional Law] (Duncker and Humblot 1928). For a contemporary discussion of the “integrative function” of constitutions by a former member of the GFCC, see Dieter Grimm, ‘Integration by Constitution’ (2005) 3(2-3) *I-CON* 193.

Thousands of commentaries on *Elfes* and *Lüth* have been written.¹⁶ For present purposes, what is important are certain strategic (political) logics. First, the *Elfes* line of jurisprudence made it clear that Art. 2(1) “protects every form of human activity without consideration of the importance of the activity for a person’s development”.¹⁷ It follows that there would be no need for the BGH’s reliance on natural law norms or reasoning to ‘fill gaps’ or generate ‘new’ rights, since the Basic Law itself already contained any unenumerated right that might be pleaded in litigation. Second, *Lüth* precluded the position charted by the Federal Supreme Labour Court, while announcing that rights were instead possessed of ‘horizontal indirect effect’ (stipulating that the codes must be interpreted in conformity with the Basic Law). Thus, although constitutional rights could not be directly pleaded, *inter partes*, all judges were under an institutional obligation to harmonize the private law with the Basic Law. In this part of *Lüth*, the GFCC acknowledged the relative autonomy of the ordinary courts: a private law dispute would ultimately remain litigation organized by the private law. Third, the constitutionalization process would proceed through judicial balancing and dialogue, which would necessarily unfold in fluid, case-sensitive ways. The GFCC could control the contours of the process, through the constitutional complaint procedure. Put differently, the GFCC delegated some of its authority to interpret the charter of rights to the ordinary courts, but retained its exclusive power to annul statutes and all other infra-constitutional legal acts, including the rulings of the ordinary courts. Fourth, the process quickly exhibited its capacity to displace the legislator, as when a judge ‘rewrite’ the Civil Code so that it includes provisions that the parliament have already explicitly rejected. In the *Soraya* (1973) case, the courts did just that, by supplying a remedy for damages when one’s ‘right of personality’ (privacy) has been violated by another, despite the fact that the *Bundestag* had pointedly refused to do so on several prior occasions.¹⁸ The Civil Code is legislation, but it must remain compatible with the dictates of the Basic Law, the ultimate master of which is the GFCC.

The GFCC’s pronouncement of the ‘horizontal indirect effect’ of rights may well have yielded rhetorical benefits, communicating to ordinary judges that the GFCC was prepared to engage in a certain degree of inter-court dialogue and diplomacy. But the holding did not end inter-court rivalry. BGH judges and civil law scholars continued to criticize *Lüth* as a usurpation of the power of the civil courts, and conflicts have regularly flared into the open.¹⁹ In the end, judges and scholars have accepted the basics of *Lüth*, in large part, because it expanded the constitutional competences and status of the BGH and other courts as the status of rights-based judging was increasing domestically and in the European courts. In any event, the holding did not stop the constitutionalization of the private law. Indeed, as Kumm argues,²⁰ the distinction between ‘direct’ and ‘indirect’ horizontal effect proved to be devoid of practical relevance, not least because the ordinary courts were placed under a reviewable obligation to ensure that the private law was compatible with the charter of rights when the latter was in play.

B. The European Union

Chinese officials and scholars rarely discuss the case of the European Union [EU]. In the EU, there is no unified civil code, although a series of major efforts at producing a ‘harmonized’ civil code began in the

¹⁶ *Lüth* is considered to be the most important ruling ever rendered by the GFCC; Peter Quint, ‘A Return to *Lüth*’ (2011) 74(16) *Roger Williams University Law Review* 73, 76.

¹⁷ *Cannabis* (1994), BVerfGE 90, 145.

¹⁸ *Soraya* (1973), BVerfGE 34, 269. In *Soraya*, the GFCC agreed with the BGH on the key question: the parliament’s failure to supply the damage remedy would lead to a fundamentally ‘unjust’ result, and is thus forbidden to the courts. Ulrich Magnus, ‘Damages for Non-Economic Loss: German Developments in a Comparative Perspective’ (1990) 39(3) *The International and Comparative Law Quarterly* 675.

¹⁹ Alec Stone Sweet, ‘The Juridical *Coup d’État* and the Problem of Authority’ (2007) 8(10) *The German Law Review* 8 (10): 915, 921.

²⁰ Mattias Kumm, ‘[Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law](#)’ (2006) 7 *German Law Journal* 341, 352.

1980s and continue into the present.²¹ That said, the founding treaties of the EU contained certain fundamental rights of a private law nature. With its decision in *Defrenne II* (1976), the Court of Justice of the EU (CJEU) went further than the GFCC, announcing the horizontal direct effect of the ‘equal pay for equal work’ provision of the Treaty of Rome, a decision that would ground the expansive development of the sex equality domain ever since, as well as non-discrimination in the workplace more generally.²² After the CJEU’s *Cassis de Dijon* (1979) ruling (on the free movement of goods) served to revive European integration,²³ EU legislators adopted a series of ‘directives’ that constituted – and ‘constitutionalized’ – the EU’s private law.²⁴ This corpus is today considered to be a type of ‘economic constitution’.²⁵ EU Directives separately cover broad areas of private law, including consumer rights and protection, unfair terms in contracts, e-commerce, financial services, social security and private pension schemes, non-discrimination on the basis of ethnicity, age, gender, and sexual preference, etc.

In December 2000, the EU codified a Charter of Rights, which binds not only the EU but the member states, including national courts, whenever they implement EU legal norms within domestic legal orders. The Charter contains a handful of ‘absolute’ rights: to human dignity (Art. 1), the right to life (Art. 2), and the integrity of the person (Art. 3); to the prohibition of torture and inhuman treatment (Art. 4), and of slavery and enforced labour (Art. 5). These are followed by long list of both negative and positive rights that are qualified by a limitation clause, including the rights to education (Art. 14), work and choice of occupation (Art. 15), fair and just working conditions (Art. 31), social security and social assistance (Art. 34), health care (Art. 35), services of ‘general economic interest’ (Art. 36), environmental protection (Art. 37), and other ‘social rights’, some of which have no analogs in Chinese law. Art. 52 of the EU Charter echoes the case law of the European Court of Human Rights: authorities must respect the proportionality principle when enforcing qualified rights.

Any limitation on the exercise of the rights and freedoms ... must be provided for by law and respect [their] essence. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Sacha Prechal – currently a justice on the CJEU – put the issue of the horizontal effect of Charter rights in this way:

[F]undamental rights are frequently ... perceived as [an] expression of values that underlie the entire legal order, public and private; they are so elementary that they must be applicable in both private and public law relationships. This may explain why [they] are often couched in general terms, without mentioning the duty bearers of these rights. According to the Court ... fundamental rights are essential values permeating the entire EU legal order and therefore may produce, under certain conditions, horizontal direct effect.²⁶

The bottom line is that, as the field of EU private law expands, so does the legal obligation to interpret and apply its elements in light of the Charter.

²¹ Arthur S. Hartkamp, et al. (eds), *Towards A European Civil Code* (Kluwer 2010, 4th ed.); Hugh Collins, *The European Civil Code: The Way Forward* (Cambridge University Press 2008);

²² Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004) ch. 4.

²³ Stone Sweet (Note 22) ch. 3.

²⁴ Hans Miklitz (ed), *Constitutionalization of European Union Private Law* (Oxford University Press 2014).

²⁵ Miguel Maduro, [We the Court: The European Court of Justice and the European Economic Constitution](#) (Hart 1998); Tony Prosser, *The Economic Constitution* (Oxford University Press 2014) 59.

²⁶ Sacha Prechal, ‘Horizontal Direct Effect of the Charter of Fundamental Rights of the EU’ (2020) 66 *Revista de Derecho Comunitario Europeo*, 407, 418.

In addition to the Charter of Rights, the CJEU controls the interpretation of the ‘general principles’ of EU law, which includes a list of rights that the CJEU began to construct in the 1970s, on the basis of the European Convention, and the ‘constitutional traditions’ of the member states. The general principles have treaty rank (that is, ‘constitutional status’), which the CJEU and national courts have leveraged to upgrade the effectiveness of national standards of rights protection. The German labour courts, for example, had opposed (since the 1950s) the GFCC’s refusal to extend full proportionality analysis to the right of non-discrimination with regard to certain discriminatory wage agreements. During the 2004-2006 period, however, the Federal Supreme Labour Court and the CJEU forged a powerful interpretive alliance that eventually forced the GFCC to do so, after the matter had been ‘constitutionalized’ under EU directives, general principles, and a landmark ruling²⁷ of the CJEU.²⁸

As these developments make clear, the migration or ‘radiation’ of rights-based adjudication of private law disputes in Europe also codified the view that rights necessarily possessed ‘horizontal’ properties, given that private power often rivalled or surpassed the power of the state in certain domains. Under this view, there can be no firm distinction between public and private law, insofar as an overarching purpose of law is to remedy unlawful harms caused by the actions of *any* actor possessed of otherwise unconstrained power.²⁹

C. Diffusion

At the domestic level, complex, multi-dimensional paths of integrating the constitution and the private law are taking place across the globe, including in Asia. In common law systems, the Constitutions of Ireland (1932) and South Africa (1996) explicitly provide for the horizontal direct effect of rights, which gradually led to routine judicial enforcement of rights in private law litigation.³⁰ In India,³¹ the innovative construction of the constitution by the courts have ‘transformed’ the private law. In Canada, a labor dispute led the Supreme Court of Canada to adopt an important, if weaker, version of horizontal indirect effect with respect to the common law, once the 1982 Charter of Rights entered into force.³² In civil law systems, one finds newer constitutions gradually impacting, or reflected in, much older civil codes, as in Brazil (whose present Constitution dates from 1988, while its Civil Code was adopted in 1916).³³ In Colombia, the Constitutional Court has since the 1990s fully committed to extending the reach of rights

²⁷ *Mangold v. Helm*, CJEU Case C-144 (Judgement of 22 November 2005).

²⁸ The episode is analysed in detail in Alec Stone Sweet and Kathleen Stranz, ‘Rights Adjudication and Constitutional Pluralism in Germany and Europe’ (2012) 19(1) *Journal of European Public Policy*, 92.

²⁹ See Dieter Grimm, ‘The Role of Fundamental Rights after Sixty-Five Years of Constitutional Jurisprudence in Germany’ (2015) 13(1) *International Journal of Constitutional Law* 9.

³⁰ Patrick O’Callaghan, ‘Constitutional Rights and Private Law’, in Andreas Furrer (ed), *Europäisches Privatrecht im wissenschaftlichen Diskurs [European Private Law in Scholarly Discourse]* (Stämpfli 2006) 249; Christopher Roederer, ‘The Transformation of South African Private Law After Twenty Years of Democracy’ (2016) 14(1) *Northwestern Journal of Human Rights* 1.

³¹ Shyamkrishna Balganes, ‘The Constitutionalization of Indian Private Law’, in Sujit Choudhry, Madhav Khosla & Pratap Banu Mehta (eds.), *The Oxford Handbook of The Indian Constitution* (Oxford University Press, 2016) 680.

³² See *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd*, The Supreme Court of Canada [1986] 2 S.C.R. 57. Alan Domes, *The Courts, The Common Law, and the Constitutional Imperative: Beyond Dolphin Delivery* (1988-1999) 27(3) *Alberta Law Review* 430.

³³ Gustavo Tepidino, ‘Human Rights in Private Law: The Brazilian Experience’, in Verica Trstenjak & Petra Weingerl (eds), *The Influence of Human Rights and Basic Rights in Private Law* (Springer 2016) 115.

into the private law,³⁴ leading an association of civil law professors to openly oppose some of its Court's most important opinions on the topic.³⁵

Curiously, Chinese scholars rarely mention the Asian cases, despite the fact that civil codes of German inspiration are common in the region. The Taiwan Area of China and South Korea possess powerful constitutional courts that embraced German-style doctrines, as means of unifying the legal system and enhancing the effectiveness of rights protection.³⁶ In South Korea, the Supreme Court issued a landmark ruling in 2010³⁷ that formally recognized the horizontal indirect effect of constitutional rights on the private law and the Civil Code of 1958, consolidating prior case law that had implied as much. Decisions strengthened the protections afforded to claims of inheritance, labour law, privacy and defamation, religious education, and of non-discrimination of transsexuals, was produced in the context of intense inter-court rivalry, a situation reminiscent of the German case. In consequence, the Supreme Court found it 'necessary' to embrace the horizontal effect of rights, not least, to 'enhance' its own relative prestige.³⁸ In the Taiwan Area, the constitutional reconstruction of the Civil Code³⁹ gathered momentum in the 1990s, particularly with respect to freedom of expression,⁴⁰ labor relations, gender equality, and family law, as the Constitutional Court built and reinforced its CJR authority.⁴¹ As in South Korea, many past and current judges and legal scholars of the Taiwan Area have pursued graduate studies in Germany, and the *Lüth* line of cases has been widely discussed.⁴² In January 2022, a constitutional complaint procedure was added to the jurisdiction of the Constitutional Court, which is likely to bolster its authority *vis à vis* the ordinary judges and the Supreme Court of the Taiwan Area. In contrast, in Japan a very weak form of horizontal indirect effect can be discerned, a product of relatively passive deployment of CJR.⁴³

In summary, the constitutionalization phenomenon contains elements of congruence in that a broad range of legal systems have embraced its main features, while being multi-faceted and diverse on the ground, in any specific polity.

³⁴ Juan Jacobo Calderón Villegas, *La Constitucionalización del Derecho Privado* [The Constitutionalization of the Private Law in Colombia] (Universidad de los Andes Press, 2011).

³⁵ JoJorge González Jácome, 'A New Judge for the Colombian Constitutional Court: The Tensions of Transition' (November 13, 2013) I-CONnect. Online at: <http://www.iconnectblog.com/2015/11/a-new-judge-for-the-colombian-constitutional-court-the-tensions-of-transition/>.

³⁶ Chien-Chih Lin, 'Autocracy, Democracy, and Juristocracy: The Wax and Wane of Judicial Power in the Four Asian Tigers' (2017) 48(4) *Georgetown Journal of International Law*, 1063.

³⁷ Supreme Court. 2008Da38288, April 22, 2010 (2010 GONG 897) (S. Kor).

³⁸ Jinsu Yune, 'Judicial Activism and the Constitutional Reasoning of the Korean Supreme Court in the Field of Civil Law', in Jiunn-rong Yeh (ed.) *The Functional Transformation of Courts: Taiwan and Korea in Comparison* (Vandenhoeck & Ruprecht Verlage/National Taiwan University Press 2015) 123, 133-134.

³⁹ The Taiwanese Civil Code, enacted in 1930 in China, was transferred to Taiwan in 1945.

⁴⁰ Ja-Lin Wu, ('The Practice of the Third-party Effectiveness Theory of Basic Rights in Taiwan's Courts: From the Perspective of Legal Economic Analysis and Applicable Benefit Assessment' 2020 68 *National Chung Cheng University Law Journal* 165) 吳家林, 《基本權第三人效力理論於我國法院之實踐——從法律經濟分析及適用利益衡量的觀察》, 載《中正大學法學集刊》2020年總第68期, 第165-227頁.

⁴¹ Li-Jiu Lee, 'The Constitutionalization of Taiwanese Family Law (2016) 11(2) *National Taiwan University Law Review* 273.

⁴² See, e.g., Shin-Min Chen, ('Constitutional Fundamental Rights and the Theory of "Third-Party Effect"', in Shin-Min Chen, *Theory and Practice of Public Law in a Rechtsstaat: Chen Xinmin's Selected Essays in Jurisprudence* [Sanmin Publishing 2011]) 陳新民, 《憲法基本權利及「對第三者效力」之理論》, 收錄於陳新民, 《法治國家公法學的理論與實踐—陳新民法學論文自選集》, 三民出版社2011年版.

⁴³ Yasuo Hasebe, 'The Supreme Court: A Judicial Court, Not Necessarily a Constitutional Court', in Albert Hung-ye Chen & Andrew James Harding (eds), *Constitutional Courts in Asia: A Comparative Perspective* (Cambridge University Press 2018) 289, 292. David Law, 'Why Has Judicial Review Failed in Japan?' (2011) 88(6) *Washington University Law Review* 1425.

II. CHINA: THE CONSTITUTION, THE CIVIL CODE, AND JUDICIAL REVIEW

When one examines the nature and scope of the Chinese Civil Code, one is struck by another commonality identified and analysed by scholars of comparative constitutional law scholars: arguments to the effect that certain pieces of ordinary law have been held to reflect the constitutional precepts and values of the polity. These are ‘super statutes’, which are common to civil and common law systems.⁴⁴ The CPC has firmly embraced the notion that particularly important meta-statutes are a necessary feature of ‘good governance’ in the PRC, whereas the ‘super statute’ label, given its constitutional associations, would lead to fierce contestation. In any event, the Civil Code is not only a ‘super-statute’, it has generated intense controversy and constitutional debate (as will be discussed in part III).

A. Political Supremacy and Judicial Review

The evolution of a state-controlled, ‘market-based’ economy in China has entailed extensive legal reform since its advent in the 1980s.⁴⁵ The CPC has overseen several major amendments to the Constitution, and promoted new legislative regulatory frameworks, some of which (e.g., the 2007 law on property) were subject to intensive debate over more than a decade before final adoption by the National People’s Congress [NPC]. In recent years, the pace of ‘comprehensive’ statutory reform has accelerated, with the NPC passing major reforms on tort liability (2010), consumer protection (2013, 2018, 2019), e-commerce (2019), banking and finance (2017), among others, some of which have been absorbed into the most far-reaching of all: the Civil Code (2021). Some of these statutes touch directly on the powers of the courts, such as the administrative litigation law (2014, amending the 1989 act), which seeks to strengthen administrative judicial review, including extending standing rules, clarifying those related to public interest actions, and creating new remedies binding on administrative authorities.⁴⁶ In 2018, the NPC conferred vast competences on what is now a super-ministry – the State Administration for Market Regulation – to adopt and supervise regulation across sectors as diverse as food, drugs, cosmetics, intellectual property and internet services, as well as to supervise compliance with anti-trust rules. Thus, considered as ‘law on the books’, the Chinese regulatory landscape has been transformed.

At the same time, the CPC has rationalized and reinforced its own centralized, ‘political’ supervision of the courts. The current ‘conventional understanding’⁴⁷ rests on the view that several inter-locking systemic issues had been settled in the 2000s. The first concerns the prohibition of CJR.⁴⁸ In 2008, a Decision of the Supreme People’s Court destroyed a movement led by certain judges and legal scholars in favor of CJR. As readers will know, the *Qi Yuling* litigation, which unfolded over a decade, formally concluding in 2008 when the Supreme People’s Court repudiated an earlier decision to the effect that the right to education, enshrined in the Constitution of the PRC, was directly effective in a private dispute. We will return to the *Qi Yuling* saga in part III, below. The second issue involves the importance of constitutionalism and state theory more generally. The Supreme People’s Court’s reversal in 2008 capped a larger process in which the CPC had made it abundantly clear to academics, litigators, and judges that the Constitution was a ‘dead-letter,’⁴⁹ and off limits for discussion. This institutionalized taboo meant

⁴⁴ Stone Sweet & Mathews (note 11) 26. The notion of the ‘super-statute’ is elucidated in William Eskridge & John Ferejohn, *A Republic of Statutes* (Yale University Press 2010).

⁴⁵ For an overview, see Barry Naughton, *The Chinese Economy: Transitions and Growth* (MIT Press 2018, 2nd ed.).

⁴⁶ Wei Cui, Jie Cheng & Dominika Wiesner, ‘Judicial Review of Government Actions in China’ (2019) 2019(1) *China Perspectives* 35.

⁴⁷ For a critical expression of the ‘conventional view’, see Qianfan Zhang, ‘A Constitution without Constitutionalism? The Paths of Constitutional Development in China’ (2010) 8(4) *International Journal of Constitutional Law* 950.

⁴⁸ Qianfan Zhang, ‘Establishing Judicial Review in China’, in Albert H. Y. Chen and Andrew Harding (eds), *Constitutional Courts in Asia* (Cambridge University Press 2018) 311.

⁴⁹ Zhang (note 47) 952.

that the basic tenets of rights-based constitutionalism, which had diffused across the world since the end of World War II,⁵⁰ were anathema. These decisions, however, left open the answer to a third question: how does the Party and the NPC ensure the compatibility of legislation with the Constitution? After all, the Constitution – as the CPC continued to insist – comprised positive law, anchoring its own legal authority.

In response, party elites have built a system of control mechanisms, including bolstering what amounts to the ‘political review’ of legislation (in contrast to ‘judicial’ review). Historically, in legislative sovereignty systems, political review of the constitutionality of legislation has at times been a normal component of parliamentary life. To take just one example, what is now the French Supreme Court (the *Cour de Cassation*) evolved from a committee of parliament (established in the Constitution of 1795) to answer questions of statutory interpretation, given that the judiciary was forbidden to do so.⁵¹ In the French Third Republic (1870-1940), eminent scholars even argued that Parliament functioned as a type of constitutional ‘court’ (*jurisdiction*), whenever it decided questions of constitutionality,⁵² a procedural legacy that exists to this day (in the guise of the *motion d’rrevabilité* of the National Assembly and the Senate). We discuss the present system of Chinese ‘political review’ in part IV below. Meanwhile, the judiciary has itself been significantly restructured, through the so-called ‘quota-reform’ initiatives that took place in the 2014-2017 period, but which have been discussed since at least the late 1990s. The reforms, overseen by the Supreme People’s Court, were meant to reduce the size of the judiciary, and enhance the accountability of judges, without necessarily re-‘imagining’ their independence from the Party.⁵³

B. Embracing the ‘Rule of Law’

Notwithstanding the fact that CJR was formally prohibited in 2008, the CPC has prioritized the ‘rule of law’ at least since 2014. In China, the phrase, the ‘rule of law’ encompasses a complex blend of ideological and legal meanings. For present purposes, the phrase entails formal commitments: (i) to govern through more detailed statutes, and (ii) to enhance the liability of officials working at the provincial and local levels, and (iii) to confer greater autonomy on judges to enforce both. The strict control of the Party over the courts is presumed *not* to be contradictory to these goals.⁵⁴

A long list of official pronouncements have gathered in force. In 2014, the Central Committee of the CPC issued a *Decision on Several Important Questions related to the Full Promotion of Ruling the Country According to Law*, which called for ‘improvements to supervisory mechanisms of constitutional implementation’.⁵⁵ The Decision also required all citizens, public officials, state organs, the armed forces, political parties, and social and corporate entities to ‘treat the Constitution as a fundamental norm ... and assume the duty to defend the Constitution’s dignity’.⁵⁶ In 2021, the Central Committee adopted its *Plan*

⁵⁰ Stone Sweet and Mathews (note 11) 10-12.

⁵¹ Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (Oxford University Press 1992) 26.

⁵² Marcel Waline, ‘Elements d’une théorie de la juridiction constitutionnel’ (1928) 45 *Revue du droit public* 449.

⁵³ Ying Sun and Hualing Fu, ‘Of Judge Quota and Judicial Autonomy: An Enduring Professionalization Project in China’, forthcoming *The China Quarterly*.

⁵⁴ See Taisu Zhang and Tom Ginsburg, ‘China’s Turn Towards Law’ (2019) 59(2) *Virginia Journal of International Law* 306. For a discussion of the meaning of the concepts of ‘rule of law’ and ‘constitutionalism’ in China, see the exchange between Michael Dowdle, ‘Of Comparative Constitutional Monocropping: A Reply to Qianfan Zhang’ (2010) 8(4) *ICON* 977, and Qianfan ZHANG, ‘Of Comparative Constitutional Monocropping: A Rejoinder to Michael Dowdle’ (2010) 8(4) *ICON* 985.

⁵⁵ English translation online at: http://www.china.org.cn/china/third_plenary_session/2014-01/16/content_31212602.htm.

⁵⁶ *Ibid.*

on *Building the Rule of Law in China (2020-2025)*, which restated the Party's determination 'to persist in the supremacy of the Constitution and the law, strengthen the unity, dignity, and authority of the legal system,' while emphasizing that 'no laws, regulations, or legal documents may conflict with the Constitution'.⁵⁷ President Xi called attention to the Constitution's 'higher law' status, promising before the 19th CPC National Congress (2017) that the state would 'ensure compliance with the Constitution, advance constitutional review, and safeguard the authority of the Constitution'.⁵⁸ By 'constitutional review', Xi was likely referring to reinforced procedures of the NPC and its Standing Committee (examined below).

There have always been gaps between 'law on the books' and 'law in practice' in the PRC. Like the Constitution, statutes, no matter how much they are publicized and celebrated by the CPC or the NPC, have not always been enforced as anything more than aspirational frameworks dressed in the trappings of law. Further, the best empirical research has demonstrated that the CPC has taken pains to maintain 'multi-layered mechanisms' of 'pressure' and control over the courts, which have been tightened under President Xi's tenure.⁵⁹ The new Civil Code of 2021 brings these tensions – given the prohibition of CJR – to the forefront.

C. *The Norms and Structure of China's New Civil Code*

The Civil Code (2021) contains legal norms that most modern constitutions present in the form of justiciable rights. These include human dignity, equality, liberty, freedom of movement, due process, personality rights (to one's name, personal honor, privacy, honor and reputation), prohibitions (of, *inter alia*, unlawful search and seizure; of defamation and libel; of harming the rights of others), and a host of social and economic rights (to work and to rest, to education, to social insurance schemes, to marry and inherit, to child support, *inter alia*), as well as various norms non-discrimination. In addition, the Code contains rights that are *not* found in the Constitution, including certain civil rights of the foetus (Art. 15), the right to life (Arts. 110, 1002), the right to health (Arts. 110, 1004), the right to intellectual property (Art. 123), the right of sexual harassment victims to seek declarations of liability of the tortfeasor and compensation (Art. 1010), among others. The Civil Code therefore potentially is more 'complete' than the Constitution, and has the potential to displace Constitution when it comes to rights.

Modern charters of rights, both national and international, share certain core features.⁶⁰ A small number of fundamental rights are expressed in absolute form, that is, they are not qualified by a limitation clause. From this vantage point, the most important provision of the Code is Art. 110:

A natural person enjoys the right to life, the right to corporeal integrity, the right to health, the right to name, the right to likeness, the right to reputation, the right to honor, the right to privacy, and the right to freedom of marriage. A legal person or an unincorporated organization enjoys the right to entity name, the right to reputation, and the right to honor.

Further, the rights to life, dignity, health, and bodily integrity, 'are protected by law and free from

⁵⁷ English translation on-line at:

<https://www.chinalawtranslate.com/en/%E6%B3%95%E6%B2%BB%E4%B8%AD%E5%9B%BD%E5%BB%BA%E8%AE%BE%E8%A7%84%E5%88%92%EF%BC%882020-2025%E5%B9%B4%EF%BC%89/>>.

⁵⁸ Xi Jinping, 'Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era' (National Congress, October 18, 2017) English translation on-line at:

http://www.xinhuanet.com/english/download/Xi_Jinping's_report_at_19th_CPC_National_Congress.pdf.

⁵⁹ He Xin, 'Pressures on Chinese Judges under Xi' (2020) 85 *The China Journal* 49, 73,

⁶⁰ Stone Sweet and Mathews (note 11) 31-41, 162-163.

infringement by any organization or individual’ (Arts. 1002, 1003, 1004, 1005). Most rights, however, are subject to a ‘limitation clause’, which in other legal systems explicitly authorizes state officials, including judges, to restrict the scope of the right for some sufficiently important public purpose.

Limitation clauses come in one of two forms: (i) an umbrella license to abridge a cluster of rights, or all rights (e.g., Art. 1 of the 1982 Canadian Charter of Rights and Freedoms); and (ii) a bespoke clause attached to a single right (e.g., Art. 6 of the German Basic Law, enumerating the right to marriage and family life). The Civil Code, of course, is not a charter of rights; nonetheless it exhibits a mix of these familiar features. General limitation clauses are announced in Art. 8 (‘When conducting a civil activity, no person of the civil law shall violate the law, or offend public order or good morals’), and Art. 132 (‘No person of the civil law shall abuse his civil-law rights and harm the interests of the state, the public interests, or the lawful rights and interests of others’). Specific limitation clauses too are scattered throughout the Code. Art 1012 reinforces Art. 8:

A natural person enjoys the right to name, and is entitled to determine, use, change, or allow others to use his name in accordance with law, provided that public order and good morals are not offended’.

Art. 999 relies on ‘reasonableness’ considerations:

The name, entity name, likeness, personal information, and the like, of a person of the civil law may be reasonably used by those engaged in news reporting, supervision of public opinions, or the like, for public interests, except that civil liability shall be borne in accordance with law where the use unreasonably harms the personality rights of the person.

And Art. 1020(1) introduces both “‘reasonableness’ and ‘necessity’ requirements:

The following acts, if done in a reasonable way, may be performed without the consent of the person holding the right to likeness: (1) using publicly available images of the person holding the right to likeness to the extent necessary for personal study, art appreciation, classroom teaching, or scientific research.

In Europe, these types of provisions – like the general clauses on ‘public order’ and ‘good morals’ – have led to judicial reliance on balancing and the enforcement of the proportionality principle.

We have left three structural properties of the Civil Code for last. First, Art. 3 makes it clear that the Code is fully justiciable⁶¹:

The personal rights, proprietary rights, and other lawful rights and interests of the persons of the civil law are protected by law and free from infringement by any organization or individual.

As important, the Code creates new causes of actions and remedies, a good example being for sexual harassment.⁶² Second, the Code is not strictly private, in that it binds public authorities (e.g., Art. 243 authorizes the expropriation of property, for public purposes, but subject to compensation and other

⁶¹ The Civil Code also gives a passing bow to legal pluralism, recognizing the potential of custom to fill gaps. Art. 10, for example, states: ‘Civil disputes shall be resolved in accordance with law. Where the law does not specify, custom may be applied, provided that public order and good morals may not be offended’.

⁶² Art. 1010: ‘A person who has been sexually harassed against his will by another person through oral words, written language, images, physical acts, or the like, has the right to request the actor to bear civil liability in accordance with law. The State organs, enterprises, schools, and other organizations shall take reasonable precautions, accept and hear complaints, investigate and handle cases, and take other like measures to prevent and stop sexual harassment conducted by a person through taking advantage of his position and power or a superior-subordinate relationship, and the like’.

‘lawful rights and interests’), and will often overlap litigation challenging administrative acts.⁶³ Third, Art. 1 states that the Code complies with the Constitution:

This Law is formulated in accordance with the Constitution of the People’s Republic of China for the purposes of protecting the lawful rights and interests of the persons of the civil law, regulating civil-law relations, maintaining social and economic order, meet the needs for developing socialism with Chinese characteristics, and carrying forward the core socialist values

Art. 1, of course, raises primordial issues. Does either the Code or the Constitution evolve and, if so, through what processes? Does Art. 1 require a doctrine of horizontal effect of the constitution and rights? If so, to what extent must the prohibition of CJR be modified? Third, the most important rights enumerated in the Code are simply announced, often without giving any interpretive guidance to judges or any kind.

Thus, considered as an instrument of delegation, the Civil Code expressly charges judges with the task to enforce vague, open-ended norms. Of course, this would normally indicate that the CPC means to empower judges with the necessary authority of interpretation and lawmaking, at least in individual cases.

III. THE SCHOLARLY DEBATE

Civil law systems have traditionally glorified the role of parliamentary and downplayed that of the courts. The judge, in Merryman’s memorable words, is conceptualized as an ‘operator of a machine designed and built by legislators’.⁶⁴ At the same time, *la doctrine* – legal scholarship – occupies an honored place. Scholars are the quasi-official commentators, intellectual critics, and adjunct reformers of statutes and the legal system itself. In Europe, scholars have, at times, rebelled against the dogmas of parliamentary supremacy; indeed, in the late 19th century and early 20th centuries, the vast majority of French and German publicists aggressively sought to convince the judiciary to overthrow the prohibition of judicial review.⁶⁵ In most periods, however, law professors reenact their primary role: as faithful agents of the ‘law on the books’.

In China, much of the CPC’s decision-making is left opaque and undocumented, which has meant that observers at times treat scholarly writings as a surrogate means of evaluating the preferences of the CPC. New trends in scholarship can be harbingers of legal change, revealing institutional friction and judicial unease. Compared to Chinese judges, scholars work under fewer constraints, both formal and informal. Moreover, many scholars worked on the drafting of the new Code. Nonetheless, if scholars are to challenge established views, they will consider the potential negative consequences of their words, including whether their writings will incur official disapproval or even formal punishment.

The Civil Code has reincarnated some of the most polarizing legal debates in the PRC’s history, including questions concerning CJR. Simplifying a complex set of debates, some scholars argue that the Civil Code – the center of gravity for the ‘private law’ – should be kept as separate as possible from the Constitution (the basis of ‘the public law’). A latent threat is implicit: to seek to revive old controversies concerning rights and review would be dangerous to the academic community and, ultimately, to the judiciary. A second group underlines the fact that the NPC itself designed the Code to be a special type of statute – a

⁶³ FENG Jianpeng: ‘Constitutional Reasons and Functions of Judicial Judgments in China: An Empirical Study Based on Public Judgment Documents’, *Legal Research*, No. 3, 2017, p. 55. 冯建鹏: 《我国司法判决中的宪法原因及其功能——基于已公开判决文书的实证研究》, 《法学研究》2017年第3期, 第55页。

⁶⁴ John Henry Merryman, *The Civil Law Tradition* (Stanford University Press 1985), 36.

⁶⁵ Stone (note 51) ch. 1. Alec Stone Sweet, ‘Why Europe Rejected American Judicial Review - and Why it May Not Matter’ (2003) 101 *Michigan Law Review* 201.

paradigmatic example of a Chinese ‘super statute’ – which explicitly proclaims the state’s commitment to fundamental rights. A third group goes even further, asserting that the Civil Code is a legitimate, even necessary, vehicle for the development of the Constitution of the PRC, enforceable rights, and the legal system. Significantly, these scholars commonly deploy German and comparative legal materials to bolster arguments in favor of ‘constitutionalizing’ the private law in China.

A. *The Strict Separation of Private and Public*

Conservatives defend preserving the pre-Code legal system as much as possible. For this group, the Code was meant to build on existing precepts of the private law, extending without transforming them. The core of the argument – orthodoxy in Europe prior to *Liith* – is that the public law and the private law are autonomous legal domains. Long, the dean of the Beihang law faculty, claims that Art. 1 of the Code establishes only a procedural requirement, at most, trite law.⁶⁶ Confirming that the Constitution permits the NPC to adopt the Code closes inquiry into the statute’s legality. Substantive incompatibilities between the two texts should be tolerated or ignored. Although Long does not oppose interpreting the Code in harmony with the Constitution, he rejects any suggestion that the Code “implements” the Constitution, or makes the latter ‘indirectly’ justiciable. The Constitution is not the ‘parent’ of the Code; and the Code’s internal force does not depend on the Constitution, except in the banal procedural sense just mentioned. Moreover, Long, Qian,⁶⁷ and others assert that a correct understanding of Chinese and comparative history would not support a ‘constitutional’ reading of the private law. Consolidating the private law deserves to be acclaimed, but not because it embodies the PRC’s constitutional values.

B. *The Civil Code as the “Fundamental” Law of China*

In a 2020 article featured in *China Law* (a journal subtitled, ‘A Professional, Authoritative Record of the Rule of Law’⁶⁸), a prominent drafter of the Civil Code – Sun Xianzhong, a member of the NPC Constitution and Law Committee, and of the Chinese Academy of Sciences) – all but declares the Code to be what we would call a super statute, with an important caveat. Sun celebrates the Code as an ‘incorporation of the guiding principles of the CPC Central Committee for national governance, ensuring people’s well-being, and advancing the development of a market economy ...’⁶⁹ The Code is the ‘cornerstone of the rule of law’,⁷⁰ Sun tells us. Further, it expresses the ‘fundamental social norms’ of the country, ‘implementing’ the ‘basic guiding principles’ of the legal system, in order to ‘propel social progress, reform, and governance’ forward, and comprising ‘the most vital fundamental initiative,’ in comparison to any previous legal reform.⁷¹ In particular, Sun focuses attention on basic rights:

The Civil Code highlights the protection of rights of the person, and comprehensively enhances the humanistic spirit of China’s law [and legal system] on the basis of human dignity... Art. 2 of the Code places personal relations ahead of property relations, and not the other way around. ... [W]ith the view to strengthening and implementing the principle of protecting the rights of the person, the Civil Code consistently seeks to boost the ... rights of the person.⁷²

⁶⁶ Long Weiqiu (‘Study of the Specialty and Independence of the Basis of the Civil Code: The Relationship between the Constitution and the Civil Code’ 2016[6] *Journal of the National Prosecutor’s College* 27, 31) 龙卫球, 《民法依据的独特性——兼论民法与宪法的关系》, 《国家检察官学报》2016年第6期, 第27-38页, 第31页.

⁶⁷ QIAN Fuchen, (‘A Basic Exposition of the Issues of the Constitution’s Judicial Enforceability – A Comparison between China and the West 2014[2] *Contemporary Law Review* 3) 钱福臣, 《我国宪法司法效力问题的基础认知——基于中西比较的立场》, 《当代法学》2014年第2期, 第3-11页.

⁶⁸ SUN (note 2).

⁶⁹ *Ibid.* 81.

⁷⁰ *Ibid.*

⁷¹ *Ibid.* 83.

⁷² *Ibid.* 89.

Following this litany comes the caveat: Sun forcefully denies that the Civil Code is or resembles a charter of rights. Bills of rights, he stresses, are merely ‘inspirational’ and ‘cannot bring [the People] any tangible benefits’.⁷³ He illustrates the point with reference to the *French Declaration of the Rights of Man* (1789) and the *Universal Declaration of Human Rights* (1948), examples that fatally subvert his own claims. The French Constitutional Council, in a famous 1971 ruling, ended a long-running controversy among scholars and politicians by incorporating the 1789 Declaration into the French Constitution⁷⁴; and domestic courts around the world recognize the UN Declaration to be a constituent component of the International Bill of Rights, provisions of which they regularly enforce, including in Hong Kong.⁷⁵

A second group is willing to go further than Sun, arguing that the Civil Code performs ‘constitutive’ functions, including the ‘legitimation’ of private law.⁷⁶ The view cannot be reconciled with Marxist-Leninist conceptions of law, or with the traditional dogmatics that would distinguish ‘private’ from ‘public’ law. Instead, the Code officially endorses a novel counter-narrative, challenging academics to reconceptualize Chinese constitutionalism and the rule of law. These scholars openly consider the various ways in which the Constitution and the Code overlap, and debate the consequences of such synergies.

Unlike Sun, those who embrace the Code’s ‘constitutional’ features argue that, at a minimum, Art. 1 of the Code implies the horizontal indirect effect of the PRC’s Constitution.⁷⁷ Nonetheless, many within this group worry that, in China, the courts are too weak, and judges too timid, to bear the heavy burden of constitutionalisation.⁷⁸

C. Integrating the Civil Code and the Constitution

A third group considers the Civil Code to be a ‘supplement’ to its ‘parent’: the Constitution.⁷⁹ Miao and Zheng argue these points expressly, while cautioning against the direct enforcement of constitutional provisions by the courts. Courts are to ‘indirectly’ apply the Constitution, through ‘constitutionally-conforming’ interpretations of the Code (i.e., broadly speaking, the German doctrine).⁸⁰ Han agrees, while seeing the Constitution as a positive constraint on judges, blocking excessively broad constructions of ‘private autonomy’, and grounding the substance and scope of the general clauses, whose purpose is to infuse the private law with the priorities of the Party and Chinese socialism.⁸¹ Wang Liming, who plays a leading role in drafting the Civil Code, is also mindful of its constitutional dimension. In Wang’s view, the Civil Code comprises a quasi-constitutional statute, while Art. 1 authorizes doctrines associated with

⁷³ Ibid. 82.

⁷⁴ Stone (note 51), ch. 3.

⁷⁵ Stephen Gardbaum, ‘Human Rights as International Constitutional Rights’ (2008) 19(4) *European Journal of International Law* 749.

⁷⁶ LIN Laifan, (A Constitutional Analysis of the Compilation of the Civil Code 2016[4] *Chinese Journal of Law* 99) 林来梵, 《民法典编撰的宪法学透析》, 《法学研究》2016年第4期, 第99-118页.

⁷⁷ MIAO Lianying & ZHENG Lei, (‘Three Constitutional Issues of the Compilation of the Civil Code’ 2015[6] *Law and Social Development* 74) 苗连营、郑磊, 《民法典编撰中的宪法三题》, 《法制与社会》2015年第6期, 第74-82页.

⁷⁸ QIAN (note 67).

⁷⁹ Cao (2020) disagrees, arguing that rights in the Civil Code are not ‘concrete manifestations’ of constitutional rights. See CAO Xiangjian (‘Constitutional Dimension of Personality Rights and the Compilation of the Civil Code’ 2020[2] *Zhejiang Social Sciences* 33) 曹相见, 《人格权法定的宪法之维与民法典编纂》, 《浙江社会科学》2020年第2期, 第33-41页.

⁸⁰ MIAO & ZHENG (note 77).

⁸¹ HAN Dayuan, (‘The Codification of the Civil Code Should Embody the Constitutional Spirit’ 2016[6] *Journal of National Prosecutors College* 3) 韩大元, 《民法典编纂要体现宪法精神》, 《国家检察官学院学报》2020年第6期, 第3页.

the horizontal indirect effect of the Constitution. Judges are, indeed, under a duty to ‘concretize constitutional values’, through their adjudication of the Civil Code.⁸² Wang, Shi and others reference the European experience in support of their arguments,⁸³ and some have even cited to *Liith*.⁸⁴

It is worth mentioning that the practical differences between (i) the ‘indirect effect’ approach to the relationship between the Constitution and the Civil Code, and (ii) Sun’s conception of a more autonomous statute, are likely more theoretical than real, when considered in terms of litigation in the courts. In his *China Law* article, Sun revisits the *Qi Yuling* case,⁸⁵ ostensibly to demonstrate how a dispute considered to be a ‘hard case’ a decade earlier has been recast as a simple case under the new Code. After discussing the proven facts (that Qi’s identity had been stolen by another student, who used it to gain entrance into a business school), Sun notes that Art. 109 of the new Code directly, and on its own, resolves the dispute. Art. 109, recall, declares the dignity norm; the other ‘personality rights’ in the Code are derived from dignity, including the protection of one’s name, as enumerated in Art. 110. Sun asserts that, because the dignity norm is ‘full and absolute’, there would today be no need to enumerate the full panoply of personality rights in order to resolve a case such as Qi’s. These comments are of obvious importance, indicating that the NPC intended to delegate interpretive powers to judges to fill normative gaps.

Scholars have also addressed several issues of great comparative interest, including gap-filling, the function of the general clauses, and balancing. As just discussed, Sun treated the Civil Code as if contained no gaps that could not be covered by more abstract norms such as dignity, or the general clauses. Those who consider the Civil Code to have operationalized a previously ‘dormant’ text – the Constitution – have argued that judges must enforce the Code while considering Constitutional norms, including when encountering gaps. The argument is both far-reaching and controversial.⁸⁶ The general clauses of the Chinese Code simply identify ‘public policy’ and ‘good morals’ as enforceable norms, but do not otherwise define or qualify them. In Europe – especially Germany and Italy – virtually identical general clauses in civil codes have served as ‘portals’ to allow the policy’s ‘objective values’ to ‘flow in’ or ‘penetrate’ the Civil Code, especially values that anchor the nation’s commitment to constitutional rights. In China, one finds scholars arguing along broadly similar lines,⁸⁷ in the context of the impossibility to apply the Constitution directly. These arguments unabashedly treat the enforcement of the Civil Code as an indirect form of CJR, demanding much more ‘creativity’ on the part of judges.⁸⁸ Finally,

⁸² WANG Liming, (‘What Does “Enacting Civil Law in Accordance with the Constitution Mean?” 2017[1] Studies on the Modernisation of the Rule of Law 71) 王利明, 《何谓根据宪法制定民法?》, 《法治现代化研究》2017年第1期, 第71-83页。

⁸³ SHI Jiayou (‘Understanding the Relationship between Human Rights and Personality Rights through Compiling an Independent Book on Personality Rights’ 2018[4] Journal of China University of Political Science and Law) 石佳友, 《人格权立法的历史演进及其趋势》, 《中国政法大学学报》2018年第4期, 第140-161页。

⁸⁴ Opposition to constitutionalization is often predicated on the view that courts do not have enough power or autonomy to reproduce a Chinese analogue of *Liith* and indirect effect. QIAN (note 67).

⁸⁵ SUN (note 2) 90.

⁸⁶ See the debate between CAO and QIN & ZHOU. CAO (note 79). QIN Qianhong & ZHOU Hang, (‘Constitutional Problems in the Implementation of the Civil Code’ 2020[11] Legal Science 21) 秦前红、周航, 《〈民法典〉实施中的宪法问题》, 《法学》2020年第11期, 第21-34页。

⁸⁷ CHEN Linlin & YAN Wei, (‘Public Order and Good Morals from Jurisprudential Perspective: Character, Type and Application’ 2021[2] Nanking Social Sciences 93) 陈林林、严巍, 《公序良俗的法理分析:性质、类型与适用》, 《南京社会科学》2021年第2期, 第93-100页; SUN Mengjiao, (‘Legal Analysis of the Judicial Application of Public Order and Good Morals: Functions, Basis and Empirical Mechanisms’ 2020[2] Law and Social Development 109, 113, 117) 孙梦娇, 《公序良俗司法应用之法理分析:功能、理据与实证机制》, 《法制与社会发展》2020年第2期, 第109-120页, 第113、117页。See also QIN and ZHOU (note 86).

⁸⁸ SUN (note 87) 117-118.

as noted, in Europe the process of constitutionalizing the codes has enshrined balancing – today subsumed by the *constitutional* principle of proportionality – despite the fact that doing so has radically expanded the courts’ policy discretion. Balancing is required whenever the litigating parties raise arguments based on two rights, or when a right arguably conflicts with an entitlement provided by the Civil Code. Chinese scholars, too, have debating balancing,⁸⁹ invoking *Luth*⁹⁰ (which they had begun, if less earnestly, a decade before the Civil Code was promulgated). Shi even advocates the adoption of multi-stage proportionality tests.⁹¹ The arguments of this third group would require courts to go far beyond the more banal practice of merely noting that their decisions conform to the Constitution.

IV. INSTITUTIONAL CAPACITY TO CONTROL THE COURTS

While they may resemble norms of the Constitution of the PRC, the rights provisions found in the Civil Code are left undefined. By making them justiciable, the CPC delegated massive, implied interpretive authority to judges. How will the Party – whose tight control over the Chinese political regime, as ruling principles, is not in doubt – control their agents?

A. Interpretation in the Judiciary

The repudiation of the *Qi Yuling* decisions by the SPC (2008) squelched a broader movement in support of CJR, but it did not stop the courts from engaging in constitutional interpretation of statutes. Sprick situated these efforts along a continuum of rising intensity and significance.⁹² Courts might take a minimalist approach, referencing constitutional values to give symbolic weight to rulings, but not necessarily to alter their content.⁹³ More assertively, a court might stipulate that the Constitution – conceived as a corpus of binding legal norms – informs and legitimizes a ruling despite the prohibition of CJR. In a third approach, the court emphasizes that the Constitution had decisively determined the meaning of the applicable law. It can therefore claim to have enforced (what are in fact) rights without thereby challenging the NPC’s authority, as direct CJR would. Sprick argued that Party elites (and the SPC) tolerated these practices insofar as they were responses to legislative inaction, concluding that constitutional interpretation would decrease as more comprehensive statutes closed gaps.⁹⁴ In any case, neither the NPC nor the SPC moved to stop judges from proclaiming the constitutionality of their rulings. Meanwhile, some Chinese scholars condemned judicial appeals to the Constitution as *per se* illegitimate usurpations of the legislature.⁹⁵

⁸⁹ LUO Zhengyan, (‘Constitutional Reflections on the Civil Code Draft’s Book on Personality Rights’ 2020[2] Zhejiang Social Sciences 42, 48) 骆正言, 《“民法典草案”人格权编的宪法学省思》, 《浙江社会科学》, 2020 年第 2 期, 第 42-52 页, 第 48 页; LIU Quan, (‘Abuse of Rights, Boundaries of Rights and Proportionality: Starting from Article 132 of the Civil Code’ 2021[3] Law and Social Development 39) 刘权, 《权利滥用、权利边界与比例原则——从〈民法典〉第 132 条切入》, 《法制与社会发展》2021 年第 3 期, 第 39-54 页。

⁹⁰ ZHENG Xianjun, (‘Civil Law as the Implementing Law of the Constitution – And a Comment on Professor Long Weiqiu’s *Constitutional Trap of the Compilation of the Civil Code*’ 2016[1] Law Review 1, 8) 郑贤君, 《作为宪法实施法的民法—兼议龙卫球教授所谓“民法典制定的宪法陷阱”》, 《法学评论》2016 年第 1 期, 第 1-10 页, 第 8 页。

⁹¹ SHI (2017) advocates the use of the standard four-step prop test. SHI Jiayou, (‘The Relationship between Human Rights and Personality Rights’ 2017[6] Law Review 99, 102) 石佳友, 《人权与人格权的关系—从人格权的独立成编出发》, 《法学评论》2017 年第 6 期, 第 98-108 页, 第 102 页。

⁹² Sprick 2019, 42.

⁹³ Sprick 2019, 49-50.

⁹⁴ Sprick 2019, 44..

⁹⁵ Sprick 2019, 57; see also Qian Fanchen, “A Fundamental Understanding of the Legal Force of the Chinese Constitution in the Private Law—Based on a Comparison of Chinese and Western Perspective”, Contemporary Law Review, No.2(2014), pp.6-9.

It is also clear that Chinese judges are adept at harnessing the Constitution to preferred policy outcomes. In ongoing research, Du has sought to persuade his peers – and the judiciary – that (i) the courts meaningfully interpret the Constitution, and that (ii) they ought to do so in order to render more effective both legislation protections and constitutional rights.⁹⁶ Among a range of interpretive and remedial techniques (e.g., issuing ‘conforming’ interpretations), Du finds that judges are adept at ‘reading in’ and ‘reading out’ statutory provisions to ensure their compatibility with the Constitution. Two examples will suffice. The *Gu v. Zhou* case (2008) involved the support of a child (Ms. Gu) who had been conceived in the course of an extra-marital relationship between Ms. Zhou and Mr. Huang some 12 years earlier. Ms. Gu sued Mr. Zhou for child support, which Mr. Zhou (who had long contested his parentage) had argued was barred under a statute of limitations provision. The presiding court held that children born out of wedlock enjoyed the same rights as those born to married parents, basing the move on Art.49 of the Constitution.⁹⁷ The court had unambiguously determined that the right to identity based on family relations (the Constitution) required ‘reading-out’ the statute of limitations (legislation). In *Jiang v. Liu* (2015)⁹⁸, a truck driver who had suffered work-related injuries sued his employer for having neglected to provide a proper contract or insurance coverage, which deprived the driver of compensation. Indeed, the employer took pains to delist his company to escape liability. Art.2 of the Labor Law excluded labor relations between natural persons (covering agreements between corporations and representatives of labor), which normally would have led to the case’s dismissal. The court, however, decided that, in maliciously deregistering the company, the employer had violated the driver’s right to occupation. Thus, in the guise of strengthening workers’ safety, the court wrote into the statute protections offered by Art.42 of the Constitution.⁹⁹ If brought today, both of these cases would be litigated under the Civil Code.

B. The Supreme People’s Court as a Control Mechanism

The CPC conferred on the SPC its authority to issue judicial interpretations in 1955, which it enhanced in the 1980s. It is now fully accepted that SPC Interpretations produce legal norms that impact the entire judiciary,¹⁰⁰ at least with respect to resolving questions of how the law is to be applied in concrete cases that have arisen in the courts.¹⁰¹ Concurrently, the Standing Committee of the NPC holds *de jure* powers to resolve disputes about the meaning of justiciable law, and to clarify how that law is to be interpreted in new circumstances.¹⁰² In practice, the respective competences of the Standing Committee and the SPC are virtually impossible to delineate, given the general legislative nature and scope of the SPC’s

⁹⁶ DU Qiangqiang, ‘Practice of constitutionality-based Interpretation in Chinese Courts’ (2016) Chinese Journal of Law (6) 107 杜强强：《合宪性解释在我国法院的实践》，载《中国法学》2016年第6期第107-125页。

⁹⁷ Constitution of the People’s Republic of China (2018 Amendment), Article 49 (1): Marriage, the family, and mother and child are protected by the state.

⁹⁸ China Institute of Applied Law: ‘Selected Cases of People’s Courts’, Vol. 89, People’s Court Press, 2015 edition, p. 162. 中国应用法学研究所编：《人民法院案例选》第89辑，人民法院出版社2015年版，第162页。

⁹⁹ Constitution of the People’s Republic of China (2018 Amendment), Article 42 (2): Through various channels, the state creates conditions for employment, enhances occupational safety and health, improves working conditions, and, on the basis of expanded production, increases remuneration for work and welfare benefits.

¹⁰⁰ Susan Finder, ‘The Supreme People’s Court of the People’s Republic of China’ (1993) 7(1) Journal of Chinese Law 145, 164-166; Albert HY Chen, *An Introduction to the Legal System of the People’s Republic of China* (4th Edition) 161-166.

¹⁰¹ 2000 PRC Law on Legislation (2015 amended), Article 104.

¹⁰² 2000 PRC Law on Legislation (2015 amended), Article 45.

pronouncements.¹⁰³ The SPC publishes its decisions in various forms.¹⁰⁴ Three of these – Interpretations; Provisions; and Official Replies – directly impact the substantive content of legal norms.¹⁰⁵ Interpretation and Provisions comprise relatively abstract interpretations: Interpretations stipulate the textual meaning of legal provisions with a view to their application in the context of litigation; while Provisions contain supplementary rules purportedly to derive from an analysis of legislative intent. The Official Replies constitute the SPC's response to concrete questions that are referred by the lower courts, usually in the context of adjudication. Each of these pronouncements binds on the courts as a whole,¹⁰⁶ and judges are expected to treat them as sources of law in their rulings.¹⁰⁷

These modes of control exhibit important features of abstract lawmaking, insofar as they are detachable from the facts of concrete litigation, and result in authoritative determinations of the meaning of contested legal provisions.¹⁰⁸ Abstract lawmaking has an overtly 'political' complexion; its function is to enhance systemic coherence and uniformity in the absence of strong judicial review and an explicitly formulated *stare decisis* principle. Indeed, the SPC unabashedly uses its pronouncements to develop the law, to respond to changing circumstances, or even to promote social transformation.¹⁰⁹ The SPC seeks to maximize two interrelated objectives: its capacity (i) to manage the courts,¹¹⁰ and (ii) to enhance its own capacity to control policy outcomes, including in the sphere of constitutional law.¹¹¹ Put somewhat differently, the SPC's makes law by filling legislative gaps, clarifying the scope of legislative provisions, and adjusting the meaning of legislative governance in diverse fields.¹¹²

To date, the SPC has issued 124 judicial interpretations concerning the Civil Code (the most recent, of February 24, 2022 interpreting aspects of the Code's General Provisions). Most of these are formally revisions of previous declarations, yet close examination reveals a great deal of substantive lawmaking within (what we have called) the Code's 'constitutional dimensions'. In December 2020, the SPC issued the first batch of systematic Interpretations on the Civil Code's three major Books, including the Book of Marriage and Family. According to the SPC's own reading, the interpretation on the meaning of 'maltreatment' under Articles 1042, 1079, and 1091 of the Civil Code embraces the constitutional 'spirit' with regard to gender equality (Article 48, para. 1 of the Constitution) and prohibition of domestic

¹⁰³ This phenomenon is criticised by some scholars as usurpation of legislative power, see, eg, YUAN Mingsheng, ('An Exploration of the Phenomenon of "Legislativization" of Judicial Interpretation' 2003[2] *Studies in Law and Business* 3) 袁明圣, 《司法解释“立法化”现象探微》, 《法商研究》2003年第2期, 第3-12页。

¹⁰⁴ Provisions of the SPC on the Judicial Interpretation Work (2021 Amendment) (No.12 [2007] of the SPC, Amendment approved by the Judicial Committee of the SPC on 8 June 2021, issued on 9 Jun 2021, effective on 16 June 2021) ('The Judicial Interpretation Provisions') Article 6.

¹⁰⁵ These rest two forms are Rules and Decisions: Rules normally address procedural issues in litigation, and Decisions are made by the SPC to amend or abolish its own judicial interpretations.

¹⁰⁶ The Judicial Interpretation Provisions, Article 5. Doctrinally speaking, the binding effect of SPC's judicial interpretations and their relationship to legal norms made by other legislative bodies is controversial. As a matter of fact, the SPC judicial interpretations possess legal effects over China's entire judicial system.

¹⁰⁷ The Judicial Interpretation Provisions, Article 27.

¹⁰⁸ SHEN Kui, ('"Democratizing" Judicial Interpretation and the Supreme Court's Political Function' 2008[1] *Social Sciences in China* 110, 104, 114) 沈岷, 《司法解释的“民主化”和最高人民法院的政治功能》, 《中国社会科学》2008年第1期, 第110-114页, 第104、114页。

¹⁰⁹ *Ibid* 102-104, 106; WANG Chenguang, 'Law-Making Functions of the Chinese Courts: Judicial Activism in a Country of Rapid Social Changes' (2006) 1(4) *Frontiers of Law in China* 524.

¹¹⁰ Taisu Zhang, 'The Pragmatic Court: Reinterpreting the Supreme People's Court of China' (2012) 25 *Colum Journal of Asian Law* 1, 42.

¹¹¹ Eric C Ip, 'The Supreme People's Court and the Political Economy of Judicial Empowerment in Contemporary China' (2011) 24 *Columbia Journal of Asian Law* 367.

¹¹² *Ibid* 394-401.

violence (Article 49, para. 4 of the Constitution).¹¹³ The SPC has also responded to the question of how lower courts should develop constitutional rights, given the inadequacy of existing laws on the books, and in the absence of direct CJR. Thus, in 2019, a law professor brought a civil lawsuit against a local safari park for using his likeness without his consent. The case, understood to be ‘China's first case on facial recognition’, attracted widespread public attention. Given the fundamental rights at stake, the case was selected as one of China's ‘Top 10 Constitutional Incidents of the Year’, catalyzing still more heated scholarly debate concerning the Constitution's horizontal effect and the enforcement of the proportionality principle.¹¹⁴ Following the appellant court's final judgment in the case (2021),¹¹⁵ the SPC issued an Interpretation on issues concerning facial recognition,¹¹⁶ which laid down detailed rules governing personality rights and their potential infringement.

The SPC also manages the Guiding Cases System [GCS], in which it published approved, ‘representative’ judicial decisions in the SPC gazette. Under the GCS, which was formally established in 2010,¹¹⁷ the SPC selects rulings deemed ‘important’, on the basis of recommendations from its internal agencies, lower courts, and civic society.¹¹⁸ The Gazette presents Guiding Cases in the form of summaries highlighting key words, and major points of the court's reasoning, holdings, and the facts of the case. Compared with the Interpretations and other forms of pronouncement, the Guiding Cases have weaker binding force, as they are not recognized as a formal source of law or legal basis for a court's decisions.¹¹⁹ Judges are nonetheless obliged to consult the Guiding Cases when presiding over litigation, if the present case is similar enough to a Guiding Case in its facts and applicable provisions.¹²⁰ Litigants may plead elements of Guiding Cases, and judges must explain how they have responded.¹²¹

To date, the SPC has issued 31 batches of guiding cases, consisting of 178 judgements in civil, criminal, and administrative law, most of which are civil cases. In the most recent (the 30th and 31st ‘batch’ of Guiding Cases), the SPC issued seven cases concerning the Civil Code, including one involving the logging of trees without a permit:

¹¹³ The SPC's First Civil Division (ed), (*Understanding and Application of the SPC Judicial Interpretation (I) on the Book of Marriage and Family of the Civil Code* [People's Court Press 2021] 37) 最高人民法院民事审判第一庭编著, 《最高人民法院民法典婚姻家庭编司法解释(一)理解与适用》, 人民法院出版社 2021 年版, 第 37 页.

¹¹⁴ See '2019 China's Top Ten Constitutional Cases Released and Seminar Held' (“2019 年度中国十大宪法事例发布暨研讨会举行”) <<http://www.calaw.cn/article/default.asp?id=13571>>.

¹¹⁵ *Guo Bing v Hangzhou Wildlife World Co. Ltd.: Disputes over Service Contract* (2021) (Intermediate People's Court of Hangzhou City of Zhejiang Province, 9 April 2021) 郭兵、杭州野生动物世界有限公司服务合同纠纷民事二审民事判决书(2020)浙01民终10940号.

¹¹⁶ Provisions of the SPC on Several Issues concerning the Application of Law in the Trial of Civil Cases Relating to Processing of Personal Information by Using the Facial Recognition Technology (Interpretation No. 15 [2021] of the SPC, approved by the Judicial Committee of the SPC on 8 June 2021, issued on 27 July 2021, effective on 1 August 2021).

¹¹⁷ Taisu Zhang (note 110) 43-45; Björn Ahl, 'Retaining Judicial Professionalism: The New Guiding Cases Mechanism of the Supreme People's Court' (2014) 217 *The China Quarterly* 121, 125-128; Mark Jia, 'Chinese Common Law? Guiding Cases and Judicial Reform' (2016) 129(8) *Harvard Law Review* 2213, 2215-2217.

¹¹⁸ Notice of the SPC on Issuing the Provisions on Case Guidance (No. 51 [2010] of the SPC, approved by the Judicial Committee of the SPC on 15 November 2010, issued and effective on 26 November 2010) ('The GCS Provisions') Article 4-5; Detailed Rules for the Implementation of the Provisions of the SPC on Case Guidance (No. 130 [2015] of the SPC, approved by the Judicial Committee of the SPC on 27 April 2015, issued and effective on 13 May 2015) ('The GCS Implementation Rules') Article 4-5.

¹¹⁹ Article 10 of the Guiding Case Implementation Rules stipulates that the Guiding Cases shall not be cited as the legal basis of judgment.

¹²⁰ The GCS Implementation Rules, Article 10, Article 11 para 1.

¹²¹ The GCS Implementation Rules, Article 11 para 2.

[The defendant's] conduct caused serious damage to the ecology and environment of the Baiyun Mountain National Nature Reserve, endangered the protection of biological diversity, resulted in serious injury to the public interest, and was a tort by nature. An incidental civil public interest action was not a civil lawsuit in the traditional sense, nor was plaintiff in the public interest action a victim in the general sense. The claim of plaintiff in the public interest action that defendant should bear the legal liability for restitution had a legal basis and should be supported.

Systematic, high quality research on the influence of the GCS on judicial decision-making on public policy does not exist,¹²² but it appears that this impact is rising.¹²³ We expect that, as the adjudication of the new Civil Code increases, so will the SPC's use of the GCS to harmonize practices, as recently emphasized by one of its members.¹²⁴ Moreover, as Sun and Fu argue, the recent 'quota reform' tightens the control of high courts over lower courts, and the SPC over the judiciary as a whole, which one expect will lead to far more attention given by judges to the Guiding Cases, as effective guidelines of decision-making.¹²⁵

C. The National People's Congress and the Communist Party

The NPC exerts the legislature's formal control through two mechanisms: *ex ante* review of constitutionality by the Constitution and Law Committee, which takes place during the process of drafting bills; and *ex post* supervision of certain legal acts by the Legislative Affairs Commission of the Standing Committee of the NPC through the Recording and Review procedure, which is available once subordinate legislation has been promulgated.¹²⁶ As mentioned, China substantially developed 'political' constitutional review¹²⁷ following the 19th National Congress of the CPC. The suite of constitutional amendments adopted in 2018 recast the 'Law Committee' as the 'Constitution and Law Committee', which was given the new charge to 'facilitate the implementation of the Constitution, provide constitutional interpretation, promote constitutional review, and enhance constitutional supervision,' in addition to existing responsibilities to review pending bills.¹²⁸ Most of the Committee's 18 members possess legal backgrounds in academia or in practice; many have experience in giving legal advice to the public sectors, including a former vice president of the SPC; but none appears to an expert in constitutional law. While scholars have assumed that the Committee would serve to build the status of the

¹²² But see GUO Ye & SUN Mei, ('Report on the Application in Judicial Proceedings of Supreme People's Court Guiding Cases (2020)' 2021[5] China Review of Administration of Justice 121) 郭叶、孙妹, 《最高人民法院指导性案例 2020 年度司法应用报告》, 《中国应用法学》2021 年第 5 期, 第 121-148 页。

¹²³ Ibid 141.

¹²⁴ Judge GUO Feng, 'Results from the "Cleanup" of Judicial Interpretations and Guiding Cases and Trends in Their Development in the Era of China's Civil Code' 12 China Law Connect 1, 9-10 available at <<https://cgc.law.stanford.edu/commentaries/clc-12-202103-34-guo-feng/>>.

¹²⁵ Sun and Fu (note 53).

¹²⁶ ZHENG Xianjun, ('Double Attributes of the Constitution and Law Committee of the NPC: Constitutional Review as Legislative Review' 2018[4] China Law Review 33, 33-34) 郑贤君, 《全国人大宪法和法律委员会的双重属性——作为立法审查的合宪性审查》, 《中国法律评论》2018 年第 4 期, 第 33-42 页, 第 33-34 页; ZHANG Xiang, ('Constitutional Law Study in the "Era of Constitutional Review": Basis and Prospect' 2019[2] Global Law Review 5, 13-15) 张翔, 《“合宪性审查时代”的宪法学: 基础与前瞻》, 《环球法律评论》2020 年第 2 期, 第 5-21 页, 第 13-15 页。

¹²⁷ For an overview of recent developments in English, see Keith J Hand, 'Constitutional Supervision in China after the 2018 Amendment of the PRC Constitution: Refining the Narrative of Constitutional Supremacy in a Socialist Legal System' (December 21, 2021). UC Hastings Research Paper Forthcoming, available at SSRN< <https://ssrn.com/abstract=3431293>>. As Hand points out, these developments have generated heated discussions within Chinese academia, but have received little attention from outsiders.

¹²⁸ Decision of the NPCSC on Matters concerning the Duties of the Constitution and Law Committee of the National People's Congress (passed, issued, and entered into force on 22 June 2018 at the 3rd Session of the 13th NPCSC).

Constitution within all state organs, it has so far played only a marginal role in doing so within the NPC's legislative procedures.¹²⁹

The Record and Review procedure has proved a more effective tool, if for supervising the legal order. As presently constituted, it requires state-level regulation and provincial statutes to be filed with the Standing Committee of the NPC for 'recording' after their promulgation.¹³⁰ The Legislative Affairs Commission (which is advised by leading legal scholars appointed to an 'advisory board') then "reviews" these recorded acts on its own initiative, upon the request of certain state organs (including the SPC),¹³¹ or upon an accepted proposal from an organisation or individuals.¹³² If a constitutional issue is involved, the Commission may decide to conduct constitutional review with the Constitution and Law Committee.¹³³ The Commission and the Committee reviews the impugned legislation against provisions expressly enumerated in the Constitution, as well the 'spirit' of its principles.¹³⁴ Review criteria notably include a proportionality-like sequence of tests to ensure that: (i) the aim of the act under review is legitimate; (ii) the lawmaker has established a rational means-end nexus; (iii) the act restricts rights no more than is necessary to achieve the end; and (iv) the restriction infringes too much upon constitutional values as a whole (balancing).¹³⁵ The review bodies may also consider (i) whether a review of the act's legality has taken place before the application of constitutional standards, (ii) whether a constitutionality-based interpretation of the act would suffice to avoid a finding of unconstitutionality, and (iii) whether a determination of unconstitutionality would be too severe, given the evidence.¹³⁶ If the act under review is held to be unconstitutional, the review bodies are expected to require the maker to modify or repeal it, before the Standing Committee of the NPC made the formal repeal decision.¹³⁷ This mode of review is abstract in nature: under current Record and Review arrangements, only legislative acts can be challenged before the NPCSC.¹³⁸ This latter restriction exposes the inadequacy of the procedure when it comes to protecting an individual's rights in cases already before the courts.¹³⁹

The Record and Review procedure remains a work in progress. At present, review is accomplished through internal communications with little public disclosure, under no formal requirement for publishing

¹²⁹ Hand (note 127) 12-17.

¹³⁰ The PRC Law on Legislation (2015 Amended), Article 98.

¹³¹ The SPC's de facto power to request for the NPCSC's constitutional review has never been exercised, and no other legal provision provides that such request can be made during litigation process.

¹³² The PRC Law on Legislation (2015 Amended), Article 99.

¹³³ The 2019 Working Measures for the Recording and Review of Regulations and Judicial Interpretations ('The R&R Working Measures') (Adopted at the 44th Meeting of the Council of Chairpersons of the Standing Committee of the Thirteenth National People's Congress on December 16, 2019) Article 20.

¹³⁴ NPCSC LAC Office for R&R, (*Introduction to the Working Measures for the Recording and Review of Regulations and Judicial Interpretations* [China Democracy and Legal Publishing House 2020] 98-100) 全国人大常委会法制工作委员会法规备案审查室著, 《<法规、司法解释备案审查工作办法>导读》, 中国民主法制出版社 2020 年版, 第 98-99 页.

¹³⁵ Ibid 99.

¹³⁶ Ibid 99-100.

¹³⁷ The PRC Law on Legislation 2015, Article 100; Working Measure Article 41-44.

¹³⁸ HUANG Mingtao, ('On the Necessity of Concrete Constitutional Review and Its Institutional Space' 2020[5] *Journal of Comparative Law* 132) 黄明涛, 《具体合宪性审查的必要性及制度空间》, 《比较法研究》2020 年第 5 期, 第 132-146 页.

¹³⁹ In the Pan Hongbin dispute, Mr. Pan challenged a local law as unlawful infringements upon his property rights before the Standing Committee of the NPC, following the adverse judicial ruling. The Standing Committee supported the claim and ordered the modification of the relevant law, but Mr. Pan's subsequent application for 'adjudication supervision' (a formal procedure to initiate retrial for erroneous judgment) was rejected on the grounds of the principle of non-retrospectivity. See Hongxia Liang, 'The Function of Human Rights Protection and Its Approaches of Filing and Review - Rethinking of PAN Hongbin Case' (2020) 19(2) *Journal of Human Rights* 204.

decisions.¹⁴⁰ It was only in 2017 that the Legislative Affairs Commission released its first annual report. From these, one learns that more than 1000 acts are filed each year. In its 2021 report, the Commission details, for the first time, elements of its constitutional reasoning. Among other such entries, the Commission criticized an act that required paternity testing in the course of an investigation into the size of a family, on the grounds that the parent-child relationship is protected by fundamental rights of by the Constitution, in particular, human dignity, personality, and privacy, in addition to the values of family harmony and stability.¹⁴¹ Liang Ying, the director of the Record and Review Office of the Legislative Affairs Commission, predicts that ‘as the work of constitutional review under the Record and Review progresses and deepens, constitutional interpretation will certainly [take its place] on the agenda, and constitutional implementation will be normalized’.¹⁴² From a comparative perspective, this procedure is the closest analog in the Chinese system to the ‘constitutional complaint’ in Germany, Europe, and Asia, or the ‘amparo’ in Spain and Latin America, although it is petitions a legislative body for action.

We have saved the most potent set of controls for last. The CPC holds and jealously guards unrivaled authority to dictate the drafting, adoption, interpretation, and application of legislation, and the ultimate power to delineate any and all boundaries within which the courts might exercise some degree of ‘relative autonomy’ from ‘politics’.¹⁴³ The Party exerts control over the SPC, regularly determining the substance and timing of Interpretations and Guiding Cases.¹⁴⁴ Recent examples concerning the Civil Code include the SPC’s Interpretations on torts for environmental damage¹⁴⁵ (the Civil Code, chapter VII ‘Liability for Environmental Pollution and Ecological Damage’, Book Seven on ‘Tort Liability’), and the Guiding Cases on biodiversity conservation,¹⁴⁶ both of which seek to further implement the CCP’s policy of ‘Ecological Civilization Construction’.¹⁴⁷ Party officials also preside over the NPC legislative procedure, which serves to verify the constitutionality of legislative bills, as well as the Recording and Review

¹⁴⁰ According to Article 101 of the Law on Legislation, the NPCSC is not obliged to publish its review feedbacks; it may release relevant opinions and decisions at its discretion.

¹⁴¹ ‘The NPCSC LAC’s Report on the Work of Record and Review in 2021’ (‘全国人民代表大会常务委员会法制工作委员会关于 2021 年备案审查工作情况的报告’)

<<http://www.npc.gov.cn/npc/c30834/202112/2606f90a45b1406e9e57ff45b42ceb1c.shtml>>; for detailed analysis, see ‘Recording & Review: Invalidating Compulsory Parentage Testing as a Tool to Enforce Birth Quotas’ <<https://npcobserver.com/2021/12/22/recording-review-invalidating-compulsory-parentage-testing-as-a-tool-to-enforce-birth-quotas/>>.

¹⁴² LIANG Ying, (‘The Status Quo, Challenges and Prospect of Recording Normative Documents for Review by People’s Congress—A Focus on the Implementation of *the Working Measures of Recording Regulations and Judicial Interpretation for Review*’ 2020[6] Local Legislation Journal 1, 19) 梁鹰, 《备案审查工作的现状、挑战与展望——以贯彻执行<法规、司法解释备案审查工作办法>为中心》, 《地方立法研究》2020 年第 6 期, 第 1-20 页, 第 19 页.

¹⁴³ Ling Li, ‘Political-Legal Order and the Curious Double Character of China’s Courts’ (2019) 6 Asian Journal of Law and Society 19, 36-37. Xin He, ‘Pressures on Chinese Judges under Xi’ (2021) 85 The China Journal 49-74.

¹⁴⁴ Ling Li (note 143) 59-60.

¹⁴⁵ The SPC Provisions on the Application of Injunction Preservation Measures in Ecological and Environmental Tort Disputes (《最高人民法院关于生态环境侵权案件适用禁止令保全措施的若干规定》) (No. 22 [2021] of the SPC, approved by the Judicial Committee of the SPC on 29 November 2021, issued on 27 December 2021, effective on 1 January 2022); The SPC Interpretation on the Application of Punitive Damages in the Trial of Ecological and Environmental Tort Disputes (《最高人民法院关于审理生态环境侵权纠纷案件适用惩罚性赔偿的解释》) (No. 1 [2022] of the SPC, approved by the Judicial Committee of the SPC on 27 December 2021, issued on 12 January 2022, effective on 20 January 2022).

¹⁴⁶ ‘The SPC Issues Guiding Cases on Biodiversity Conservation’ (‘最高法发布生物多样性保护专题指导性案例’) <<https://www.court.gov.cn/zixun-xiangqing-335151.html>>.

¹⁴⁷ Opinions of the CCP Central Committee and the State Council on Accelerating the Ecological Civilization Construction (《中共中央、国务院关于加快推进生态文明建设的意见》) (issued by the CCP Central Committee and the State Council on 25 April 2015).

procedure, which serves to ensure other legislative bodies' compliance with the policy decisions of the CCP's Central Committee.¹⁴⁸ Although it is rarely possible (or worthwhile) to analyze separately the decisions of the Party, the SPC, and the NPC,¹⁴⁹ the Party maintains its own specialized committees and procedural controls. The CPC's Political and Legal Affairs Committee¹⁵⁰ is tasked with ensuring that the Party's pronouncements and policy instruments are "implemented correctly and uniformly,"¹⁵¹ including by the SPC.¹⁵² It does so primarily through the Case Coordination and Case Inspection procedure already mentioned, which it uses selectively,¹⁵³ as a function of a legal dispute's relative political sensitivity.¹⁵⁴ Finally, Party officials comprise a normal presence in the courts. Tellingly, they are fully expected to 'instruct the responsible judge on how to handle politically sensitive or influential cases'¹⁵⁵ – now understood as 'those affecting social stability, the general public, and the image of the state'¹⁵⁶ – under threat of punishment, including dismissal and criminal prosecution.

V. Conclusion

China's new Civil Code has revived certain, now classic questions concerning the scope of judicial power in the PRC. It is clear that the norms, structure, and justiciability of the new Civil Code, in synergy with other pieces of legislation, signal a softening of the Party's once categorical opposition to any form of rights-base judicial review. Judges are actively engaged in statutory interpretation with reference to provisions of the Constitution, and a growing group of scholars encourage the courts to institutionalize these practices even further. It is also clear that there exists opposition to a larger process of 'constitutionalization', which one has observed abroad.

From the point of view of a simple principal-agent framework of analysis, it is clear that Chinese rulers have decided to delegate broad powers of interpretation and enforcement onto the courts, while retaining the means to quash any unwanted judicial ruling. The logic of such a system is to gain the advantages of delegation – to encourage policy innovation, to enhance the system's capacity to respond to social inputs, and to furnish a scapegoat to blame for policy that proves unpopular – while limiting costs, theoretically to zero. In China, the principals are well-positioned to develop its control of courts further.

More broadly, the Civil Code illustrated just how firmly the Party has embraced the 'super statute' as a quasi-constitutional instrument of governance. The PRC had good reasons to turn to 'the rule of law', while seeking to enhance 'judicial accountability', not least, in order to consolidate and rationalize its own capacities to manage a vast and diverse polity. At the very least, a greater reliance on comprehensive statutes and litigation can improve information on how the Party's goals are implemented, and how

¹⁴⁸ NPCSC LAC Office for R&R (note 134) 100-101.

¹⁴⁹ The personnel of party organs and state bodies often overlap.

¹⁵⁰ Ling Li, 'The Chinese Communist Party and People's Courts: Judicial Dependence in China' (2016) 64(1) *The American Journal of Comparative Law* 37, 59.

¹⁵¹ Regulations on Political and Legal Work of the CCP (《中国共产党政法工作条例》) (adopted by the CCP Central Committee, effective on 13 January 2019) Article 12.

¹⁵² The personnel of these bodies may not be independent of one another. Zhou Qiang, the current president of the SPC, serves as a member the CCP's Central Committee, a member of the Central PPLAC, and is the Secretary of the SPC's Party Group, each of which is a formally distinct entity. These party organizations are different in their organizational relationships.

¹⁵³ Ling Li (note 143) 66-72.

¹⁵⁴ See, eg, Fu Yulin and Randall Peerenboom, 'A New Analytic Framework for Understanding and Promoting Judicial Independence in China' in Randall Peerenboom (ed), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge University Press 2009); Hualing Fu, 'Building Judicial Integrity in China' (2016) 39(1) *Hastings International and Comparative Law Review* 167.

¹⁵⁵ Xin He, 'Pressures on Chinese Judges under Xi' (note 143), 51.

¹⁵⁶ Xin He, 'Pressures on Chinese Judges under Xi' (note 143), 67.

lower-level officials (including judges) govern. The marginal costs of enhancing a decentralized system of monitoring performance is far lower than building a new system of direct supervision from Beijing. In the case of the Civil Code, Sun (Mangjiao) found that judges typically rely on “socialist core values” as part of the reasoning and basis underlying public order and good morals, thus connecting the CPC’s policy priorities to day-to-day judging.¹⁵⁷

How will the tensions and ambiguities discussed in this paper be resolved? In our view, we are at an important moment in the development of the Chinese legal system, but one likely to produce incremental change. Of course, even small incremental changes can register large cumulative effects downstream. We think a first scenario, in which nothing of much importance happens and the legal system continues to operate much as it did prior to the entry of force of the Civil Code, is unlikely. Judges have been given a great deal of work to do, and some will assume their assigned tasks aggressively. Yet, it is worth recalling that a past instance of major legislative reform – of Criminal Procedure (1979, and revised in 1996 and 2012) – utterly failed in its ambitions.¹⁵⁸ Much more likely is a second scenario: the Civil Code accelerates processes already underway. Judges will increasingly rely on the use of techniques of interpretation to ensure conformity of the Code with the Constitution; the CPC will refine mechanisms of control to discipline the process when necessary; and scholarly debate on the “constitutionalisation” of private law – indeed of the entire legal order – and of indirect CJR will intensify. A third scenario – that the process of implementing the Code will transform the Chinese legal system, and introduce a more robust rights-protecting constitutionalism – is also an unlikely outcome, for reasons discussed. This last point made, China has moved (however tentatively) in the direction of other systems that have constitutionalized the private law.

¹⁵⁷ SUN (note 90).

¹⁵⁸ Joshua Rosenzweig, ‘Disappearing Justice: Public Opinion, Secret Arrest and Criminal Procedure Reform in China’ (2013) 70 *The China Journal* 73. See also Hualing Fu, ‘Between the Prerogative and the Normative: The Evolving Power to Detain in China’s Dual State’, forthcoming *Law and Ethics of Human Rights*.