

1. Historical and Political Background

Role of the CCP in the Chinese legal system

- CCP: the ruling party in China since 1949; largest political party; longest ruling party in modern history?
- Since Xi Jinping came to power, one of the major initiatives undertaken → promotion of Chinese rule of law
- Is the Party subject to the law or law subject to the Party?
 - Looking at the law on paper – answer is indisputable; CCP is subject to the Constitution and the law:
 - CPC Constitution, Preamble: “The Party shall act within the bounds of the Constitution and laws.”
 - PRC Constitution, Art 5(3): “All state organs, the armed forces, all political parties [incl. CCP/other parties in allegiance with CCP] and public organisations and all enterprises and undertakings must abide by the Constitution and the law must be investigated.”
 - But in reality, CCP has total control over the nation, incl. the legal system i.e. legislature, judicature, legal profession – always been the case since 1949
 - A compelling conclusion is that CCP is above the law
 - Party Supremacy – Constitution, Preamble: “Under the leadership of the CCP and the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of ‘Three Represents’, the **Chinese people of all nationalities will continue to adhere to the people’s democratic dictatorship and follow the socialist road...**” (statement of **four cardinal principles** i.e. four most important principles of Chinese politics)

2014 Rule of Law Decision – key decision

“Governance according to the law requires that the **party governs the country on the basis of the Constitution and the laws**, and requires that the Party manages the Party and **governs the Party according to intra-Party regulations**. We must persist in the Party leading legislation, guaranteeing law enforcement, supporting the judiciary and taking the lead in respecting the law...”

- First central idea is that the party is to act within the bounds of law/Constitution in its governance of the country
 - But despite this there is still yet to be a major breakthrough in Chinese political and legal reform
- Secondly, Party is to **govern/manage the Party according to intra-Party regulations**
 - CCP has an extensive framework of internal rules and regulations
 - E.g. there are detailed rules in relation to anti-corruption, under which top officials are convicted for taking bribes
 - Many of these rules are not published, including disciplinary regulations
 - these disciplinary regulations have been revamped in the last few years; looks like a mini criminal code; e.g. there are detailed rules on how a party member should behave, extending to the personal life of party members
 - There’s no STATE LAW generally governing the exercise of power by the govt. i.e. the administrative process within Chinese govt. – and this is one of the major deficiencies in the Chinese legal system
- Idea of ‘**party leadership**’ over the legal system is firmly implemented in practice
 - JUDICIARY: practical reality → Courts follows decisions already made by the party

Party has a very extensive **organisational structure**

- Provincial level – top committee and Provincial committee has several other committees
- Disciplinary Inspection Committee (DIC) at every level holds the power to investigate disciplinary matters
- Central Commission for Discipline Inspection is the highest internal-control of the institution of the CCP and is tasked with enforcing internal rules and regulations and combating corruption and malfeasance in the party – investigates corruption; has powers greater than any Chinese official
- Party Disciplinary Inspection Powers incl. Shuanggui (detention of Party officials/members) and the waiver of rights
- **Shuanggui power**: Party disciplinary inspector has the power to require a party official to be at a designated time at a designated place
 - Most feared power → Individuals will simply be taken away by disciplinary inspectors regardless of position
 - Usually limited to party members and is within the internal party disciplinary process; this means → no access to lawyers, family, automatic waiver of rights under the justice system, criminal procedure law does not apply
 - All corruption cases since Xi Jinping – commenced with Shuanggui
 - End of investigation – DIC will release a report; report will almost invariably condemn the detainee
 - DIC recommends disciplinary sanctions – heaviest penalty is expulsion OR party will recommend the matter to law enforcement agency, inviting them to start their own investigations
 - So the process is → party investigation first. Then law enforcement investigation.
 - Note: There is a distinction between party procedure and law enforcement procedure
 - Also, internal rules are different from state laws

- Party members/officials are subject to internal rules – organisation rules may be harsher than state laws; could deprive a person of some rights/liberties under state laws
 - Once an individual joins the CCP, that individual waives part of legal rights
 - CCP member when joining the party takes an oath that he or she will sacrifice everything (incl. private interests) for communism – you join the party voluntarily
 - ‘waiver theory’: an intellectual justification for disciplinary inspection power is the idea that you have waived your rights when you joined the party
 - Is this compatible with the CCP promotion of the rule of law?
 - Is it compatible with the global notion of rule of law and human rights protection?
 - the differentiating factor between corruption in China and corruption in other countries is that CCP deals with corruption through internal matters first
 - A practical justification in support for waiver theory may be that CCP has extraordinary power, if you want to investigate an important CCP official, it requires extraordinary means
- Who appoints the DIC?
- Focus of the CCP is Politburo – within the Politburo, the Standing Committee (China’s highest decision making body), one member is appointed to be in charge of disciplinary inspections → Secretary of CCDI (currently, Wang Qishan)

2. Form and Substance of Chinese Law

The Chinese Legal System

Civil law tradition:

- Based on European civil law tradition → Decision to follow German-style civil law tradition during Qing Dynasty
- But adopted some common law influences

System of law:

- Constitutional law → Organic laws e.g. on how the National People’s Congress is set up; on State Council (executive branch of the govt.); on People’s courts
- Civil law → mainly Commercial law
- Criminal law
- Procedure law → Civil/criminal/administrative
- Administrative law → Economic law

Forms (sources) of law (in order of hierarchy) – five recognized categories (authority: Legislation Law statute)

- laws i.e. statutes made by the national legislature
 - national legislature has two bodies – national party’s congress and NPC standing committee (two separate bodies that make laws – NPC standing committee makes most of the laws)
 - law should not contravene the constitution (but who decides whether a law is unconstitutional?)
 - these are binding on the courts
- administrative regulations
 - regulations made by the state council which is the highest executive within the govt. (analogous to a cabinet)
- local regulations
 - binding within that locality and the courts
- ministerial rules
 - courts routinely follow them but they are NOT binding upon courts
- local governmental rules
 - similar to ministerial rules, not strictly binding on courts but courts in most cases follow them however

*interpretations → attaches to the rules/laws under the five categories above

- some authorities have the power to give interpretations e.g. NPC standing committee
- courts can also generally interpret these sources

*Constitution – Can it be judicially applied? Controversial issue.

Other sources of Chinese law which are more controversial:

- state policy
 - General Principles of Civil Law incl. provision which says ‘in dealing with cases, if the law is not clear, the courts can apply state policy’ – this provision was never repeated
 - So doubtful whether this remains valid today – that state policy is a valid source of law
 - Furthermore, supposedly, China is practicing rule of law

- No binding force on the court
 - Usually in state council docs. – but state council produces numerous documents on a daily basis
 - Also, state policy is not PARTY policy – distinction between state laws and party policy
 - custom
 - most academics consider this to be a source of law
 - draft civil code (which is in works now) – probably will give some recognition to civil custom
 - so if the law is not clear, courts can consider customs as a subsidiary source of law
 - no law has given recognition that custom has some legally binding effect – some judicial recognition
 - doctrine
 - general/fundamental principles which underline an area of law
 - some scholars of CIVIL LAW say that ‘if neither law nor custom is clear, apply DOCTRINE’
 - but there’s no statutory or judicial recognition of this so possibly just a theory...
 - HOWEVER, MOST Chinese laws will state fundamental principles – they are usually stated in the STATUTE → so in practice, fundamental principles are applied all the time because they are statutory provisions themselves
 - Treaties
 - Follows European tradition & in general, international treaties CAN BE DIRECTLY applied by the courts (no need for ratification as is the case in common law jurisdictions like Aus)
 - Civil and commercial cases – treaties are directly applicable and they PREVAIL over inconsistent domestic law
 - Human rights treaties – less clear if they can be directly applied by the courts
 - One category has been expressly excluded by court i.e. WTO agreement is not directly applicable in domestic Chinese cases

Interpretation of law

- Legislative interpretation – by legislature
 - Constitution, art 67(4): “The Standing Committee of the NPC exercises the following functions and powers:... (4) To interpret statutes;...”
- Administrative interpretation
- **Judicial interpretation – focus of this course**
 - What sources of law can the court interpret?
 - What is the legal effect of interpretation by the court?

Judicial interpretation

Organic Law of the People’s Courts, art.33: “The Supreme People’s Court gives interpretation on questions concerning specific application of laws and decrees in judicial proceeding.”

- ❖ Only the Supreme Court can issue interpretations of LAW and DECREES
- ❖ Meaning of decree? Probably govt. regulations
- ❖ Compared to Aus court which will not interpret law without reference to context/case, it’s different in China

Example – Legislation Law, art. 104:

“Specific interpretations on the application of law in adjudication or procuratorial work made by SPC and SPP shall be reported to NPCSC for recording within 30 days of their being released.

Adjudication and procuratorial organs other than SPC and SPP must not make specific interpretations on the application of law.”

- ONLY Supreme Court (SPC)/Supreme People’s Procuratorate (SPP) has the power to make binding interpretation of the law. → in this course, we will only look at the Supreme Court – will not look at the SPP

Forms of Supreme Court Interpretations – usually fall within the first four categories:

1. interpretation – interpretation re PARTICULAR transactions; MOST AUTHORITATIVE
2. regulation (or provisions) – re issues of procedures, judicial process or administration of justice
3. reply – answer from SC to a question raised by a lower court; closest thing China has to a binding precedent in common law
4. decision – not as important; decision by SC on something trivial re internal issues within the judicial system

Note: Interpretations are ABSTRACT interpretations of statutes; most LOOK like statutes, organized into articles

Supreme courts generally draft these regulations by getting feedback from lower courts – lower courts consult with Supreme Court about interpretation difficulties

Residual category – every provincial high court issues from time to time (Provincial “documents on adjudicative work”) → provincial courts cannot make binding interpretations so they are not called judicial interpretation; BUT if you have a case in that province, you need to bear it in mind

- ❖ usually they deal with interpretations not dealt with by SPC

Interpretations do not involve case law – cases are not binding on lower courts

Then do judicial decisions have any precedential effect? Do we need to cite them?

Case law

- 1) replies – closest to a binding precedent in common law (but this has been in decline)
- 2) guiding cases – carefully designated by SC as guiding cases; they are a guide to the application of law in future decisions; given authoritative value – **most authoritative**
- 3) gazette cases – cases, carefully selected by SC or by its subdivisions, they are published in the SC Gazette or some special journals, e.g. the SPC Gazette; they are also given authoritative value
- 4) other cases – residual; they do not have ANY normative value

*Recently China decided to publish every judgment online

(1) Replies

- based on **request for instructions** from lower courts – SC will receive this and consider whether to ‘reply’; it will not reply to every request
- if SC decides to reply, it will in the form of a letter incl. decision (i.e. expressly rules, that P or D should win) → in effect, when there is a reply, case is decided by the SC → in effect a binding decision by SPC
- ISSUE 1: lack of transparency – no right to make own submission in that process; all INTERNAL court procedure
- ISSUE 2: infringement of the parties’ right to appeal if reply is given – no point in appealing, the SC will obviously uphold the decision by the lower court (which in effect is their own decision) – but right to appeal is a constitutional right
 - have been trying to modify this, therefore, issuing fewer replies and also, the way a reply is written is different from before – just outlines the principles so that it may preserve the appeal; nonetheless, if SC issues a reply on an issue of law, appeal is quite meaningless

(2) Guiding cases

Launch of guiding cases in 2010. These guiding cases can be:

- (1) cases receiving wide societal attention
- (2) where rules of law are too general
- (3) typical cases
- (4) cases that are difficult, complex or of a novel type
- (5) other guiding cases

What becomes guide cases? How do they become guiding cases?

- ❖ Recommendation cases by lower courts, legal professionals, public
- ❖ Examination by the Guiding Cases Working Office – incl. judges and legal academics who examine the recommended/chosen cases; majority of these cases are lower court decisions
- ❖ Decisions by the SPC Adjudication Committee (incl. judges) – every decision making committee in every Chinese court
- ❖ When can it be applied? To be **applied by way of reference (means they are not binding, refer to them and follow them)** in similar cases – not strictly binding courts but courts are expected to follow them
- ❖ 60 cases in 12 releases so far since 2012

These guiding cases operate not so differently to binding precedents in common law

So why the development of case law now? Rationale:

- ❖ equity – decide similar cases in similar ways
- ❖ efficiency – follow previous case
- ❖ law reform – allows for more flexibility
- ❖ judicial capacity-building

Problems

- ❖ Centralised system
- ❖ Limited quantity
- ❖ Norm-creating character of cases
- ❖ Guiding effect – ‘apply as a matter of reference’, what does this really mean? Unclear what the specific consequences/requirements

(3) Gazetted case

- ❖ Cases published in the Supreme People’s Court Gazette – carefully selected by the editorial committee of the Gazette – editors are mainly judges of the SC
- ❖ Before the guiding cases came out – gazette cases were the most important body of cases in China – they were supposed to guide future case decisions
- ❖ 5-6 issues per year → Each issue will publish 6-7 cases
- ❖ every court subscribes to the Gazette

(4) “Guidance and reference” cases

- ❖ Their authoritativeness is lower than gazetted cases
- ❖ These are published in a series of books called ‘guidance and reference’ series on different jurisdictions of the courts

- e.g. criminal law
- ❖ Some normative value
- ❖ SC is slow in approving/publishing gazetted and guidance cases so lower courts for expediency address urgent issues through these series

(5) All other cases

- ❖ No normative value in law / Only empirical instances of how courts follow the law

3. The Constitution

Historical Overview – How the Constitution has evolved

- ❖ The Common Programme (1949) – adopted to serve as an interim constitution
- ❖ The 1954 Constitution – cultural revolution began
- ❖ The 1975 Constitution – radical ideology/extreme principles
- ❖ The 1978 Constitution – cultural revolution was over; more reforms taking place
- ❖ The 1982 Constitution – in operation now; although amended since then

The 1954 Constitution

- ❖ Preamble: “Our Country has established unbreakable friendship with the USSR and other people’s democratic countries.”
- ❖ Reflect the political circumstances at the time – China/Soviet Union formed the Socialist alliance
- ❖ Comprehensive and at least on paper, progressive – guaranteed numerous civil rights
- ❖ Art. 19 PRC defends the people’s democratic system, suppresses all treasonous and counter- revolutionary activities and punishes all traitors and counter-revolutionary elements. For a certain period, the State shall, according to law, deprive the political rights of feudal landlords and bureaucratic capitalists, but will also give them ways of livelihood so that they are reformed to become self-reliant citizens through labour.
 - Communist control of the power was not stable – Chiang Kai Shek (Nationalist party) was still after power in the mainland
- ❖ **Art. 90 The citizens of PRC have the freedom of residence and migration.**
 - **This freedom was later removed and remains that way in China**
 - Chinese citizens if born in a particular place, must remain in that place for life → regulated by household registration system
 - Should a person want to migrate to another place, in order to move and become a registered migrant, person has to change the hukou status – this is a difficult change esp. from rural – city move
 - As a matter of reality, many move but as a matter of law, these migrants are rural citizens as per the household system – consequently, they do not receive welfare benefits in the new location

The 1975 Constitution

Written at the end of the cultural revolution (after millions were persecuted)

Preamble: “Over more than 20 years, the Chinese people of all nationalities have marched on triumphantly, achieved great victories in the socialist revolution and construction, achieved the great victory in the Cultural Revolution of the Proletariat, and consolidated and strengthened the proletariat dictatorship.”

- ❖ Confirmed the cultural revolution

“Socialism is a long historical period. During the period, class, class contradiction and class struggle always exist; the battle between the two lines of socialism and capitalism always exists; the danger of capitalist restoration always exists; the threat of subversion and aggression from imperialism and socialist- imperialism always exists. These contradictions can only be solved according to the Theory of Continued Revolution under the Proletariat Dictatorship.”

- ❖ Maoist theory of continuing revolution

Art. 2 CCP is the core leadership of the people of all China. The working class achieves leadership of the State through its vanguards the CCP.

Art. 12 The proletariat must implement wholesale dictatorship over the bourgeoisie in the superstructure including all cultural areas. Culture, education, literature, arts, sports, public health, science and research must all serve proletariat politics, serve the workers, peasants and soldiers and be integrated with production and labour.

Art. 25 Prosecution and trial of cases must follow the masses line. In significant counter- revolutionary criminal cases, the masses shall be mobilised in the discussion and criticism.

Art. 26 The basic rights and obligations of citizens are to support the CCP leadership, to support the socialist system and to submit to the Constitution and laws of the PRC.

Summarised the ideology behind the radical cultural revolution → But In 1976 Mao died and the radicals were prosecuted

The 1978 Constitution – under Deng Xiao Ping

Preamble: “Chairman Mao Zedong is the founder of PRC. All the victories in our revolution and construction have been achieved

under the guidance of Marxism, Leninism and Mao Zedong Thought. To raise permanently and to defend resolutely Chairman Mao's great banners is the fundamental guarantee for the unified battle of Chinese people of all nationalities in order to bring the revolutionary cause of the proletariat to the conclusion."

- ❖ Still paid lip service to Mao Zedong

"We must uphold the proletariat's struggle against the bourgeoisie, uphold the struggle of the socialist line against the capitalist line, oppose revisionism, prevent capitalist restoration and prepare to deal with the subversion and aggression of socialist imperialism and imperialism against our country."

- ❖ Still some radical ideology

But noticeable changes in the direction of the CCP:

- ❖ Art. 11 The State upholds the general line of *constructing* socialism with all the efforts and in a strenuous and efficient way, develops the national economy in a planned, proportionate and speedy manner and increases without halt the social productive forces in order to strengthen the independence and security of the State and improve progressively the material and cultural life of the people.
 - **Shift towards more emphasis on the economic development**
- ❖ Art. 45 Citizens have the freedom of speech, communication, publication, rally, association, march, demonstration and strike and have the rights to "speak out freely, to air views freely, to hold great debates and to write big-character posters." (FOUR BIGS – these were deleted because they were the hallmark of persecution against intellectuals)

The 1982 Constitution

Fundamental Ideology:

"Four Cardinal Principles"

Constitution, Preamble: "Under the *leadership of the Communist Party of China* and the *guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory* and the important thought of 'Three Represents', the Chinese people of all nationalities will continue to *adhere to the people's democratic dictatorship* and *follow the socialist road*, persevere in reform and opening to the outside world, steadily improve socialist institutions, ..."

*in italics = the four cardinal principles

- ❖ Encapsulates the underlying principles/ideologies of the current regime
- ❖ Three represents by Jiang Zemin (Deng's successor) officially opens up the CCP to those people who would traditionally not be working class i.e. the capitalist and therefore the political elite joined hands with the economic elite
- ❖ Current political system → *people's democratic dictatorship*

Socialism

Art. 1: The PRC is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants. The socialist system is the basic system of the PRC. Disruption of the socialist system by any organization or individual is prohibited.

Economic policy – undergone the most changes to the Constitution:

Public Ownership

Original Art. 6 The basis of the socialist economic system of the PRC is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people.

Land Ownership

Art. 10: No organization or individual may appropriate, buy, sell or otherwise engage in the transfer of land by unlawful means. The right to the use of land may be transferred according to law.

- ❖ No private ownership
- ❖ Citizens granted a land-use right

Market Economy 1993 Amendments

Art. 15 Abolishing the planned economy "The state practises socialist market economy."

- ❖ Officially adopted

Evolving Role of Private Economy

1988 Amendment to Art. 11: The state permits the private sector of the economy to exist and develop within the limits prescribed by law. The private sector of the economy is a complement to the socialist public economy. The state protects the lawful rights and interests of the private sector of the economy, and exercises guidance, supervision and control over the private sector of the economy.

1999 Amendments

Art. 6 on basic economic system: "In the primary stage of socialism, the state upholds the basic economic system under which the public ownership is dominant and diverse forms of ownership develop side by side and keeps to the distribution system under which distribution according to work is dominant and diverse modes of distribution coexist."

2004 Amendments

Art. 11 (amended three times): The state protects the lawful rights and interests of the non-public sectors of the economy, including individual and private sectors of the economy. The state encourages, supports and guides the development of the non-public sectors of the economy, and exercises supervision and control over the non-public sectors according to law.

Political system at the national level

- ❖ Each local level replicates the political structure of the national level

5 entrances to the Forbidden city through Tiananmen Square reflects the formal structure created by the Constitution

- ❖ NPC – supreme organ of the state
- ❖ NPC created 4 others bodies of state power created by and accountable to the NPC -> State president; Central Military Commission (CMC); Supreme People's Court (SPC); SPP

NPC Supremacy

Art. 2: All power in the PRC belongs to the people. The National People's Congress and the local people's congresses at various levels are the organs through which the people exercise state power.

Art 3: The state organs of the PRC apply the principle of **democratic centralism**.... All administrative, judicial and procurator organs of the state are created by the people's congresses to which they are responsible and by which they are supervised.

State President

Art. 80: The President of the PRC, in pursuance of the decisions of the National People's Congress and its Standing Committee, promulgates statutes, appoints or removes the Premier, Vice- Premiers, State Councilors, ...declares a state of emergency, declares a state of war, and issues a mobilization order."

- ❖ President can act on these things pursuant to a decision of the legislature → president doesn't have independent decision-making power; symbolic figurehead/head-of-state; doesn't wield actual power
- ❖ Before president Jiang Zemin – previous presidents were lower ranked party officials

Art. 81: "The President of the PRC represents the PRC in conducting activities of national affairs and receiving foreign diplomatic representatives and; in pursuance of the decisions of the Standing Committee of the National People's Congress, appoints or recalls plenipotentiary representatives abroad, and ratifies or abrogates treaties and important agreements concluded with foreign states."

State Council

Art. 85: The State Council, that is, the Central People's Government, of the PRC is the executive body of the highest organ of state power; it is the highest organ of state administration.

Central Military Commission (CMC)

Art. 93 The Central Military Commission of the PRC directs the armed forces of the country.

- ❖ Technically two body of CMCs (party CMC and State CMC) but in reality, comprised of the same staff

Supreme People's Court (SPC)

Supreme People's Procuratorate (SPP)

- ❖ Job is to supervise the implementation of law
- ❖ Court is equal to the SPP

State Structure

In reality, there are four levels (not three). At each local level, there is usually a local govt., legislature, judiciary and procuracy

Art. 30: The administrative division of the PRC is as follows:

- (1) The country is divided into **provinces, autonomous regions and municipalities** directly under the Central Government;
First level → provincial level entities (32): 23 provinces, 5 autonomous regions (many minority groups but not necessarily the majority), 4 mega-cities (Beijing, Shanghai etc – these cities shouldn't be confused with the cities in the second level)
 - will find court, govt, legislature and procuracy
- (2) Provinces and autonomous regions are divided into autonomous prefectures, counties, autonomous counties, and cities;
This should be divided into two levels
 - **Cities and autonomous prefectures (higher level)**

- Districts (divisions of cities)
- Legislature, govt, intermediate court and procuracy
- Counties and autonomous counties (lower level)
 - Legislature, govt, court and procuracy

(3) Counties and autonomous counties are divided into townships, nationality townships, and towns.

Town level → Govt but no legislature, court or procuracy (although there could be a tribunal)

National laws apply throughout the country

5 tiers of govt – each level is accountable to the next level up

Constitutional provision governing SARs (Hong Kong & Macao) → provincial level

Art. 31 The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of specific conditions.

Governed by basic laws

Constitutionalism

Concept of constitutionalism and the extent to which it is implemented/accepted in Chinese law is disputed in Chinese literature

- Argued by conservative thinkers that constitutionalism is a creature of capitalism, which is incompatible with the socialist system of China / Others have supported the universalised (Western) notion of constitutionalism
- Constitutionalism is considered as one of the seven taboo subjects in China – largely rejected

Constitutional Supremacy?

“The Constitution is the concentrated reflection of the will of the Party and the people, and is the fundamental law formed through a process of scientific democracy. To persist in ruling the country according to the law, we must first and foremost persist in ruling the country according to the Constitution; to persist in governing according to the law, we must first and foremost persist in governing according to the Constitution.” (CPC 2014 Rule of Law Decision)

- **Does the constitution enjoy supremacy in the Chinese political and legal system?**
- **Western idea of constitutionalism embraced by the CCP – “Constitution represents the will of the party and the people”**
- **Words spoken by Xi Jinping – but they were found to be mere words of politic rhetoric/lip service**

Fundamental Law

Preamble: “This Constitution, ... is the fundamental law of the state and has supreme legal authority. The people of all nationalities, all state organs, the armed forces, all political parties and public organizations and all enterprises and institutions in the country must take the Constitution as the basic standard of conduct, and they have the duty to uphold the dignity of the Constitution and ensure its implementation.”

- Constitutional supremacy is stated in the Constitution itself

Super Majority for Amendment

Art. 64 Amendments to the Constitution are to be proposed by the **Standing Committee of the National People's Congress** or by more than one-fifth of the deputies to the National People's Congress and adopted by a vote of more than two-thirds of all the deputies to the Congress.

- But actual practice has always been that proposed amendment must be discussed and approved by the Politburo first

Rule of Law

Art. 5: The PRC governs the country according to law and makes it a socialist country ruled by law. **(amended in 2004 – idea of rule of law introduced)**

The state upholds the uniformity and dignity of the socialist legal system.

No laws or administrative or local rules and regulations may contravene the Constitution.

- **Upholds universal notions of rule of law/constitutionalism i.e. that nobody is above the law**

All state organs, the armed forces, all political parties and public organizations and all enterprises and institutions must abide by the Constitution and the law. All acts in violation of the Constitution or the law must be investigated.

No organization or individual is privileged to be beyond the Constitution or the law.

Liu Xiaobo, 08 Charter and Freedom of Speech

- Called for fundamental reform of Chinese political/legal system
- To adopt multi-party democracy
- To respect the rights of ethnic minorities
- These ideas were provocative/radical
- Now in prison

Article 35: Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of

procession and of demonstration.

- **Freedom of speech provision**

Article 51. The exercise by citizens of the People's Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens.

- **Restriction on freedom of speech**

Real value of Constitution is often unwritten

- Free speech → Wall between internal speech and external speech – you can discuss things behind closed doors but you might not be able to make the same statements in public

If the real constitution is actually unwritten, why does the CCP just not release it to the public?

Two strains of argument in the international literature

- Very critical about the Chinese govt. – Chinese govt is very defensive
- Apologetic (minority) – focus on Chinese govt's unprecedented achievements in development; idea that China has a very different cultural background/history – emerges from many years of civil law, internationally isolated for many decades; relativist thinking of applying international norms

Consider CCP disciplinary procedures in light of rule of law, constitutionalism, human rights

→ applicability of these international norms of rule of law, constitutionalism, human rights to the Chinese political/social system

Judicial application of the Constitution – what role does the Constitution play in the actual legal process

Can the Chinese court apply the constitution? *Judicialisation of the Constitution*

- Constitution itself says that it should be implemented – if so, is there any mechanism that the Constitution has prescribed for the application of the Constitution?

The main way that it is applied

- Legislative Supervision – responsibility of the legislature (standing committee of the NPC, who is charged with the interpretation of the Constitution) to supervise the implementation of the Constitution
 - But this mechanism hasn't been effective so reforms have been proposed, hasn't been done since 1980s

Proposed reforms – to improve constitutional implementation

2014 Rule of Law Decision

“Perfect the constitutional supervision system of the National People's Congress and its Standing Committee, complete procedures and mechanisms for constitutional interpretation. Strengthen filing and review systems and capacity building ...”

Aim to:

- (a) Strengthen the power of the legislature (although they haven't done their job in the past)
- (b) Complete procedures and mechanisms for constitutional interpretations (which atm are lacking)
- (c) Strengthen filing and review systems

Through

- NPCSC
- NPC Constitutional Committee
- Ordinary courts – individual can claim that something has violated constitutional right but can ordinary courts deal with constitutional issues?
- Constitutional Court

Can constitution be applied/cited in specific cases? Case studies:

SPC 1955 Reply (SC giving answers to lower court questions)

“The Constitution of PRC is the basic law of this country and the ‘mother law’ of all laws. Chairman Liu Shaoqi pointed out in the Report on the Draft Constitution that, ‘it stipulates what is legal, or what is required by law and shall be implemented, what is illegal and must be forbidden on the most important issues of the national life of this country’. On criminal cases, the Constitution has no provisions on how to convict a criminal and impose a penalty. Therefore, we agree to your opinion that it is **inappropriate to cite the Constitution as basis for conviction of a criminal and imposition of a penalty in the criminal judgment.**”

- Seemed to indicate that the SC did not allow courts to apply constitution in specific cases
- Q to SC was re criminal case ‘we are writing the criminal judgment, in our judgment, can we cite the Constitution?’
- Strictly speaking, this reply did not say that you should not apply the Constitution in any case
 - It merely denounces the rule of citation
- If you look at the reason behind the reply – two reasons:
 1. No relevant provision in the Constitution – constitution only has general rules on crimes and punishment
 2. Constitution has a general and fundamental character – it's not about specific legal issues

But in SPC 1988 Reply on Work Injury

“The practice of labor protection for the laborers was definitely stipulated in our constitution, which is the right enjoyed by the

laborers. Zhang Xuezheng and Xu Guangqiu as the employers shall give labor protection for the laborers according to law, but they stated 'Industrial Injury Excluded from Responsibility' in their recruitment registration form. This kind of behavior is inconsistent with the provisions of the constitution and relevant laws, and it has also seriously violated the socialist public morality, so it shall be invalid civil behaviors."

- In the reply itself referred and applied the Constitution
- Civil case which involved expansive interpretation of constitutional rights and which invalidated a contractual defence

Constitution, Art. 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.

SPC 2001 Reply on Right to Education (Qi Yuling Case) (repealed in 2008)

"Chen Xiaoqi and the others have, by means of infringing upon the right of personal name, infringed upon Qi Yuling's basic right of receiving education, which shall be enjoyed by her in accordance with the Constitution, and have caused specific losses, therefore, they shall bear the corresponding civil liabilities."

Affirmed that Constitution could be applied directly to a case

- Held that constitutional right of education was infringed and thereby, protected by the court
- Constitutional right could constitute a cause of action in this case
- Foreshadowed potential for constitutional litigation
- SC did not refer specifically to the constitutional provision it was referring to but clear that it is
 - Constitution, art. 46(1): Citizens of PRC have the duty as well as the right to receive education.
 - Also there exists an extremely relevant statutory provision: Education Law, art. 81 If anyone, in violation of the provisions of this Law, infringes upon the lawful rights and interests of teachers, educatees or schools or other institutions of education, thus causing losses or damage, he shall bear civil liabilities according to law."

Case became controversial

- ❖ Politically it was controversial because it was a major step taken by the SC – it was criticised for usurping the power over the legislature
- ❖ Also, is art 46(1) the appropriate constitutional provision?
 - Qi's right to general education was not infringed upon
 - Right that was infringed was a private right i.e. a contractual right?

2008 Appeal of this case – Appeal was allowed

- ❖ **So, many people believe that the legal position on the application of the Constitution is that Chinese courts should not apply the Constitution in specific cases**

HOWEVER, there exists no legal prohibition on Chinese courts on applying the Constitution

4. The Law-Making Process

Legislative Competence

Unicameral System: NPC and NPCSC

Art 58 The NPC and its Standing Committee exercise the legislative power of the State

- One legislative house so Bill goes through that house and if it is passed, it becomes law
- This is so, even though there are two separate bodies involved in law-making (NPC and NPCSC)
- NPC only meets for 10 days – most of the work is done by Standing Committee

Election of delegates

- Not elected by the voters; voters can only elect reps at lowest local level
 - So, direct election only at county and township levels
- Provincial People's Congress – will elect their NPC delegate from their province
 - Nominee doesn't have to live in that province
 - In order to make sure that embarrassment will be avoided, party organisational department uses various methods to ensure outcomes (i.e. rigs the election)
 - E.g. ballot can be printed in such a way that delegates know who to vote for and who to eliminate

NPC

- Art 62 NPC exercises the following function and powers:
... (3) to enact and amend basic laws governing criminal offences, civil affairs, the State organs and other matters...

NPCSC

- Art 67 NPCSC exercises the following functions and powers: