Asian Journal of Comparative Law (2023), **18**, 319–344
doi:10.1017/asjcl.2023.18

ASIAN JOURNAL OF COMPARATIVE LAW
CAMBRIDGE UNIVERSITY PRESS

ARTICLE

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

Alec Stone Sweet[*], Chong Bu[**] and Ding Zhuo[***]

Faculty of Law, University of Hong Kong, Hong Kong SAR
Corresponding author. E-mail: asweet@hku.hk; alec.sweet@yale.edu

(Received 21 April 2022; revised 4 July 2022; accepted 9 August 2022; first published online 25 May 2023)

Abstract

Chinese elites have celebrated its new Civil Code (2021) as the most important statute in the nation's history, and the 'cornerstone' of its turn toward 'rule of law'. The Code expressly binds all persons, as well as public officials, and is judicially enforceable. The statute enshrines rights to dignity, equality, 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 prohibited from directly enforcing the PRC's Constitution. The article explores the relationship between the Code and Constitution, through a comparative analysis of: (i) the process of 'constitutionalising' the private law around the globe; (ii) the scholarly discourse on the 'horizontal effect' of rights in China; (iii) the structure of the Code itself; and (iv) the development of 'political' control mechanisms, to be deployed by the Communist Party of China and organs of the state to constrain how judges use their interpretive powers.

On 1 January 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 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.

*Professor, Chair of Comparative and International Law, Faculty of Law, University of Hong Kong.
**PhD Candidate, Faculty of Law, University of Hong Kong.
***PhD Candidate, Faculty of Law, University of Hong Kong.

[1]Civil Code of the People's Republic of China [中国人民共和国民法典] (adopted at the 3rd Session of the 13th NPC 28 May 2020, effective 1 Jan 2020). English translation online at the China Justice Observer website: <https://www.chinajusticeobserver.com/law/topics/civil-code> accessed 18 Apr 2022.

[2]Sun Xianzhong, 'Reflections on Function of National Governance of China's Civil Code' (2020) 6 China Law 81, 82–89.

The Civil Code is the centerpiece of a series of recent, highly-publicised 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 (SPC) 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 Constitution, as well as most of the rights found in Western states where CJR operates routinely. Further, through interpretation and application of legal norms, courts participate in the law-making function, at a minimum, through gap-filling, which ostensibly conflicts with the PRC's power structure. This article 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 (NPC). 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 'constitutionalisation'[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 recognised and debated the importance of the German situation. In recent decades, the basic features of the constitutionalisation 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 article proceeds as follows. It first summarises the process through which the private law was constitutionalised. Chinese elites were broadly aware of these developments, and they debated them with different degrees of sophistication during the drafting of the new legislation. Then, 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 in the subsequent Part, which describes and assesses the often fierce scholarly debate in the PRC on the wisdom and feasibility of linking the Constitution and the Civil Code. The Part thereafter examines the means available to governing elites to control how the judiciary will interpret and apply such provisions, through the SPC, the NPC, and certain organs of the CPC itself. Finally, we consider various prospects for the evolution of the legal system in light of these control mechanisms.

[3]See the second Part below.

[4]On the 'constitutionalisation' 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 available in: Peter E Quint, 'Free Speech and Private Law in German Constitutional Theory' (1989) 48 Maryland Law Review 247.

[6]See the second and third sections of the Part immediately below.

https://doi.org/10.1017/asjcl.2023.18 Published online by Cambridge University Press

The 'Constitutionalisation' of the Private Law in Comparative Perspective

For present purpose, by 'constitutionalisation' of the private law, we refer to the process through which (i) constitutional rights evolved as sources of private law that can be pleaded by litigants and enforced by the 'ordinary' courts, and (ii) the techniques of constitutional interpretation became important modes of argumentation and decision-making in non-constitutional courts, in particular when enforcing the Civil Code. Looking back on this process, two points stand out. First, decisions of a constitutional (or unified 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 'constitutionalisation' phenomenon.

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 constitutionalised. 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; labour 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 specialised 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 constitutionalisation 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 Article 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, Article 2(1) comprised an open-ended recognition of general 'liberty.' Given the virtually unlimited scope of Article 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 characterised as a normative system constituted by 'objective constitutional values' – 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

[7] Article 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 Jan 1957), 6 BVerfGE 32. The ruling remains the longest yet rendered by the GFCC, at more than 300 pages.

[9] Article 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 Jan 1958), BVerfGE 7, 198.

https://doi.org/10.1017/asjcl.2023.18 Published online by Cambridge University Press

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 Labour court had decided to enforce the charter of rights directly, without authorisation 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 review[12] into something akin to the 'diffuse' system of CJR associated with the USA.[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*.

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 Article 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

[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 Sajo (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 Verfassungrecht* [*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 International Journal of Constitutional Law 193.

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

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

https://doi.org/10.1017/asjcl.2023.18 Published online by Cambridge University Press

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 harmonise 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 organised by the private law. Third, the constitutionalisation 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 criticise *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' horizonal 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.

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 'harmonised' civil code began in the 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

[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 The International and Comparative Law Quarterly 675.

[19]Alec Stone Sweet, 'The Juridical *Coup d'État* and the Problem of Authority' (2007) 8 The German Law Review 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.

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

https://doi.org/10.1017/asjcl.2023.18 Published online by Cambridge University Press

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 'constitutionalised' – 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 (Article 1), the right to life (Article 2), and the integrity of the person (Article 3); to the prohibition of torture and inhuman treatment (Article 4), and of slavery and enforced labour (Article 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 (Article 14), work and choice of occupation (Article 15), fair and just working conditions (Article 31), social security and social assistance (Article 34), health care (Article 35), services of 'general economic interest' (Article 36), environmental protection (Article 37), and other 'social rights', some of which have no analogs in Chinese law. Article 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.

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

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

[23]ibid 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.

https://doi.org/10.1017/asjcl.2023.18 Published online by Cambridge University Press

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 'constitutionalised' under EU directives, general principles, and a landmark ruling[27] 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]

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 labour 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 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, and to China itself. The Taiwan Area of China and South Korea possess powerful constitutional courts that embraced German-style doctrines,

[27] *Mangold v Helm*, CJEU Case C-144 (Judgment of 22 Nov 2005).

[28] The episode is analysed in detail in: Alec Stone Sweet & Kathleen Stranz, 'Rights Adjudication and Constitutional Pluralism in Germany and Europe' (2012) 19 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 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 Northwestern Journal of Human Rights 1.

[31] Shyamkrishna Balganesh, '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,* [1986] 2 SCR 57; Alan Domes, 'The Courts, The Common Law, and the Constitutional Imperative: Beyond *Dolphin Delivery*' (1988–1989) 27 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.

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

[35] Jorge González Jácome, 'A New Judge for the Colombian Constitutional Court: The Tensions of Transition' (I-CONnect Blog, 13 Nov 2013) <http://www.iconnectblog.com/2015/11/a-new-judge-for-the-colombian-constitutional-court-the-tensions-of-transition/> accessed 14 Apr 2022.

https://doi.org/10.1017/asjcl.2023.18 Published online by Cambridge University Press

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 2010[37] that formally recognised 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 Code[39] gathered momentum in the 1990s, particularly with respect to freedom of expression, labour relations, gender equality,[40] 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 constitutionalisation 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.

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 discussed below).

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

[37]Supreme Court 2008가38288, Apr 22, 2010 (2010 공 897) (South Korea).

[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 as the main Chinese civil law, was transferred to Taiwan in 1945.

[40]Ja-Lin Wu (吳家林), '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 [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]' (2020) 68 National Chung Cheng University Law Journal (中正大學法學集刊) 165.

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

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

[43]Yasuo Hasebe, 'The Supreme Court: A Judicial Court, Not Necessarily a Constitutional Court', in Albert HY Chen & Andrew J 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 Washington University Law Review 1425.

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

https://doi.org/10.1017/asjcl.2023.18 Published online by Cambridge University Press

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 (eg, the 2007 law on property) were subject to intensive debate over more than a decade before final adoption by the 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 rationalised and reinforced its own centralised, 'political' supervision of the courts. The current 'conventional understanding'[47] rests on the view that several interlocking systemic issues had been settled in the 2000s. The first concerns the prohibition of CJR.[48] In 2008, an SPC Decision destroyed a movement led by certain judges and legal scholars in favour of CJR. As readers will know, the *Qi Yuling* litigation, which unfolded over a decade, formally concluding in 2008 when the SPC 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 later on in the article. The second issue involves the importance of constitutionalism and state theory more generally. The SPC'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 institutionalised taboo meant 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

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

[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 International Journal of Constitutional Law 950.

[48]Qianfan Zhang, 'Establishing Judicial Review in China', in Albert HY Chen & Andrew J Harding (eds), *Constitutional Courts in Asia: A Comparative Perspective* (Cambridge University Press 2018) 311.

[49]Zhang (n 47) 952.

[50]Stone Sweet & Mathews (n 11) 10–12.

https://doi.org/10.1017/asjcl.2023.18 Published online by Cambridge University Press

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' later on in the article. 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]

Embracing the 'Rule of Law'

Notwithstanding the fact that CJR was formally prohibited in 2008, the CPC has prioritised 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 to be consistent with these goals, a fact that many consider to be in contradiction with 'rule of law' requirements.[54]

A long list of official pronouncements has 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 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 emphasising that 'no laws, regulations, or legal documents may conflict with the Constitution'.[57] President Xi called attention to the

[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 [Elements of a Theory of the Constitutional Court]' (1928) 45 Revue du droit public 449.

[53]Ying Sun & Hualing Fu, 'Of Judge Quota and Judicial Autonomy: An Enduring Professionalization Project in China' (2022) 251 The China Quarterly 866.

[54]There exists an important and contentious debate about the PRC's capacity to reform its legal system. For an exploration of China's self-understanding of 'rule of law', see Randall Peerenboom, 'Fly High the Banner of Socialist Rule of Law with Chinese Characteristics! What Does the 4th Plenum Decision Mean for Legal Reforms in China?' (2015) 7 Hague Journal on the Rule of Law 49. For skepticism about the turn to 'rule of law', see Qianfan Zhang, 'The Communist Party Leadership and Rule of Law: A Tale of Two Reforms' (2020) 30 Journal of Contemporary China 578. For an assessment of potential positive impacts of the 'turn', see Taisu Zhang & Tom Ginsburg, 'China's Turn Towards Law' (2019) 59 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 International Journal of Constitutional Law 977, and Qianfan Zhang, 'Of Comparative Constitutional Monocropping: A Rejoinder to Michael Dowdle' (2010) 8 International Journal of Constitutional Law 985.

[55]中共中央关于全面推进依法治国若干重大问题的决定 (adopted at the 4th Plenary Session of the 18th Central Committee of the CPC on 23 Oct 2014). English translation available online at: China Law Translate, 'CCP Central Committee Decision concerning Several Major Issues in Comprehensively Advancing Governance According to Law' (28 Oct 2014) <https://www.chinalawtranslate.com/en/fourth-plenum-decision/> accessed 14 Apr 2022.

[56]ibid.

[57]法治中国建设规划 (2020-2025 年). English translation online at: China Law Translate, 'Plan on Building the Rule of Law in China (2020–2025)' (10 Jan 2021) <https://www.chinalawtranslate.com/en/%E6%B3%95%E6%B2%BB%E4%B8%AD

https://doi.org/10.1017/asjcl.2023.18 Published online by Cambridge University Press

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 publicised 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.

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 (Article 15), the right to life (Articles 110 and 1002), the right to health (Articles 110 and 1004), the right to intellectual property (Article 123), the right of sexual harassment victims to seek declarations of liability of the tortfeasor and compensation (Article 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 Article 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 infringement by any organisation or individual' (Articles 1002, 1003, 1004 and 1005). Most rights, however, are subject to a 'limitation clause', which in other legal systems explicitly authorises 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 (eg, Article 1 of the *1982 Canadian Charter of Rights and Freedoms*); and (ii) a bespoke

%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/> accessed 14 Apr 2022.

[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 [决胜全面建成小康社会 夺取新时代中国特色社会主义伟大胜利]' (delivered at the 19th National Congress of the CPC on 18 Oct 2017) <http://www.xinhuanet.com/english/download/Xi_Jinping's_report_at_19th_CPC_National_Congress.pdf> accessed 14 Apr 2022.

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

[60]Stone Sweet & Mathews (n 11) 31–41, 162–163.

https://doi.org/10.1017/asjcl.2023.18 Published online by Cambridge University Press

clause attached to a single right (eg, Article 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 Article 8 ('When conducting a civil activity, no person of the civil law shall violate the law, or offend public order or good morals'), and Article 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'). In China, it is assumed that 'public policy' and 'good morals' most immediately refers to the policy goals of the CPC and the Party State.

Specific limitation clauses too are scattered throughout the Code. Article 1012 reinforces Article 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'.

Article 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 Article 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 the penetration of constitutional rights, as well as the constitutional command to enforcement the proportionality principle.

We have left three structural properties of the Civil Code for last. First, Article 3 makes it clear that the Code is fully judicially enforceable, including against state officials:[61]

> 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 organisation 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 (eg, Article 243 authorises the expropriation of property, for public purposes, but subject to compensation and

[61]The Civil Code also gives a passing bow to legal pluralism, recognising the potential of custom to fill gaps. Article 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]Article 1010 of the Civil Code: '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 organisations 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'.

https://doi.org/10.1017/asjcl.2023.18 Published online by Cambridge University Press

other 'lawful rights and interests'), and will often overlap litigation challenging administrative acts.[63] Third, Article 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.

Article 1, of course, raises primordial issues. Does either the Code or the Constitution evolve and, if so, through what processes? Does Article 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.

Thus, considered as an instrument of delegation, the Civil Code expressly charged judges with the task of enforcing vague, incomplete, open-ended norms. This indicates that the CPC meant to empower judges with the necessary authority of interpretation and lawmaking, at least in individual cases.

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 conceptualised 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. Morevover, 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 polarising 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 paradigmatic example of a Chinese 'super statute' –

[63]Feng Jianpeng (冯建鹏), 'Constitutional Reasons and Functions of Judicial Judgments in China: An Empirical Study Based on Public Judgment Documents [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]' [2017] Chinese Journal of Law (法学研究) 44, 55.

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

[65]Stone (n 51) ch 1; Alec Stone Sweet, 'Why Europe Rejected American Judicial Review – and Why it May Not Matter' (2003) 101 Michigan Law Review 201.

https://doi.org/10.1017/asjcl.2023.18 Published online by Cambridge University Press

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 favour of 'constitutionalising' the private law in China.

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 *Lüth* – is that the public law and the private law are autonomous legal domains. Long, the dean of the Beihang law faculty, claims that Article 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, 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.

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'),[67] a prominent drafter of the Civil Code – Sun Xianzhong, a member of the NPC Constitution and Law Committee, and of the Chinese Academy of Social 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 …'[68] The Code is the 'cornerstone of the rule of law',[69] 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.[70] In particular, Sin 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.[71]

[66]Long Weiqiu (龙卫球), 'Study of the Specialty and Independence of the Basis of the Civil Code: The Relationship between the Constitution and the Civil Code [民法依据的独特性——兼论民法与宪法的关系]' [2016] Journal of the National Prosecutors College (国家检察官学院学报) 31.
[67]Sun (n 2).
[68]ibid 81.
[69]ibid.
[70]ibid 83.
[71]ibid 89.

https://doi.org/10.1017/asjcl.2023.18 Published online by Cambridge University Press

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'.[72] 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 Constitution;[73] and domestic courts around the world recognise the UN Declaration to be a constituent component of the International Bill of Rights, provisions of which they regularly enforce, including in Hong Kong.[74]

A second group is willing to go further than Sun, arguing that the Civil Code performs 'constitutive' functions, including the 'legitimation' of private law.[75] 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 reconceptualise 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. For some, such as Qian,[76] this overlap is fully acknowledged, but it is for the legislator to harmonise the courts.

Those who embrace the Code's 'constitutional' features argue that, at a minimum, Article 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]

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 (ie, 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 Article 1 authorises doctrines associated with the horizontal indirect effect of the

[72]ibid 82.

[73]Stone (n 51) ch 3.

[74]Stephen Gardbaum, 'Human Rights as International Constitutional Rights' (2008) 19 European Journal of International Law 749.

[75]Lin Laifan (林来梵), 'A Constitutional Analysis of the Compilation of the Civil Code [民法典编纂的宪法学透析]' [2016] Chinese Journal of Law (法学研究) 99.

[76]Qian Fuchen (钱福臣), 'A Basic Exposition of the Issues of the Constitution's Judicial Enforceability – A Comparison between China and the West [我国宪法私法效力问题的基础认知—基于中西比较的立场]' [2014] Contemporary Law Review (当代法学) 3.

[77]Miao Lianying (苗连营) & Zheng Lei (郑磊), 'Three Constitutional Issues of the Compilation of the Civil Code [民法典编纂中的宪法三题]' [2015] Law and Social Development (法制与社会发展) 74.

[78]Qian (n 76).

[79]Cao disagrees, arguing that rights in the Civil Code are not 'concrete manifestations' of constitutional rights: see Cao Xiangjian (曹相见), 'Constitutional Dimension of Personality Rights and the Compilation of the Civil Code [人格权法定的宪法之维与民法典编纂]' [2020] Zhejiang Social Sciences (浙江社会科学) 33.

[80]Miao & Zheng (n 77).

[81]Han Dayuan (韩大元), 'The Codification of the Civil Code Should Embody the Constitutional Spirit [民法典编纂要体现宪法精神]' [2016] Journal of National Prosecutors College (国家检察官学院学报) 3.

https://doi.org/10.1017/asjcl.2023.18 Published online by Cambridge University Press

Constitution. Judges are, indeed, under a duty to 'concretise 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 *Lüth*.[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 Article 109 of the new Code directly, and on its own, resolves the dispute. Article 109, to 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 Article 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 noted, Sun treats the Civil Code as if it 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 operationalised 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, as noted, in Europe the process of constitutionalising 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

[82]Wang Liming (王利明), 'What Does "Enacting Civil Law in Accordance with the Constitution Mean"? [何谓根据宪法制定民法？]' [2017] Law and Modernisation (法治现代化研究) 71.

[83]Shi Jiayou (石佳友), 'Understanding the Relationship between Human Rights and Personality Rights through Compiling an Independent Book on Personality Rights [人格权立法的历史演进及其趋势]' [2018] Journal of the China University of Political Science and Law (中国政法大学学报) 140.

[84]Opposition to constitutionalisation is often predicated on the view that courts do not have enough power or autonomy to reproduce a Chinese analogue of *Lüth* and indirect effect. See Qian (n 76).

[85]Sun (n 2) 90.

[86]See the debate between Cao (n 79) and Qin & Zhou: Qin Qianhong (秦前红) & Zhou Hang (周航), 'Constitutional Problems in the Implementation of the Civil Code [〈民法典〉实施中的宪法问题]' [2020] Law Science (法学) 21.

[87]Liu Zhigang (刘志刚), 'The Public Order and Moral and the Fundamental Rights [公序良俗与基本权利]' [2009] Science of Law (Journal of Northwest University of Political Science and Law) (法律科学(西北政法大学学报)) 62; Sun Mengjiao (孙梦娇), 'Legal Analysis of the Judicial Application of Public Order and Good Morals: Functions, Basis and Empirical Mechanisms [公序良俗司法应用之法理分析:功能、理据与实证机制]' [2020] Law and Social Development (法制与社会发展) 109, 113, 117. See also Qin & Zhou (n 86).

[88]Sun (n 87) 117–118.

https://doi.org/10.1017/asjcl.2023.18 Published online by Cambridge University Press

entitlement provided by the Civil Code. Chinese scholars, too, have debating balancing,[89] invoking *Lüth*[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.

Controlling 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?

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 legitimises a ruling despite the prohibition of CJR. In a third approach, the court emphasises 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]

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 (eg, issuing 'conforming' interpretations), Du finds that judges are

[89]Luo Zhengyan (骆正言), 'Constitutional Reflections on the Civil Code Draft's Book on Personality Rights ["民法典草案" 人格权编的宪法学省思]' [2020] Zhejiang Social Sciences (浙江社会科学) 42, 48; Liu Quan (刘权), 'Abuse of Rights, Boundaries of Rights and Proportionality: Starting from Article 132 of the Civil Code [权利滥用、权利边界与比例原则——从〈民法典〉第132条切入]' [2021] Law and Social Development [法制与社会发展] 39.

[90]Zheng Xianjun (郑贤君), '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* [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"]' [2016] Law Review (法学评论) 8.

[91]Shi advocates the use of the standard four-step proportionality test. See Shi Jiayou (石佳友), 'The Relationship between Human Rights and Personality Rights [人权与人格权的关系—从人格权的独立成编出发]' [2017] Law Review (法学评论) 98, 102.

[92]Daniel Sprick, 'Judicialization of the Chinese Constitution Revisited: Empirical Evidence from Court Data' (2019) 19 The China Review 42.

[93]ibid 49–50.

[94]ibid 44.

[95]ibid 57; see also Qian (n 76) 6–9.

[96]Du Qiangqiang (杜强强), 'Practice of constitutionality-based Interpretation in Chinese Courts [合宪性解释在我国法院的实践]' [2016] Chinese Journal of Law (法学研究) 107.

https://doi.org/10.1017/asjcl.2023.18 Published online by Cambridge University Press

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.[97] 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 Article 49 of the Constitution.[98] 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),[99] 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. Article 2 of the *Labour Law* excluded labour relations between natural persons (covering agreements between corporations and representatives of labour), 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 Article 42 of the Constitution.[100] If brought today, both of these cases would be litigated under the Civil Code.

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. Viewed comparatively, it is important to recognise that the SPC is *not* a constitutional court, but a quasi-legislative organ of governance that manages the judicial system in the name of the CPC and NPC. That point made, it is now fully accepted that SPC Interpretations produce legal norms that impact the entire judiciary,[101] at least with respect to resolving questions of how the law is to be applied in concrete cases that have arisen in the courts.[102] Concurrently, the Standing Committee of the NPC holds *de jure* powers to resolve disputes about the meaning of

[97]National Judges College (国家法官学院) & Renmin University of China Law School (中国人民大学法学) (eds), *Summary of Chinese Trial Cases: 2009 Civil Trial Volume* [中国审判案例要览(2009 年民事审判案例卷)] (Renmin University Press [中国人民大学出版社] 2010) 458.

[98]Constitution of the People's Republic of China (Amended 2018) [中华人民共和国宪法(2018修正)] (adopted at the 1st Session of the 13th National People's Congress on 11 Mar 2018) [henceforth 'The PRC Constitution'], art 49, para 1: 'Marriage, the family, and mother and child are protected by the state'.

[99]China Institute of Applied Law [中国应用法学研究] (ed), *Selected Cases of People's Courts: Vol 89* [人民法院案例选》第 89 辑] (People's Court Press [人民法院出版社] 2015) 162.

[100]The PRC 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.' A third case, *Chen Jindi v Xu Jian: Disputes over General Personality Right* [陈进弟与徐建一般人格权纠纷一审民事判决书] (2015) (Judgment no 35, Primary People's Court of Xiashan District of Zhanjiang City, Guangdong Province, 2015 [(2015)湛霞法民一初字第 335 号判决书]) highlights the reliance of judges on the Constitution as the basis of statutory interpretation. Medical conditions had led the plaintiff Chen and the defendant to perform and preserve an *in vitro* fertilisation of the plaintiff's ovum, a service which was provided by a medical organisation during their marriage. After the couple had divorced, the defendant refused to transfer the embryo to the plaintiff. The case was brought under Article 17 of the 2015 revised Population and Family Planning Law ('Citizens have reproductive rights'). To interpret the statute, the court invoked Article 33(2) of the Constitution (on equality), which states that 'all citizens of our country are equal before the law'. Men and women, the Court held, must respect each other's respective rights in such a case. The logic is transferrable to the new Civil Code. See Feng (n 63) 53.

[101]Susan Finder, 'The Supreme People's Court of the People's Republic of China' (1993) 7 Journal of Chinese Law 145, 164–166; Albert HY Chen, *An Introduction to the Legal System of the People's Republic of China* (4th edn, LexisNexis 2011) 161–166.

[102]Legislation Law of the People's Republic of China (Amended 2015) [中华人民共和国立法法(2015 修正)] (adopted at the 3rd Session of the 12th National People's Congress on 15 Mar 2015) [henceforth, 'The PRC Legislation Law'], art 104.

https://doi.org/10.1017/asjcl.2023.18 Published online by Cambridge University Press

justiciable law, and to clarify how that law is to interpreted in new circumstances.[103] 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 pronouncements.[104] The SPC publishes its decisions in various forms.[105] Under the current system, three of these – Interpretations; Provisions; and Official Replies – directly impact the substantive content of legal norms.[106] 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,[107] and judges are expected to treat them as sources of law in their rulings.[108]

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.[109] 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.[110] The SPC seeks to maximise two interrelated objectives: its capacity (i) to manage the courts,[111] and (ii) to enhance its own capacity to control policy outcomes, including in the sphere of constitutional law.[112] 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.[113]

To date, the SPC has issued 127 judicial interpretations concerning the Civil Code (the most recent, as of 24 February 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

[103]The PRC Legislation Law, art 45.

[104]This phenomenon is criticised by some scholars as usurpation of legislative power. See eg, Yuan Mingsheng (袁明圣), 'An Exploration of the Phenomenon of Legislativisation of Judicial Interpretation [司法解释"立法化"现象探微]' [2003] Studies in Law and Business (法商研究) 3.

[105]Provisions of the SPC on the Judicial Interpretation Work (Amended 2021) [最高人民法院关于司法解释工作的规定(2021 修正)] (No 12 [2007] of the Supreme People's Court, amendment approved by the Judicial Committee of the Supreme People's Court 8 Jun 2021, issued 9 Jun 2021, effective 16 Jun 2021) [henceforth 'The Judicial Interpretation Provisions'], art 6.

[106]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.

[107]The Judicial Interpretation Provisions, art 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.

[108]The Judicial Interpretation Provisions, art 27.

[109]Shen Kui (沈岿), 'Democratising Judicial Interpretation and the Supreme Court's Political Function [司法解释的"民主化"和最高法院的政治功能]' [2008] Social Sciences in China [中国社会科学] 104, 110–114.

[110]ibid 102–104, 106; Wang Chenguang, 'Law-Making Functions of the Chinese Courts: Judicial Activism in a Country of Rapid Social Changes' (2006) 1 Frontiers of Law in China 524.

[111]Taisu Zhang, 'The Pragmatic Court: Reinterpreting the Supreme People's Court of China' (2012) 25 Columbia Journal of Asian Law 42.

[112]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.

[113]ibid 394–401.

https://doi.org/10.1017/asjcl.2023.18 Published online by Cambridge University Press

the Constitution) and prohibition of domestic violence (Article 49, para 4 of the Constitution).[114] 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', catalysing still more heated scholarly debate concerning the Constitution's horizontal effect and the enforcement of the proportionality principle.[115] Following the appellant court's final judgment in the case (2021),[116] the SPC issued an Interpretation on issues concerning facial recognition,[117] which laid down detailed rules governing personality rights and their potential infringement, a month before the promulgation of the more comprehensive Personal Information Protection Law.

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,[118] the SPC selects rulings deemed 'important', on the basis of recommendations from its internal agencies, lower courts, and civic society.[119] 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 recognised as a formal source of law or legal basis for a court's decisions.[120] 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.[121] Litigants may plead elements of Guiding Cases, and judges must explain how they have responded.[122]

To date, the SPC has issued 31 batches of guiding cases, consisting of 178 judgments in civil, criminal, and administrative law, most of which are civil cases. The *Guiding Case No 99* exemplifies

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

[115]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]' (28 Feb 2020) <http://www.calaw.cn/article/default.asp?id=13571> accessed 17 Apr 2022.

[116]*Guo Bing v Hangzhou Wildlife World Co Ltd: Disputes over Service Contract* (2021) (Intermediate People's Court of Hangzhou City of Zhejiang Province, 9 Apr 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].

[117]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 [最高人民法院关于审理使用人脸识别技术处理个人信息相关民事案件适用法律若干问题的规定] (Interpretation No 15 [2021] of the Supreme People's Court, approved by the Judicial Committee of the Supreme People's Court 8 Jun 2021, issued 27 Jul 2021, effective 1 Aug 2021).

[118]Zhang (n 111) 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 Harvard Law Review 2213, 2215–2217.

[119]Notice of the SPC on Issuing the Provisions on Case Guidance [最高人民法院关于案例指导工作的规定] (No 51 [2010] of the SPC, approved by the Judicial Committee of the Supreme People's Court 15 Nov 2010, issued and effective 26 Nov 2010), arts 4–5; Detailed Rules for the Implementation of the Provisions of the SPC on Case Guidance [《最高人民法院关于案例指导工作的规定》实施细则] (No 130 [2015] of the Supreme People's Court, approved by the Judicial Committee of the Supreme People's Court 27 Apr 2015, issued and effective 13 May 2015) [henceforth 'The GCS Implementation Rules'], arts 4–5.

[120]Article 10 of the GCS Implementation Rules stipulates that the Guiding Cases shall not be cited as the legal basis of judgment.

[121]The GCS Implementation Rules, Article 10, Article 11 para 1.

[122]The GCS Implementation Rules, Article 11 para 2.

https://doi.org/10.1017/asjcl.2023.18 Published online by Cambridge University Press

how the SPC controls lower court decisions through reconstruction under the GCS.[123] The dispute was triggered by a historian's article that challenged the veracity of a well-known story of revolutionary heroes who chose to commit suicide rather than surrender in wartime. One important aspect of the dispute, as the lower courts affirmed in their original decisions,[124] is how to balance freedom of speech with conflicting rights (freedom of reputation) and interests (public interests and national sentiments). The SPC selects the case as a Guiding Case and only highlights the public dimension of the reputation of national heroes and martyrs, leaving out the issue of freedom of speech altogether.

Systematic, high quality research on the influence of the GCS on judicial decision-making on public policy does not exist,[125] but it appears that this impact is rising.[126] We expect that, as the adjudication of the new Civil Code increases, so will the SPC's use of the GCS to harmonise practices, as recently emphasised by one of its members.[127] 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 may well lead to far more attention given by judges to the Guiding Cases, as effective guidelines of decision-making.[128]

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.[129] As mentioned, China substantially developed 'political' constitutional review[130] 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

[123]*SPC Guiding Case No 99: Ge Changsheng v Hong Zhenkuai: Dispute over Right and Reputation and Right of Honour* [指导案例 99 号：葛长生诉洪振快名誉权、荣誉权纠纷案] <https://www.court.gov.cn/fabu-xiangqing-136381.html> accessed 4 Jul 2022.

[124]*Ge Changsheng v Hong Zhenkuai: Disputes over Right of Reputation and Right of Honour* (2016) (The Primary People's Court of Xicheng District of Beijing Municipality, 27 Jun 2016) [葛长生诉洪振快名誉权、荣誉权纠纷案 (2015) 西民初字第 27841 号]; *Hong Zhenkuai v Ge Changsheng: Appeals in Disputes over Right of Reputation and Right of Honour* (2016) (The Second Intermediate People's Court of Beijing Municipality, 15 Aug 2016) [洪振快与葛长生名誉权、荣誉权纠纷上诉案 (2016) 京 02 民终 6272 号].

[125]But see Guo Ye (郭叶) & Sun Mei (孙妹), 'Report on the Application in Judicial Proceedings of Supreme People's Court Guiding Cases (2020) [最高人民法院指导性案例 2020 年度司法应用报告]' [2021] China Review of Administration of Justice (中国应用法学) 121.

[126]ibid 141.

[127]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' (2021) 12 China Law Connect 1, 9–10 <https://cgc.law.stanford.edu/commentaries/clc-12-202103-34-guo-feng/> accessed 17 Apr 2022.

[128]Sun & Fu (n 53).

[129]Zheng Xianjun (郑贤君), 'Double Attributes of the Constitution and Law Committee of the NPC: Constitutional Review as Legislative Review [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]' [2018] China Law Review (中国法律评论) 33, 33-34; Zhang Xiang (张翔), 'Constitutional Law Study in the "Era of Constitutional Review": Basis and Prospect ["合宪性审查时代"的宪法学：基础与前瞻]' (2020) Global Law Review (环球法律评论) 5, 13–15.

[130]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' (2022) 23 Asian-Pacific Law and Policy Journal 137. As Hand points out, these developments have generated heated discussions within Chinese academia, but have received little attention from outsiders.

https://doi.org/10.1017/asjcl.2023.18 Published online by Cambridge University Press

constitutional supervision,' in addition to existing responsibilities to review pending bills.[131] 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 be an expert in constitutional law. While scholars have assumed that the Committee would serve to build the status of the Constitution within all state organs, it has so far played only a marginal role in doing so within the NPC's legislative procedures.[132]

The Recording 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.[133] 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),[134] or upon an accepted proposal from an organisation or individuals.[135] If a constitutional issue is involved, the Commission may decide to conduct constitutional review with the Constitution and Law Committee.[136] The Commission and the Committee reviews the impugned legislation against provisions expressly enumerated in the Constitution, as well the 'spirit' of its principles.[137] 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).[138] 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.[139] 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.[140] This mode of review is abstract in nature: under current Recording and Review arrangements, only legislative acts can be challenged before the Standing Committee of the NPC.[141] This latter restriction exposes the inadequacy of the procedure when it comes to protecting an individual's rights in cases already before the courts.[142]

[131]Decision of the Standing Committee of the National People's Congress on Matters concerning the Duties of the Constitution and Law Committee of the NPC [全国人民代表大会常务委员会关于全国人民代表大会宪法和法律委员会职责问题的决定] (adopted at the 3rd Session of the 13th Standing Committee of the National People's Congress 22 Jun 2018).

[132]Hand (n 130) 12–17.

[133]The PRC Legislation Law, art 98.

[134]The SPC's de facto power to request for the Standing Committee of the NPC's constitutional review has never been exercised, and no other legal provision provides that such request can be made during litigation process.

[135]The PRC Legislation Law, art 99.

[136]Working Measures for the Recording and Review of Regulations and Judicial Interpretations[法规、司法解释备案审查工作办法] (adopted at the 44th Meeting of the Council of Chairpersons of the 13th Standing Committee of the NPC 16 Dec 2019, effective 16 Dec 2019) [henceforth 'The Recording and Review Working Measures'], art 20.

[137]Standing Committee of the NPC Legislative Affairs Commission's Office for Recording and Review [全国人大常委会法制工作委员会法规备案审查室著], *Introduction to the Working Measures for the Recording and Review of Regulations and Judicial Interpretations* [<法规、司法解释备案审查工作办法>导读] (China Democracy and Legal Publishing House [中国民主法制出版社] 2020) 98–99.

[138]ibid 99.

[139]ibid 99–100.

[140]The PRC Legislation Law, art 100; The Recording and Review Working Measures, arts 41–44.

[141]Huang Mingtao (黄明涛), 'On the Necessity of Concrete Constitutional Review and Its Institutional Space [具体合宪性审查的必要性及制度空间]' [2020] Journal of Comparative Law (比较法研究) 132.

[142]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

https://doi.org/10.1017/asjcl.2023.18 Published online by Cambridge University Press

The Recording 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 decisions.[143] 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 criticised 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.[144] Liang Ying, the director of the Recording and Review Office of the Legislative Affairs Commission, predicts that 'as the work of constitutional review under the Recording and Review progresses and deepens, constitutional interpretation will certainly [take its place] on the agenda, and constitutional implementation will be normalised'.[145] From a comparative perspective, this procedure is only a distant and imperfect analog to the 'constitutional complaint' in Germany, Europe, and Asia, or the 'amparo' in Spain and Latin America, although it petitions to a legislative body for action, among many structural differences.

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'.[146] The Party exerts control over the SPC, regularly determining the substance and timing of Interpretations and Guiding Cases.[147] Recent examples concerning the Civil Code include the SPC's Interpretations on torts for environmental damage[148] (the Civil Code, chapter VII 'Liability for Environmental Pollution and Ecological Damage', Book Seven on 'Tort Liability'), and the Guiding Cases on biodiversity conservation,[149] both of which seek to further implement the CPC's policy of 'Ecological Civilisation

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 Journal of Human Rights 204.

[143]According to Article 101 of the PRC Legislation Law, the Standing Committee of the NPC is not obliged to publish its review feedbacks; it may release relevant opinions and decisions at its discretion.

[144]Standing Committee of the NPC Legislative Affairs Commission, 'The Standing Committee of the NPC Legislative Affairs Commission's Report on the Work of Recording 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]' (21 Dec 2021) <http://www.npc.gov.cn/npc/c30834/202112/2606f90a45b1406e9e57ff45b42ceb1c.shtml> accessed 17 Apr 2022; for detailed analysis, see Wei Changhao, 'Recording & Review: Invalidating Compulsory Parentage Testing as a Tool to Enforce Birth Quotas' (NPC Observer, 22 Dec 2021) <https://npcobserver.com/2021/12/22/recording-review-invalidating-compulsory-parentage-testing-as-a-tool-to-enforce-birth-quotas/> accessed 17 Apr 2022.

[145]Liang Ying (梁鹰), '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* [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]' [2020] Local Legislation Journal (地方立法研究) 1, 19.

[146]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; He (n 59).

[147]Li (n 146) 59–60.

[148]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 29 Nov 2021, issued 27 Dec 2021, effective 1 Jan 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 27 Dec 2021, issued 12 Jan 2022, effective 20 Jan 2022).

[149]Supreme People's Court, '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]' (5 Dec 2021) <https://www.court.gov.cn/zixun-xiangqing-335151.html> accessed 17 Apr 2022.

https://doi.org/10.1017/asjcl.2023.18 Published online by Cambridge University Press

Construction'.[150] 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 procedure, which serves to ensure other legislative bodies' compliance with the policy decisions of the CPC's Central Committee.[151] Although it is rarely possible (or worthwhile) to analyse separately the decisions of the Party, the SPC, and the NPC,[152] the Party maintains its own specialised committees and procedural controls. The CPC's Political and Legal Affairs Committee[153] is tasked with ensuring that the Party's pronouncements and policy instruments are 'implemented correctly and uniformly',[154] including by the SPC.[155] It does so primarily through the Case Coordination and Case Inspection procedure already mentioned, which it uses selectively,[156] as a function of a legal dispute's relative political sensitivity.[157] 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'[158] – now understood as 'those affecting social stability, the general public, and the image of the state'[159] – under threat of punishment, including dismissal and criminal prosecution.

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 institutionalise these practices even further. It is also clear that there exists opposition to a larger process of 'constitutionalisation', which one has observed abroad.

As we have emphasised, outside China, the constitutionalisation process has been catalysed and sustained by (i) constitutional courts anxious to assert their authority in newly democratised systems, and by (ii) inter-jurisdictional rivalry, between constitutional courts and other courts in the legal system. The Chinese case is singular, three inter-related points standing out in this regard. First, China's purported 'turn' to justiciable rights and the 'rule of law' did not lead them to create a constitutional court, or any other robust commitment device. Second, from the perspective of the third group of scholars discussed above, China is attempting to accomplish a unique feat. The legislature has expending enormous resources to build a quasi-constitutional system of rights protection

[150]Opinions of the CPC Central Committee and the State Council on Accelerating the Ecological Civilisation 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 CPC Central Committee and the State Council 25 Apr 2015).

[151]Standing Committee of the NPC Legislative Affairs Commission's Office for Recording and Review (n 137) 100–101.

[152]The personnel of party organs and state bodies often overlap.

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

[154]Regulations on Political and Legal Work of the CPC [中国共产党政法工作条例] (adopted by the CPC Central Committee, effective 13 Jan 2019), art 12.

[155]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 CPC's Central Committee, a member of the Central Political and Legal Affairs Committee, 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 organisational relationships.

[156]Li, 'The Chinese Communist Party and People's Courts' (n 146) 66–72.

[157]See eg, Fu Yulin & 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 Hastings International and Comparative Law Review 167.

[158]He (n 59) 51.

[159]He (n 59) 67.

https://doi.org/10.1017/asjcl.2023.18 Published online by Cambridge University Press

from within the private law. Outside China, the trick is to enable the constitution's penetration into the Civil Code, through the latter's general clauses, while meaningfully preserving the private law's relative autonomy. Third, the general clauses in the Chinese Civil Code will enable the primacy of the CPC's own aims and priorities, in the guise of 'public policy' and 'good morals'. Thus, the new Civil Code presents lawyers, judges, scholars, and foreign observers with intriguing possibilities, but the ruling Party's control over the Code's development remains virtually total.

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 rationalise 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 lower-level officials (including judges) govern. The marginal costs of enhancing a decentralised 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 Mengjiao 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.[160] It bears repeating that the new Civil Code and other reforms can and will be used in illiberal ways, as a means of suppressing individual rights and supporting the party state.[161]

How will the tensions and ambiguities discussed in this article 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.[162] 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

[160]Sun (n 87).

[161]To take just one example, the dignity norm – which is announced both in the Civil Code (Article 109) and the Constitution (Article 38) – covers 'personal dignity', but the SPC and judges treat the norm as covering the dignity of the state, the constitution itself, officials, and the flag, which means that a person or group may be punished for what would be ordinary instances of protest speech elsewhere. See Alec Stone Sweet & Trevor TW Wan, 'Global Constitutionalism and the People's Republic of China: Dignity as the "Fundamental Basis" of the Legal System?' (University of Hong Kong Faculty of Law Research Paper No 2022/59) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4290361> accessed 10 Mar 2023.

[162]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 Political-Legal System' (2022) 16 Law and Ethics of Human Rights 61.

https://doi.org/10.1017/asjcl.2023.18 Published online by Cambridge University Press

constitutionalism – is also an unlikely outcome. As we have emphasised, Chinese political authorities have thus far refused to relinquish their tight control of the courts, while supporting more 'judicial independence' in speeches and legislation. This last point made, China has moved (however tentatively) in the direction of other systems that have constitutionalised the private law, profoundly changing interpretive rhetoric and technique.

Cite this article: Stone Sweet A, Bu C, Zhuo D (2023). Breaching the Taboo? Constitutional Dimensions of the New Chinese Civil Code. *Asian Journal of Comparative Law* **18**, 319–344. https://doi.org/10.1017/asjcl.2023.18