Role of the CCP in the Chinese legal system

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

2014 Rule of Law Decision – key decision

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

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

Party has a very extensive organisational structure

- Provincial level – top committee and Provincial committee has several other committees
- Disciplinary Inspection Committee (DIC) at every level holds the power to investigate disciplinary matters
- Central Commission for Discipline Inspection is the highest internal-control of the institution of the CCP and is tasked with enforcing internal rules and regulations and combating corruption and malfeasance in the party – investigates corruption; has powers greater than any Chinese official
- Party Discipline Inspection Powers incl. Shuanggui (detention of Party officials/members) and the waiver of rights
- Shuanggui power: Party disciplinary inspector has the power to require a party official to be at a designated time at a designated place
  - Most feared power → Individuals will simply be taken away by disciplinary inspectors regardless of position
  - Usually limited to party members and is within the internal party disciplinary process; this means → no access to lawyers, family, automatic waiver of rights under the justice system, criminal procedure law does not apply
  - All corruption cases since Xi Jinping – commenced with Shuanggui
  - End of investigation → DIC will release a report; report will almost invariably condemn the detainee
  - DIC recommends disciplinary sanctions – heaviest penalty is expulsion OR party will recommend the matter to law enforcement agency, inviting them to start their own investigations
    - So the process is → party investigation first. Then law enforcement investigation.
    - Note: There is a distinction between party procedure and law enforcement procedure
  - Also, internal rules are different from state laws
• Party members/officials are subject to internal rules – organisation rules may be harsher than state laws; could deprive a person of some rights/liberties under state laws
• Once an individual joins the CCP, that individual waives part of legal rights
• CCP member when joining the party takes an oath that he or she will sacrifice everything (incl. private interests) for communism – you join the party voluntarily
• ‘waiver theory’: an intellectual justification for disciplinary inspection power is the idea that you have waived your rights when you joined the party
  • Is this compatible with the CCP promotion of the rule of law?
  • Is it compatible with the global notion of rule of law and human rights protection?
    o the differentiating factor between corruption in China and corruption in other countries is that CCP deals with corruption through internal matters first
  • A practical justification in support for waiver theory may be that CCP has extraordinary power, if you want to investigate an important CCP official, it requires extraordinary means

Who appoints the DIC?
• Focus of the CCP is Politburo – within the Politburo, the Standing Committee (China’s highest decision making body), one member is appointed to be in charge of disciplinary inspections → Secretary of CCDI (currently, Wang Qishan)

2. Form and Substance of Chinese Law

The Chinese Legal System

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

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

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

*interpretations → attaches to the rules/laws under the five categories above
  o some authorities have the power to give interpretations e.g. NPC standing committee
  o courts can also generally interpret these sources

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

Other sources of Chinese law which are more controversial:
• state policy
  o General Principles of Civil Law incl. provision which says ‘in dealing with cases, if the law is not clear, the courts can apply state policy’ – this provision was never repeated
    • So doubtful whether this remains valid today – that state policy is a valid source of law
    • Furthermore, supposedly, China is practicing rule of law
- No binding force on the court
  - Usually in state council docs. – but state council produces numerous documents on a daily basis
  - Also, state policy is not PARTY policy – distinction between state laws and party policy
- custom
  - most academics consider this to be a source of law
  - draft civil code (which is in works now) – probably will give some recognition to civil custom
  - so if the law is not clear, courts can consider customs as a subsidiary source of law
  - no law has given recognition that custom has some legally binding effect – some judicial recognition
- doctrine
  - general/fundamental principles which underline an area of law
  - some scholars of CIVIL LAW say that ‘if neither law nor custom is clear, apply DOCTRINE’
  - but there’s no statutory or judicial recognition of this so possibly just a theory…
  - HOWEVER, MOST Chinese laws will state fundamental principles – they are usually stated in the STATUTE → so in practice, fundamental principles are applied all the time because they are statutory provisions themselves
- Treaties
  - Follows European tradition & in general, international treaties CAN BE DIRECTLY applied by the courts (no need for ratification as is the case in common law jurisdictions like Aus)
    - Civil and commercial cases – treaties are directly applicable and they PREVAIL over inconsistent domestic law
    - Human rights treaties – less clear if they can be directly applied by the courts
    - One category has been expressly excluded by court i.e. WTO agreement is not directly applicable in domestic Chinese cases

**Interpretation of law**

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

**Judicial interpretation**

Organic Law of the People’s Courts, art.33: “The Supreme People’s Court gives interpretation on questions concerning specific application of laws and decrees in judicial proceeding.”
- Only the Supreme Court can issue interpretations of LAW and DECREES
- Meaning of decree? Probably govt. regulations
- Compared to Aus court which will not interpret law without reference to context/case, it’s different in China

Example – Legislation Law, art. 104:
“Specific interpretations on the application of law in adjudication or procuratorial work made by SPC and SPP shall be reported to NPCSC for recording within 30 days of their being released.
Adjudication and procuratorial organs other than SPC and SPP must not make specific interpretations on the application of law.”
- ONLY Supreme Court (SPC)/Supreme People’s Procuratorate (SPP) has the power to make binding interpretation of the law. → in this course, we will only look at the Supreme Court – will not look at the SPP

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

Note: Interpretations are ABSTRACT interpretations of statutes; most LOOK like statutes, organized into articles
Supreme courts generally draft these regulations by getting feedback from lower courts – lower courts consult with Supreme Court about interpretation difficulties

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

Interpretations do not involve case law – cases are not binding on lower courts
Then do judicial decisions have any precedential effect? Do we need to cite them?

**Case law**

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

*Recently China decided to publish every judgment online*

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<th>(1) Replies</th>
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<tr>
<td>- based on <strong>request for instructions</strong> form lower courts – SC will receive this and consider whether to ‘reply’; it will not reply to every request</td>
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<td>- if SC decides to reply, it will in the form of a letter incl. decision (i.e. expressly rules, that P or D should win) → in effect, when there is a reply, case is decided by the SC → in effect a binding decision by SPC</td>
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<td>- ISSUE 1: lack of transparency – no right to make own submission in that process; all INTERNAL court procedure</td>
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<tr>
<td>- ISSUE 2: infringement of the parties’ right to appeal if reply is given – no point in appealing, the SC will obviously uphold the decision by the lower court (which in effect is their own decision) – but right to appeal is a constitutional right</td>
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<tr>
<td>- have been trying to modify this, therefore, issuing fewer replies and also, the way a reply is written is different from before – just outlines the principles so that it may preserve the appeal; nonetheless, if SC issues a reply on an issue of law, appeal is quite meaningless</td>
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<th>(2) Guiding cases</th>
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<tr>
<td>Launch of guiding cases in 2010. These guiding cases can be:</td>
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<td>- cases receiving wide societal attention</td>
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<td>- where rules of law are too general</td>
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<td>- typical cases</td>
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<td>- cases that are difficult, complex or of a novel type</td>
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<td>- other guiding cases</td>
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What becomes guide cases? How do they become guiding cases?

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

60 cases in 12 releases so far since 2012

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

So why the development of case law now? Rationale:

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

Problems

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

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<th>(3) Gazetted case</th>
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<tr>
<td>Cases published in the Supreme People’s Court Gazette – carefully selected by the editorial committee of the Gazette – editors are mainly judges of the SC</td>
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<tr>
<td>Before the guiding cases came out – gazette cases were the most important body of cases in China – they were supposed to guide future case decisions</td>
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<tr>
<td>5-6 issues per year → Each issue will publish 6-7 cases</td>
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<td>every court subscribes to the Gazette</td>
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<th>(4) “Guidance and reference” cases</th>
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<td>Their authoritativeness is lower than gazetted cases</td>
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<tr>
<td>These are published in a series of books called ‘guidance and reference’ series on different jurisdictions of the courts</td>
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### 3. The Constitution

#### Historical Overview – How the Constitution has evolved

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

#### The 1954 Constitution

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

#### The 1975 Constitution

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

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

- Confirmed the cultural revolution
  - “Socialism is a long historical period. During the period, class, class contradiction and class struggle always exist; the battle between the two lines of socialism and capitalism always exists; the danger of capitalist restoration always exists; the threat of subversion and aggression from imperialism and socialist- imperialism always exists. These contradictions can only be solved according to the Theory of Continued Revolution under the Proletariat Dictatorship.”
  - Maoist theory of continuing revolution
- Art. 2 CCP is the core leadership of the people of all China. The working class achieves leadership of the State through its vanguards the CCP.
- Art. 12 The proletariat must implement wholesale dictatorship over the bourgeoisie in the superstructure including all cultural areas. Culture, education, literature, arts, sports, public health, science and research must all serve proletariat politics, serve the workers, peasants and soldiers and be integrated with production and labour.
- Art. 25 Prosecution and trial of cases must follow the masses line. In significant counter-revolutionary criminal cases, the masses shall be mobilised in the discussion and criticism.
- Art. 26 The basic rights and obligations of citizens are to support the CCP leadership, to support the socialist system and to submit to the Constitution and laws of the PRC.

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

#### The 1978 Constitution – under Deng Xiao Ping

Preamble: “Chairman Mao Zedong is the founder of PRC. All the victories in our revolution and construction have been achieved
under the guidance of Marxism, Leninism and Mao Zedong Thought. To raise permanently and to defend resolutely Chairman Mao’s great banners is the fundamental guarantee for the unified battle of Chinese people of all nationalities in order to bring the revolutionary cause of the proletariat to the conclusion.”
   - Still paid lip service to Mao Zedong

“We must uphold the proletariat’s struggle against the bourgeoisie, uphold the struggle of the socialist line against the capitalist line, oppose revisionism, prevent capitalist restoration and prepare to deal with the subversion and aggression of socialist imperialism and imperialism against our country.”
   - Still some radical ideology

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

The 1982 Constitution

Fundamental Ideology:

“Four Cardinal Principles”
Constitution, Preamble: “Under the leadership of the Communist Party of China and the guidance of Marxism- Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of ‘Three Represents’, the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship and follow the socialist road, persevere in reform and opening to the outside world, steadily improve socialist institutions, …”
*in italics = the four cardinal principles
   - Encapsulates the underlying principles/ideologies of the current regime
   - Three represents by Jiang Zemin (Deng’s successor) officially opens up the CCP to those people who would traditionally not be working class i.e. the capitalist and therefore the political elite joined hands with the economic elite
   - Current political system \( \rightarrow \) people’s democratic dictatorship

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

Economic policy – undergone the most changes to the Constitution:

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

Land Ownership
Art. 10: No organization or individual may appropriate, buy, sell or otherwise engage in the transfer of land by unlawful means. The right to the use of land may be transferred according to law.
   - No private ownership
   - Citizens granted a land-use right

Market Economy 1993 Amendments
Art. 15 Abolishing the planned economy “The state practises socialist market economy.”
   - Officially adopted

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