

# Separation of Powers with “Chinese Characteristics”? The Chinese Understanding of the Principle and its Reception in Private International Law Cases in Switzerland and the USA

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This article demonstrates how the reception of the principle of separation of powers has evolved in China. While the country has in some periods of its history subscribed to the principle, today's legal system under Communist rule seems to reject it. The findings are then used to analyze whether the Chinese understanding of separation of powers has been an issue in private international law cases in Switzerland and the USA. Recent developments may point to a change of paradigm in this regard.

## Introduction<sup>1</sup>

China is far away. Not only geographically but also culturally. The law being a mirror of the society it governs, this distance translates into a legal order that is quite different from so-called Western ones. China is also close. In an age of globalization, the economic and societal interlinkages between citizens and entities from different regions lead to a shrinking of the seemingly big geographical and cultural distances between countries.

One area in which the tension between distance and proximity of legal orders becomes apparent is private international law, where judges are confronted with requests to recognize foreign decisions and judgments on a daily basis. Due to practical considerations, legal orders generally have a pragmatic approach towards recognition and tend to trust foreign legal systems. However, if the distance between their own and the foreign legal system is considered too great, and the foreign system interprets fundamental constitutional principles differently, conflicts arise. Separation of powers is such a fundamental principle. It is a feature of all constitutional democracies in the world.<sup>2</sup> The

independence of the branches of government – especially the judiciary – forms the very base of the legitimacy of these bodies. In China, the situation is somewhat different. While the country has subscribed to this principle in certain periods of its history, today's legal system under Communist rule seems to reject the separation of powers – at least the Western interpretation of this principle.

The present paper first traces back the reception of the concept of separation of powers and its evolution in Mainland China through an analysis of Chinese constitutional law. The second part examines whether the Chinese understanding of the concept has created problems when Swiss or US courts were confronted with judgments handed down by Chinese courts. For both the Swiss and the US legal system, the separation of powers is a core condition when it comes to recognizing foreign decisions under private international law. The wider political and societal context in which this condition is discussed and evaluated when it comes to China is however quite different, which makes for an interesting comparison.

## I. Separation of Powers in China

### A. Imperial China

With regards to separation of powers, the starting point in China is not very different from that in the West, where most political systems were dominated by absolutism prior to the American and French Revolutions. In late Imperial China, state power was concentrated in the person of the Emperor, who delegated state tasks to local government officials in a hierarchical system of bureaucracy.<sup>3</sup> The idea of an independent judiciary did not exist.<sup>4</sup> The functions of rule promulgation, rule enforcement, and dispute resolution were carried out by the same government

<sup>1</sup> The present contribution is a shortened version of a paper the author wrote as part of a class on Chinese law at the Center for Transnational Legal Studies in London.

<sup>2</sup> A. KAVANAGH, *The Constitutional Separation of Powers*, in: D. Dyzenhaus/M. Thorburn (eds.), *Philosophical Foundations of Constitutional Law*, Oxford 2016, p. 221 ff.

<sup>3</sup> W. C. JONES, *The Great Qing Code*, Oxford 1994, p. 5 f.

<sup>4</sup> C. I. PANG, *History of Judicial Reforms in China*, *China Law Review* 1922, p. 156 ff.

official.<sup>5</sup> It was well known that such extensive powers in the hands of a single individual carried the risk of abuse. The traditional solution to this problem in Imperial China was however not a separation of powers between several individuals or bodies but the implementation of a strict selection process in the form of the Imperial Civil Service Examination.<sup>6</sup> Nevertheless, the deficiencies of this system of concentration of power became increasingly apparent in the late Qing dynasty. As part of the so-called self-strengthening movement, Chinese rulers decided to end the “century of humiliation” set off by the Opium Wars by embracing and adopting Western ideas – including the separation of powers.

## B. Early Communist Rule

Formally, the first Communist Constitution of China, enacted in 1954, established a classic tripartite separation of powers between the National People's Congress (legislative), the State Council (executive), and the Supreme People's Court (judiciary). Regarding the latter, article 78 of the 1954 Constitution states that in administering justice the people's courts are independent, subject only to the law.<sup>7</sup> This did however not change the fact that, in practice, it was the party – even though not mentioned in the constitution – which held the real power in Communist China.<sup>8</sup>

The dominant position of the party was formally recognized in China's second Constitution of 1975. Article 2 states that the Communist Party of China is the core of leadership of the whole Chinese people, and that the working class exercises leadership over the state through its vanguard, the Communist Party of China.<sup>9</sup> Regarding the judiciary branch, no mention is made of judicial independence. Instead, article 25 para. 1 holds that the people's courts are responsible and accountable to the people's congresses and their permanent organs at the corresponding levels, and that the presidents of the people's courts are appointed

and subject to removal by the permanent organs of the people's congresses at the corresponding levels.

## C. China's Cautious Turn Towards the Rule of Law

The 1982 Constitution and the events surrounding it marked a major break in the political ideology of the state. After Mao Zedong's death, Deng Xiaoping came to power and implemented a policy of reform and opening. This included the development of legal theory and elements of the rule of law.<sup>10</sup> In the 1982 Constitution,<sup>11</sup> the Communist Party is once again not mentioned. Regarding judiciary independence, the turn towards the rule of law is reflected in article 126, which states that the people's courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference from administrative bodies, public organizations or private individuals. This time, the constitutional mandate was respected to some extent in practice. However, in the same way that the market economy introduced by Deng Xiaoping's reforms retained “Chinese characteristics”, the separation of powers was to be a “separation of powers with Chinese characteristics”. In fact, article 128 of the 1982 Constitution still holds that the Supreme People's Court is responsible to the National People's Congress and its Standing Committee, and that local people's courts at different levels are responsible to the organs of state power which created them. The judiciary therefore enjoys adjudicative independence, i.e., protection from interference when deciding cases, but it is not an equal branch of government that enjoys the same powers as and acts as a check on the legislative.<sup>12</sup> Judges are subject to constant control, supervision, and accountability regarding their alignment with party policy when deciding cases.<sup>13</sup>

## D. China's Turn Against the Rule of Law

Up until the end of the 20<sup>th</sup> century the principles

<sup>5</sup> W. HE, *In the Name of Justice: Striving for the Rule of Law in China*, Washington D.C. 2012, p. 12.

<sup>6</sup> HE (fn 4), p. 13.

<sup>7</sup> I am citing the translation by the Foreign Language Press, published in Peking in 1954.

<sup>8</sup> Y. N. CHANG, *The Chinese Communist State System Under the Constitution of 1954*, *The Journal of Law and Politics* 1956, p. 520 ff.

<sup>9</sup> I am again citing the translation by the Foreign Language Press, published in Peking in 1975.

<sup>10</sup> A. H. Y. CHEN, *China's Long March towards Rule of Law or China's Turn against Law?*, *The Chinese Journal of Comparative Law* 2016, p. 1 ff.

<sup>11</sup> Translation available at <https://china.usc.edu/constitution-peoples-republic-china-1982> (accessed 8.10.2023).

<sup>12</sup> M. B. CHEN/Z. LI, *Courts Without Separation of Powers: The Case of Judicial Suggestions in China*, *Harvard International Law Journal* 2023, p. 203 ff.

<sup>13</sup> CHEN/LI (fn 11), p. 217.

of rule of law, separation of powers and judicial independence were gradually strengthened in China. However, around the turn of the millennium, a reversal can be observed.<sup>14</sup> In 2015, the Supreme People's Court explicitly rejected the notions of judicial independence and separation of powers according to Western political and legal theory.<sup>15</sup> With a constitutional amendment in 2018, the party was once again introduced into Chinese constitutional law.<sup>16</sup> Furthermore, another potentially substantial change occurred, the consequences of which are not yet entirely clear. By creating a National Commission of Supervision as “the highest supervisory organ” (article 125) of the state, the amendment seems to have created a fourth distinct branch of government with wide-ranging powers. The Commission can investigate and sanction public officials – including judges.<sup>17</sup>

## II. Chinese Separation of Powers in Foreign Private International Law Cases

### A. Recognition and Cases under Swiss law

Switzerland's Federal Act on Private International Law states in its article 27 para. 2 lit. b that recognition of a decision shall be denied if a party establishes that the decision was delivered in violation of fundamental principles of Swiss procedural law, including the fact that the party concerned was denied the right to be heard. In a 2007 judgment, the Swiss Federal Supreme Court ruled that one of the fundamental principles protected by this provision is the right to an independent and impartial tribunal (as guaranteed by article 30 para. 1 of the Swiss Constitution as well as article 6 para. 1 of the European Convention on Human Rights). According to the Supreme Court, violations of the principle can stem from the personal behavior of members of the judiciary as well as from functional and organizational circumstances.<sup>18</sup>

<sup>14</sup> See C. F. MINZNER, *China's Turn Against Law*, *The American Journal of Comparative Law* 2011, p. 935 ff.

<sup>15</sup> <https://www.reuters.com/article/china-law-idINKBN-0LU07M20150226> (accessed 8.10.2023).

<sup>16</sup> A translation of the 2018 amendment is available at <https://china.usc.edu/2018-amendment-constitution-peoples-republic-china> (last accessed 8.10.2023).

<sup>17</sup> Articles 11 and 15 para. 1 of the Supervision Law of the People's Republic of China (available at <https://www.legal-tools.org/doc/ef4c4d/pdf/>, accessed 8.10.2023).

<sup>18</sup> Judgment of 20.7.2017, 4A\_137/2007, C. 6.1.

In the past 23 years,<sup>19</sup> the Swiss Federal Supreme Court has never had to rule on the recognition of a judgment handed down in China. The same seems to be true of the higher cantonal courts, although the picture is less complete in this case.<sup>20</sup> Judgments by lower cantonal courts are generally not published. The absence of published judgments leads to two observations. First, it is proof of the widespread use of arbitration clauses in commercial contracts involving Swiss and Chinese entities – a practice which may be interpreted as a lack of trust in the independence of Chinese courts by private actors. Second, in non-commercial matters like family law, the absence of published judgments might point to the fact that these proceedings never make it to higher courts because they are not disputed. This would in turn lead to the conclusion that Chinese judgments and decisions are generally recognized by Swiss courts in these matters.

### B. Recognition and Cases under US law

In the United States, there is no federal legislation on the recognition of foreign decisions or judgments. The recognition is regulated by a mix of federal common law and state law.<sup>21</sup> In *Hilton v. Guyot*, the US Supreme Court held that foreign judgments should be recognized if “there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and *under a system of jurisprudence likely to secure an impartial administration of justice* between the citizens of its own country and those of other countries [...]”.<sup>22</sup> On state level, many states have adopted the Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA).<sup>23</sup> The UFCMJRA establishes recognition of foreign judgments as the principle and non-recognition as the exception. The grounds on which recognition must be

<sup>19</sup> The Swiss Federal Supreme Court started publishing all its judgments electronically in the year 2000.

<sup>20</sup> Not all cantonal courts publish all their judgments online.

<sup>21</sup> M. E. SOLIMINE, *Recognition and Enforcement of Foreign Judgments in American Courts and the Limits of the Law Market Model*, *Theoretical Inquiries in Law* 2022, p. 97 ff.

<sup>22</sup> 159 U.S. 113 (1895), 202, emphasis added.

<sup>23</sup> The UFCMJRA, including an official commentary, is available at [https://higherlogicdownload.s3-external-1.amazonaws.com/UNIFORMLAWS/589ebbeb-7abd-5600-cf34-cd-354189c6d2\\_file.pdf?AWSAccessKeyId=AKIAVRDO7IERE-B57R7MT&Expires=1696779865&Signature=awe3U%2BaG-j4guUoTaiV4UIHFvJhE%3D](https://higherlogicdownload.s3-external-1.amazonaws.com/UNIFORMLAWS/589ebbeb-7abd-5600-cf34-cd-354189c6d2_file.pdf?AWSAccessKeyId=AKIAVRDO7IERE-B57R7MT&Expires=1696779865&Signature=awe3U%2BaG-j4guUoTaiV4UIHFvJhE%3D) (accessed 8.10.2023).

refused include the judgment being rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law (section 4 lit. b N° 1).

Contrary to Switzerland, the issue of lacking judicial independence in China has been raised in recognition cases in front of US courts. Chinese judgments are generally recognized by US courts if the parties fulfill the formal requirements for recognition.<sup>24</sup> However, in 2021 the Supreme Court of New York (New York's court of first instance) refused to recognize and enforce a Chinese court judgment. According to the Court, the judgment in question was “rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of process of law in the United States.”<sup>25</sup> The case was received critically by legal scholars,<sup>26</sup> and it was later overturned on appeal by New York's Appellate Division, which refuted the first instance's general claim that Chinese courts were not impartial.<sup>27</sup>

It is currently unclear if the New York Supreme Court's decision marks the beginning of a reversal in US Courts' policy of recognition or if it is simply an outlier. In a 2023 comprehensive study of the topic, Donald Clarke came to a similar conclusion and observed a general inability of US courts to inquire into the Chinese legal system and to assess it according to the recognition doctrine under federal and state law.<sup>28</sup> This led the author to call for a reform of the doctrine of recognition of foreign judgments by US courts.<sup>29</sup> In May 2023, Clarke reiterated his conclusions in front of the U.S.-China Economic and Security Review Commission, a body created by the US Congress, in a hearing on “Rule by Law: China's Increasingly Global

Legal Reach”<sup>30</sup>

## Concluding Remarks

The present paper has shown that China currently rejects the Western understanding of separation of powers and judicial independence. What this means for private law cases in Western countries is only beginning to emerge. The example of the United States has shown that the general practice of recognition of Chinese judgments may be about to change. In Switzerland, the issue has not been raised by courts or legal scholars, but I suspect that will change sooner rather than later. In an increasingly polarized world, when deciding whether to recognize judgments handed down by Chinese courts, Swiss and especially American courts will have to be careful not to be guilty of exactly what they could accuse Chinese courts of: lack of independence and political instrumentation.

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<sup>24</sup> W. S. DODGE/W. ZHANG, Reciprocity in China-US Judgments Recognition, *Vanderbilt Journal of Transnational Law* 2020, p. 1541 ff.

<sup>25</sup> *Shanghai Yongrun Inv. Mgt. Co., Ltd v Kashi Galaxy Venture Capital Co., Ltd*, 2021 NY Slip Op 31459(U).

<sup>26</sup> See the blog post by W. S. DODGE/W. ZHANG at <https://conflictoflaws.net/2021/new-york-court-denies-enforcement-of-chinese-judgment-on-systemic-due-process-grounds/> (accessed 8.10.2023).

<sup>27</sup> *Shanghai Yongrun Inv. Mgt. Co., Ltd v. Maodong Xu*, 2022 NY Slip Op 01523 [203 AD3d 495].

<sup>28</sup> D. CLARKE, Judging China: The Chinese Legal System in U.S. Courts, *University of Pennsylvania Journal of International Law* 2023, p. 455 ff.

<sup>29</sup> CLARKE (fn 27), p. 585.

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<sup>30</sup> See [https://www.uscc.gov/sites/default/files/2023-05/Donald\\_Clarke\\_Testimony.pdf](https://www.uscc.gov/sites/default/files/2023-05/Donald_Clarke_Testimony.pdf) (accessed 8.10.2023).