

U.S. and China – Comparison of Constitutional Models

Executive Summary

This report compares certain fundamental aspects of the constitution and legal system in the U.S. and China ("**Constitutional Models**"). The findings are summarized in the table below.

	U.S.	China
Rule of Law	Enshrined in the Constitution; Powers to rule or adjudicate stem from the Constitution. No powers above the law.	No. Powers to rule or adjudicate, stem from the National People's Congress.
Separation of Powers	Yes. Enshrined in the Constitution.	No. Powers are centralized and stem from the National People's Congress.
Independent Judiciary	Yes. Judges are in principle free from political pressure. Final arbiter of the Constitution is Supreme Court.	No. The judiciary is subordinate to political scrutiny. Final arbiter is the Standing Committee of the National People's Congress, not the Courts.
Fundamental Rights	Yes. Fundamental rights (e.g. due process) can be used to challenge legal acts or administrative measures.	Some protection. Increasingly challenged.

Rule of Law vs. Rule by Law

The rule of law is a fundamental principle for Western and in particular European democracies. The principle is enshrined in Article 2 of the EU Treaty.¹

Recently, on 3 April 2019, the European Commission launched an infringement procedure against Poland for violating these principles, when it imposed a new disciplinary regime on judges. According to the European Commission, this undermined judicial independence in Poland.²

The UN Secretary General has described the rule of law as referring to *“the principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated.”*³

At the heart of this principle lies the confidence individual citizens have that the laws will be enforced effectively and fairly. Such confidence is built on the presence of particular infrastructure including judicial independence, fair hearings and effective implementation of decisions made by the judiciary, and most importantly, that the government and legislature are not above the law.⁴

¹ Consolidated version of the Treaty on European Union https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF

² European Commission Press Release, 3 April 2019, http://europa.eu/rapid/press-release_IP-19-1957_en.htm

³ Report by UN Secretary General on Rule of Law and Transitional Justice, 23 August 2004, https://www.un.org/en/ga/search/view_doc.asp?symbol=S/2004/616

⁴ D. Lawrence and J. Patterson, The Foreign Policy Centre Briefing: Rule of Law in China, 24 September 2018 <https://fpc.org.uk/wp-content/uploads/2018/09/FPC-Briefing-Rule-of-Law-in-China-Sep-2018.pdf>

U.S.

The U.S. Constitution establishes a system of government based on the rule of law. John Adams, the second President of the United States, referred to a “*government of laws, not of men*”.⁵

The rule of law principle is a central feature of the American justice system. The U.S. Constitution, the world’s oldest written national constitution, serves as the cornerstone.⁶

Acts of Congress and orders of the President are considered lawful only to the extent they comport with the Constitution, which continues to be the “*supreme Law of the Land*.”⁷

Presidents, Senators, Supreme Court Justices, and other federal officials swear an oath to support the Constitution prior to taking office.⁸ As Theodore Roosevelt, the 26th President of the United States, famously proclaimed, “[*n*]o man is above the law.”⁹

China

By contrast, China has historically considered law as an instrument used by the rulers to guide and control the population.¹⁰ The law as such has no inherent value in and of itself (as opposed to the Western view) but is only used as a means to maintain social hierarchy and order.¹¹

⁵ John Adams, The Letters of Novanglus, 23 January – April 1775 <http://www.masshist.org/publications/adams-papers/view?id=PJA02dg5>

⁶ Sandra Day O’Connor, Introduction to The Constitution: The Essential User’s Guide, 12 August 2016 <https://constitutioncenter.org/learn/educational-resources/constitution-faqs>

⁷ Article VI, U.S. Constitution <https://www.archives.gov/founding-docs/constitution-transcript>

⁸ See, e.g., Articles II and VI, U.S. Constitution <https://www.archives.gov/founding-docs/constitution-transcript>

⁹ Theodore Roosevelt, Third Annual Message, 7 December 1903 <https://millercenter.org/the-presidency/presidential-speeches/december-7-1903-third-annual-message>.

¹⁰ George G. Chen, Le Droit, C’est Moi: Xi Jinping’s New Rule-By-Law Approach, 26 July 2017 <http://ohrh.law.ox.ac.uk/le-droit-cest-moi-xi-jinpings-new-rule-by-law-approach/>

¹¹ Zhang Xiangming, On Two Ancient Chinese Administrative Ideas, The Culture Mandala: Bulletin of the Centre for East-West Cultural and Economic Studies, 5 no. 1, 2002 <http://www.international-relations.com/wbcm5-1/wbrule.htm>

In China, the concept of “rule by law”, more accurately describes China’s understanding of and attitude towards law. This concept was codified when the term “governing the country by law” was written into the Chinese constitution in 1999.¹²

The rule by law concept in China does include the principle that government officials may also be held accountable for wrongdoing.¹³ However, there is a fundamental difference in concept compared to the rule of law under the U.S. Constitution, as the Chinese Communist Party (“CCP”) appears to stand above the law.¹⁴ According to the Chinese Constitution, all powers in China stem from the National People’s Congress (the majority of its delegates are members of the CCP¹⁵), and all administrative and judicial organs are created by the National People’s Congress, under which they are supervised.¹⁶

Separation of powers

The “*separation of powers*” refers to a model of government with authority divided into three branches – the legislature, the executive, and the judiciary – each of which is “*confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches.*” This division is designed to avoid the consolidation of power by a single individual or group for purposes of abusing “*the machinery of the State*”.¹⁷

U.S.

The U.S. Constitution establishes three separate but equal branches of government: the Congress (the legislative branch), the President (the executive branch), and the Supreme Court (the judicial branch).¹⁸

¹² George G. Chen, *Le Droit, C’est Moi: Xi Jinping’s New Rule-By-Law Approach*, 26 July 2017 <http://ohrh.law.ox.ac.uk/le-droit-cest-moi-xi-jinpings-new-rule-by-law-approach/>

¹³ *Id.* Referring to for example, Xi Jinping anti-corruption campaign.

¹⁴ China and the Rule of Law: A Cautionary Tale for the International Community, 28 June 2018 <https://www.justsecurity.org/58544/china-rule-law-cautionary-tale-international-community/>

¹⁵ Statistics published by the National People’s Congress in 2000 reveals that 71.5% of its delegates are CCP members. See http://www.npc.gov.cn/npc/rdgl/rdzd/2000-11/30/content_8643.htm (in Chinese)

¹⁶ Article 2 and 3 of the Chinese Constitution www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372963.htm

¹⁷ M.J. C. Vile, *Constitutionalism and the Separation of Powers*, 2nd Edition 1998, Page 14 http://files.libertyfund.org/files/677/0024_Bk.pdf

¹⁸ Articles I, II, and III, U.S. Constitution <https://www.archives.gov/founding-docs/constitution-transcript>

Additionally, a series of “*checks and balances*” is employed to limit the ability of any one branch to become too dominant.¹⁹ For example, the President has the right to veto bills passed by Congress, but Congress may then override such a veto with a sufficient majority.²⁰ The President serves as the Commander in Chief of the Armed Forces,²¹ but Congress retains the power to declare war and to appropriate funds needed to engage in military operations.²²

China

China has never developed similar concepts. Historically, traditional Chinese local government held absolute powers regarding the enactment of rules (legislative) and the execution of rules (executive), as well as the resolution of disputes (judicial).²³

Although the rule by law concept has been developed, even today, the official view in China seems sceptical towards the concept of “*separation of powers*” and the political danger it may pose to the powers of the CCP, as demonstrated by the speech given by Chief Justice Zhou Qiang, China’s top judicial official, to legal officials in Beijing in January 2017: “*we should resolutely resist erroneous influence from the West: ‘constitutional democracy,’ ‘separation of powers’ and ‘independence of the judiciary,’*”²⁴

Further, in a series of articles published on the official website of the Chinese judiciary,²⁵ “*separation of powers*” and “*judicial independence*” are described as “*political constructs*” produced at such a time and under conditions specific to Western society, which, despite having brought many benefits to the development of Western world, are fundamentally incompatible with the Chinese Constitution

¹⁹ M.J. C. Vile, *Constitutionalism and the Separation of Powers*, 2nd Edition 1998, Pages 19-20 http://files.libertyfund.org/files/677/0024_Bk.pdf

²⁰ Article I, Section 7, U.S. Constitution <https://www.archives.gov/founding-docs/constitution-transcript>

²¹ Article II, Section 2, U.S. Constitution <https://www.archives.gov/founding-docs/constitution-transcript>

²² Article I, Section 8, U.S. Constitution <https://www.archives.gov/founding-docs/constitution-transcript>

²³ *He Weifang*, *In the Name of Justice*, Brookings Institution Press 2012, Chapter One, page 12 https://www.brookings.edu/wp-content/uploads/2016/07/inthenameofjustice_chapter.pdf

²⁴ The New York Times, 18 January 2017, <https://www.nytimes.com/2017/01/18/world/asia/china-chief-justice-courts-zhou-qiang.html>

²⁵ <https://www.chinacourt.org/article/detail/2017/01/id/2514518.shtml>;
<https://www.chinacourt.org/article/detail/2017/01/id/2512847.shtml>;
<https://www.chinacourt.org/article/detail/2017/01/id/2512852.shtml> (in Chinese)

(i.e. the supremacy of the CCP as discussed below), and unsuitable in the Chinese context.

Judicial independence

U.S.

Although not explicitly granted to the judicial branch in the text of the Constitution, it is a long established principle under U.S. law that the courts have the final authority to determine “*what the law is*”.²⁶

As a logical consequence of that principle, the courts have the ability to invalidate the laws passed by Congress and the President should such laws to be incompatible with the U.S. Constitution itself.

Several features of the U.S. system insulate judges from political influence. Chief among these features is the lifetime appointment for judges on courts established under Article III of the U.S. Constitution, which includes the Supreme Court of the United States. So long as judges serve under “*good Behaviour*” they cannot be removed from office.²⁷ No Supreme Court justice has ever been removed on these grounds.²⁸

China

China has experienced rapid development in its legal infrastructure in recent decades, which has produced many results.²⁹ Many laws in China contain provisions modelled on or similar to their Western counterparts and the structure of the Chinese legal system appears comparable to those in the West – legislatures, courts, lawyers, judges, bar associations *etc.* However, contrary to the U.S. or Western systems, the internal legal culture of China supports the supremacy of the CCP, which is firmly enshrined in China’s Constitution.³⁰

²⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)
<https://cdn.loc.gov/service/ll/usrep/usrep005/usrep005137/usrep005137.pdf>

²⁷ Article III, Section 1, U.S. Constitution <https://www.archives.gov/founding-docs/constitution-transcript>

²⁸ *Elizabeth Nix*, Has a U.S. Supreme Court Justice Ever Been Impeached?, 28 October 2018
<https://www.history.com/news/has-a-u-s-supreme-court-justice-ever-been-impeached>

²⁹ China and the Rule of Law: A Cautionary Tale for the International Community, 28 June 2018
<https://www.justsecurity.org/58544/china-rule-law-cautionary-tale-international-community/>

³⁰ It is stated in the preamble of the Chinese Constitution that “*The system of the multi-party cooperation and political consultation led by the Communist Party of China will exist and*

In China, although the law says that judges must adjudicate cases without interference by administrative organs, social organizations or individuals,³¹ in practice, the judges are appointed (and can be removed at any time) by the corresponding legislative committees.³² With no tenure to protect them, the judges are naturally under considerable pressure when deciding important or sensitive cases.³³

Further, the decision of a judge is subject to direct supervision and control by the adjudication committee (comprising of the court leadership) as well as influence by the local political-legal committee, a CCP organization responsible for overall “*coordination*” of the police, procuracy, justice bureau and court.³⁴

The final arbiter of legal interpretation, as provided in Article 67(4) of the Chinese Constitution, is the Standing Committee of the National People’s Congress (*i.e.* the central legislative committee and highest organ of state power) (“**NPCSC**”), not the courts. Above all, the vast majority of the high-ranking officials at all levels in the courts and in government, as well as the delegates to the National People’s Congress, are CCP members.³⁵

Therefore, contrary to the U.S. model, the Chinese judiciary is not independent from political influence. Rather, the government is based on the *unity* of executive, legislative and judicial powers.³⁶

develop for a long time to come.”; see also China and the Rule of Law: A Cautionary Tale for the International Community, <https://www.justsecurity.org/58544/china-rule-law-cautionary-tale-international-community/>

³¹ Article 131 of the Constitution and Article 8 (2) of Judges Law of the People’s Republic of China

³² Chapter 5 of the Judges Law of the People’s Republic of China

³³ Why China’s 2010 Medical Malpractice Reform Fails to Reform Medical Malpractice <http://law.emory.edu/eilr/documents/volumes/26/2/comments/kearney.pdf> see pages 14 - 15

³⁴ World Politics Review, 14 January 2014 <https://www.worldpoliticsreview.com/articles/13495/struggling-for-justice-chinas-courts-and-the-challenge-of-reform>

³⁵ As mentioned on the websites of Chinese government and courts, more than 95% of the leaders of the governments of county level or above are CCP members; more than 99% of judges are CCP members. See also note 15 above.

³⁶ *Benedict Sheehy*, Fundamentally Conflicting Views of the Rules of Law in China and the West and Implications for Commercial Disputes, Northwestern Journal of International Law & Business, Volume 26, Issue 2, Winter 2006 <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1622&context=njilb>

Fundamental rights vs. rule by law with Chinese characteristics

U.S.

The concept of fundamental rights is a “ubiquitous feature” in modern U.S. jurisprudence.³⁷ As expressed most powerfully in the preamble to the U.S. Declaration of Independence, “we hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”

The Bill of Rights, which is codified as the first 10 amendments to the U.S. Constitution, sets out a list of fundamental rights and freedoms, such as freedom of speech, press and religion.³⁸ The 14th Amendment, with its guarantees of due process of law and equal protection under the law, is also frequently used when individuals seek redress against government overreach that infringes upon their individual liberties.³⁹

On a regular basis, the courts strike down federal or state laws, in whole or in part, because these laws infringe upon the fundamental rights of individuals.⁴⁰

China

In China, a company or a person has the right under the law to appeal to the court against an administrative decision.⁴¹ However, because, as discussed above, the executive and the judiciary in China are united under the CCP’s rule, it is unrealistic to expect that a judge, which has no legally established decree of independence in

³⁷ Nicholas P. Zinos, Fundamental Rights in Early American Case Law: 1789-1859 <https://content.sciendo.com/downloadpdf/journals/bjals/7/1/article-p137.xml>

³⁸ Amendments I – X, U.S. Constitution <https://www.archives.gov/founding-docs/bill-of-rights-transcript>

³⁹ Amendment XIV, U.S. Constitution <https://www.archives.gov/founding-docs/amendments-11-27>

⁴⁰ In a notable recent example the Supreme Court found that the 4th amendment’s protection against “unreasonable search and seizure” required authorities to obtain a warrant before collecting significant amounts of location data related to suspect’s mobile phone. See *Adam Liptak*, In Ruling on Cellphone Location Data, Supreme Court Makes Statement on Digital Privacy, New York Times, 22 June 2018 <https://www.nytimes.com/2018/06/22/us/politics/supreme-court-warrants-cell-phone-privacy.html>

⁴¹ The Administrative Review Law of the People’s Republic of China

relation to the CCP, would issue a ruling which contradicts the will or instructions of the administration.⁴²

In addition to raising awareness concerning the absence of fair trials and due procedure, NGOs such as Amnesty International and Human Rights Watch, as well as foreign governmental institutions, regularly present evidence regarding China's violations of the freedoms of speech, movement, and religion *etc.* of its citizens and of others within its jurisdiction.⁴³

This lack of protection of fundamental rights may seem unacceptable in a Western democratic society. Reportedly, many citizens in China are willing to give up – or at least not actively fight for – fundamental rights such as due process and fair trial in exchange for economic prosperity and security.⁴⁴

⁴² Supra note 33

⁴³ See, for example, general overviews on China published on the websites of Human Rights Watch <https://www.hrw.org/world-report/2019/country-chapters/china-and-tibet> and Amnesty International <https://www.amnesty.org/en/countries/asia-and-the-pacific/china/>

⁴⁴ *Lawrence and Patterson*, supra note 4 <https://fpc.org.uk/wp-content/uploads/2018/09/FPC-Briefing-Rule-of-Law-in-China-Sep-2018.pdf>