Verfassungsblog
ON MATTERS CONSTITUTIONAL

Constitutional Battles beyond China's Regulation of Online Terrorist Speech

Ge Chen

02.02.2022 doi: 10.17176/20220202-121110-0

The Chinese government's suppression of Internet speech is almost legendary. It has waxed with critiques and curses. It has met with opposition at home and abroad. It has generated attention, research, investigation, and literature across the world. Yet, it has managed to forge, along with the Chinese Communist Party (CCP)'s military force, an impregnable cornerstone of what Oxford professor Stein Ringen dubbed the Party-state's "perfect dictatorship". In essence, authoritarian states are all worried about uncontrolled Internet speech and the menace it may pose to the monopolistic rule of this form of government and its leadership. As early as 2009, the Shanghai Cooperation Organisation presaged the advent of an "information war" in an agreement that aligns authoritarian states. In 2015, China enacted the National Security Act (NSA), Art. 25 of which prescribes "cyber sovereignty". This term conceptualises the presumptuous assertion of state sovereignty in a virtual environment and the weaponisation of the Internet. Presumably, such an overall information war is also targeted at terrorist speech. Indeed, Art. 19 of the Counterterrorism Act lays down the principle of combatting terrorist speech in accordance with relevant online speech regulations. Therefore, in order to understand China's approach to terrorist speech, it is indispensable to go beyond and understand the entire picture of China's developing agenda of taming Internet speech.

A Regulatory Framework of Vague Speech Consequentialism

At a landmark plenary session in 2014, the CCP pledged to turn its resolution of redefining and retooling the Party-state structure into national laws. Thus, the ensuing seven years witnessed the proliferation of China's laws and regulations on Internet speech in an unprecedented manner, particularly the 2018 constitutional amendment which upgrades the CCP's disciplinary organs into a constitutional power and allows it to oversee the speech of all public servants. The current legal framework of Internet speech regulation is found primarily under a skein of legal sources including China's Constitution, laws issued by the National People's Congress (China's central legislature), regulations enacted by the State Council and its constituent ministries and departments (China's central government), as well as the judicial interpretations of the Supreme People's Court (SPC/China's highest judicial authority). Basically, this patchwork of online speech regulation coalesces around China's constitutional mandates of speech protection on the one hand and its restrictions on the other. In a Marxist-Leninist one-party state, however, the focus is always on the regulatory side. There are three types of constitutional caveats against "misuse of Internet speech" in China, each dotted with various forms of speech-repressive rules geared toward speech consequentialism.

The first caveat, and one of utmost importance, places national interests with "national security" at the very top. All recent laws including the NSA, the Cybersecurity Act (2016), the Anti-Espionage Act (2017), and the Counterterrorism Act (2018) refer to this fundamental, yet ambiguously defined concept. In most cases, "national security" covers such online speech that criticises the government, its officials and its policies, which could all amount to incitement or subversion. Alternatively, speech that supposedly "divulges national secrets" may also be considered a potential threat endangering the regime. Besides, the Counterterrorism Act defines "terrorism" in terms of "the aim to realise political, ideological and other

purposes". Vague as these accusations may be, the punishments are always clear: online speakers could be fined, warned, administratively detained, or penalised.

The second caveat concerns societal interests. Any online speech with the potential of arousing social chaos, confusion, and, ultimately, collective action would be deemed socially and politically harmful. This is also a case defined by the Counterterrorism Act. Such speakers run the risk of a criminal offence under the title of "seeking a quarrel to make trouble". Strategically, censors and prosecutors would also place most online speech related to incitement and sedition under this open-ended category, so as to avoid wider attention and criticism for their prosecution of political dissidents. "Socially harmful speech" may include mass protests and insulting national flags. But it may also cover pornography and online rumours. The latter represents one of China's recent legal developments in controlling the "irresponsible spread of online speech". In practice, however, government authorities often muffle whistle blowers by virtue of this speech-restrictive rule, notably, in case of a pandemic that could be ascribed to government ineptitude.

The final caveat addresses individual interests. This type of online speech regulation aims to restrict speech in the name of protecting one's right to equal status, reputation, privacy, and copyright. Above all, the Counterterrorism Act emphasises the threats of online hate and extremist speech. The regulation may result in prosecution of speech that often triggers the government's radical reaction to ethnical tension, religious intransigence, regional confrontation, or gender discrimination. But such regulations could also be targeted at defamation and libel. Where speech is not connected directly to government concerns, enforcement can be linked to one's material losses such as economic loss due to an infringement. A notable form of defamation is created under China's 2018 Act on the Protection of Heroes and Martyrs, which bans any alleged insult or defamation of those persons the state defines as heroes or martyrs. Under this law, even an online parody of such a person was subject to prosecution.

Extraterritoriality: How Long Can an Authoritarian Long-arm Be?

Armed with such a speech-repressive regime, China's authoritarian state aims to expand its global influence through long-arm regulation of Internet speech including terrorist speech. At its 19th Congress, the CCP claimed to "move toward the centre of the global stage". This was a clarion call that reverberates in all fields of the Internet ranging from political speech to commercial and academic speech. While contemporary online speech governance dwells on a co-existential triangle consisting of states, speech platforms, and end users, China's authoritarian model of speech regulation turns both media platforms and users into passive recipients of its orders. Art. 43 of the Cybersecurity Act establishes the notice and takedown measures for Internet Service Providers (ISPs) in a comprehensive manner, which predates Germany's Network Enforcement Act (Netzwerkdurchsetzungsgesetz/NetzDG). In fact, this is merely extension of its entrenched online censorship regime. Indeed, Art. 49 of this Act subjects this system of speech surveillance to government supervision, and Art. 50 empowers government authorities to block overseas information transfer where they perceive any danger. These principles are enshrined in Art. 19 of the Counterterrorism Act and generate global chilling effects.

More recently, China's Cyberspace Administration has published new draft regulations to ban the use and abetted use of VPNs to visit overseas websites, while making a feigned gesture of "soliciting public comments" on the authoritarian regime's adamant step forward of heightening the penalty for seeking and receiving overseas information. For individual users whose fingers on the keyboard tremble under a variety of draconian censorship rules, this draft is merely a final punch of a rivet in sealing the coffin. However, this measure may be just supplementary to a series of rules against multinational Internet and high-tech companies that used to run lucrative business in China. The CCP is well aware of the tremendous ripple effects on digital trade and E-commerce of the other side of the Pacific Ocean: when it decides to

regulate Internet speech and punish large domestic social media, shareholders on Wall Street will feel the pain in their accounts, the National Basketball Association will swallow the pill of self-censorship for fear of losing market shares in China, and Microsoft will have to close its localised version of LinkedIn.

Compared with the US, Europe appears to be even more vulnerable to China's online speech regulations. Rather than in business, the most salient examples of chilling effects come from academic, educational and cultural sectors. In 2017, the world's biggest academic book publisher Springer was found to have blocked access to politically sensitive titles in China, after Cambridge University Press received orders from Chinese authorities to censor similar titles there. Indeed, there are several important voices questioning whether China bought its way into UK universities, considering the huge educational services and research partnerships that exist between the two countries. More recently, a Confucius Institute at two German universities turned down a book talk concerning China's paramount leader, causing the debate on whether Germany's academic freedom is decided in Beijing. In France, two universities in Lyon had to end their partnership with the Confucius Institute earlier, when officials from Beijing required the French side to revise its curriculum in favour of the Chinese government's ideology.

The Rise of Chinese Constitutionalism: Is It a Moment of Constitutional Rot for Western Democracies?

As analysed above, a comprehensive framework of regulating online speech, including terrorist speech, is embedded in China's constitutional framework since its famous 2018 amendment, which removed the term limit of the state chairman and consecrated the "Xi Jinping Thought" as the country's new ideological guideline. Thus, the Constitution upholsters the infrastructure of the Party-state in an age of a universally digitalised world. With that, the Chinese state accomplishes its stunning turn toward legalising a politically repressive regime.

In a sense, these outright impacts of China's online speech regulations are corollaries of the rise of "Chinese constitutionalism", a self-conflicting term created in an authoritarian state that didn't draw much attention when it emerged toward the end of China's post-Deng reform era. However, it has become more outstanding with the rise of China's self-asserted global political influence. In the eyes of several Chinese constitutional lawyers, Chinese constitutionalism is based on, connected with, and much akin to the political philosophy developed by the German jurist Carl Schmitt, a member of the Nazi Party. That political theory was *inter alia* criticised for endorsing totalitarian power by highlighting the enemy of the regime and instrumentalising law to realise political goals.

The aforementioned CCP legal agenda dating back to 2014 fits into this theoretical framework. In fact, "rule by law" (instrumentalising law for political goals) in lieu of the rule of law was the political wisdom of ancient Chinese rulers. As early as in the second century B.C., a Chinese political theorist remarked that "righteousness and kindness are the cutting edge of a prince, while power and laws are merely his knife and axe" ([redacted]). This approach of combining law and morality to rule a country is echoed astoundingly by the dichotomy of "law of justice and law of love" (loi de justice et loi d'amour) which served, ultimately, to restrict the press freedom in France in the 19th century. This dualistic view of law and politics was adopted by China's former State Chairman Jiang, but Chairman Xi's view of law is more inward-looking and adjacent to what I'd call "I am the law" (le droit, c'est moi). This version of rule-by-law tactics is still way far from what Fredrick the Great, an enlightened despot of Prussia in the 18th century, embraced as a first step toward the rule of law (Rechtsstaatlichkeit).

As Balkin argues, every liberal democracy may face a period of "constitutional rot" at different stages of political stagnancy. Surely China's thriving authoritarian system of speech regulation envisages, at least for itself, a rapidly falling western civilisation that it aims to conquer by its information war and disinformation campaigns. It is against this backdrop that China's belligerent "wolf warrior diplomacy" is propagating its belief on a large scale. Chinese diplomats are

carrying out this show in an increasingly fierce manner on various social media platforms in liberal democracies, though ordinary Chinese in the mainland are forbidden to visit any overseas websites.

Western countries are standing up to this online information war in alliance. Australia says no. France says no. Germany says no. The UK says no. Not to say the Sino-US relationship is plummeting to the hell on a steady track – partly owing to this online information war. Perhaps there are no visible physical conflicts. Perhaps authoritarian and liberal rules of regulating terrorist speech are highly identical on a technical level. But there is a hardly reconcilable, fundamental clash of two types of constitutional values that treat free speech, which aims to ensure one's core access to political participation, in different ways: one regime's survival relies on a flourishing scenario of Internet speech, while the other's survival relies on a moribund one. Everyone who wants to keep this right alive should remember what Plato taught us: "one of the penalties for refusing to participate in politics is that you end up being governed by your inferiors". So did the CCP remember the words well before 1949. Hardly will one do after 1984 arrives.

ABOUT THE AUTHOR

Ge Chen

Ge Chen is assistant professor at Durham Law School (currently on leave) and a resident fellow of the Information Society Project at Yale Law School.Ge Chen is assistant professor at Durham Law School (currently on leave) and a resident fellow of the Information Society Project at Yale Law School.

SUGGESTED CITATION

Chen, Ge: Constitutional Battles beyond China's Regulation of Online Terrorist Speech, Verfassungsblog, 02.02.2022, doi: 10.17176/20220202-121110-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20220202-121110-0.