

Bull in the China Shop: A Free Speech Doctrine for the People's Republic

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The United Nations' Universal Declaration of Human Rights clearly states that people have the right to freedom of speech in its preamble and to expression and opinion as well as the right to impart them through any media in Article 19. The First Amendment of the United States succinctly states, albeit as a negative right: "Congress shall make no law abridging the freedom of speech." And, the subject matter of this essay, the Constitution of the People's Republic of China, states:

Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration (Article 35).

Citizens of the People's Republic of China have the right to criticize and make suggestions regarding any state organ or functionary (Article 41).

In China, however, it is not the judiciary that enforces these rights, but rather the government, and this is salient because the PRC's constitution also adds: "Whoever incites others by spreading rumors or slanders or any other means to subvert the State power or overthrow the socialist system shall be sentenced to fixed-term imprisonment of not more than five years, criminal detention, public surveillance or deprivation of political rights; and the ringleaders and the others who commit major crimes shall be sentenced to fixed-term imprisonment of not less than five years (Article 105)." Hence, although Freedom of Speech Law is written as a positive right in the PRC's constitution, in terms of everyday living it means very little if an individual runs afoul of the government. The essay will formulate a new Freedom of Speech doctrine for China.

This essay takes the view that many (if not almost all) laws are made with two thoughts in mind: 1) outline the way that individuals relate to each other; and, 2) suggest a vision for

society in the future. Arguably, laws replace the central role of religion in many places. The first part of this essay will outline potential sources that could help in the development of Freedom of Speech law for China. The second will outline a proposed Freedom of Speech doctrine for China. Finally, some of the problems that exist with the proposal will be teased out in the third section since no law is perfect. Given the present situation in China, this doctrine might very well resemble loosening a bull in a china shop. Ultimately, the outcome could be good for both China and humanity.

Sources to Inform Doctrine

My starting point would be to see what has traditionally informed Chinese law. As someone who is living in China and studying business there, I know for a fact that Daoism, Confucianism, and Buddhism all influence business practices today. Given the respect for chain of command in Chinese Freedom of Speech law, their influence can be seen there as well. I would also look at Marxism, which greatly reflects, or at least utilizes, this influence. I would also look at the statements of Chinese leaders over the last couple of decades to see where they stand on Freedom of Speech. There seems to have been an attempt to bring more rights to the individual before it was reversed in this century. All of this would represent a good baseline of the major thoughts underpinning Chinese Freedom of Speech law at this time.

There are a great many other sources China could consult in formulating a Freedom of Speech doctrine. In fact, I was in South Korea from the mid-1990's to 2009. In my first years there, the country quite literally looked at constitutions and other documents from all over the world in formulating its Human Rights laws after the end of military rule in the late 1980's. If I was to write the new Freedom of Speech laws for China, that is exactly what I would do.

My view is that in some ways America and China are polar opposites when it comes to what the law is supposed to protect. In America, there is a great deal of emphasis on the rights of the individual (at least at this point). In China, there is a great deal of emphasis on containing the individual so that the greater social good (as defined by the government) is not damaged. In all honesty, at this point of time (although it was not always so), I think that America has gone too far in defending the rights of the individual without keeping the greater good of the community in mind. Unsurprisingly, my country, Canada, placed a much greater emphasis on the harmony of the society when it remade its human rights laws in the Charter of Rights and Freedoms in the early 1980's. Given what I know about laws combating racism in Europe, I suspect there is also a great deal more emphasis on community over there than in America. If I was remaking Chinese law, I would definitely look at all of these countries' constitutions and other documents to find a middle way between American individualism and the Chinese collective good. In my thinking, both go too far in their respective directions.

I would look at specific cases that have shaped American Freedom of Speech laws. There is one opinion that has touched my heart and moved me the most. I also think it would be a good middle ground between America and China when it comes to Freedom of Speech doctrine. It is Justice Brandeis' concurrence upholding conviction in *Whitney v. California*. Some of the key points he raised were:

The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights. These may not be denied or abridged. But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to

produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled. ...

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil through the processes of education, the remedy to be applied is more speech, not enforced silence. ...

Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrence ordinarily applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech and assembly.

In essence, Justice Brandeis does believe the state has a right to protect itself, but there must be a high likelihood of violence that might damage the state. As noted, he did uphold the conviction of Whitney, which in Justice Brandeis' view did constitute a clear and present danger.

At this point, it would be useful to discuss *Dennis v. United States*. Since I am a Political Science major (before studying Business), I must say this case in many ways is the equivalent of the fear that the communist government in China has today of neo-liberal capitalism eventually ruling the day much like the American government in the 1950's was concerned with communist conspiracies. And, much like Americans think that the PRC's government locks up dissidents for flimsy reasons, the *Dennis* case could be interpreted as the American government convicting

people on grounds that are not particularly convincing. I especially liked Justice Douglas' dissenting opinion:

If this was a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute ...

So far as the present record is concerned, what practitioners did was to organize people to teach and themselves teach the Marxist-Leninist doctrine contained in four books ...

Those books are to Soviet Communism what Mein Kampf was to Nazism. If they are understood, the ugliness of communism is revealed, its deceit and cunning are exposed, the nature of its activities becomes apparent, and the chances of its success are less likely.

I honestly wish the PRC's government would take the same approach to dissidents. Given the incredible ecological damage created by capitalism over its history, the inequalities of capitalist societies, and the various economic crises that have been seen over the last 200 years, there are numerous good arguments against neo-liberalism that could be advanced by Beijing. But, much like America which was seeing one domino after another falling to the communists in the mid-20th century, so Beijing sees capitalist successes around the world. In fact, if it looked more closely, there has been increasing resistance to the neo-liberal American model. The fact that the model is losing ground around the world is increasingly being seen – one of the most prominent examples being the passing of legislation in India in August 2013 of compulsory Corporate Social Responsibility contributions from corporations that are above a certain size.

There are other American cases and legal articles that I cannot discuss in detail but would still look at. These would include examining the cases involved with the evolution of regulating

speech as the American Supreme Court went from the clear and present danger test (Schenck v. United States, Frohwerk v. United States, Debs v. United States, Abrams v. United States) to the reasonableness approach (Gitlow v. New York, Whitney v. California) to the risk-formula approach (Dennis v. United States) to the Brandenburg test (Brandenburg v. Ohio). Finally, I would examine articles dealing with Free Speech law, especially those concerned with the Marketplace of Ideas (Emerson and Schauer) and their critics (MacKinnon). These should give me a good grounding for writing my doctrine.

Free Speech Doctrine for China

The proposal for a Freedom of Speech doctrine for China will be informed by four major themes. First, a marketplace of ideas must be allowed to develop where people's ideas on Freedom of Speech can battle with each other – the tricky part will be to create a system of checks and balances so that no group can dominate by overwhelming the others. Second, given China's situation today, the Freedom of Speech doctrine will be more communitarian than that of the United States. Third, an independent body (not the government) must be responsible for enforcing laws. Fourth, and finally, a mechanism must exist for laws to evolve as technology changes the way people relate to each other and society moves forward. I will outline the rationale for each of these while outlining my Freedom of Speech doctrine for China.

Four main constitutional theories of free speech have been put forward. First, there is self-governance. The basic thought is that open speech is necessary for people to be educated about the issues on which government must make decisions. Second, there is the market-place of ideas. Free speech is necessary for people to bring their ideas into competition with other ideas to see which are superior – a discovery of truth as it were. Third, there is advancing

autonomy. Free speech is necessary for people to shape their character and identify their viewpoints in society – it is an important characteristic of personhood and autonomy as the spirit is seen as requiring the need to express itself. Finally, there is promotion of tolerance. As people come across other viewpoints, they see validity in what others are saying. Although they might not change their own viewpoint they will be more respectful of others.

The position taken in this essay is that the concept of the marketplace of ideas can theoretically subsume the others so it holds the potential to be superior. It is true that debating important ideas is important for self-government to be successful. But, if free speech is viewed as a debate in the marketplace of ideas, then it serves the function of educating people to govern themselves successfully. It is also true that free speech allows people to define themselves in society. Again, people also identify who they are when they put forward their ideas in a debate in the marketplace. Finally, a debate in the marketplace can also open people to tolerance of other ideas as nothing has a monopoly on the truth. The big problem is that some voices come to dominate the marketplace and other voices get drowned out. This makes good government, developing an identity, and developing a respect for other viewpoints more difficult. So, any Freedom of Speech doctrine must allow for as many voices as possible to be heard – but true equality does not exist anywhere. And, certainly it does not exist in the People's Republic of China.

The first part of the proposed doctrine would be the promotion of Deliberative Democracy by the Chinese government and in the country's schools. Deliberative Democracy is really a marketplace where different ideas can come into contact with each other and the best ones can prevail. Ordinary people would come together once a year in committees and discuss

what is best for their society. They would come together in mini-publics of the cities and towns they live in to debate the major issues of the day. The people would keep their day jobs but meet at off-hours for a couple of weeks for these meetings. This is already happening in places in Porto Alegre, Brazil where the city budget is decided through a process of Deliberative Democracy. This also happens in Bangla Desh, where Deliberative Democracy often has a direct impact on what doctors can charge for their services. There are numerous instances of this throughout the Western World, including my hometown of Edmonton, Canada. There, the City of Edmonton Citizen's Panel came together through the auspices of the University of Alberta and various levels of government to map out a plan to make the city more ecologically friendly. The Chinese authorities call themselves a government of the people. So, Deliberative Democracy would not be a violation of any Communist doctrines. I suspect that much as the country has become increasingly capitalist over the last few decades, more and more Freedom of Speech can be expected in the coming decades – I think it will be impossible for the government to contain this at some point so it is politically astute if they ride the wave rather than try to hold it back. And, acting like they are supporting the people's wishes because this is what they say they want through Deliberative Democracy meetings would help in that regard.

This brings me to the case of Liu Xiaobo. He was a dissident who took the words of Hu Jintao and others to heart about Freedom of Speech. In Charter 08, he pushed hard for the advancement of civil liberties (including Freedom of Speech laws), judicial independence, and political reform in China. The end result was that the Chinese authorities outlawed what he was doing and incarcerated him in 2008. Obviously, they felt a threat and wanted to stop it. But, imagine if there had been a process of Deliberative Democracy, where despite government attempts at control, the people asked for a small amount of gains in civil liberties a little bit at a

time over the course of several meetings. This would allow the marginalized voices to be heard with a far greater potential of having their suggested policies eventually implemented. That would have been a better outcome for Liu – actually, all concerned. Liu was able to even get some communist party members to sign onto Charter 08 – a slower, more deliberate strategy (offered by Deliberative Democracy) would have been the far wiser approach.

Second, my doctrine would ask people to explain the communitarian benefits of any changes to the law when they approached the government. Given the country's religious and political history, changes will be slow and reflective of the past. But change is almost certainly inevitable given that more than 600 million Chinese have access to the internet. The government probably also knows this and recognizes that it might be able to slow down the change if it adopts some of the policies that more and more of the people want. Actually, the Standing Committees of the National People's Congress are already supposed to take suggestions from ordinary citizens concerning reforms, but little has happened to this point. Given the changes in China, this inactivity is unlikely to continue. And, if, as my doctrine states, people are able to show the communitarian benefit, this will make it easier for the government to go along with changes.

Third, my doctrine would require judicial independence. Actually, this is already happening and the Chinese have a word for it: *xianfua sifahua*. This means "judicialization of the constitution." The courts have increasingly become involved in cases involving the constitution. In the famous *Qi Yuling*, there was a ruling that a student had indeed lost the right to an education because another student had stolen his identity. However, the communist party slapped this decision down and reversed the verdict. In other cases, courts have ruled that "due

process” was not followed. Some of these decisions have been allowed to stand by the government. Although very little has happened, the government is letting other bodies determine cases involving the constitution. Again, given the changes in China, this can be expected to continue. And, my doctrine is just going along with this.

Finally, there must be a mechanism for laws to change as societies evolve – and I think the use of deliberative democracy will be able to deal with this. Again, a marketplace of ideas debated in a mini-public should be able to determine the future direction for China’s constitutional laws. And, the events in China and the rest of the world make it abundantly clear that greater protection for freedom of speech can be expected in the future. I have no doubt that my call for communitarian justification will fall by the wayside at some point. But, this could be a good way to get the government and much of the population onside with the changes.

So, my doctrine for Freedom of Speech in China would be as follows. It would keep Article 35 and add additional items: “Citizens of the People’s Republic of China will enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration. Mini-publics will come together once a year physically to ensure the doctrine remains a living document reflecting the will communitarian of the people. Ultimately, the interpreters of this doctrine will be the people and an independent judiciary beholden to none with the responsibility of upholding the common good.” This, by implication, keeps Article 41 intact and drops Article 105. Article 35 is the starting and let the people decide how they will proceed from there.

No Doctrine is Without Flaws

I will say that there is a very long distance to go. But, the words “I’m tired” uttered by Rosa Parks ushered in changes to American society that were almost unimaginable. She stood

up for her human rights. It seems to be the case that more and more people are doing this in China. Despite the very great distance to go, Liu thinks that change toward liberalism is unstoppable.

There are three main flaws that I see with my doctrine. First, although I have tried very hard to deal with the issue of curtailing the possibilities of some voices becoming dominant, there is no guarantee of this. Catherine MacKinnon articulated my fears in her criticism of pornography being legal. She raised the point that some studies indicate rape has increased because of pornography. But, this has not prompted decision-makers to make pornography illegal. And, according to MacKinnon, a large segment of the population suffers because of this. It seems beyond argument some voices dominate the system in America. There is no marketplace of ideas where people can compete equally and come to solutions that are best for society. There is a dominant group that gets its way no matter how much damage they might do to society. MacKinnon is quite correct in pointing this out. I wish MacKinnon would have suggested a way to deal with this issue.

As a professor, I tell my students to remember two rules of life. First, life is not fair. And, second, do what you need to do in order to be effective but do not do anything illegal or immoral. I simply do not know what else I can do to make the process of creating a Free Speech doctrine more fair and open than to introduce Deliberative Democracy. It is one of the few ways that marginalized voices are being heard on a very uneven field of competition. In fact, the record with Deliberative Democracy is that when a voice does try to predominate, there is a reaction and the voice either moderates or is ignored. Although I highly doubt that Deliberative

Democracy will be completely fair, it is about as fair as things get in the world we live in. I cannot imagine a fairer marketplace of ideas.

The second flaw is that change will come slowly. I have to agree with this. The first few years (if not decades) will be spent on coming up with communitarian justifications for change. This could play right into the hands of the communist party. And, it might be able to use this argument to stay in power. But, politically, I think it is the astute thing to do. This will lessen the members' resistance to calls for change coming from outside the party. Although some people will undoubtedly want faster change, my proposal is a very realistic option for proceeding given how the communist party has reacted to calls for civil liberties in the past.

Finally, my Political Science background has taught me that people do not give up power easily. The communist party has ruled the country for almost seven decades. It will not easily cede power to civilians and the law courts. My proposed doctrine tries to entice the communist party to go along with this by not proposing major changes quickly. It might even be able to lead the vanguard on some occasions. If things happen slowly, there is a much better chance that Freedom of Speech laws that actually mean something will eventually come about. This is the only way to deal with a government that recognizes that things are changing but does not want the change to happen too quickly. They might be opposed to my doctrine because it will take power away from them. Yet, the government has been willing to give up some of its power. But, if it perceives too much is being given up, there is a backlash and the government rescinds the change. So, although my doctrine sharply deviates from the American First Amendment, a slow-moving plan that seems to uphold traditional and Marxist values seems like the best way to proceed in order to bring the Chinese communist party onside to accept change.

Last Words

In concluding, it is necessary to state that there are an enormous number of dissenting views in the study of American case law that has reached the Supreme Court. Although I consider all the people there to be hard-working and dedicated to their profession, good people simply do not agree about everything. In fact, it was a concurring opinion with a different viewpoint and a dissenting opinion that inspired me the most as I came up with a doctrine for Free Speech in China.

Also, I see similarities in the way the law is evolving in the United States in China. It really was not all that long ago that the communist scare was gripping America and this was strongly influencing decisions made by the Supreme Court of the United States. The fear that a group of dissidents might overthrow the American government ruled the day. Given the international geopolitical situation, one can see why Americans came to this viewpoint.

This is not all that different from what is happening in China today. The West was powerful at the end of World War II with 3 seats in the United Nations Security Council. America also drew a security perimeter around Taiwan. In fact, it was not until Jimmy Carter recognized the People's Republic that it got its seat on the Security Council. Over the last 25 years, Beijing has seen one communist government after another fall around the world. Understandably, they are concerned that they might be next. Unlike the United States, which had a *Marbury v. Madison* to uphold the independence of the judiciary, the Chinese government can act on its own behalf. Frankly, they are not behaving too much differently than the American courts did when they viewed that the United States might be in trouble. And, China has been in a geopolitical state of weakness almost since the end of World War II.

Given this, it is not surprising how slowly China has moved in terms of Civil Liberties for its people. Even so, the world of today is one where governments simply are finding it very difficult to maintain a monopoly on information or power. That could explain why China's leadership has spoken out over the last couple of decades about more rights for the general population. And, much like America, there is no unanimity on how to proceed. But, America has moved to more Freedom of Speech protection under the Brandenburg test. We can expect similar movement from China in the future. My proposed doctrine will make it easier for the Chinese government to do that.