

# THE SEPARATION OF POWERS, ROLE OF THE PRESS AND THE EMERGENCE OF ONLINE MEDIA IN CHINA AND TAIWAN

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## ABSTRACT

Despite sharing a common culture over thousands of years, the modern stance of the Chinese and Taiwanese governments relating to the separation of powers and human rights has taken a drastically different path over the past seven decades. This paper begins with a brief introduction to traditional Chinese jurisprudence and how it has been shaped in recent times by the emergence of Western legal principles.

It further examines the correlation between the separation of powers and the diversity of political discussion and level of regulation in the media of the People's Republic of China ('PRC' or 'China') and the Taiwanese Republic of China ('ROC' or 'Taiwan'), and how the constitutional and legislative provisions of each address these concepts and how they reflect international treaties adopted by each government. The emergence of online media to further demonstrate the different stances taken by the PRC and ROC on the adoption of these Western principles is analysed. Finally, the paper will examine the international criticisms the PRC and ROC face for their practices regarding media censorship.

The paper suggests that maintaining a separation of powers is crucial in order to uphold a free, independent press.

**Keywords:** *separation of powers, online media, China, Taiwan, censorship*

## I. INTRODUCTION

To gain an understanding of the purpose and effect of media laws in the PRC and the ROC, it is essential to first provide a brief overview of the cultural context in which these laws, and the legal systems of these governments as a whole, has developed.

Traditional Chinese legal philosophy differs vastly from that of the West. Unlike the Roman-derived legal systems of the West, the Chinese legal system had for

centuries operated as a state-centered entity. There existed little regard for the human rights, judicial independence and equality before the law that has become the staple of Western democracy.<sup>1</sup>

The traditional Chinese legal system has been influenced by two major competing, and occasionally compromising, legal ideologies. The first is Confucianism, which was developed in the Spring and

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<sup>1</sup> Kwan, Angela, 'Is Confucius to blame? Chinese culture and the conception of the rule of law in the two Chinas' (2004) 13 (3) *Polemic* 15-22, 16.

Autumn period of ancient China (771-476 BCE). It draws on the teachings of the ancient Chinese philosopher Confucius. This school of thought operated on the basis that human nature was objectively good, and that legal disputes were to be solved through compromise to preserve harmony in society.<sup>2</sup> There was little need for public legal institutions and little emphasis was placed on the procedural formality and codification of law that is commonly considered an element of the rule of law in the West.<sup>3</sup>

The second school of thought, Chinese Legalism, developed later in Chinese history during the Warring States period (475-221 BCE).<sup>4</sup> This ideology saw law as a means of ensuring citizens complied with the will of the state. This was to be done through rewarding loyalty, and enforcing strict punishments for acts against the state.<sup>5</sup> This placed the governing elite of the state above the law, violating the rule of law principle that all are equal before the law.

While Chinese law is similar to Western law in the sense that it does not explicitly derive from religion, there are dissimilarities between the two.<sup>6</sup> This means there are inherent difficulties in the

importation of Western legal doctrines, such as the separation of powers and Western perceptions of human rights, into a Chinese cultural context. Chinese law is built upon thousands of years of tradition, and operates in such a manner as to persuade those subjected to it to comply through balance and compromise. This differs from the obligatory attitude of the positive, codified legal traditions in the West.<sup>7</sup> Chinese law is based around what is culturally deemed as 'right' from a traditional intrinsic standpoint, and not from a written law issued by a designated positive law-making body. This has sparked much academic discussion around what is referred to as the Asian values debate, a notion that the traditional culture of Asian societies justifies to a certain extent the imposition of autocratic governments.<sup>8</sup>

In the Western sense, Chinese traditional legal theory considerably lacked what Walker claims is constitutionalism.<sup>9</sup> Under Walker's theory, constitutionalism refers to the measures taken in a society's law to prevent any individual or entity from wielding absolute power. Constitutionalism thus entails 'not individual rights but

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<sup>2</sup> Ibid.

<sup>3</sup> Zhao Jun, 'Mutual Encouragement and Interaction of International Rule of Law and China's Rule of Law' (Speech delivered at Guanghua Law School, Hangzhou, 12 January 2017).

<sup>4</sup> Kwan, Angela, above n 1, 16.

<sup>5</sup> Ibid.

<sup>6</sup> H. Patrick Glenn, *Legal Traditions of the World* (Oxford University Press, 2<sup>nd</sup> ed, 2004) 302-5.

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<sup>7</sup> Ibid, 302.

<sup>8</sup> Michael C. Davis, 'Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values' (1998) 11 *Harvard Human Rights Journal* 109-147, 113.

<sup>9</sup> Son, Bui Ngoc, 'Confucian constitutionalism: classical foundations' (2012) 37 *Australian Journal of Legal Philosophy* 61-98, 64, citing Graham Walker, 'The Idea of Nonliberal Constitutionalism' in Ian Shapiro and Will Kymlicka (ed) *Nomos XXXIX: Ethnicity and Group Rights* (1997) 161-62.

fettered power'. The law was a tool to carry out the will of the state rather than preventing the arbitrary wielding of power.<sup>10</sup> Furthermore, the lack of codification suggests that the Chinese legal tradition lacks common rule of law aspects, including transparency, predictability and equal access to due process before the law.

On the other side of the argument, however, it is argued that, although not codified, the governing authority of a Confucian society is still prohibited from the arbitrary wielding of power.<sup>11</sup> Wejen Chang argues that, although the obligations of the state are not codified in the Western sense, Confucian philosophy still holds that order and morality are to be preserved in a society. Under this doctrine, it is the responsibility of the governing body to maintain a social environment in which basic human rights are preserved. The role of the law and the state therefore is to ensure that society at large remains harmonious to ensure prosperity for its citizens.<sup>12</sup> This view, however, is arguably unrealised absolutely in a traditional Chinese society which is in part influenced by legalist ideals. While both Confucianism and legalism promote social harmony, a legalist approach does not consider the moral standard inherent in Confucian philosophy. Thus, while the largely Confucian Chinese legal philosophy

complies with constitutionalism, there exists the potential for a legalist head of state to abuse this authority.

It is evident from this that the differences in Chinese and Western traditional cultures has seen each society employ the law in vastly varying manners to pursue their respective aims. While Western notions of the rule of law, liberalism and individualism have shaped the development of much of Europe's laws from the Enlightenment onwards, traditional Chinese culture has placed the preservation of familial and communal harmony as the paramount priority in society and the preservation of social unity as the law's main objective.<sup>13</sup> This contrast is evident in the Chinese attitudes towards the separation of powers doctrine and stance on human rights, particularly the right to freedom of speech and publication. A comparative examination of both China and Taiwan provide an insight into the influence that the acceptance – or rejection – of these Western values has had in the formation of these modern Asian legal systems.

## **II. LEGAL MATERIALS AND METHODS**

Legal materials used in this research consist of primary legal material and secondary legal materials. Primary legal materials include relevant cases as well as

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<sup>10</sup> Ibid.

<sup>11</sup> H. Patrick Glenn, above n 6, 115,

<sup>12</sup> Ibid.

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<sup>13</sup> Kwan, Angela, above n 1, 16.

international and national regulations on subject matter. Since this research compares China's and Taiwanese Laws, thus both national laws relating to state's power in controlling media as well as censorship, are used as legal basis. International convention, that is *International Covenant on Civil and Political Rights* is also used as primary legal materials in this research.

Secondary materials includes journal articles with relevant topic of discussions and other relevant sources. The research begins with the discussions of each state's constitutions relating to state's control in media, tyhen comparasion is drawan. The analyses of international convention is also conducted to analyse consistency between international and national regulations. At the end, the international criticisms the PRC and ROC face for their practices regarding media censorship are examined.

### III. RESULTS AND DISCUSSIONS

#### 1. Separation of Powers in The PRC and ROC

The history of China's legal structure shows a lack of any notion of separation of powers or checks and balances.<sup>14</sup> Although there existed magistrates to apply the laws in traditional China, the office these magistrates held was of a combined administrative and judicial nature. Furthermore, while the magistrates were to

apply the law, they were granted no interpretive freedom. Any issues involving the interpretation of the codes in question was to be dealt with by the government, with magistrates exposing themselves to administrative or criminal sanction if they erred from this.<sup>15</sup> Thus, it is evident that China lacked any form of judicial independence, with the judiciary in China being held accountable to the government, whose interests its rulings were expected to uphold.<sup>16</sup>

This is a trend that has continued up to the present in modern mainland China. The Communist Party of China ('CCP') has flatly outlined its views that the separation of powers is incompatible with Chinese culture and society. In 1987, Deng Xiaoping, then Chairman of the Military Commission and the chief policy-maker in China, stated that China would reject the Western notion of the separation of powers. This was reiterated again in 2011 by Wu Bangguo, Chairman of the National People's Congress (NPC) and a member of the Political Bureau (politburo) Standing Committee.<sup>17</sup> This seems to suggest that there exists a dichotomy between Western legal traditions and Eastern culture, although it raises the question of how the Taiwanese government has, after a period of arbitrary

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Qian Gang, *The Power of Separation* (2017) China Media Project: A project of Journalism and Media Studies at the University of Hong Kong <<http://cmp.hku.hk/2012/09/24/27418/>>

<sup>14</sup> H. Patrick Glenn, above n 6, 307-8.

rule by the Kuomintang (KMT), managed to adopt the Western separation of powers and emerge as a democratic government system.

Taiwan, however, has increasingly adopted Western principles into its legal system and has emerged from a period of authoritarian martial law autocracy to a more democratic, transparent and politically diverse society despite its common traditional background with mainland China.<sup>18</sup> Although the ROC maintained the same Constitution after its flight to Taiwan in 1949 as it did at the formation of the Republic in 1911, judicial independence was subverted for several decades. When martial law was imposed in May 1949, the authority of both the judiciary and the executive arms were assumed by the military and the KMT operated a regime which involved the significant curtailment of civil and political rights.<sup>19</sup> Despite this, however, there was a steady shift in authority from military tribunals to ordinary courts until martial law was eventually lifted in 1987, allowing the separate arms of the Taiwanese government to operate outside the ambit of the KMT's emergency powers and more in line with the separation of powers provided for in the Constitution.<sup>20</sup>

In 1990, the Constitutional Court of Taiwan held, in J.Y. Interpretation 261, that

the KMT's indefinite extension of national representatives was unconstitutional. It provided that 'periodical reelection of representatives is crucial for reflection of the will of the people and for implementation of constitutional democracy'.<sup>21</sup> Although the powers exercised under martial law were authorized to be exercised indefinitely, they did not permit the extension of the national representatives' terms of service, which is limited to six years pursuant to Article 28, paragraph 1 of the ROC's Constitution.<sup>22</sup> This landmark decision paved the way for a more diverse political landscape, culminating in the formation of the Democratic Progressive Party ('DPP') in 1992 and its democratic election to power in 2000.<sup>23</sup>

The Taiwanese government is divided into five separate arms of government. In addition to the traditional Western separation of powers into the three arms of executive, legislature and judiciary, the Taiwanese government also comprises an Examination Yuan and Control Yuan. Despite this, it still holds the principles of inter-governmental accountability and judicial independence at its heart.<sup>24</sup>

<sup>18</sup> Michael C. Davis, above n 8, 113.

<sup>19</sup> Tay-sheng Wang, 'The Legal Development of Taiwan in the 20<sup>th</sup> Century: Toward a Liberal and Democratic Country' (2002) 11 *Pacific Rim Law & Policy Journal* 1-23, 6.

<sup>20</sup> Ibid, 20.

<sup>21</sup> 釋字第 261 號 [Judicial Yuan Interpretation No. 261] [1990].

<sup>22</sup> Ibid.

<sup>23</sup> Freedom House, 'Freedom in the World 2017: Taiwan Profile' <  
<https://freedomhouse.org/report/freedom-world/2017/taiwan>>

<sup>24</sup> Ibid.

## Media in The PRC and ROC

By 1949 there existed two governments proclaiming to be the true China. Both the Republic of China, established in 1911 and forced to resettle on the island of Taiwan in 1949, and the People's Republic of China, which established a Chinese communist rule from Beijing in 1949, had starkly contrasting views on what ideals were to be adopted from the West. This is evident in each China's attitudes towards the doctrine of the separation of powers, which has had considerable influence on each government's stance on media regulation.

The media in the People's Republic of China has been closely monitored from the time the government was founded. Particularly during the Cultural Revolution of 1966-76, Maoist ideals dominated the state's perception of the role of the media. The view of the government was that the media was an instrument to promote the interests of the state rather than inform the population.<sup>25</sup>

For a short-lived period in the late 1970s, there existed a period of greater media liberty. Private media was granted greater scope to publish political materials. This changed again in 1980 when Deng Xiaoping announced that the four great freedoms in the media would be abolished. These were the freedom to speak freely, to

air views publicly, to hold debates and freedom to write wall posters.<sup>26</sup>

Although modern Taiwan has emerged into an open and transparent democracy, for decades after the Republic of China's KMT government fled to Taiwan there was considerable constraint on the civil liberties and human rights of its citizens. The ROC on Taiwan ('ROCOT') operated as a one-party system like the PRC until, in 1992, the Democratic Progressive Party ('DPP') emerged. This gave a platform to the more reformist campaigners in Taiwan's society, and the DPP took power in the 2000 election.<sup>27</sup> Having established this cultural context in which the media, government and individuals interact, it is easier to understand the role of the constitutional and legislative institutions in place for the regulation of both conventional and online media and the influences international law has had on this.

## 2. Legal Provisions and Institutions Concerning Press Freedom

### Constitutional Provisions on the Right to Free Speech in China and Taiwan

Now that the cultural and legal backdrop of both traditional China and the Western-influenced modernization of the two Chinas has been established, it is clearer how human rights are reflected in the laws of the PRC and ROC and how the right to

<sup>25</sup> John A. Lent, 'Freedom of Press in East Asia' (1981) 3 *Human Rights Quarterly* 137-49, 137.

<sup>26</sup> Ibid, 141.

freedom of speech operates with respect to media independence. Although both China's and Taiwan's constitutions contain provisions safeguarding the right to free speech for their respective citizens, this paper will explore the is a dramatic difference in the operation of both in practice, which has drastic implications for the level of individual expression and discourse permitted in each state.

Both China and Taiwan have formally adopted the terms of the International Covenant on Civil and Political Rights (ICCPR). Article 19.2 preserves an individual's 'right to freedom of expression' whether it be through speech, writing, 'or any other media of his choice'.<sup>28</sup> This in substance mirrors Article 19 of the Universal Declaration of Human Rights ('UDHR'), which, in its preamble, also evinces the object of upholding 'freedom of speech and belief'.<sup>29</sup>

While the PRC signed the ICCPR on 5 October 1998, they are yet to ratify it. Thus, it has not passed into binding domestic law in China.<sup>30</sup> The ROC has been unable to ratify the document. Although it signed it in 1967, it was excluded from the United Nations ('UN') in 1971 and lacks formal recognition from the UN as a state. This

means that it is unable to formally ratify UN treaties.<sup>31</sup> The Taiwanese government has nonetheless implemented the ICCPR through the Implementation Act in 2009, giving the covenant legal force on a domestic level.<sup>32</sup> Thus, while the PRC has officially signed the ICCPR, it has yet to ratify and be bound by them while Taiwan, who is incapable of ratification, has nevertheless assumed the terms of the ICCPR through domestic enacting legislation.

Under Article 35, the Constitution of the People's Republic of China assures that all citizens 'enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration'.<sup>33</sup> Furthermore, Article 47 provides for the 'freedom to engage in scientific research, literary and artistic creation and other cultural pursuits... in education, science, technology, literature, art and other cultural work'.<sup>34</sup>

Below, however, the Constitution contains provisions that may be used to justify the circumvention of this right. Article 51 provides that the rights of citizens may only be exercised where they do not 'infringe upon the interests of the State, of

<sup>28</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19.2.

<sup>29</sup> *Universal Declaration of Human Rights* 1948

<sup>30</sup> Human Rights Watch, 'China: Ratify key international human rights treaty' 8 October 2013.

<sup>31</sup> Taiwan Association for Human Rights, 'The hidden face of Taiwan: Lessons learnt from the ICCPR/ICESCR review process' April 2013, 9.

<sup>32</sup> *Ibid.*

<sup>33</sup> «中华人民共和国宪法» [Constitution of the People's Republic of China] art 35.

<sup>34</sup> «中华人民共和国宪法» [Constitution of the People's Republic of China] art 47.

society or of the collective, or upon the lawful freedoms and rights of other citizens'.<sup>35</sup> This provision is imprecise, and provides no indication as to what, in practice, constitutes an infringement capable of justifying the nullification of a citizen's constitutional right to free speech, and gives the Chinese government considerable discretion in deciding what should be regulated in the press.

Like China, the Taiwanese Constitution contains a provision safeguarding a citizen's right to free speech. This is found in Article 11, which upholds the 'freedom of speech, teaching, writing, and publication' in Taiwan.<sup>36</sup> Also like China, the Taiwanese Constitution provides for the potential abridgement of these rights by law in instances to 'prevent infringement upon the freedoms of others, to avert an imminent danger, to maintain social order, or to promote public welfare'.<sup>37</sup> However, given Taiwan's more transparent process of Constitutional Interpretation, there is much less discretion for the Taiwanese government to contravene the right to free speech as it must first be held accountable to

the Grand Justices of the Constitutional Court, the highest judicial body in Taiwan.<sup>38</sup>

The Grand Justices of Taiwan have shown caution in the past when it has come to circumventing the right to free speech in favour of other rights. Constitutional Interpretation 509 is one of the leading cases on the balance between free speech and the rights of others.<sup>39</sup> This interpretation dealt with a case involving Articles 310 and 311 of the Taiwanese Criminal Code when, in 1996, a magazine alleged the head of the Ministry of Transportation at the time, Zhao-yang Tsai, embezzled funds to pay for private building renovations. Action was raised on the grounds of libel against the magazine, who counter-argued that the Articles were unconstitutional as they violated the magazine's right to freedom of publication under Article 11.<sup>40</sup>

Ultimately it was decided that the Article did not contravene the right to freedom of speech. The court found that monetary compensation for libel in a civil case would be unsatisfactory as 'it would be tantamount to issuing them a licence to defame'.<sup>41</sup> Therefore, a criminal sanction is a constitutional means of preserving someone's right to reputation and freedom

<sup>35</sup> «中华人民共和国宪法» [Constitution of the People's Republic of China] art 51.

<sup>36</sup> «中華民國憲法» [Constitution of the Republic of China] art 11.

<sup>37</sup> «中華民國憲法» [Constitution of the Republic of China] art 23.

<sup>38</sup> Jeffrey C.F. Li, 'The Constitutional Litigation in Taiwan' (Speech delivered at Soochow University, 18 January 2017).

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> 釋字第 509 號 [Judicial Yuan Interpretation No. 509] [2000].



from defamation, even if it is at the expense of another's right to free speech. It was further held that Article 311, which provides defences for the offence of making defamatory statements with bona fide intent on the grounds of 'public interest', was valid and constitutional.<sup>42</sup>

Another landmark interpretation involving the right to freedom of speech emerged from Interpretation No. 689. This case involved the stalking by a journalist of a person in a public space. The Grand Justices found that the provision in question, Article 89, Paragraph 2 of the Social Order Maintenance Act, was constitutional, provided that the press was engaged in newsgathering of events that are in the public interest.<sup>43</sup>

These interpretations reflect what is referred to by Professor Li-Hui Lu as the 'two-sided theory'.<sup>44</sup> That is, a balancing act between freedom of speech, which is not of itself an absolute right, and the right to be free from groundless defamation. Professor Lu argues that an appropriate balance between the right of free speech and the right of reputation is that free speech should prevail over defamation where the remark in issue is true.<sup>45</sup> This notion shows an

inclination towards the implementation of Western ideals of free speech theory. It considers that free speech is essential to promote an environment in which individuals can exchange ideas and contribute to the democratic process.

### **Legislative and Administrative Strategies for the Regulation of Media**

China's court system does not engage in the broad, dominant interpretive and applicatory roles that are entrusted upon Western courts.<sup>46</sup> The Chinese government instead designates authority to statutorily empowered government institutions. Decisions are therefore lacking in the impartiality and procedural transparency that is so crucial to the separation of powers, and broad, discretionary legislation is provided no platform for challenge in the sense that the Constitutional Court provides for Taiwan.<sup>47</sup>

Due to the broad array of media platforms, the Chinese government has several different bodies for regulating media.<sup>48</sup> The General Administration of Press and Publication monitor print publication media. The State Administration

<sup>42</sup> Jeffrey C.F. Li, 'The Constitutional Litigation in Taiwan' (Speech delivered at Soochow University Law School, Taipei, 18 January 2017).

<sup>43</sup> Ibid.

<sup>44</sup> Li-Hui Lu, 'An Analysis of the "Two-Sided Theory" – A New Perspective of Taiwanese Civil Defamation Law' (2011) 29 *Chun Yuan Financial & Economic Law Review* 244-302, 255.

<sup>45</sup> Ibid, 266-7.

<sup>46</sup> Donald C. Clarke, 'Empirical Research into the Chinese Judicial System' in Erik G. Jensen and Thomas C. Heller (eds), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford University Press, 2003) 164-192, 168.

<sup>47</sup> Ibid.

<sup>48</sup> Michael Ting, 'The Role of the WTO in Limiting China's Censorship Policies' (2011) 41 *Hong Kong Law Journal* 285-301, 288.

of Radio, Film and Television monitor broadcast and electronic media, including the internet. Both are held accountable to the CCP's Central Propaganda Department.<sup>49</sup> Thus, the regulation of speech in China is upheld by institutions directly accountable to the CCP. This allows the CCP to have direct influence over the content across all platforms of domestic Chinese media, limiting the issues published in to only those that serve the public interest and considerably restraining the media's potential as a platform of social and political discussion as well as censoring access to challenging foreign sources.

As discussed above, the constitutional rights of Chinese citizens may be subverted if the information is classified as a 'state secret'.<sup>50</sup> What qualifies as a state secret is set out in an open-ended, non-exhaustive nature in Article 8 of the 1988 Law on the Protection of State Secrets.<sup>51</sup> The provision lists several things, though concludes with anything 'all other matters classified as state secrets by the national State Secrets Bureau' (SSB).<sup>52</sup> This imparts unfettered discretion on the States Secret Bureau, a government

body, to decide whether the right to free speech may be circumvented.

Furthermore, depending on the nature of the state secret, the classification of the information is decided by the SSB. For information involving issues of defence, the SSB consults with the Central Military Commission, and for other issues it consults with the ministries of Foreign Affairs, Public Security, State Security and any other 'relevant central organs'.<sup>53</sup> Despite the appearance of diversity in the process of state secret classification, all organs are ultimately accountable to the Communist Party of China, presenting the potential to eliminate the consideration of any alternative and potentially conflicting views.

Article 20 of the Law on the Protection of State Secrets provides that 'relevant security regulations shall be complied with and no state secrets shall be disclosed' in any publication or broadcast.<sup>54</sup> Again, these security regulations are to be devised at the discretion of the SSB as per Article 17.<sup>55</sup>

This therefore provides that the Chinese government has the authority to declare any form of publication illegal due to the broad, indefinite language of the legislation governing what is acceptable for publication or not. In addition, the lack of judicial independence evinced by Article 128 of the Constitution of the People's

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<sup>49</sup> Ibid.

<sup>50</sup> «中华人民共和国宪法» [Constitution of the People's Republic of China] art 53.

<sup>51</sup> Human Rights in China, 'State Secrets: China's Legal Labyrinth' (Report, Human Rights in China, 2007), 81-9, 82, citing Law on the Protection of State Secrets (People's Republic of China), National People's Congress Standing Committee, 5 September 1988.

<sup>52</sup> Ibid, 81.

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<sup>53</sup> Ibid, 85.

<sup>54</sup> Ibid, 89.

<sup>55</sup> Ibid.

Republic of China, which holds the courts responsible to the NPC and requisite state bodies, makes it highly unlikely that any court would rule against the government.<sup>56</sup> China's rejection of the separation of powers therefore arguably eliminates the opportunity for an independent review of the government's decisions relating to media censorship.

Taiwan, however, has arguably taken a much less restrictive legislative approach to its regulation of speech. Freedom Press's 2017 'Freedom in the World' report awarded Taiwan its highest possible score in political rights and civil liberties, which examines factors such as the independence of the press and the diversity of discourse in the media.<sup>57</sup> While the aim of China's censorship policies is to ensure that no publication contrary to the interests of the state may challenge the CCP, the major examples of Taiwan's legislation curbing freedom of speech has been enacted with the purpose of preventing unfettered free speech from infringing the rights of other citizens.

When compared with China, Taiwanese media regulation covers a much narrower scope of information and is much more transparent in nature. The direct language of legislative provisions and

implementation of proper process constrains much of the governmental discretion that is available in China. The Taiwanese media can publish materials of a broader public interest, and are not confined to issues and attitudes aligned with state interests.<sup>58</sup>

Article 310 of the Criminal Code, the law challenged in the abovementioned Constitutional Interpretation No. 509, provides an example of where the state has deemed it appropriate to constrain freedom of speech where it infringes the right to reputation.<sup>59</sup>

It is thus discernible that, given the trend in Constitutional Interpretations and the language of the legislation on libel and constraints on free speech, that Taiwanese law places considerable emphasis on the 'public interest'.<sup>60</sup> This aligns with the self-government theory of free speech. It promotes true and relevant free speech on the basis that it facilitates democratic discussion and social contribution.<sup>61</sup> However, it also acknowledges that free speech is not absolute, and holds the potential to harm other individuals the subject of the speech. Thus, an interesting balance is struck between the potentially conflicting traditional Chinese legal philosophy or preserving social and communal harmony on the one hand and the

<sup>56</sup> «中华人民共和国宪法» [Constitution of the People's Republic of China] art 128.

<sup>57</sup> Freedom House, 'Freedom in the World 2017: Taiwan Profile' (2017) <  
<https://freedomhouse.org/report/freedom-world/2017/taiwan> >

<sup>58</sup> Ibid.

<sup>59</sup> Jeffrey C.F. Li, 'The Constitutional Litigation in Taiwan' (Speech delivered at Soochow University Law School, Taipei, 18 January 2017).

<sup>60</sup> Ibid.

<sup>61</sup> Li-Hui Lu, above n 44, 256.

encouragement of democratic political involvement on the other. The contrast between the stances adopted by the PRC and ROC on these issues has become further broadened with the emergence of online communication and the seemingly limitless platform this presents for the distribution of information.

### 3. Response to the Surge of Online and Social Media Communication

Due to the inexpensive cost and broadness of internet access and the relatively level platform for both author and audience, Ritika Patni and Nihal Joseph argue that the internet has taken on a 'democratic character'.<sup>62</sup> This has led to the emergence of a new frontier of one- and two-way communication platforms and the possibility for instant and anonymous dissemination of information. This media revolution has prompted the governments in both China and Taiwan to respond by way of implementing new laws and institutions to ensure the media continues to function in line with each government's respective ideals.

In early 2017, China took a further step in restricting online access to forbidden materials by restricting the use of virtual

private networks (VPNs).<sup>63</sup> Under this strengthened stance of the Ministry of Industry and Information Technology, VPN providers may not lawfully offer their services without obtaining prior government approval. This is a renewed attempt by the Chinese government to prevent people in mainland China from accessing online sites and information that has been blocked by the Chinese government.<sup>64</sup>

There exists no official elaboration by the CCP as to the topics considered appropriate for censorship on the internet. Furthermore, the Chinese government has not released statistics or court data on the way these laws are applied. Common topics the focus of censorship in the part, however, have included religious and political materials and materials which promote critical thought, as well as pornography and defamatory content.<sup>65</sup>

In November 2016, the Standing Committee of the NPC introduced a new Cyber Security Law.<sup>66</sup> This law requires internet service providers ('ISPs') to store the data of clients, and obliges them to assist authorities in any criminal or administrative investigation. It also prohibits the distribution online of any information which

<sup>62</sup> Ritika Patni and Nihal Joseph, 'WTO Ramifications of Internet Censorship: The Google-China Controversy' (2010) 3 *NUJS Law Review* 337-363, 338.

<sup>63</sup> Josh Ye, 'China tightens Great Firewall by declaring unauthorised VPN services illegal', *South China Morning Post* (online), 23 January 2017, [2].

<sup>64</sup> Ibid.

<sup>65</sup> Ritika Patni and Nihal Joseph, above n 61, 345.

<sup>66</sup> International Foundation of Journalists, 'Strangling the Media: China Tightens Its Grip' (China Press Freedom Report 2016, International Foundation of Journalists, 20 January 2017) 44.

may threaten or challenge socialism and the state.<sup>67</sup> The International Federation of Journalists (IFJ) suggests that, by increasing the burden on ISPs to censor and remove inappropriate content, the government reduces its own responsibility for censorship.

Taiwan has no central framework of online media regulation.<sup>68</sup> However, two laws act as control mechanisms for internet access. First, the *Protection of Children and Youths Welfare and Rights Act* provides for the creation of regulations to prevent children accessing immoral content online.<sup>69</sup> Under Article 46(1) this is to be achieved through tracking and filtering the content accessible to children, and Article 46(2)-(3), internet platform providers are required to restrict the type of content that young users can access. If this is not complied with, the government has the authority to remove the immoral content.<sup>70</sup> The *Act* defines children as those under age 12 and youths as those between ages 12 and 18.<sup>71</sup>

The second mechanism exists in the *Copyright Act*<sup>72</sup>. By virtue of Chapter VI-1, ISPs are permitted to suspend their service

to those accused of accessing material in breach of copyright three or more times.<sup>73</sup>

Although Taiwan has adopted a much more liberal approach to online media, concerns as to internet neutrality have still emerged even after the establishment of democracy in the ROC. In 2013, a Bill was proposed to amend the *Copyright Act*. This would have allowed the Taiwanese Intellectual Property Office to require ISPs to blacklist any peer-to-peer file sharing sites that violated copyright laws.<sup>74</sup> This sparked protest amongst those who believed the vague and imprecise nature of the amendments posed a threat to the freedom of online information and internet neutrality and the proposal was abandoned.<sup>75</sup>

Despite these concerns, Taiwan has moved to solidify free, impartial press online. The importance of a free, neutral online media has been a hotly defended concept in Taiwan and has been used as a point of argument against attempts to increase the scope of copyright laws. However, it is arguable that, despite this, the *Protection of Children and Youths Welfare and Rights Act* evidences the retention of aspects of values and morality as a guiding principle in the Chinese legal tradition and

<sup>67</sup> Ibid.

<sup>68</sup> Li, Jeffrey (Chen-Fei), 'Internet control or internet censorship? Comparing the control models of China, Singapore and the United States to guide Taiwan's choice' (2013) 14 *Pittsburgh Journal of Technology Law and Policy* 1-43, 4.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> *Protection of Children and Youths Welfare and Rights Act* (Republic of China) Legislative Yuan, 8 August 2010, art 2.

<sup>72</sup> Li, Jeffrey (Chen-Fei), above n 67, 4.

<sup>73</sup> Ibid.

<sup>74</sup> Tobias, Sharone, 'Internet and press freedom in Taiwan', *The Diplomat* (online), 28 June 2013.

<sup>75</sup> Sutton, Maria, *Taiwanese users thwart government plans to introduce internet blacklist law* (3 June 2013) Electronic Frontier Foundation < <https://www.eff.org/deeplinks/2013/06/taiwanese-users-thwart-government-plans-introduce-internet-blacklist-law> >

despite the liberal online media atmosphere in Taiwan, provides that freedom of the press, despite its importance as a fundamental right, is not absolute.

#### 4. International Criticisms

While Taiwan's stance on freedom of speech has in recent decades grown much more aligned with internationally recognised human rights practices, China has drawn criticism from the global community for what seems to be an increasingly tight media regulation policy.

In order to gain entrance into the World Trade Organisation (WTO), the Chinese government has had to adapt its censorship policies to suit the criteria of the WTO. Michael Ting has argued, however, had a limited influence on Chinese policy. While the WTO has jurisdiction to influence member nations' policies with relevance to the market and international trade, it has no influence when the issue is one of human rights.<sup>76</sup>

Furthermore, while the WTO has a Panel for the resolution of disputes, these disputes can only be brought forth by members of the WTO. Therefore, actions cannot be brought forth by internet companies, such as Google, whose access to the Chinese market has been constrained and even restricted by Chinese censorship

policies.<sup>77</sup> Thus, for the WTO to intervene on China's media censorship, it is dependent on a separate member nation bringing forth an action. Even then, it will only act to promote international trade rather than in the interest of human rights.<sup>78</sup>

Patni and Joseph suggest, however, that Chinese internet regulation policies have the potential to be in breach of the WTO's General Agreement on Trade in Services (GATS).<sup>79</sup> However, the GATS only covers sectors which are agreed upon by the member nation. Thus, it is perfectly within China's power to enter the agreement, yet exclude its online service sector from the terms.<sup>80</sup> Thus, while China's policies may draw criticisms from the global community, the options to challenge China's policies in the sphere of international trade law are quite limited.

#### IV. CONCLUSIONS AND SUGGESTIONS

Drawing on the above information, it can be said that there is a link between the scope of human rights and media independence and the existence of the separation of powers in a society. While both the PRC and ROC are derived from a common history dating thousands of years, and while both contain provisions in their Constitutions regarding basic human rights

<sup>76</sup> Michael Ting, 'The Role of the WTO in Limiting China's Censorship Policies' (2011) 41 *Hong Kong Law Journal* 285-301, 285.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid, 300.

<sup>79</sup> Ritika Patni and Nihal Joseph, above n 61, 350.

<sup>80</sup> Ibid.

and the freedom of speech and expression, in practice this is realised considerably different.

The government of mainland China is of a much more autocratic nature than that of Taiwan. While the PRC has maintained its one-party system and judicial accountability to the CCP, Taiwan has shifted away from this to a more democratic, transparent system of governance with a strong, independent judiciary. This prevents the Constitutionality of laws and government actions relating to media regulation from being impartially and independently tested in the PRC. Instead, the judiciary is pressured by the one-party government to apply laws in line with government policy, thus constraining the potential for political discussion and debate on human rights in the court and leaving a judge as merely another issuer of CCP policy.

After a period of democratic emergence in the latter half of the 20<sup>th</sup> century, Taiwan has become a more transparent and democratic society. The foundation of the DPP marked the decline of the absolute rule of the KMT in Taiwan, and saw the acceptance in the Taiwanese government of a broader representation of political expression. This has been reflected in Taiwan's media, which is left largely unfettered by the state, and is for the most part only circumvented to preserve the rights

of other individuals or the welfare of minors.

The emergence of online communication technology has provided a forum for further distinction between the stances of the PRC and ROC. While the PRC has sought to bring the internet within the control of the CCP and maintain its tight-fisted censorship policy, the ROC has embraced this new platform for free expression and speech. Despite their differences however, both still retain elements of their Chinese jurisprudential roots with conceptions of collective societal morality at the heart of both governments' respective regulatory stances.

From here there is a discernible connection between the liberty and independence of a society's media and the presence of a separation of powers in its laws and institutions. In order to prevent a society's information from operating as a mere mouthpiece of the state, it is imperative to ensure that no power may be arbitrarily vested in and exercised by any one governing body. This facilitates an open, transparent media and online culture in which ideas and information may be exchanged freely that is a staple of any modern, vibrant democracy.

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